

File/6/2

**BEFORE THE SUPREME COURT CHAMBER
OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case File No: 001/18-07-2007-ECCC/SCC
Filed Before: The Supreme Court Chamber
Date of Document: 14 January 2011
Party Filing: Co-Lawyers for KAING Guek Eav alias "DUCH"
Original: Khmer

CLASSIFICATION

Classification Suggested by the Filing party: PUBLIC
Classification by the Chamber: សាធារណៈ / Public
Classification Status:
Review of Interim Classification:
Records Officer's Name:
Signature:

**REPLY BY THE CO-LAWYERS FOR KAING GUEK EAV ALIAS "DUCH"
TO THE CO-PROSECUTORS' RESPONSE OF 20 DECEMBER 2010**

Filed by:

The Co-Lawyers for the Accused:
 KAING Guek Eav alias "DUCH"
 KAR Savuth
 KANG Ritheary

Lawyers for the Civil Parties:

KONG Pisey
 HONG Kimsuon
 YUNG Panith
 KIM Mengkhy
 MOCH Sovannary
 TY Srina
 Silke STUDZINSKY

Distribution to:

The Supreme Court Chamber:
 Judge KONG Srim, President
 Judge Motoo NOGUCHI
 Judge SOM Sereyvuth
 Judge A. KLONOWIECKA-MILART
 Judge SIN Rith
 Judge C.N. JAYASIINGHE
 Judge YA Narin

Co-Prosecutors:

CHEA Leang
 Andrew CAYLEY

ឯកសារទទួល	
DOCUMENT RECEIVED/DOCUMENT REÇU	
ថ្ងៃ ខែ ឆ្នាំ (Date of receipt/Date de réception): 17 / 02 / 2011
ម៉ោង (Time/Heure): 11 : 30
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SAN N. BADA

Plu/lu/2

Martine JACQUIN
Philippe CANONNE
Pierre Olivier SUR
Alain WERNER
Brienne McGONIGLE
Annie DELAHAIE
Elizabeth RABESANDRATANA
Karim KHAN
Fabienne TRUSSES-NAPROUS
Christine MARTINEAU

File 4/2

TABLE OF CONTENTS

I- INTRODUCTION	Page 4
II- Reply to the Co-Prosecutors' Response concerning Ground 1	Page 13
III- Reply to Co-Prosecutors' Response concerning Ground 2	Page 19
IV- Conclusion	Page 21

I- INTRODUCTION

P16/16/2

1. On 18 November 2010, the Co-Lawyers for the Accused filed their appeal with the Supreme Court Chamber requesting it Chamber to set aside the Trial Chamber Judgement in Case File 001/18-07-2007/ECCC/TC, to release **KAING Guek Eav** alias "**DUCH**" ("the Accused") and to consider his provisional detention as a protective measure granted to a potential witness¹ who will testify against the senior leaders and those who were most responsible for crimes at S-21, also known as Tuol Sleng Prison, during period of Democratic Kampuchea.²
2. On 21 December 2010 the Defence received the Co-Prosecutors' Response requesting the Supreme Court Chamber to dismiss the Defence Appeal in its entirety.³
3. The Supreme Court Chamber issued a decision granting the Defence leave to reply to the Co-Prosecutors Response.⁴
4. The Co-Prosecutors understand that the issue raised in the Defence Appeal is not the guilt or innocence of the Accused, but rather whether the ECCC has personal jurisdiction to prosecute him.⁵
5. As explained in their Appeal, the Co-Lawyers for the Defence have provided new evidence to the Supreme Court Chamber⁶ proving unequivocally that **KAING Guek Eav** alias "**DUCH**" was at the lowest rank within the CPK and government hierarchy. He was only chief of *Santebal* or head of prison guards.

¹ Appeal by the Co-Lawyers for KAING Guek Eav alias "Duch", 18 November 2010, F14.

² Written Record of Interview of Charged Person and Interview of Pol Pot by Nate Thayer, 21 January 2008, ERN 00159555-00159556, E3/11.

³ Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias "Duch" against the Trial Chamber Judgment of 26 July 2010, 20 December 2010, F14/4.

⁴ Decision Granting Leave to the Co-Lawyers for the Accused to Reply to the Response of the Co-Prosecutors, 22 December 2010, F14/4/1.

⁵ Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias "Duch" against the Trial Chamber Judgment, 20 December 2010, para. 2, F14/4.

⁶ The selected 31 Biographies of Khmer Rouge Leaders and others, Prepared for the UN Commission of Experts August-September, 1998 (DUCH's Biography), ERN 00626210-00626212, F14.2.4.

F14/6/2

This new evidence was prepared by Documentation Center of Cambodia experts, who collect evidence for the ECCC.

6. Moreover, the evidence submitted to the Trial Chamber by Mr. Craig C. Etcheson, expert and investigator with the Office of the Co-Prosecutors,⁷ reveals that KAING Guek Eav alias “DUCH” was at the lowest rank within the CPK and the DK government hierarchy.⁸ His role at Tuol Sleng Prison was to receive orders and forward them directly to those who executed them, analyse confessions and prepare reports for his superiors to make decisions.⁹
7. All the evidence included and discussed in the Appeal¹⁰ relates to Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia, Articles 1 and 2 (new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia and Rule 87 of the Internal Rules on evidence.
8. The Judgement in Case File 001/18-07-2007/ECCC/TC does not discuss the exculpatory evidence to the effect that the Accused was not among the senior leaders responsible for the crimes committed at S-21 (Tuol Sleng Prison)¹¹ despite the evidence brought by the Accused himself to this effect.¹² This constitutes violation of human rights law.¹³
9. Whereas KAING Guek Eav alias “DUCH” clearly identified the senior leaders of Democratic Kampuchea and those most responsible for the crimes committed at S-21 (Tuol Sleng Prison), such as MEAS Muth, SOU Meth, SON Sen and Pang, the Judges did not take this into account. Moreover, they

⁷ Report by Craig C. Etcheson, E3/32.

⁸ Regiment chief.

⁹ Correspondences at S-21 between DUCH and his superior, ERN 00002455 [Kh].

¹⁰ Appeal brief by the Co-Lawyers for KAING Guek Eav alias “Duch” against the Trial Chamber Judgment of 26 July 2010, 18 November 2010, (Doc. F14).

¹¹ Judgment, 26 July 2010, (Doc. E188).

¹² Written Record of Interview of Charged Person, 6 May 2008, E3/41, ERN 00209179, ERN 00209180-00209182, ERN 00209182-00209183 “Noted Section.” S-21 PRISONER LIST “1975-1978”, Doc. E3/38, Annex A, ERN 00171462, in which CHHIM Sam Aok alias Pâng are referred to as Chief of the S-71 Security Centre, overseeing several other units.

¹³ International Covenant on Civil and Political Rights, Article 14.3(e).

F14/4/2

again omitted to summon them as witnesses for a confrontation with the Accused, KAING Guek Eav alias “DUCH”.¹⁴

10. By focusing only on subject matter jurisdiction,¹⁵ the Judges committed a grave error concerning the jurisdiction set out in Article 1 of the Agreement and Articles 1 and 2 of the ECCC Law, which define the tribunal’s personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes.¹⁶
11. Contrary to the Co-Prosecutors’ submissions in their Response, the Co-Lawyers for the Defence maintain the position they adopted in their Appeal, in accordance with Rule 87 of the ECCC Internal Rules.¹⁷
12. By relying on international jurisprudence without being familiar with civil law and common law, the Judges *proprio motu* expanded their jurisdiction and arbitrarily litigated the matter based merely on their emotions rather than on the law.¹⁸ In their Response, the Co-Prosecutors tried to evade the issue of violation of the principle of legality (*nullum crimen sine lege*),¹⁹ which is enshrined in the civil law system that is currently applicable in Cambodia. By their reliance on common law with undue focus on the jurisprudence of the ICTY and ICTR,²⁰ the Co-Prosecutors revealed that they were bent on bringing charges against KAING Guek Eav alias “DUCH” despite the

¹⁴ Written Record of Initial Appearance, 31 July 2007, E3/915; Written Record of Interview of Charged Person, 21 January 2008 E3/11, ERN 00159555-00159556; Written Record of Interview of Charged Person, 24 January 2008, E3/437, ERN 00160724-00160725, ERN 00159568 [Kh] (Statement from the Standing Committee, Document from DC-Cam); Written Record of Interview of Charged Person, 18 February 2008, E3/31, ERN 00164330; Written Record of DUCH, 18 February 2008, E3/31, Annex I, Written Record of Interview of DUCH, 19 February 2008, E3/489 Annex ERN 00164360; Written Record of Interview of DUCH, 28 February 2008, E3/218, ERN 00165440; Written Record of Interview of DUCH, 1 April 2008, E3/5, ERN 00177635-00177636; Written Record of Interview of DUCH dated 5 May 2008, E3/12, ERN 00204290-00204291, ERN 00204292.

¹⁵ Written Record of Interview of Witness, only at S-21, 1. Mâm Nai, D22/14, D50/2, 2. PRAK Khan D19/VII, D19/VIII, 3. SUOS Thy D22/9, 4. MEAS Peng Kry D28/7, 5. HIM Huy D19/VI, D51/2, 6. Tay Teng D28/12, D50/3.

¹⁶ Judgment, 26 July 2010, E188, ERN 00572528, p. 6, first sentence; ERN 00572531-00572532, p. 9-10, para. 28.

¹⁷ Fourth sentence of Co-Prosecutors’ Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias “Duch” against the Trial Chamber Judgement of 26 July 2010, F14/4.

¹⁸ The universal civil law principle of legality (*nullum crimen sine lege*).

¹⁹ Co-Prosecutors’ Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias “Duch” against the Trial Chamber Judgement of 26 July 2010, F14/4.

²⁰ Judgment, 26 July 2010, ERN 00572532-00572533, p. 10-11, ERN 00572677, p.155, ERN 00572537, p. 15, E188.

P14/4/2

violation of the civil law principle of legality (*nullum crimen sine lege*). This course of action by the Co-Prosecutors led the Judges – who did not have time to review the many thousands of pages of evidence – to accept the Co-Investigating Judges' conclusions²¹ and to reach the erroneous conclusion that they had jurisdiction to prosecute DUCH.

13. The Judgment as a whole²² contains many testimonies of both former staff and victims of Tuol Sleng Prison. Those who were higher ranked than DUCH, such as NUON Chea and lower ranked than NUON Chea were not considered, and were not summoned for a confrontation according to the law.²³
14. The error concerning personal jurisdiction stems from three main factors. Even the Co-Prosecutors made the same error at the outset when they charged KAING Guek Eav alias “DUCH” as one of the senior leaders, and it was not until after the Co-Investigating Judges' investigation that the Co-Prosecutors considered that he was not among the senior leaders.²⁴
 - a. The crimes were committed a long time ago and the volume of documents collected exceeds that in a normal case file.
 - b. The Trial Chamber omitted to summon witnesses who were higher ranked than Duch, such as NUON Chea, MEAS Muth and SUO Meth, for a confrontation in accordance with the law.²⁵
 - c. The Chamber were horrified by the atrocities committed at S-21, and the Co-Investigating Judges failed to identify any high ranking witnesses. Moreover, they overlooked and did not summon a key witness, who was the most senior S-21 official, namely NUON Chea, an Accused in Case 002, for a confrontation with the Duch. Calling him as witness was crucial with regard to the issue jurisdiction, as his testimony would have helped

²¹ Judgment, 26 July 2010, ERN 00572530-00572531, p. 8-9, para. 25, E188.

²² Judgment, 26 July 2010, ERN 00572539-00572540, para 52, point 1.6.5.3, E188.

²³ Rule 87 (1), (2) and (5) of the ECCC Internal Rules.

²⁴ Judgment, 26 July 2010, ERN 00572528, E188.

²⁵ International Covenant on Civil and Political Rights, Article 14.3(e).

P/16/4/2

determine whether KAING Guek Eav alias "DUCH" is among those most responsible for the crimes committed at S-21 or Tuol Sleng Prison.²⁶

15. The exclusive reliance on the jurisprudence of the international tribunals, the ICTY and the ICTR, stems from improper understanding of the international law deriving from customary law. Since international customary law is applied by virtually all international tribunals, it is important to clearly understand the characteristic of an offence, its circumstance and common nature, the law on sentencing and the law on the determination of a court's jurisdiction in order to determine whether there are lacunae and whether the court can rely on such jurisprudence. Otherwise international jurisprudence may be relied upon at the detriment of national and international law.²⁷ It may also be used for ideological and political vengeance at the detriment of justice. As a matter of fact, we can rely on existing international and national law without having recourse the jurisprudence which is merely a source of law.²⁸
16. The definition of the category of senior leaders and those most responsible for the crimes must be based on law. Moreover, it is not necessary to rely on international customary law sources, which derives from common law, instead of civil law in a civilized country like Cambodia, which is deeply rooted in the civil law tradition.
17. If the idea is to convict an individual who is regarded as an enemy by society without taking into account the legality of the Chamber, the resulting trial becomes a forum for vengeance between the victors and the vanquished, as depicted in the Lafontaine fable *The Wolf and the Lamb*.²⁹

²⁶ Rule 87 (1), (2), (3), (4), (5) and (8): Rules of Evidence.

²⁷ The ECCC Law is based on the 1956 Penal Code and the Agreement.

²⁸ Code of Criminal Procedure of the Kingdom of Cambodia, Section 2, Article 321: Rules of Evidence: Evidence Evaluation by Court.

²⁹ Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia states: the purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes. The purpose is echoed in its Preamble: WHEREAS in the same resolution the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security.

P/16/4/2

18. In a trial of Second World War criminals, the Supreme Court of Canada³⁰ observed that the trial and appellate courts of Canada that the judges had sufficient time during the trial proceedings to examine the issue of subject matter and personal jurisdiction at the same time and that it was not necessary to examine them one after the other. It found that those courts were without jurisdiction over Imre Finta and cleared him of all charges.
19. The undue reliance on the case-law of the ICTY, the ICTR and the SCSL gives the impression that the ECCC's Law and Internal Rules are non-existent, that the State of Cambodia has no laws, and that the trials at the ECCC cannot be conducted in reliance on the Agreement.³¹
20. In their Appeal, the Co-Lawyers for the Defence raised arguments deriving from evidence of specific facts established by the Office of the Co-Prosecutors and the Defence itself. Those arguments highlight the applicable legal instruments, which are based on the Agreement, as well as the ECCC Law, Cambodian legal texts, such as the Code of Criminal Procedure, the Constitution and the 1956 Penal Code, which are the sources of the ECCC Law.³²
21. For their part, the Co-Prosecutors rely entirely in their Response on the case-law of the ICTY, which has earned a reputation for failing to respect human rights; it also does not follow the same standards as the ECCC. The entire world learned with resentment that the ICTY left Mr. Slobodan Milošević die in custody from lack of medical care. Moreover, unlike the ECCC, the ICTY Statute does not delineate personal jurisdiction.³³ For all these reasons, relying on ICTY case-law is legally specious and shows lack of respect for human rights in the quest for genuine justice.³⁴

³⁰ Supreme Court of Canada, case of *R v. Finta*, [1994] 1.S.C.R.701 *Her Majesty the Queen v. Imire Finta*. Imire Finta was charged with war crimes and crimes against humanity during the Nazi of Europe during the Second World War. Case Nos. 23023, 23097. 1993, June, 2, 3; 1994, March 24.

³¹ Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias "Duch" against the Trial Chamber Judgement of 26 July 2010, 20 December 2010, F14/4.

³² Appeal Brief by the Co-Lawyers for KAING Guek Eav alias "Duch" against the Trial Chamber Judgement of 26 July 2010, 18 November 2010, F14.

³³ Articles 6, 7, and 9 of the ICTY Statute.

³⁴ Accused Slobodan Milošević at the ICTY died in custody before the trial was completed.

F14/4/2

22. For our part, we hope that no one will rely on the case-law of the special court for Iraq to support their case. Some courts do not reflect respect for international standards.³⁵
23. The Co-Prosecutors' Response makes no reference to trial transcripts because they contain no testimonies of any witnesses who held a higher rank than the Accused, such as NUON Chea, SOU Meth, MEAS Muth; those individuals were not summoned for a confrontation with the Accused.³⁶ Instead, their testimonies appear in Case File 002.
24. The Co-Lawyers for the Defence maintain their position, in strict conformity with the civil law tradition, and will refrain from engaging in any unnecessary discussion of the case-law of other tribunals whether or not such case-law is valid. Apart from the Agreement,³⁷ the Defence will rely on international law sources in support of our arguments only where:
- A question arises which is not addressed in the ECCC Law, the Agreement, the Penal Code of Cambodia, the Constitution of Cambodia, the ECCC Internal Rules and treaties or conventions.
 - Such sources of applicable international law are consistent with the civil law tradition, the Agreement, the ECCC Law and the Penal Code of Cambodia.
 - Such sources are not inconsistent with Article 51 (new) of the Constitution of Cambodia on the separation of powers. According to this Article, the Chamber is not empowered to make laws. Article 51 (new) on the separation of powers prohibits reliance on international jurisprudence. The Co-Prosecutors submit that the Co-Lawyers for the Defence repeatedly refer to the Trial Chamber's failure to consider its "submissions" on personal jurisdiction.³⁸

³⁵ International Covenant on Civil and Political Rights, Article 14.3(e).

³⁶ Rule 87 (1) and (2) of the ECCC Internal Rules.

³⁷ Article 12(1): Procedure. According to Article 12(1) of the Agreement, the procedure must be in accordance with Cambodia Law.

³⁸ Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias "Duch" against the Trial Chamber Judgement of 26 July 2010, para. 8, p. 11, (Doc. F14/4).

P16/4/2

25. These arguments are reflected in the Introduction to the Judgment.³⁹ Accordingly, they are contrary to the ECCC Internal Rules⁴⁰ and the Code of Criminal Procedure of Cambodia.⁴¹
26. In response to paragraph 8, sub-paragraph 3 of the Co-Prosecutors Response, the Co-Lawyers for the Defence submit that it is true that Article 1 of the Agreement only provides for the prosecution of **senior leaders and those most responsible**.⁴²
27. The phrase “those most responsible” must be interpreted according to its legal meaning and at the discretion of the Judges⁴³ with reasoning supported by evidence from facts and legal texts.⁴⁴
28. According to the ICTY case-law, the phrase “most senior leaders” only refers to individuals who, by virtue of their position and function in the relevant hierarchy, both de jure and de facto, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the “most senior”, rather than “intermediate”.⁴⁵ The ICTY Referral Bench considered criteria such as the role of the permanent leaders and defined senior leaders, and where applicable, a clear political mandate as permanent leader, entailing political responsibilities by the accused, such a permanent post, by virtue of which can negotiate with international elements and has a number of individuals under his command and control. This is different from DUCH’s situation to the extent that he was not charged as “most senior leader” and does not qualify as “most responsible” because:

³⁹ Judgment, 26 July 2010, E188.

⁴⁰ Rule 87(1) of the ECCC Internal Rules.

⁴¹ Code of Criminal Procedure of Cambodia, Section 2: Rules of Evidence, Article 321.

⁴² Preamble to the Agreement and purpose of the Agreement, Article 1.

⁴³ Code of Criminal Procedure of Cambodia, Section 2, Part 3: Rules of Evidence, Article 321.

⁴⁴ Article 51 (new) of the Constitution of Cambodia: separation of powers. The Court has no power to enact laws. The power to enact laws lies exclusively with the legislature.

⁴⁵ *Prosecutor v Dragomir Milosovic*, Decision on Referral of Case Pursuant to Rule 11 *bis*, Referral Bench, 8 July 2005, para. 22, http://www.icty.org/x/cases/dragomir_milosevic/tdec/en/050708.htm.

F14/4/2

- 1- He was the Secretary of S-21. This position is equivalent to that of office chief or department head within the Cambodian administrative hierarchy.⁴⁶
- 2- He had no political responsibility within the CPK Standing Committee.⁴⁷
- 3- His role was to forward orders from his superiors to his subordinates. "The orders were not initiated by him and did not reflect his will."⁴⁸
- 4- He did not have staff under him by virtue of the power vested in him, given that S-21 executed orders and was under the direct control of the highest echelons of the CPK.⁴⁹

Therefore, the attempt to include him in the category of "those most responsible" based on the ICTY case-law is not only an error, but it also shows disregard for current Cambodian law.

29. The Co-Prosecutors should have made a distinction between "those who were least responsible" and "suspects." The Co-Prosecutors' allegation⁵⁰ that the Co-Lawyers for the Defence are wrong in paragraph 37 of their Appeal and state the opposite of what is stated in Article 29 (new) of the ECCC Law is negative and in bad faith; it also shows disregard for the merits of the Appeal. In reality, paragraph 37 of the Defence Appeal states the following:

"Likewise, the ECCC's Law which is adopted on the basis of the 1956 Penal Code does not allow for a prosecution of any person who was at the lower echelons for crimes committed during the DK regime because they acted on orders from the upper echelons"

This refers to "low-ranked persons" who acted upon orders from the upper echelon, like other the perpetrators.

Article 29 (new) of the ECCC Law refers to "the senior leaders of Democratic Kampuchea and the most responsible persons" as cited below:

⁴⁶ *Prakas* of the Ministry of Interior on Prison Management of 31 March 1998.

⁴⁷ Decision of the Party Centre of 30 March 1976 on other matters, ERN 00003136-00003142 [Kh].

⁴⁸ Trial Chamber Judgment, 26 July 2010, E188, para. 256.

⁴⁹ Co-Prosecutors' Introductory Submission, D3, para. 49.

⁵⁰ Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias "Duch" against the Trial Chamber Judgement of 26 July 2010, para. 29, F14/4.

F16/4/2

“The fact that a suspect has committed a crime upon an order from the DK Government or an upper echelon shall not relieve him/her of criminal responsibility or mitigate punishment.”⁵¹

30. The phrase “those who were most responsible for the crimes” refers to the perpetrators or co-perpetrators who fashioned the criminal policy, implemented it had the means to stop it.⁵² Perpetrators or co-perpetrators who carried out orders cannot be prosecuted under Article 1 of the Agreement or Articles 1 and 2 (new) of the ECCC Law.
31. In the Judgement⁵³ it is stated that the Accused acted on the orders of the Standing Committee and forwarded those orders to his staff. Given their position within the State apparatus, the Chamber concluded that the S-21 interrogators and S-24 staff who perpetrated acts of torture acted in an official capacity. Their authority was deemed to be command authority.

II- Reply to the Co-Prosecutors Response concerning Ground 1⁵⁴

32. In their Response, the Co-Prosecutors fail to raise any arguments or to cite any authorities:
- it was the Co-Prosecutors who adduced the evidence and placed it on Case File 001/18-07-2007/ECCC/TC;
 - the evidence before the Chamber proved that KAING Guek Eav alias Duch is responsible for the crimes committed at S-21, also known as Tuol Sleng Prison.

⁵¹ See Article 2 (new) of the ECCC Law.

⁵² Decision of the Central Committee of 30 March 1976 on executions within the Central Committee and the regions, ERN00003136- ERN00003142 [Kh]. The CPK Standing Committee had control over the appointment of senior government and military leaders. Expert report of Craig C. Etcheson, OCP expert, ERN 00314643, p. 5, E3.32.

Standing Committee meeting of 9 October 1975, ERN 00292868-00292886.

According to Articles 1 and 2 (new) of the ECCC Law, the ECCC has jurisdiction to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes committed during the period from 17 April 1975 to 6 January 1979.

⁵³ Trial Chamber Judgement, 26 July 2010, E188, para. 256.

⁵⁴ Co-Prosecutors’ Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias “Duch” against the Trial Chamber Judgement of 20 December 2010, at point 2, para 11, F14/4.

F14/4/2

33. The Co-Prosecutors' assertion in their Response⁵⁵ that the Trial Chamber committed no error concerning personal jurisdiction over KAING Guek Eav alias Duch is not based on evidence⁵⁶ as required by law. In other words, their assertion is unfounded, and we reject it.
34. The evidence contained in the documents submitted by Mr. Craig C. Etcheson⁵⁷ an expert with OCP and the DC-Cam documents⁵⁸ clearly reveals that:
- Tuol Sleng prison was a secret military prison;
 - Duch was merely a regiment chief;⁵⁹
 - Tuol Sleng Prison was under the control of the Centre Army and the CPK Standing Committee;⁶⁰
 - Duch was only Secretary of S-21, also known as Tuol Sleng prison, or regiment secretary;⁶¹
 - His role was to receive orders from above and forward them for execution and then report to his superiors;⁶²
 - KAING Guek Eav alias Duch was at the bottom of the hierarchy of the Centre Army's General Staff office;⁶³
 - KAING Guek Eav alias Duch was under S-71 headed by Pang and Lin, who were directly under POL Pot;⁶⁴
35. This proves that KAING Guek Eav alias Duch does not come under the remit of Articles 1 and 2 (new) of the ECCC Law.⁶⁵ We therefore request the ECCC Supreme Court Chamber to re-examine the evidence to the effect that KAING

⁵⁵ Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias "Duch" against the Trial Chamber Judgement of 26 July 2010,, 20 December 2010, F14/4.

⁵⁶ Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias "Duch" against the Trial Chamber Judgement of 20 December 2010, at point 2, para. 11 (1, 2), F14/4.

⁵⁷ Report by Craig C. Etcheson, E3/32.

⁵⁸ Thirty-one (31) selected Biographies of Khmer Rouge Leaders and others, Prepared for the UN Commission of Experts August-September, 1998 (Duch's Biography, ERN 00626210-00626212, F14.2.4.

⁵⁹ Report by Craig C. Etcheson, para. 115, ERN 00146849, E3/32.

⁶⁰ Report by Craig C. Etcheson, para. 24, Security, ERN 00146828, 00146854, E3/32.

⁶¹ Judgment, 26 July 2010 (Doc. E188), para. 129. Report by Craig C. Etcheson, para. 115, E3/32 .

⁶² See Son Sen' handwritten note to KAING Guek Eav alias "Duch", ERN 00002455 [Kh], D91/I.

⁶³ Report by Craig C. Etcheson, para. 117, ERN 00146849, E3/32.

⁶⁴ Report by Craig C. Etcheson, para. 133, ERN 00146853-00146854, E3/32.

⁶⁵ The ECCC has jurisdiction over on the senior leaders of the DK and those who were most responsible for the crimes.

P14/4/2

Guek Eav alias Duch does not come under the remit Articles 1 and 2 (new) of the ECCC Law.

36. Paragraph 12 of the Co-Prosecutors' Response states that "the Appellant's objection to the exercise of personal jurisdiction over him, which was presented on the last day after more than nine months of the trial proceedings" was belated under Rule 89. Yet, Rule 87⁶⁶ of the ECCC permits the parties to present evidence at any time during the trial proceedings.

The Co-Lawyers for the Defence relied on the following evidence:

1. All the documents on the case files that were put before the Trial Chamber and confirmed against the Accused;
2. Witness court testimonies; and
3. Expert testimonies

in reaching their conclusions. We therefore respectfully request the Judges to rely thereupon in considering all arguments to the contrary. The judges can examine two types of evidence. That does not mean that evidence concerning personal jurisdiction cannot be examined simply because it was presented during the last session of the nine-month trial. Evidence concerning jurisdiction is crucial and may be presented at any time during the trial proceedings, according to Rule 87 of the Internal Rules.

37. In paragraph 15 of their Response, the Co-Prosecutors misconstrued Rule 89 because they considered that all the evidence was adduced on the basis of Rule 89 of the Internal Rules and not of Rule 87.⁶⁷ A judgement cannot be fair if it is rendered without a thorough consideration of all the evidence adduced at

⁶⁶ The Supreme Court of Canada stated that it is unnecessary to show the jurisdictional condition beyond reasonable doubt. However, the Trial Chamber judges shall consider the evidence based on the jurisdiction and they shall not only rely on their assessment of the alleged charges. Some facts are necessary to establish the existence of jurisdiction which may not be necessary for the jury in their evaluation of the crimes as not all decisions shall be made by the jury. When the Trial Chamber judges examine evidence in relation to the jurisdictional matter it is generally more effective if they consider the evidence at the same time the jury examines it in relation to the crimes. This indicates that the evidence on jurisdictional matter made by the Trial Chamber is useful and shall be presented and used as arguments at any time to support testimony provided by experts or other potential witnesses. The dismissal of evidence on jurisdictional matter by a Trial Chamber as it is considered presented belatedly is not acceptable in certain judicial systems in civilized countries.

⁶⁷ Rule 87 of the ECCC Internal Rules: Rules of Evidence.

F14/6/2

trial or through refusal to consider some evidence without proper cause. The judges always have adequate time to assess and weigh the evidence, subject matter jurisdiction and personal jurisdiction.⁶⁸ Once the judges have reviewed the inculpatory and exculpatory evidence according to Rule 87, the provisions of Rule 89 of the ECCC cannot bar them from discharging the task of delivering justice to the Accused. The allegation that the Defence objection raised on the last day of the trial was a “belated” preliminary objection is contrary to the general practice before Cambodian courts.⁶⁹

38. In response to paragraphs 15 and 16 of the Co-Prosecutors’ Response, raising a jurisdictional issue does not constitute a preliminary objection. Indeed, the Judgement of Case File 001/18-07-2007/ECCC/TC⁷⁰ contains objections to personal jurisdiction over the Accused. According to the rules of evidence, evidence may be adduced at any time during trial. The fact that the Defence had no evidence on personal jurisdiction is immaterial, since its closing statement are based on the evidence presented throughout the trial regarding personal jurisdiction.⁷¹
39. There are four types of jurisdiction: personal jurisdiction, territorial jurisdiction, temporal jurisdiction and subject-matter jurisdiction.⁷² It is crucial for a criminal court to determine the scope of its jurisdiction, as this may have an effect on its legitimacy and effectiveness. The personal jurisdiction in this instance does not include individuals or senior leaders who fall outside the Court’s jurisdiction.⁷³ By bringing charges against KAING Guek Eav⁷⁴

⁶⁸ Advice by the Supreme Court of Canada in *R v Finta*, [1994] 1.S.C.R.701 Her Majesty the queen v. Imire Finta who was charged with War Crimes and Crimes against Humanity during the Nazi’s rule over Europe during the Second World War. Case No. 23023, 23097. 1993, June, 2, 3; 1994, March 24.

⁶⁹ The general practice in national court system is that the lawyer shall make his/her closing statement at the very final stage of the proceedings for judges to consider.

⁷⁰ Judgment, 26 July 2010, E188, para 12 (1.4).

⁷¹ 1- The Supreme Court of Canada’s case: *R v Finta*, [1994] 1.S.C.R.701 Her Majesty the queen V Imire Finta who was charged with War Crimes and Crimes against Humanity during the Nazi’s rule over Europe during the Second World War. Case Nos. 23023, 23097. 1993, June, 2, 3; 1994, March 24. 2- Article 46 of the Code of Criminal Procedures of Cambodia on the judgement of the preliminary objection “the court shall issue a decision on a preliminary objection in a judgment separate from the judgment on the merits. However, the court may also issue only one judgement which includes a decision on the preliminary objection and a decision on the merits.”

⁷² Article 2 (new) of the ECCC Law.

⁷³ Articles 3 (new) to 8 of the ECCC’s Law provide that the ECCC have jurisdiction to over *suspects* only.

F14/4/2

without taking account of the national legal norms⁷⁵ or based on a cursory knowledge of national law – on the basis of which law the Defence adduced its evidence concerning personal jurisdiction – both the Co-Prosecutors and the Trial Chamber erred in the application of the Internal Rules.⁷⁶ Such incompetence could adversely affect the Court's contribution to national unity and reconciliation.

40. In paragraph 19 of their Response,⁷⁷ the Co-Prosecutors again fail to recognise that the submissions based on factual evidence⁷⁸ are brought under Rule 87 of the Internal Rule, and that Rule 89 does not bar the Judges from relying on Rule 87 in litigating a matter.⁷⁹ The Trial Chamber relied on Rule 89 (Preliminary Objections) in concluding that the Co-Lawyers' arguments were belated preliminary objections. However, those arguments concern personal jurisdiction; they do not constitute preliminary objections. Moreover other courts have litigated this matter and ruled to the same effect.⁸⁰

⁷⁴ Para. 18 of the response of the Co-Prosecutors to the Defence's appeal brief of 20 November 2010, F14/4.

⁷⁵ Para. 2 of the Annex 5 of the Paris Peace Agreement provides that: ... "It [constitution] will prohibit the retroactive application of criminal law." Article 5 of Law on the Outlawing of the Democratic Kampuchea Group, 1994 provides that "This Law shall grant a stay of six months after coming into effect to permit people who are members of the political organization of military forces of the "Democratic Kampuchea" group to return to live under the control of the Royal Government in the Kingdom of Cambodia without facing punishment for crimes which they have committed."

⁷⁶ Rules 53(4) of the ECCC Internal Rules.

⁷⁷ Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias Duch" against the Trial Chamber Judgement of 20 December 2010, para. 19, F14/4, in which the preliminary objection was raised.

⁷⁸ Case No. 001/18-07-2007/ECCC/TC.

⁷⁹ Rule 87(1) and (2) states that all evidence is admissible without regard for belatedness.

⁸⁰ Recommendations by the Supreme Court of Canada in *R v. Finta*, [1994] 1.S.C.R.701 *Her Majesty the Queen v. Imre Finta*, Case Nos. 23023, 23097. 1993, June, 2, 3; 1994, March 24, The Supreme Court of Canada stated that "The requirements for jurisdiction need not be proved beyond a reasonable doubt. The trial judge, however, must consider the evidence to satisfy the jurisdiction requirements and not simply base his or her assessment of these requirements on the charges as alleged. Because some of the facts necessary to establish jurisdiction are not the same as those necessary for the jury's determination of the underlying offence, all the findings of fact cannot be left to the jury. Here, since the jury will have to hear much of the same evidence related to the offences as the trial judge would have to hear in relation to the jurisdiction issue, it will usually be more efficient to have the trial judge consider the jurisdiction issue at the same time as the jury hears the evidence related to the offence". This indicates that the evidence on jurisdictional matter made by the Trial Chamber is useful and shall be presented and used as arguments at any time to support testimony provided by experts or other potential witnesses. The dismissal of evidence on jurisdictional matter by a Trial Chamber as it is considered presented belatedly is not acceptable in certain judicial systems in civilized countries.

F14/4/2

41. In paragraph 44 of their Response,⁸¹ the Co-Prosecutors specifically recognise that *“the Co-prosecutors at the ECCC are expected to make a selection as to which suspects to prosecute.”*⁸² Moreover, analysis of the evidence from the DC-Cam biography selection,⁸³ prepared for the UN Commission of Experts, clearly demonstrates that the prosecution relies on a biography selection for its case. The Co-Prosecutors’ allegation that the Accused is among the senior leaders of Democratic Kampuchea is unsubstantiated, and it also demonstrates the Co-Prosecutors’ abuse of prosecutorial power in violation of the law,⁸⁴ this is merely political vendetta.
42. In their Response, the Co-Prosecutors do not refer to any of the evidence which was prepared and submitted by Mr. Craig C. Etcheson, a staff member of their Office,⁸⁵ and neither do they cite any arguments or legal authorities in support of their Response. They tend to overly rely on the practices of other tribunals, and do not seem to reflect the actual prosecutorial powers vested to them under the law; more importantly, this course of action is contrary to the training received at law schools worldwide.
43. In paragraph 45 of their Response,⁸⁶ the Co-Prosecutors reveal their limited knowledge of the law. The concept of “equality before the law”, as set forth in Article 31 of the Constitution of Cambodia, was very clearly invoked by the Co-Lawyers for the Accused. In their own submissions, the Co-Prosecutors refer to the general notion that all individuals are subject to the same laws regardless of their race, wealth, gender, or other status classification. Therefore, individuals who have committed the same crime must be prosecuted in the same conditions, with no exceptions. Accordingly, if the

⁸¹ Co-Prosecutors’ Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias “Duch” against the Trial Chamber Judgement of 20 December 2010, F14/4, para 44, p. 20.

⁸² Co-Prosecutors’ Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias “Duch” against the Trial Chamber Judgement of 20 December 2010, F14, para. 44. The Co-Prosecutors strongly admit that the ECCC Agreement and the ECCC Law impose no obligation to try all potential perpetrators of crimes falling within its jurisdiction.

⁸³ The selected 31 Biographies of Khmer Rouge Leaders and others, Prepared for the UN Commission of Experts August-September, 1998 (Duch’s Biography), ERN 00626210-00626212, F14.2.4.

⁸⁴ It violates Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the purpose of the establishment of the ECCC. It violates Article 1, Article 2 (new) of the ECCC Law. It violates Rule 87(1), 87(2) of Rule of Evidence of the ECCC Internal Rules.

⁸⁵ Report by Craig C. Etcheson, E3/32.

⁸⁶ Co-Prosecutors’ Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias “Duch” against the Trial Chamber Judgement of 20 December 2010, F14/4, para 45, p. 20-21.

F14/4/2

chiefs of the other 195 detention centres⁸⁷ all across Kampuchea committed the same crimes within the jurisdiction of the ECCC, the Co-Prosecutors cannot evade their obligation to prosecute them on the pretext that **no law requires them to do so**. Indeed, Article 1 of the Agreement and Articles 1 and 2 (new) of the ECCC Law are binding for everyone, including the ECCC Co-Prosecutors. The number of people killed at the Chong Chroy Security Office⁸⁸ was ten times higher than that at S-21. Moreover, the chief of Chong Chroy was also its secretary.⁸⁹ This is consistent with the decision dated 30 March 1976⁹⁰ according to which S-21 was to receive orders from all military units of the Party Central Committee to smash people within the Central Committee and the zonal security offices were to receive their orders from the zone offices. If KAING Guek Eav is charged as being among those most responsible for the crimes, the chiefs of the other security offices must also be prosecuted on the same ground of subject matter jurisdiction. **However, if the Co-Prosecutors argue that the ECCC has no jurisdiction over the heads of the 195 Security Centres around country, the same should apply to KAING Guek Eav, who was the head of S-21.**

III- REPLY TO THE CO-PROSECUTORS RESPONSE CONCERNING GROUND 2⁹¹

44. The Co-Prosecutors failed to substantiate their claim that no error was committed concerning jurisdiction and repeatedly cited ICTY case-law,⁹² as in Case File 001/18-07-2007/ECCC/TC.
45. At the ICTY, the Prosecution alleged that the Trial Chamber erroneously applied the beyond a reasonable doubt standard in its judgement.⁹³ In the case

⁸⁷ Khmer Rouge Prison, Document from the Documentation Center of Cambodia, Case No. 001/18-07-2007/ECCC/TC, E3/220.

⁸⁸ Khmer Rouge Prison, Document from the Documentation Center of Cambodia, compiled by PHENG Pong Rasy, p. 81 [Kh].

⁸⁹ Khmer Rouge Prison, Document from the Documentation Center of Cambodia, compiled by PHENG Pong Rasy, p. 81 [Kh].

⁹⁰ Decision of the Central Committee on Other Matters, 30 March 1976, ERN 00003136-00003142 [Kh].

⁹¹ Response to the second argument: The Trial Chamber has made no error on "sentencing," p. 43 [Kh].

⁹² The Chamber failed to present evidence based on facts existed between 17 April 1975 to 6 January 1979 within the territory of Kampuchea and at Tuol Sleng prison (S-21) and failed to cite any valid national and international legal texts.

F14/4/2

at hand, the Co-Lawyers are requesting the Chamber to re-examine all the evidence presented by the Office of Co-Prosecutors⁹⁴ and the other parties, concerning its jurisdiction.

46. The Trial Chamber omitted to examine all the evidence based on the beyond reasonable doubt standard in determining that it has personal jurisdiction over the Accused, according to Articles 1 and 2 (new) of the ECCC Law and Article 1 of the Agreement. As at ICTY, the Co-Prosecutors requested the Chamber to examine all the evidence concerning its jurisdiction, based on the beyond a reasonable doubt standard.⁹⁵ Although the Prosecution presented its arguments to convince the Chamber to include the Accused in its jurisdiction, the ICTY and the Supreme Court of Canada came to conclusion that the Chamber must always review the evidence based on the beyond reasonable doubt standard with regard to both personal and subject-matter jurisdictions.⁹⁶ Hence, if the Chamber had duly examined all evidence as submitted above, it would have found that **KAING Guek Eav** alias **DUCH** was a low-ranking member of the Communist Party of Kampuchea,⁹⁷ and should therefore have

⁹³ See Appeals Chamber, 16 November 2005, JP/MO/1021e. Summary of Appeal Judgement, *Prosecutor v. Sefer Halilović*, p. 3, para. 1. ICTY, http://www.icty.org/x/cases/halilovic/tjug/en/051116_halilovic_summary_en.pdf. http://www.icty.org/x/cases/halilovic/acjug/en/071016_Halilovic_summary_en.pdf

⁹⁴ See ICTY Appeals Chamber, 16 November 2005, JP/MO/1021e. Summary of Appeal Judgement, *Prosecutor v. Sefer Halilović*, p. 3, para. 2. ICTY, http://www.icty.org/x/cases/halilovic/tjug/en/051116_halilovic_summary_en.pdf. http://www.icty.org/x/cases/halilovic/acjug/en/071016_Halilovic_summary_en.pdf

⁹⁵ See ICTY Appeals Chamber, 16 November 2005, JP/MO/1021e. Summary of Appeal Judgement, *Prosecutor v. Sefer Halilović*, p. 3, para. 2. ICTY, http://www.icty.org/x/cases/halilovic/tjug/en/051116_halilovic_summary_en.pdf. http://www.icty.org/x/cases/halilovic/acjug/en/071016_Halilovic_summary_en.pdf

⁹⁶ Recommendations by the Supreme Court of Canada in *R v. Finta*, [1994] 1.S.C.R.701 *Her Majesty the Queen v. Imire Finta*, Case Nos. 23023, 23097. 1993, June, 2, 3; 1994, March 24, "The Supreme Court of Canada stated that it is unnecessary to show the jurisdictional condition beyond reasonable doubt. However, the Trial Chamber judges shall consider the evidence based on the jurisdiction and they shall not only rely on their assessment of the alleged charges. Some facts are necessary to establish the existence of jurisdiction which may not be necessary for the jury in their evaluation of the crimes as not all decisions shall be made by the jury. When the Trial Chamber judges examine evidence in relation to the jurisdictional matter it is generally more effective if they consider the evidence at the same time the jury examines it in relation to the crimes. This indicates that the evidence on jurisdictional matter made by the Trial Chamber is useful and shall be presented and used as arguments at any time to support testimony provided by experts or other potential witnesses. The dismissal of evidence on jurisdictional matter by a Trial Chamber as it is considered presented belatedly is not acceptable in certain judicial systems in civilized countries.

⁹⁷ Expert report by Craig C. Etcheson, E3/32, and recommendations by the Supreme Court of Canada in *R v. Finta*, [1994] 1.S.C.R.701 *Her Majesty the queen V Imire Finta*, Case Nos. 23023, 23097. 1993, June, 2, 3; 1994, March 24, "The Supreme Court of Canada stated that it is unnecessary to show the jurisdictional condition beyond reasonable doubt. However, the Trial Chamber judges shall consider

F14/4/2

concluded that it had no jurisdiction over him, instead of handing down a combined sentence of 35 years imprisonment against him.⁹⁸ Therefore the Defence submission is at least consistent with the two courts.

47. Grounds 1 and 2 are interrelated; Ground 1 concerns evidence relating to facts at Tuol Sleng prison during the 17 April 1975 to 6 January 1979 period, while Ground 2 relates to both national and international law, as well as to other international authorities. However, the Co-Prosecutors' Response⁹⁹ contains no beyond-a-reasonable-doubt evidence despite the large body of evidence it contains, including the report by the expert from their own Office.¹⁰⁰

IV- CONCLUSION

48. In their Response, the Co-Prosecutors use double standards and abuse their powers:
- They failed to investigate the statements provided to the Co-Investigating Judges by the expert and the Accused regarding the senior leaders. Their Response to the Defence Appeal is couched in general terms and does not to raise any counter arguments or cite proper legal authorities;
 - The Co-Prosecutors argue that there is no law requiring them to prosecute the perpetrators. In fact, Article 1 of the Agreement clearly states that the Co-Prosecutors have prosecutorial power over only two categories of individuals: **senior leaders of Democratic Kampuchea and those who were most responsible** for the crimes. If there is no evidence about the status of the persons in those two categories, the

the evidence based on the jurisdiction and they shall not only rely on their assessment of the alleged charges. Some facts are necessary to establish of the existence of jurisdiction which may not be necessary for the jury in their evaluation of the crimes as not all decisions shall be made by the jury. When the Trial Chamber judges examine evidence in relation to the jurisdictional matter it is generally more effective if they consider the evidence at the same time the jury examines it in relation to the crimes. This indicates that the evidence on jurisdictional matter made by the Trial Chamber is useful and shall be presented and used as arguments at any time to support testimony provided by experts or other potential witnesses. The dismissal of evidence on jurisdictional matter by a Trial Chamber as it is considered not presented on time is not accepted in certain judicial systems in western countries.

⁹⁸ Judgement, 26 July 2010, para. 679, E188.

⁹⁹ Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias "Duch" against the Trial Chamber Judgement of 20 December 2010, F14/4.

¹⁰⁰ Report by Craig C. Etcheson, E3/32.

F14/4/2

Co-Prosecutors are not empowered to prosecute them, as this is beyond their prosecutorial ambit. The Co-Prosecutors have clearly stated that there no law requiring them to prosecute perpetrators, that KAING Guek Eav alias DUCH and his colleagues come under the category of those responsible for the crimes committed at S-21 and that it was SON Sen, NUON Chea and POL Pot who planned the crimes and oversaw their commission until the end given that they are the most responsible for the crimes committed at S-21;

- The heads of the other 195 prisons¹⁰¹ throughout the country have not been prosecuted. This is consistent with Article 1 of the Agreement and Articles 1 and 2 (new) of the ECCC Law. The same should also apply to KAING Guek Eav.

49. In their Response, the Co-Prosecutors were unable to provide any evidence based on facts, legal texts or specific international law authorities; they relied solely on ICTY case-law.
50. The ICTY Trial Chamber has ruled against reliance on improper case-law.¹⁰² The Supreme Court Chamber must therefore re-examine the Defence Appeal in reliance on the standards specifically set out by the Co-Lawyers for the Accused; the Trial Chamber omitted to do this.
51. All the evidence examined does not meet the minimum standards of the national courts. Any evidence that is not proven beyond a reasonable doubt must be rejected. The Co-Prosecutors' submissions are without merit and must be rejected.

¹⁰¹ Khmer Rouge Prison, Document from the Documentation Center of Cambodia, Case File No. 001/18 -07-2007/ECCC/TC, E3/220.

¹⁰² Co-Prosecutors' Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias "Duch" against the Trial Chamber Judgement of 20 December 2010, para. 54, p. 24, F14/4.

FILE/4/2

14-01-2011	National Co-Lawyers KAR Savuth KANG Ritheary	Phnom Penh	
Date	Name	Location	Signature