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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' OBSERVATIONS ON THE CORRECTED ENGLISH VERSION OF THE
APPEAL BRIEF BY THE CO-LAWYERS FOR KAING GUEK EAV ALIAS "DUCH"
AGAINST THE TRIAL CHAMBER JUDGEMENT**

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I. INTRODUCTION

1. On 19 November 2010, the Accused Kaing Guek Eav *alias* Duch (“the Accused”) filed his Appeal Brief by the Co-Lawyers for Kaing Guek Eav *Alias* “Duch” Against the Trial Chamber Judgement of 26 July 2010 (“Original Appeal”).¹ The Co-Prosecutors filed their Response to the Appeal Brief on 20 December 2010 (“OCP Response”).² The Co-Prosecutors received notice on 4 February 2010 of a corrected English translation of the Original Appeal (“Corrected Appeal”) to which substantive edits were made.³
2. There do not appear to be any time limits for filing a correction to a translation, which must be approved by the Interpretation and Translations Unit.⁴ The OCP notes, however, that the Appellant’s corrected Appeal Brief in English was filed more than 2 months after the initial filing and more than 1 month after the OCP filed its Response Brief. No notice was given to the OCP regarding the re-translation.
3. The OCP respects the necessity of submitting accurate translations in all languages, and of the need to request corrections of filings, where the translation is incorrect. However in this instance, rather than editing translation errors, some changes to the Corrected Appeal appear to be legal revision in light of the Co-Prosecutors’ Response. This conclusion is reinforced by the fact that a review by Khmer lawyers in the OCP who also speak English reveals the original Khmer brief translates more closely to the original English filing in certain areas.
4. In addition, many quotations from the Original Appeal cited in the OCP Response have now changed, making the OCP Response appear imprecise and unsubstantiated in parts.
5. For clarification to the Supreme Court Chamber, the Co-Prosecutors have here identified and duplicated those sections from the English translation of the Original Appeal and the Corrected Appeal in regards to: (1) apparent changes to the Corrected Appeal in light of

¹ Appeal Brief by the Co-Lawyers for Kaing Guek Eav *alias* “Duch” Against the Trial Chamber Judgement of 26 July 2010, Case File No. 001/18-07-2007-ECCC/SC, Defence, 18 November 2010, F14 (“Original Appeal”).

² 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, Case File No. 001/18-07-2007-ECCC/SC, Office of the Co-Prosecutors, 20 December 2010, F14/4 (“OCP Response”).

³ Appeal Brief by the Co-Lawyers for Kaing Guek Eav *alias* “Duch” Against the Trial Chamber Judgement of 26 July 2010, Case File No. 001/18-07-2007-ECCC/SC, Defence, 18 November 2010 (Request for Correction filed 3 February 2011), F14/Corr-2 (“Corrected Appeal”).

⁴ Filing of Documents Before the ECCC, Practice Direction ECCC/01/2007/Rev.5, 17 September 2010, article 3.17.

the OCP Response; and (2) quotations from the Original Appeal cited in the OCP Response that have now been changed in the Corrected Appeal.

II. RESPONSIVE CHANGES TO THE CORRECTED APPEAL

6. The Co-Prosecutors argued that the Accused “knowingly and deliberately chose not to challenge personal jurisdiction.”⁵ As a supporting citation, the OCP Response quoted the Original Appeal, which stated that “the Defence ‘did not oppose the Co-Prosecutors [in regards to jurisdiction] at the beginning’.”⁶ The Corrected Appeal removed this clause and instead states that the Defence was not afforded the opportunity to oppose the jurisdiction of the Court over the Accused.
 - a. **Original Appeal, para. 94:** “...the Defence did not oppose the Co-Prosecutors at the beginning....”
 - b. **Corrected Appeal, para. 94:** “...the Defence was not afforded the opportunity from the outset to respond to the Co-Prosecutors' charges....”
7. The Co-Prosecutors noted in the OCP Response that the Accused misconstrued the intention of the dissent of one of the Trial Chamber judges: “[t]he Appellant falsely asserts that Judge Lavergne’s dissent ‘admitt[ed]’ that the Trial Chamber lacked jurisdiction over the Appellant. On the contrary, the dissent was limited solely to discussing the quantum of the sentence imposed on the Appellant.”⁷ The Corrected Appeal adjusted the language used in the Original Appeal to characterize the effect of Judge Lavergne’s dissent.
 - a. **Original Appeal, para. 96:** “The evidence showing that the Trial Chamber had no jurisdiction over Kaing Guek Eav alias Duch was reflected through the acceptance and knowledge by the National and International Co-Judges because there was at least one international judge admitting that the Trial Chamber actually did not have the jurisdiction over Kaing Guek Eav alias Duch.”
 - b. **Corrected Appeal, para. 96:** “Moreover, the Dissenting Opinion of the international judge, reflecting his belief that the Trial Chamber did not have jurisdiction to try KAINING Guek Eav, amounts to proof that all the trial judges, both national and

⁵ OCP Response, para. 16.

⁶ OCP Response, fn 35.

⁷ OCP Response, para. 8.

international, knew and recognised that the ECCC lacked the personal jurisdiction to be seized of Case 001.”

8. The Co-Prosecutors noted that, in various places, the Defence cited to its “submissions” without indicating how or when these submissions were made: “[t]he Appellant repeatedly refers to the Trial Chamber’s failure to consider its ‘submissions’ on personal jurisdiction but fails to specify which submissions it refers or clearly state when such submissions were made even though these are obviously key facts.”⁸ In the Corrected Appeal adds additional clarification regarding the “submissions” in some places and, in other places, uses the word “objection” or “argument” instead of “submission.”

- a. **Original Appeal, para. 5 (emphasis added)**: “As a result, the Co-Lawyers for the Accused made another attempt to raise this matter *in their submission* and requested that Judges review the Defence evidence confirming that the provisions of Article 1 of the Agreement and articles 1 and 2 (new) of the ECCC law do not apply to the Accused.”

Corrected Appeal, para. 5 (emphasis added): “For that reason, the Co-Lawyers for KAING Guek Eav made another attempt to raise the question of the jurisdiction of the ECCC *in their Final Submission*, moving that that Judges re-examine the evidence to the effect that Article 1 of the Agreement and Articles 1 and 2 (new) of the ECCC law do not apply to KAING Guek Eav.”

- b. **Original Appeal, para. 66 (emphasis added)**: “The Chamber failed to consider Rule 87 of the Internal Rules of the ECCC and the *Defence Counsel's submission* by relying only on Rule 89. The rejection of the *submission made by the Defence Counsel*, who depended wholly on the evidence presented to the Chamber by the Prosecutors, and the entire reliance on Rule 89 violated Rule 87, which made the exculpatory evidence not entirely examined to ensure that the ECCC did not have the jurisdiction over the Accused *as submitted* by the Defence Counsel.”

Corrected Appeal, para. 66 (emphasis added): “By dismissing *the submissions contained in Defence Final Submission*, the Trial Chamber only took account of Rule 89 of the Internal Rules, but not Rule 87. The dismissal, based solely on the evidence adduced before the Chamber and on Rule 89, amounts to a violation of Rule 87, in that no exculpatory evidence was assessed in order to verify whether, *as submitted by*

⁸ OCP Response, para. 8.

the Lawyers for the Defence in their Final Submission, the ECCC actually had jurisdiction over KAING Guek Eav.”

- c. **Original Appeal, para. 70 (emphasis added)**: “Article 290(6) may have also been viewed that the Trial Chamber of the ECCC could have applied it if the Chamber had examined the evidence submitted by the Defence and conceded that it did not have the jurisdiction over the Accused. The application of Rule 89 of the Internal Rules of the ECCC to reject *the submission made by the Defence Counsel* showed that the Chamber also agreed on the submission made by the Defence that the Accused was not within the jurisdiction of the ECCC, but it was only that the submission by the Defence Counsel was late. Thus, the Trial Chamber of the ECCC shall issue an order stating it has no territorial jurisdiction over the case as stipulated in Article 290(6) of the applicable Code of Criminal Procedure of the Kingdom of Cambodia. Hence, the submission by the Defence Counsel to the Trial Chamber of the ECCC that the Accused was not within the jurisdiction of the ECCC could not be rejected with the reason that it was submitted late because every reasoning submitted by the Defence Counsel was entirely taken from Rule 87(1). . . .”

Corrected Appeal, para. 68 (emphasis added): “Article 290(6) could have also been interpreted this way, and this would have meant that the Trial Chamber – had it considered the evidence *submitted by the Defence in their Final Submission* – would have recognized that it did not have jurisdiction over KAING Guek Eav. By relying on Rule 89 of the Internal Rules, the Trial Chamber seemed to imply that it agreed with the Defence's view that KAING Guek Eav is not within the purview of the jurisdiction of, the ECCC. This is indeed why the Trial Chamber evaded the issue claiming that the Defence interlocutory motion was belated. The Trial Chamber should have complied with the provisions of Article 290(6) of the current Code of Criminal Procedure of the Kingdom of Cambodia, and declined jurisdiction. Hence, the Chamber could not dismiss the Defence submission that KAING Guek Eav is not within its jurisdiction, simply because it was belated, especially considering that the Defence submissions were all brought under Rule 87(1) of the Internal Rules.”

- d. **Original Appeal, para. 71 (emphasis added)**: “That the Trial Chamber of the ECCC failed to examine the *submission* made by the Defence Counsel completely violated Rules 92 and 93 of the Internal Rules of the ECCC. . . .”

Corrected Appeal, para. 71 (emphasis added): “By refusing to consider the Defence *arguments*, the Trial Chamber acted in utter violation of Rules 92 and 93 of the Internal Rules....”

- e. **Original Appeal, para. 71:** “The rejection of evidence showing the jurisdictional matter of the court by stating that the submission was not made on time cannot be accepted based on various judiciaries in some civilized countries.”

Corrected Appeal, para. 71: “Therefore, according to the legal system in most civilised countries, it is not acceptable to exclude evidence relating to jurisdiction on the ground that it is presented beyond time.”

- f. **Original Appeal, para. 94 (emphasis added):** “...the court considered that it had jurisdiction over him and it rejected *the submission by the Defence* by calling the submission the late preliminary objection.”

Corrected Appeal, para. 94 (emphasis added): “...the Trial Chamber therefore tried KAING Guek Eav on the incorrect premise that he came under its jurisdiction; moreover, it dismissed the *Defence objections*, simply on the ground that they were belated.”

III. QUOTATIONS FROM THE ORIGINAL APPEAL CITED IN THE OCP RESPONSE WHICH HAVE CHANGED IN THE CORRECTED APPEAL

9. The Co-Prosecutors wish to prevent any prejudice against them given that the OCP Response cited from the Original Appeal and the language of many of these citations has now changed although the content generally appears to be similar. For the benefit of the Supreme Court Chamber, the Co-Prosecutors are providing citations from their Response which quoted the Original Appeal, and the quotation as it has now changed in the Corrected Appeal.

- a. **OCP Response, para. 3:** “He claims that the ECCC lacks personal jurisdiction over him, that he does not satisfy the requisite standard because ‘he is not classified within the senior leaders and most responsible persons’ leadership structure within the Democratic Kampuchea regime.”

Corrected Appeal, para. 22: “...he was neither a senior leader of Democratic Kampuchea nor among those most responsible for the crimes committed under this regime.”

- b. **OCP Response, para. 3:** “The Appellant concludes his submission by asserting that the Case 001 proceedings should be considered ‘a mistaken trial,’ that his detention should be considered as a ‘protective measure for a potential witness,’ and that he should be released.”

Corrected Appeal, para. 100: “The proceedings in Case 001 “must be considered as the result of an error by the Chamber” and “[t]he detention of Kaing Guek Eav from the date of his arrest until the present should be considered as a form of protection”.

- c. **OCP Response, fn 13:** “*See, e.g.* Defence Appeal Brief, paras. 4-6 (referring generally, with no specific reference or citation, to ‘supporting evidence’....)”

Corrected Appeal, para. 4: “...evidence in support....”

- d. **OCP Response, fn 13:** “*See, e.g.* Defence Appeal Brief . . . para. 21 (claiming that personal jurisdiction is based fundamentally on national administrative norms without providing reference to such norms). . . .”

Corrected Appeal, para. 21: “...administrative law norms...”

- e. **OCP Response, fn 13:** “*See, e.g.* Defence Appeal Brief . . . para. 22 (referring generally to ‘significant national legal instruments’ indicating that the Appellant is not classified within the ‘senior leaders and most responsible persons’ leadership structure’ without reasonably referencing such instruments). . . .”

Corrected Appeal, para. 22: “...there is a large number of documents from the then authorities which describe his role and hierarchical position, and reveal that he was neither a senior leader of Democratic Kampuchea nor among those most responsible for the crimes committed under this regime.”

- f. **OCP Response, fn 13:** “*See, e.g.* Defence Appeal Brief . . . para. 25 (referring generally to an unspecified ‘legal theory of defining the most responsible persons’ whereby one defines such persons by looking at their willpower in the hierarchy and volition compared to other prison secretaries)”

Corrected Appeal, para. 25: “From a legal standpoint, in determining if an individual fits in the category of those most responsible, it is necessary to determine the powers he or she held, based on his/her hierarchical rank.”

- g. **OCP Response, fn 14:** “*See, e.g.* Defence Appeal Brief . . . paras. 23, 25 (obscurely asserting that because other prisons purportedly claimed greater victims than S-21, this ‘explicitly confirms’ that former prison heads are not considered to be most responsible persons). . . .”

Corrected Appeal, para. 23: “This clearly shows that the then prisons heads do not fit into the category of those most responsible, under the ECCC Law.”

- h. **OCP Response, fn 15:** “*See, e.g.* Defence Appeal Brief, para. 69 (asserting that the Trial Chamber ‘*used too much presumption* by stating that it agreed with the Prosecutors’). . . .(emphasis added).”

Corrected Appeal, para. 69: “The Chamber thus relied on an excessive presumption against KAING Guek Eav by accepting the prosecution evidence. . . .”

- i. **OCP Response, fn 15:** “*See, e.g.* Defence Appeal Brief . . . para. 25 (stating that ‘the Chamber has *improperly concurred with the unreasonable reasoning which lacks reasonable legal ground* and with which the prosecution relies on to press charges on the accused [. . .] *such arguments lack legal logic* and cannot be used for defining the status of a person who is most responsible’) . . . (emphasis added).”

Corrected Appeal, para. 25: “The Chamber erroneously concurred with conclusions that were without legal basis, and in reliance thereupon, it was determined that KAING Guek Eav comes under the category of those most responsible for the crimes. . . .[t]hose conclusions are legally unsound and cannot form a basis for determining that a person was among those most responsible.”

- j. **OCP Response, fn 16:** “*See, e.g.* Defence Appeal Brief . . . paras. 91, 99 (misconstruing the fact that one Trial Chamber Judge dissented as to the quantum of sentence to mean that there was ‘irregularity in offering justice to the Accused’ . . .).”

Corrected Appeal, para. 99: “The Trial Chamber Judges did not reach a unanimous decision. This proves that the trial of KAING Guek Eav was vitiated by irregularities.”

- k. **OCP Response, para. 12:** “The Defence Appeal challenges this determination, alleging that the Trial Chamber ‘applied Rule 89 at the wrong time and with procedural defect.’”

Corrected Appeal, para. 71: “[The Trial Chamber] misapplied Rule 89; this amounts to procedural defect.”

- l. **OCP Response, fn 42:** “*See, e.g.* Defence Appeal Brief, para. 33 (‘DUCH was not a senior leader; he had lower hierarchical status => he had no right to issue orders and make decisions => less responsible.’)”

Corrected Appeal, para. 33 (emphasis added): “KAING Guek Eav was not a senior leader and was of low rank within the hierarchy => he had no power to issue orders or to make decisions => he had limited responsibility.”

- m. **OCP Response, fn 42:** “*See, e.g.* Defence Appeal Brief...para. 22 (stating that the Appellant is not within the ECCC’s jurisdiction because ‘he is not classified within the senior leaders and most responsible persons’ leadership structure within the Democratic Kampuchea regime’).”

Corrected Appeal, para. 22: “...he was neither a senior leader of Democratic Kampuchea nor among those most responsible for the crimes committed under this regime.”

- n. **OCP Response, fn 43:** “*See, e.g.* Defence Appeal Brief, para. 33 (arguing that DUCH cannot be considered a person ‘most responsible’ because ‘an individual’s responsibility is based on his/her legal, hierarchical authority’ and DUCH had ‘lower’ hierarchical status)...”

Corrected Appeal, para. 33: “...a person's responsibility depends on his/her legal authority within this hierarchy...[Duch] was of low rank within the hierarchy....”

- o. **OCP Response, fn 43:** “*See, e.g.* Defence Appeal Brief...paras. 37-38 (stating that the ECCC Law ‘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’)...”

Corrected Appeal, para. 37: “[T]he ECCC Law, which is based on the 1956 Penal Code, does not provide for prosecuting persons who held junior positions within the hierarchy of Democratic Kampuchea for any crimes they may have committed during that period, to the extent that such persons would have acted on orders from their superiors.”

- p. **OCP Response, fn 43:** “*See, e.g. Defence Appeal Brief...para. 100* (‘The ECCC Chamber had no jurisdiction over [DUCH] . . . because Duch’s status both within the ranks of the Government of Democratic Kampuchea and the Communist Party of Kampuchea was relatively the basis and lowest status, not the high status.’)”

Corrected Appeal, para. 100: “[T]he Chamber had no jurisdiction over [Duch]. The evidence shows that he held a junior, and not senior position both within the ranks of Government of Democratic Kampuchea and within Communist Party of Kampuchea.”

- q. **OCP Response, fn 43:** “*See, e.g. Defence Appeal Brief...para. 65* (claiming that the ECCC Law ‘does not cover groups of individuals who carried out the order of committing crimes and did not have the power to make decisions by their own’ but rather covers ‘a group of individuals who had the power to make political decisions which established the criminal policy’).”

Corrected Appeal, para. 65: “The ECCC Law does not apply to persons who executed orders to commit crimes, but who had no decision-making power as such”; “namely only those who had the power to make political decisions, establish criminal policies and make sure that those policies were implemented.”

- r. **OCP Response, fn 54:** “*See Defence Appeal Brief, para. 25* (stating that ‘the Chamber has *improperly concurred with the unreasonable reasoning [in the indictment] which lacks reasonable legal ground* and with which the prosecution relies on to press charges on the accused., charging him as one of the most responsible persons and describing S-21 as a very important security centre, carrying out national-wide operations. *Such arguments lack legal logic* and cannot be used for defining the status of a person who is most responsible.’ (emphasis added) . . .”

Corrected Appeal, para. 25: “*The Chamber erroneously concurred with conclusions that were without legal basis, and in reliance thereupon, it was determined that KAING Guek Eav comes under the category of those most responsible for the crimes, because S-21 was a very important security centre which carried out nation-wide operations. Those conclusions are legally unsound and cannot form a basis for determining that a person was among those most responsible.*”

- s. **OCP Response, fn 54:** “*See Defence Appeal Brief...para. 25 (obscurely citing to an unspecified ‘legal theory of defining the most responsible persons’ that purportedly excludes persons who received orders from higher echelons).*”

Corrected Appeal, para. 25: “*From a legal standpoint, in determining if an individual fits in the category of those most responsible, it is necessary to determine the powers he or she held, based on his/her hierarchical rank.*”

- t. **OCP Response, para. 37:** “*The Appellant himself noted that the ICTY Referral Bench—when considering the gravity of crimes charged—has taken into account ‘the number of victims, the geographic and temporal scope and manner in which they were allegedly committed, as well as the number of separate incidents.’*”

Corrected Appeal, para. 19: “*...factors such as the number of victims, the geographic and temporal scope of the crimes and manner in which they were allegedly committed, as well as the number of separate incidents of the crime....*”

- u. **OCP Response, para. 48:** “*As Ground 2 of their Defence Appeal, the Co-Lawyers allege an ‘error concerning conviction.’*”

Corrected Appeal, p. 19 (heading): “*...error concerning conviction and sentence.*”

- v. **OCP Response, para. 48:** “*In particular, the Co-Lawyers allege that the Trial Chamber ‘failed to consider Rule 87 of the Internal Rules of the ECCC and the Defence Counsel’s submission . . . which made the exculpatory evidence not entirely examined to ensure that the ECCC did not have jurisdiction over the Accused as submitted by the Defence Counsel.’*”

Corrected Appeal, para. 66: “By dismissing the submissions contained in Defence Final Submission, the Trial Chamber only took account of Rule 89 of the Internal Rules, but not Rule 87. The dismissal, based solely on the evidence adduced before the Chamber and on Rule 89, amounts to a violation of Rule 87, in that no exculpatory evidence was assessed in order to verify whether, as submitted by the Lawyers for the Defence in their Final Submission, the ECCC actually had jurisdiction over KAING Guek Eav.”

- w. **OCP Response, para. 48:** “They further allege that ‘the Chamber used too much presumption by stating that it agreed with the Prosecutors and failed to give any reasoning as a credible argument which did not have any reasonable doubt about every evidence it used as the reasoning in determining its jurisdiction over the Accused.’”

Corrected Appeal, para. 69: “The Chamber thus relied on an excessive presumption against KAING Guek Eav by accepting the prosecution evidence and not raising any valid reasons as to why it was convinced beyond any reasonable doubt based on the evidence permitting it to determine that it had personal jurisdiction.”

- x. **OCP Response, fn 115:** “See, e.g. Defence Appeal Brief, para. 66 (stating that ‘the exculpatory evidence [was] not entirely examined to ensure that the ECCC did not have the jurisdiction over the Accused’)...”

Corrected Appeal, para. 66: “...no exculpatory evidence was assessed in order to verify whether, as submitted by the Lawyers for the Defence in their Final Submission, the ECCC actually had jurisdiction over KAING Guek Eav.”

- y. **OCP Response, fn 115:** “See, e.g. Defence Appeal Brief...para. 69 (alleging that the Trial Chamber ‘failed to examine the exculpatory evidence about the entire personal jurisdiction presented by the Defence’)...”

Corrected Appeal, para. 69: “[The Trial Chamber] omit[ed] to consider the exculpatory evidence about the requirements for the exercise of personal jurisdiction.”

- z. **OCP Response, fn 115:** “*See, e.g.* Defence Appeal Brief...para. 70 (stating that the Trial Chamber would have conceded that it did not have jurisdiction over the Accused if it ‘had examined the evidence submitted by the Defence’).”

Corrected Appeal, para. 70: “...the Trial Chamber - had it considered the evidence submitted by the Defence in their Final Submission - would have recognized that it did not have jurisdiction over KAING Guek Eav.”




- aa. **OCP Response, para. 56:** “...the Trial Chamber was aware of and took into account the types of facts and evidence the Appellant characterizes as ‘not yet presented by’ the Trial Chamber.”

Corrected Appeal, para. 72 (heading): “Exculpatory evidence not considered by the Chamber”.

IV. CONCLUSION

10. The Co-Prosecutors highlight the discrepancies resulting from the Corrected Appeal for the benefit of the Supreme Court Chamber in its evaluation of the Appeals submitted by the Defence and the Co-Prosecutors.
11. The Co-Prosecutors support the practice of submitting accurate translations of filings in a timely manner for judicial efficiency so that parties are given an opportunity to adequately and precisely respond to pleadings.

Respectfully submitted,

Date	Name	Place	Signature
16 March 2011	CHEA Leang Co-Prosecutor		 
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