

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

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**APPEAL BRIEF BY THE CO-LAWYERS FOR KAING GUEK EAV ALIAS
"DUCH" AGAINST THE TRIAL CHAMBER JUDGEMENT OF 26 JULY
2010**

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Appeal Brief by the Co-Lawyers for Kaing Guek Eav Alias "Duch" against the Trial Chamber
Judgement of 26 July 2010

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APPEAL BRIEF BY THE CO-LAWYERS FOR KAING GUEK EAV ALIAS "DUCH"
AGAINST THE TRIAL CHAMBER JUDGEMENT OF 26 JULY 2010

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INTRODUCTION

1. In application of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“the Agreement”), the Extraordinary Chambers were established for the purpose of bringing to trial those suspected of committing War Crimes, Crimes against Humanity, Genocide and Grave Breaches of the Geneva Conventions of 12 August 1949.
2. Under the Agreement, both contracting parties share a common goal, namely to seek justice for the people of Cambodia and to bring about national reconciliation and national unity, as well as peace and respect for Cambodia’s national sovereignty.
3. Article 2 of the Agreement and Articles 1 and 2 (new) of the ECCC Law define the jurisdiction of the ECCC as follows:
 - 1). The ECCC only has jurisdiction for the prosecution of war crimes, crimes against humanity, genocide and grave breaches of the Geneva Conventions of 12 August 1949;
 - 2). The ECCC has jurisdiction for the prosecution of crimes committed during the period from 17 April 1975 to 6 January 1979;
 - 3). The ECCC has jurisdiction for the prosecution of the crimes committed in territory of the Kingdom of Cambodia;
 - 4). The ECCC has jurisdiction over only senior leaders of Democratic Kampuchea and those most responsible for the crimes.
4. During the trial, the Co-Lawyers for KAING Guek Eav raised the issue of the jurisdiction of the ECCC, submitting that the ECCC has no jurisdiction over their client, and requested the Trial Chamber to re-examine the evidence in support of the fact that Articles 1 and Article 2 (new) of the ECCC Law do not apply to KAING Guek Eav

5. However, the Judges ignored the Defence request and continued with the trial until completion. 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.
6. The Judges again refused to re-examine the exculpatory evidence adduced by the Defence, and on 26 July 2010, the Trial Chamber issued its Judgement in Case File No. 001/18-07-2007/ECCC/TC by which it entered a finding of guilty against KAING Guek Eav alias – former head of S-21, a secret military prison, which was under the Ministry of National Defence and the General Staff Headquarters, headed by SON Sen – and sentenced him to a single prison term of 35 years.
7. Noting the Notice of Appeal of the Co-Lawyers for KAING Guek against the Trial Chamber Judgement of 26 July 2010 (“Co-Lawyers’ Notice of Appeal”);¹
8. Noting the 10 September 2010 request by the Co-Lawyers for KAING Guek Eav alias “DUCH” to extend the time limit for filing of their appeal against the Trial Chamber Judgement of 26 July 2010;²
9. Noting the 18 October 2010 Supreme Court Chamber Decision on Request by the Co-Lawyers for KAING Guek Eav alias “Duch” to Extend the Time Limit for Filing an Appeal against the Judgement of the Trial Chamber of 26 July 2010;³

¹ E188/8.

² F6.

³ F6/2.

10. Considering that the Trial Chamber erred on a question of law in its Judgment of 26 July 2010, by finding the Accused guilty, whereas he was not within the purview of the jurisdiction of the ECCC, the Defence hereby files the present appeal raising the following grounds:

I. GROUND 1: ERROR CONCERNING THE JURISDICTION OF THE TRIAL CHAMBER

Personal jurisdiction

11. The personal jurisdiction is restricted to senior leaders of Democratic Kampuchea and to those most responsible for the crimes and grave breaches of national and international law.
12. Neither the Agreement nor the ECCC Law expressly defines “senior leaders of Democratic Kampuchea” or “those most responsible” for the crimes.
13. It cannot be inferred from the Agreement or the ECCC Law that KAING Guek Eav” is one of those most responsible for the crimes.
14. The Trial Chamber considered KAING Guek Eav alias “DUCH” as forming part of those most responsible the crimes in order to try him at any cost. However, in holding such a view, it omitted to take into account of a fundamental principle enshrined in the Constitution of Cambodia as enunciated in paragraph 2, appendix 5 of the 1991 Paris Peace Accord, that “*the constitution prohibits the retroactive application of criminal law.*”⁴
15. Article 5 of the Law on the Outlawing of the Democratic Kampuchea Group states: “*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*

⁴ Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991.

Royal Government in the Kingdom of Cambodia without facing punishment for crimes which they have committed". The above principle should have been taken into account. By omitting to take it into account, the Trial Chamber ignored existing Cambodian law. This runs counter to Rule 87(1) of the ECCC Internal Rules ("the Internal Rules").

16. The Trial Chamber concurred with the speculative conclusion of the Co-Investigating Judges that KAING Guek Eav fits in the category of those most responsible for the crimes within the jurisdiction of the ECCC. In their Closing Order, the Co-Investigating Judges state that "while DUCH was not a senior leader of Democratic Kampuchea, he may be considered in the category of most responsible for crimes (...)".⁵
17. By concurring with such a conclusion, the Trial Chamber committed a grave error in that it violated Rule 87(1) of the ECCC Internal Rules and Article 38 of the Constitution of the Kingdom of Cambodia, which states that "any case of doubt shall be resolved in favour of the accused".⁶
18. Furthermore, it is noteworthy that the Group of Experts was also uncertain about the actual meaning of "those most responsible for the crimes and grave violations of national and international law", Its report reveals a different opinion regarding Article 1 of the ECC Law that "(...) this seems especially true with respect to certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng".⁷
19. The jurisprudence of other international tribunals which have also examined the notion of "most senior leaders suspected of being most responsible", reveals that the relevant criteria are the gravity of the crimes charged and the degree of responsibility of the accused. When assessing the gravity of the crimes charged, the Referral Bench of the International Criminal Tribunal for

⁵ Closing Order, para. 129.

⁶ Article 38, paragraph 6 of the Constitution of the Kingdom of Cambodia.

⁷ Judgement, 26 July 2010, para. 19.

Yugoslavia (“ICTY”) has relied on 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, . whereas the level of responsibility of the accused has been evaluated on the basis of considerations such as the level of participation in the crimes, the hierarchical rank or position of the accused, including the number of subordinates and hierarchical echelons above him or her, and the permanence of his position.⁸

20. In determining the class of senior leaders considered most responsible, the ICTY has used two main criteria, namely:
1. the gravity of the crimes, an element of criminal law; and
 2. the hierarchical rank, an element in administrative law.

Based on the foregoing jurisdiction of the ICTY, KAING Guek Eav, considered by the Co-Co-Investigating Judges as a senior leader of Democratic Kampuchea, cannot be considered as forming part of those most responsible either. The Supreme Chamber should therefore re-examine these criteria in favour of the Accused.

21. According to the ECCC Law – which relies on both criminal law and administrative law norms, and the purpose of which is to bring to trial only the most senior leaders and those most responsible for the crimes committed in Democratic Kampuchea the Chamber must act within the confines of its personal jurisdiction in determining who fits in the “most responsible” category .
22. Regarding KAING Guek Eav, 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

⁸ Judgment, 26 July 2010, para. 22.

most responsible for the crimes committed under this regime.⁹ This therefore leaves no doubt as to the fact that KAING Guek Eav does not fall within the purview of the jurisdiction of the ECCC.

23. KAING Guek Eav was head of S-21, one of approximately two hundred (200) security centres in Cambodia during the Khmer Rouge regime.¹⁰ The number of prisoners who died at S-21 is much lower than that in other prisons in Democratic Kampuchea. For example, up to 150,000 prisoners were killed at Chong Chrauy prison in Kampong Chhnang province, but a much larger number were killed in other prisons across the country.¹¹ This clearly shows that the then prisons heads do not fit into the category of those most responsible, under the ECCC Law.
24. The Closing Order alleged that, as Deputy of S-21, KAING Guek Eav led the Interrogation Unit and participated in the planning of S-21 operations and training of staff on interrogation techniques. As Chairman of S-21, his role consisted of oversight of the entire S-21 operation, including the annotation of confessions and the ordering of executions. S-21 was a very important security centre of Democratic Kampuchea, considered as an organ of the Communist Party of Kampuchea (“CPK”), reporting to the very highest levels of the CPK leadership, carrying out nation-wide operations and receiving high-level cadres and prominent detainees.¹²
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. The question arising is, what does the law require? Is it to prosecute a detention centre with

⁹ E3/14.

¹⁰ E3/220.

¹¹ Documentation Center of Cambodia (Khmer Rouge Prisons), p. 81.

¹² Judgment, 26 July 2010, para. 23.

nationwide operations or those most responsible for the crimes? 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. In this instance, as Secretary of S-21, KAING Guek Eav's role was to receive prisoners who were sent from all over the country for interrogation and execution on orders from above.¹³ There is therefore no evidence that KAING Guek Eav was among those most responsible, insofar, as like the other heads of security centres all around the country, he did not act on his own initiative.

26. Worse still, the Chamber concluded that KAING Guek Eav participated in the planning of S-21 operations.¹⁴ This conclusion is entirely without foundation. Indeed, owing to his low rank as Deputy Secretary of S-21, and to the political structure of the CPK, of which he was not a member of the Standing Committee, KAING Guek Eav had no power to express opinions or to advise the Party on matters of policy on national security. This conclusion is therefore specious.
27. In general, legal practitioners consider prison institutions as an instrument of government's power. Accordingly, decisions to open or close prisons or to make changes thereto belong to the State. Individuals are not empowered to open prisons. In this particular instance, S-21 was established by decision of the CPK Central Committee at a meeting held in October 1975, at which SON Sen, member of Standing Committee, was put in charge of national security.¹⁵
28. In the second sentence of paragraph 33 of the Closing Order, which cites a written record of interview of KAING Guek Eav, it is indicated that he was Secretary of S-21, but he had no legal authority giving him oversight over its

¹³ Indictment, para. 31.

¹⁴ Judgment, 26 July 2010, para. 23.

¹⁵ Searching for the Truth, Documentation Center of Cambodia, Issue 2, February 2000, p. 53.

operations. His power was restricted to relaying the decisions of his superiors.¹⁶

29. As stated in paragraph 49 of the Co-Prosecutors' Introductory Submission, "S-21, which came to be known as Tuol Sleng, operated on instructions and under the direct command of the highest authorities of the CPK".¹⁷
30. We wish to recall Judge Cartwright's observation that it was the CPK which identified "enemies" and for the most part ordered their arrest. She added that the Accused was unaware of the highly confidential 30 March Directive and could not therefore be said to share its policy.¹⁸ This unequivocal opinion therefore confirms that KAING Guek Eav is not in the category of those most responsible for the alleged crimes.
31. There is a large body of evidence to the effect that KAING Guek Eav had no authority to make decisions on arrests or to order execution of prisoners. The decision to arrest and execute KOY Thuon, CHHAY Kimhor, VORN Veth and Nath was made by the upper echelon, on the special orders of SON Sen.¹⁹ Additionally, KAING Guek Eav was not empowered to decide the fate individual prisoners, including that of many of his friends and his brother-in-law ,Professor PHUNG Ton.²⁰ Indeed, he was not even empowered to participate in making such decisions. The foregoing proves that KAING Guek Eav cannot be placed in the category of those most responsible for the crimes and grave breaches of national and international law.
32. The Trial Chamber recognises at paragraph 256 of its Judgment of 26 July 2010 that KAING Guek Eav executed the orders of the Standing Committee and relayed them to his staff. The Chamber concluded that given their position within the State apparatus, the S-21 interrogators and S-24 staff, who

¹⁶ Indictment, para 33, D99, and E3/26, Record of Interview of 2 October 2007.

¹⁷ Introductory Submission, para. 49, D3.

¹⁸ Judgment, 26 July 2010, para. 99.

¹⁹ Written Record of Interview of Charged Person by CIJ, 29 November 2007.

²⁰ Written Record of Interview by the CIJs, 31 March 2008 E3/929.

perpetrated acts of torture, acted in an official capacity. Those acts have been considered as having been executed within a clearly established hierarchy in which the authors had an official status.

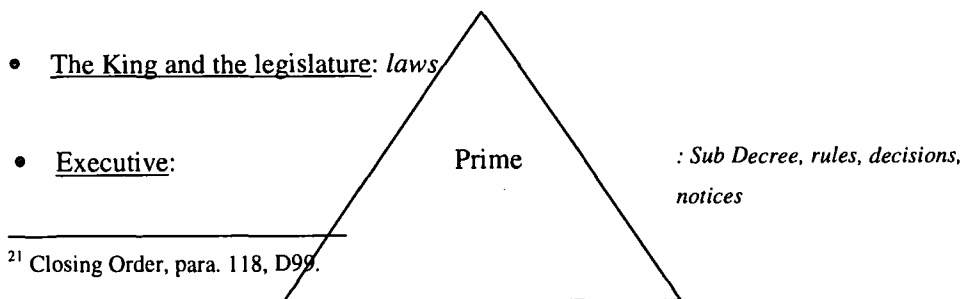
33. Within a system that has a clearly established hierarchy, a person's responsibility depends on his/her legal authority within this hierarchy. In other words, if such person's high rank within the hierarchy empowers him to issue orders and make decisions regarding how such orders are to be executed; this means that he/she may be held accountable for his/her decisions. Now, in the case at hand, KAING Guek Eav was Secretary of S-21. Moreover, he was not a member of the CPK Standing Committee. He therefore had no power to make any decision concerning arrests or to order execution.²¹ Consequently, he cannot be held liable for the crimes charged on the basis of being among those most responsible.

(1) Responsibility within a hierarchy

Senior leaders are high rank people within the hierarchy => they have the power to issue orders and to make important decisions => they have a great deal of responsibility.

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.

(2) Exercise of decision power within a hierarchy



<u>Minister</u>	
Minister	: <i>Prakas, directives</i>
<u>Department</u>	: <i>reports, official Letters</i>
Office or Prison	: <i>reports, official Letters</i>

34. In paragraph 29 of the Judgment, the Trial Chamber stresses that the 1956 Penal Code was the applicable national law governing during the 1975 to 1979 period.
35. Article 99 of the 1956 Penal Code provides: *“Any act shall not be regarded as a criminal offence when it is committed on an order by the law and that the person who issues such order is a legitimate authority”*.²²
36. According to Cambodian customary law, a person can benefit from mitigating circumstances or be entirely exonerated of criminal liability for a crime committed while acting under the orders of another person. For example, a King pardoned a person for an act that person committed on the orders of another person.²³
37. Moreover, the 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.
38. The Co-Prosecutors and the entire Chamber are fully aware of the tenor of the above norm. Furthermore, as indicated at paragraphs 49 of the Introductory Submission and 256 of Judgment the 26 July 2010, they even acknowledge that the Accused acted on the orders from the Standing Committee. The question is therefore why did both the Co-Prosecutors and the Chamber conclude that KAING Guek Eav is within the purview of the jurisdiction

²² D99/3/3, ERN 00222205 (Khmer).

²³ Compendium of Cambodian Folk Tales, Vol. 3, p. 137-144.

ECCC without taking account of the legal standards set out above? This erroneous conclusion violates not only national law (1956 Penal Code) as recognised by the Co-Prosecutors and the Chamber, but also Article 15.1 of the International Covenant on Civil and Political Rights (the “International Covenant”).

39. It is noteworthy that no charges have been brought against any persons who committed crimes on the orders of their superiors or Angkar, for example, against heads of other security centres. KAING Guek Eav is in the same position as those heads of the other security centres; he must therefore enjoy from the same rights as them, including the ones set forth in Article 31(2) of the 1993 Constitution of Cambodia. .

(3) Psychological assessment report

40. The psychological assessment report concerning KAING Guek Eav contains another reason why he does not fit in the category of those most responsible for the crimes committed. The report indicates that he was physically and psychologically vulnerable. It states that “throughout his imprisonment between 1968 and 1970, DUCH was very afraid of death. He lived in fear every day, because he saw prisoners being sent to their death. He was not tortured or mistreated. However, he was *traumatised* by the fear of death and not knowing when it might strike.”²⁴ This is ample proof that he was psychologically vulnerable
41. The report also states that in 1978, his fear was acted out through depression. The report quotes KAING Guek Eav as saying: “...I was seized with fear for a long time when seeing people being arrested abnormally.”²⁵

²⁴ E3/509, p. 19..

²⁵ E3/509, p. 21.

42. The following conclusions in the report seem somewhat ambiguous: “DUCH does not suffer from neurosis, mental disorder or perversion. However, the absence of perversion may be open to debate.”²⁶ According to the principle that “any case of doubt shall be resolved in favour of the accused”,²⁷ Duch must be considered as suffering from a perversion, a psychological condition. This therefore clearly shows that, from a legal standpoint, there is no evidence to establish *prima facie* that comes under the category of those most responsible.

(4) Responsibility within the CPK hierarchy

43. Based on an analysis of the CPK hierarchy, there two distinct periods to consider in determining who qualifies as most responsible for the crimes committed.

A. The period from 17 April 1975 to 30 March 1976

44. On 17 April 1975, when the Khmer Rouge soldiers entered Phnom Penh, crimes were committed, including forcible movements of population and secret executions. Those crimes were committed as part of pre-established plan whose specific aim was the virtual enslavement of the entire Cambodian population, as alleged at paragraphs 15 and 16 of the Co-Prosecutors’ Final Submission of 18 July 2008,²⁸ and paragraphs 10 and 11 of the Co-Investigating Judges’ Closing Order of 8 August 2008, which it specifically states that “the CPK exercised effective authority”.²⁹

²⁶ E3/509, p.106.

²⁷ Article 8, para. 6 of the Constitution of the Kingdom of Cambodia.

²⁸ D96, Final Submission, p. 8, ERN 00206182.

²⁹ D99, Closing Order, 8 August 2008, p. 4-5, ERN 00210786-00210787.

45. Furthermore, paragraph 12 of their Closing Order of 8 August 2008, the Co-Investigating Judges' unequivocally state that "politically motivated extra-judicial executions were committed from the outset by military units".³⁰
46. Shortly before and after 17 April 1975, military units from each division and local authorities from each Zone were placed under the command of the Zone Secretary and Deputy Secretary.
47. The Zones whose forces were combined to attack and take control of Phnom Penh were:
1. The East Zone, with SAO Yan alias Phim as Secretary;
 2. The Special Zone, under VORN Vet and SON Sen;
 3. The Old Southwest Zone, under UNG Choeun alias Mok and CHOU Chet alias Sy; and
 4. The Old North Zone, under KOY Thuon, and KÈ Pôk.
48. RUOS Nhim, Secretary of the Northwest Zone, attacked and captured Battambang with his men.
49. Therefore, ten persons attacked and captured Phnom Penh and Battambang. They were:
1. POL Pot
 2. NUON Chea
 3. SAO Yan alias Phim
 4. UNG Choeun alias Mok
 5. VORN Vet
 6. SON Sen
 7. KOY Thuon
 8. RUOS Nhim
 9. CHOU Chet alias Sy
 10. KE Pork

³⁰ D99, Closing Order, 8 August 2008, p. 4-5, ERN 00210786-00210787.

50. Immediately after the Khmer Rouge seized power, those ten persons implemented their criminal plan. They are therefore the “most responsible” for the crimes and serious violations of Cambodian and international law” during the period from 17 April 1975 to 30 March 1976.
51. KAING Guek Eav was not among those most responsible for the crimes and grave breaches of national and international law, for the following reasons:
1. As indicated at paragraph 12 of the Closing Order, starting on 17 April 1975 and during the ensuing period, it was the military units which evacuated and executed people. However, KAING Guek Eav was a policeman, not a member of the military units.
 2. During the forcible transfer of population from Phnom Penh to the countryside, when executions were committed, KAING Guek Eav was stationed in Amleang, Thpormg district, Kampong Speu province. He therefore did not participate in the evacuation of the population from Phnom Penh.
 3. KAING Guek Eav’s name does not appear on the list of the ten zone committee secretaries who led the attacks on Phnom Penh and Battambang and ordered evacuations and executions.

B. The period from 30 March 1976 to 6 January 1979

52. According to paragraph 35 of the Co-Investigating Judges’ Closing Order of 8 August 2008, “the Party had clarified authority to execute (...)”. The question is who actually had authority to make decisions to smash or execute people? It was only those who were vested with such authority who fit in the category of those most responsible for the crimes and breaches of the law.

53. According to the Central Committee decision of 30 March 1976,³¹ four entities were vested with the power to order executions inside and outside the ranks:
- On the local level, that decision belonged to *the zone Standing Committee*;
 - Within the Central Office: the Central Office Committee;
 - Within the Independent Zone: the Standing Committee; and
 - Within the Central Military: the General Staff.
54. Therefore, it is the members of those four entities who must be considered as those most responsible for the crimes and grave breaches of national and international law.
55. KAING Guek Eav was among those least responsible for the crimes and grave breaches of national and international law;³² he therefore comes under the category of those outside the jurisdiction of the ECCC, as it is defined in the ECCC Law.
56. During KAING Guek Eav's trial, the Trial Chamber applied its power to evaluate its jurisdiction far beyond the purview of Article 1 of the Agreement and Articles 1 and 2 (new) of the ECCC Law.³³
57. The Trial Chamber failed to thoroughly examine the personal jurisdiction of the Extraordinary Chambers as set forth in Article 1 of the Agreement and Articles 1 and 2 (new) of the ECCC Law.³⁴ Furthermore, the Trial Chamber's finding on this question runs counter to customary international law applied by Military Tribunals at Nuremberg and Tokyo. The Military Tribunals at Nuremberg and Tokyo did not prosecute or bring to trial soldiers from the Axis powers³⁵ even though it is generally accepted that those individuals

³¹ Decision of Central Committee, 30 March 1976, ERN 00003136-00003142 (Khmer).

³² Report by Craig C. Etcheson, p. 5 ERN 00146826 and p. 11 ERN 00146832, E3/32.

³³ Judgment, 26 July 2010, para. 18.

³⁴ Judgment, 26 July 2010, para. 18.

³⁵ Article 6 of Charter of the International Military Tribunal at Nuremberg and Article 5 of the Charter of the International Military Tribunal for the Far East (Tokyo).

committed the same crimes as leaders of the European Axis powers and the Far Eastern war criminals. This is because the jurisdiction of those tribunals was restricted to prosecuting leaders of the European Axis powers and the major Far Eastern war criminals. This is why, for example, no members of the local branch of the Nazi Party was prosecuted or brought to trial. Only senior Nazi leaders and those most responsible for the crimes committed, such as army generals of the European Axis powers, were charged and tried.

58. The Nuremberg and Tokyo Tribunals did not – and were empowered – determine *proprio motu* their jurisdiction to try members of the Allied Forces who committed crimes, even though those crimes were at the very least as serious as the ones with which the leaders of the European Axis powers and the Far Eastern war criminals were charged. This means that courts must abide with the law defining their jurisdiction even when they consider that that other persons have committed the same crimes of similar gravity, in accordance with the maxim: *Dura lex, sed lex* or the law [is] harsh, but [it is] the law”
59. The ECCC Trial Chamber relied on the application of international customary law at the ICTY and the International Criminal Tribunal for Rwanda (ICTR); whereas before these Tribunals – unlike the Nuremberg and Tokyo Military Tribunals, and the ECCC – restrictions on jurisdiction only relate to subject matter but not to personal jurisdiction.³⁶ It is a mistake to invoke sources of law from customary international law, which derives from international customs, to the extent that those sources and the criminal circumstances relating thereto bear little similarity to the sources and criminal circumstances we are dealing with here. Therefore, ICTY and ICTR precedents cannot be invoked.
60. In fact, the procedure before the Extraordinary Chambers is in accordance with the ECCC Law, which specifically defines the jurisdiction of the

³⁶ Article 6 of the Statute of the International Criminal Tribunal for Rwanda, 1994 (ICTR), and Article 6 of the Statute of the International Tribunal for former Yugoslavia, 1994 (ICTY).

ECCC.³⁷ It is therefore not necessary for the Trial Chamber to seek guidance from other sources of law. Even when it is necessary to seek guidance from such sources, those sources must be consistent with the ECCC Law and with the other Cambodian law and other statutes and laws in Cambodia, as provided in Article 12(1) of the Agreement.

61. Application of various international legal instruments to complement the Law on ECCC is possible only where the laws applicable at the ECCC are clearly inadequate, and where such international legal instruments are consistent with the legal system of the sovereign state under which the ECCC operates especially considering that, unlike the International Criminal Court (ICC), the ECCC is not an independent international court, as stated in Article 12(1) of the Agreement. Consequently, the ECCC operates under the sovereignty of the Cambodia, which *de facto* has adopted the civil law system; the ECCC therefore operates under Cambodian legal norms. By using the common law system,³⁸ the Trial Chamber has demolished not only the important legal norms of the civil law as used by the State under whose jurisdiction the ECCC operates, but also the legal norms established by the United Nations and the Royal Government of Cambodia in accordance with civil law. As a consequence, the principle of *nullum crimen sine lege* must be followed. However, in light of the foregoing, it is clear that the Chamber acted contrary to the provisions of Rule 2 of the Internal Rules.
62. By adopting a system enabling it to extend its jurisdiction, the Trial Chamber breached Article 51 (new), Chapter 4 of the Constitution of Cambodia, which provides for the separation of the three powers. The Trial Chamber is not empowered to enact laws or to interpret them. The power to legislate may only be exercised by the legislative branch and interpretation of the law is the responsibility of the Constitutional Council. Therefore, the Trial Chamber was mistaken in interpreting Article 1 of the Agreement and Articles 1 and 2

³⁷ Article 1, Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea; articles 1 and 2 (new) of the ECCC Law.

³⁸ Judgement, 26 July 2010, para. 45.

(new) of the ECCC Law as imprecise³⁹ and by assuming the power to interpret and establish complementary provisions deriving from international customary law as applied at the ICTY and the ICTR.⁴⁰ It thereby acted in breach of the fundamental civil law principle of *null crime sine lege*.

63. By adopting a system enabling it to *proprio motu* expand its jurisdiction, the Trial Chamber acted in grave breach of the firm position taken by the United Nations and the Royal Government of Cambodia in Article 1 and 2 (new) of the ECCC Law. It has thereby set a precedent which has and will continue to be a grave error both for the Cambodian legal system as a whole and for international legal institutions. In addition, the Trial breached the *pacta sunt servanda* principle,⁴¹ which is set forth in Article 26 of the Vienna Convention on the Law of Treaties.
64. The Statutes of the Nuremberg and Tokyo Military Tribunals specifically prohibited them from applying any system that could have allowed them to *proprio motu* expand their jurisdiction.⁴² This is in fact why no a single one of the soldiers from the European Allied Forces was brought before the Nuremberg Military Tribunal, even though soldiers of the Allied Forces had committed war crimes similar to those of German soldiers. Likewise, no American soldiers were prosecuted or brought to trial for war crimes in East Asia despite the fact that they dropped bombs of mass destruction and violated the laws of war.
65. In terms of both jurisdiction and the crimes prosecuted, the situation of the ICTY and ICTR is different from that of the ECCC. The ICTY and ICTR have full jurisdiction over those accused of war crimes, genocide and crime against humanity, and their personal jurisdiction is not restricted owing to the fact that

³⁹ Judgement, 26 July 2010, para. 19.

⁴⁰ Judgement, 26 July 2010, para. 22.

⁴¹ Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under the Cambodian law of Crimes Committed during the Period of Democratic Kampuchea.

⁴² Article 6 of the Charter of the International Military Tribunal at Nuremberg and Article 5 of the Charter of the International Military Tribunal for the Far East (Tokyo).

such crimes were committed on racial or religious grounds and stemmed from separatist aspirations. Therefore, the Statutes the ICTY and the ICTR state that these Tribunals have jurisdiction over any persons who committed specified in their respective Statutes. However, the personal jurisdiction of the ECCC is clearly restricted,⁴³ to the extent that the crimes were committed on purely political grounds. Accordingly, under the ECCC Law, the Extraordinary Chambers only have jurisdiction over senior leaders of Democratic Kampuchea and those most responsible for the crimes committed during its regime, namely only those who had the power to make political decisions, establish criminal policies and make sure that those policies were implemented. The ECCC Law does not apply to persons who executed orders to commit crimes, but who had no decision-making power as such. Yet, the Trial Chamber proceeded to complement the ECCC Law by seeking guidance from international legal instruments deriving from customary international law, which instruments are not only inconsistent with the Law,⁴⁴ but are also inapplicable since the ECCC Law is itself inadequate. This reveals that the Trial Chamber *proprio motu* extended its jurisdiction because the Judges felt overwhelmed by the immensity of the task and the exceedingly atrocious nature of the crimes; they thus focused only on their subject matter jurisdiction. That is why the Trial Chamber adopted a system allowing it to *proprio motu* expand its jurisdiction such that it covered KAING Guek Eav. This is a violation of Article 14.1 of the International Covenant on Civil and Political Rights and Article 13(1) of the Agreement, both of which provide that everyone is entitled to fair hearing.

II. GROUND 2: ERROR CONCERNING CONVICTION AND SENTENCE

1. The Trial Chamber committed an error in the exercise of its discretion by entering a finding of guilty without regard to Rule 87 of the ECCC Internal Rules

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

⁴³ Articles 1 and 2 (new) of the ECCC Law.

⁴⁴ Judgment, 26 July 2010, paras. 30 and 31.

Rule 87. The dismissal, based solely⁴⁵ 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.

67. The reason why the Trial Chamber refused to consider Rule 87, as requested by the Lawyers for the Defence, was because the Judges knew fully well that in reality, no elements allowed them to apply Article 1 of the Agreement and Articles 1 and (new) of the ECCC Law to KAING Guek Eav. Accordingly, in the Introduction of its Judgement, the Trial Chamber demolished the Agreement between the United Nations and the Royal Government of Cambodia, in that it violated the fundamental principle of *jus cogens* (compelling law) enshrined in the common law principle of legality by relying on common law authorities for its interpretation of this principle in such a way as to call into question Article 1 of the Agreement and Articles 1 and 2(new) of the ECCC Law, which restrict the personal jurisdiction for the Extraordinary Chamber to senior leaders and those most responsible for the crimes.⁴⁶
68. The failure to consider the submission of the Lawyers for the Defence amounts to failure to consider exculpatory evidence, whereas such evidence could raise reasonable doubt. In breach of Rule 87(1) of the Internal Rules, the Trial Chamber thus entered its findings on the basis of unchallenged evidence, and was thus not satisfied beyond reasonable doubt. Yet, according to Article 38 of the Constitution of Cambodia, any case of doubt must be resolved in favour of the accused.
69. The Trial Chamber found KAING Guek Eav guilty in reliance on inculpatory evidence of the crimes charged, omitting to consider the exculpatory evidence

⁴⁵ Report by Craig C. Etcheson, ERN 00314778-00314842, E3/32.

⁴⁶ Judgment, 26 July 2010, paras. 30 and 31.

about the requirements for the exercise of personal jurisdiction.⁴⁷The 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.

70. By its failure to consider the provisions of Rule 87(1) of the Internal Rules, the Trial Chamber violated Article 290(6) of Code of Criminal Procedure of the Kingdom of Cambodia, which provides that “if the court which was seized of a case finds that it does not have territorial jurisdiction, it must issue an order to this effect”. 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 recognised 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. Moreover, the Trial Chamber could have relied on Article 290(6) of Code of Criminal Procedure of the Kingdom of Cambodia, pursuant to Rule 12(1) of the Agreement, an instrument similar to the Internal Rules, and declined jurisdiction.
71. By refusing to consider the Defence arguments, the Trial Chamber acted in utter violation of Rules 92 and 93 of the Internal Rules, ignoring the fact that it misapplied Rule 89; this amounts to procedural defect. There is a large body

⁴⁷ Judgment, 26 July 2010, paras. 17 and 18.

of exculpatory evidence adduced by the KAING Guek Eav himself, regarding his role and real functions⁴⁸, and evidence adduced by the Prosecution,⁴⁹ which reveals that our client is not within the purview of Article 1 of the Agreement or Articles 1 and 2 (new) of the ECCC Law. Unfortunately, the Trial Chamber omitted to consider that evidence; this amounts to a grave error. The Supreme Court of Canada identified the error committed by a Canadian trial court by putting too much emphasis on personal jurisdiction during trial and failing to consider evidence establishing the jurisdictional requirements.⁵⁰ While the Supreme Court of Canada considered that the existence of the requirements for jurisdiction need not be demonstrated beyond a reasonable doubt, it nevertheless underlined that the judge must have considered the evidence in order to satisfy the requirements and that he cannot simply base his or her assessment on these requirements only on the alleged charges. Because some of the facts necessary to establish jurisdiction are not the same as those necessary for the jury's determination of the offence charged, 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 offence 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 time as the jury hears the evidence related to the offence. All this goes to show that evidence jurisdiction is useful and may be adduced at any time by means of expert testimony or by some other means. 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.

A. Exculpatory evidence not considered by the Chamber

72. We refer to the report submitted by Craig C. Etcheson, Analyst with the Office of the Co-Prosecutors.⁵¹

⁴⁸ Written Record of Interview of Duch, Case No. 001, E3/23 to E3/41..

⁴⁹ E3/32 Report by Craig C. Etcheson, E3/32.

⁵⁰ Supreme Court of Canada, case of *R v. Finta*, [1994] 1.S.C.R.701 *Her Majesty the Queen v. Imre Finta* [1994]: Case Nos. 23023, 23097. 1993: 2, 3 June; 1994, March 24. . Imire Finta was charged with war crimes and crime against humanity during the period of Nazi control of Europe during WWII.

⁵¹ Report by Craig C. Etcheson, ERN 00314778, E3/32.

(1) Personnel and organisation

73. The Etcheson report contains information on how to identify the leaders of Democratic Kampuchea and the CPK, as well as those most responsible for the crimes committed under this regime.
74. The main office for the Central Committee's operations was "Office 870". A network of entities worked for this office; they were all designated by a code name starting with the letter "K". Those entities were also under another office called "Office S-71". The main entities were: K1, K2, K3, K4, K5... K20".⁵²
75. An analysis of the CPK Central Committee structure clearly reveals that its members had control over all senior officials, of the Party, the government and the army.⁵³
76. The Standing Committee was also in direct contact with sector, district and branch levels personnel.⁵⁴
77. The Central Committee decision on a number of issues contains information on delegation of decision power for the execution of enemies from within and outside the ranks. The power to smash within and outside the ranks.⁵⁵

(2) Security

78. The Standing Committee, again acting in the name of the Central Committee, had the power to authorize lower level organs of the party apparatus to carry out extrajudicial executions, as revealed by Central Committee decision dated 30 March 1976.⁵⁶ Zones also had the authority to "administer discipline in the

⁵² Report by Craig C. Etcheson, para. 14, ERN 00314781-00314782, E3/32.

⁵³ Report by Craig C. Etcheson, paras. 15, 16, 17 and 18, ERN 00314783-00314784, E3/32.

⁵⁴ Report by Craig C. Etcheson, para. 21, ERN 00314786, E3/32.

⁵⁵ Central Committee Decision, ERN 00003136-00003142, E3/32.

⁵⁶ Report by Craig C. Etcheson, para. 24, ERN 00314787, E3/32.

Zone framework”. Decision-making power rested with the zone standing committees, meaning that they could kill people if they wanted.⁵⁷

(3) Communication at the zonal level

79. Zone Committees were in regular communication with sectors, districts and communes, and also with the Centre.⁵⁸

(4) Military Committee of the Central Committee⁵⁹

80. Pol Pot: Chairman

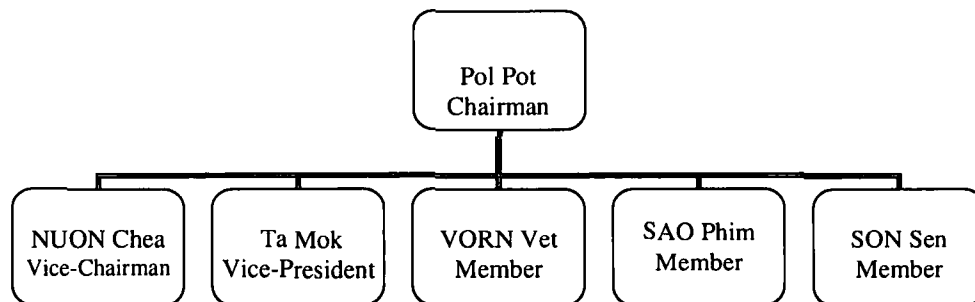
NUON Chea: Deputy, in charge of political affairs

UNG Chhoeun (Ta Mok): Deputy, in charge of military affairs

Van: Member of the Military Committee within the Central Committee

KHIEV: Member of the Military Committee within the Central Committee, Chairman of the General Staff Council.

(5) Organisational chart of the Military Committee of the Central Committee⁶⁰



⁵⁷ Report by Craig C. Etcheson, para. 46, ERN 00314797, E3/32.

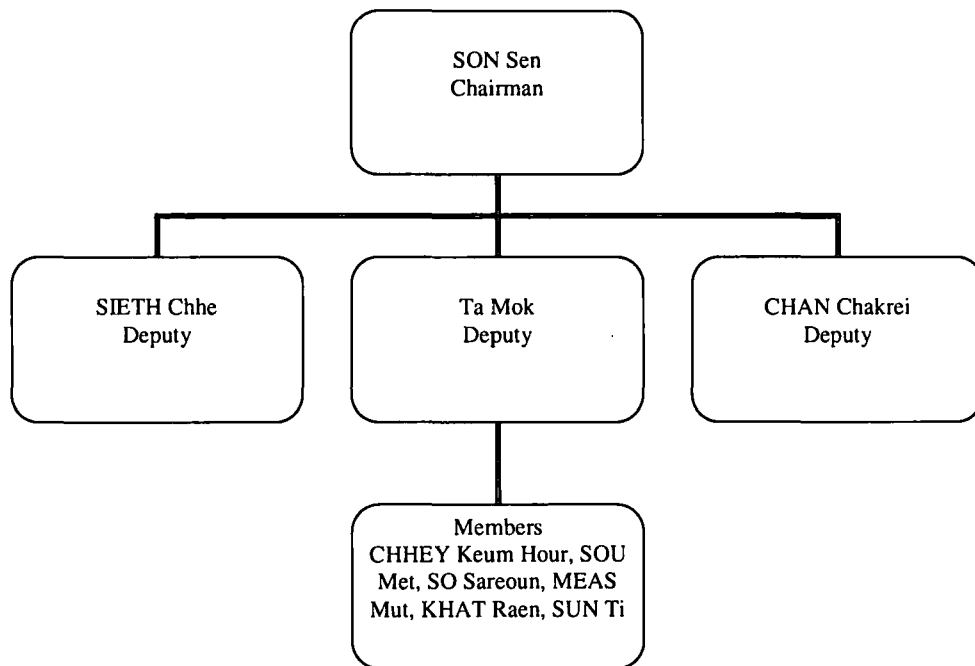
⁵⁸ Report by Craig C. Etcheson, para. 55, ERN 00314800, E3/32.

⁵⁹ Report by Craig C. Etcheson, para. 99, ERN 00314817-00314818, E3/32.

⁶⁰ Report by Craig C. Etcheson, para. 100, ERN 00314818, E3/32.

(6) General Staff⁶¹

81. The General Staff of the Revolutionary Army of Kampuchea under SON Sen alias KHIEU, alias Brother 89, performed the standard functions of a military command office, including planning, operations, intelligence, and logistics. There were between 311 and 326 General Staff officials.

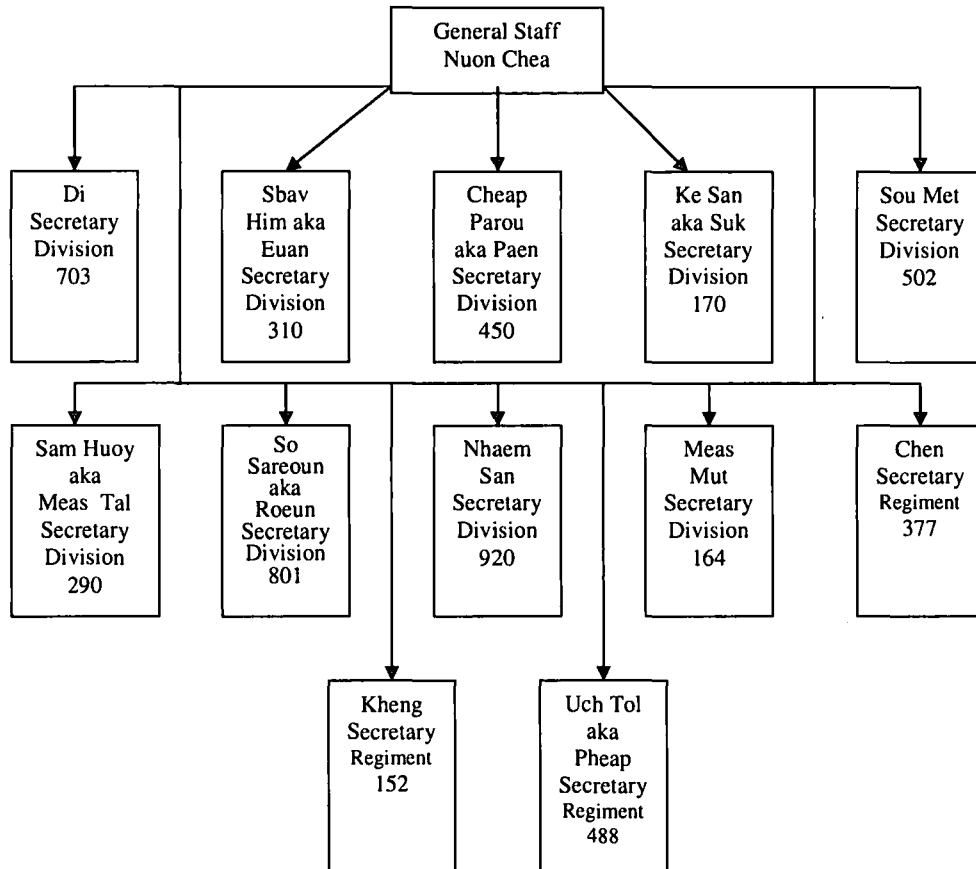
(7) Organisational chart of the General Staff of the Revolutionary Army of Kampuchea⁶²

82. The Revolutionary Army had nine divisions (703, 310, 450, 170, 290, 502, 801, 920, and 164) and three autonomous regiments (152, 488 and 377) and several offices (S-21, M-63, M-62).⁶³

⁶¹ Report by Craig C. Etcheson, para. 108, ERN 00314821, E3/32.

⁶² Report by Craig C. Etcheson, para. 109, ERN 00314821-00314822, E3/32.

⁶³ Report by Craig C. Etcheson, para. 115, ERN 00314824, E3/32.

(8) Revolutionary Army of **Kampuchea Divisions and Autonomous Regiments**⁶⁴**Military Committee of the Central Committee**

83. The party leadership observed that the “core and fundamental duty of the Revolutionary Army is the defence of the country of the security domestically within the country”. S-21 was primarily concerned with enforcing internal security and was listed as part of the Revolutionary Army of Kampuchea. The CPK leadership further observed that “only the Party leads the army; no other organ or individual may leads.”⁶⁵

⁶⁴ Report by Craig C. Etcheson, para. 116, ERN 00314824-00314825 E3/32.

⁶⁵ Report by Craig C. Etcheson, para. 117, ERN 00314825, E3/32.

84. The Commander of Division 502, Sou Met, declared the arrest of enemy elements who were sent to S-21.⁶⁶ Sou Met ordered Division 502 to eradicate internal enemies within the units of organization under his command. He ordered arrests and transfers to S-21.⁶⁷

(9) Ministries⁶⁸

1. Comrade Secretary: in charge of military and economic affairs
 2. Comrade Deputy Secretary: party affairs, social action, culture, propaganda and education;
 3. Comrade Van: foreign affairs, both Party and State;
 4. Comrade Hem: in charge of the Front and the Royal Government, and Commerce (accounting and pricing);
 5. Comrade Thuch: national and international trade;
 6. Comrade Khieu: in charge of general staff and security;
 7. Comrade Vorn: industry, railways and fisheries;
 8. Comrade Doeun: Chairman, Political Office of 870;
 9. Comrade Phea: in charge of culture, social action and foreign affairs
 10. Comrade At: propaganda and re-education, both internal and external
 11. Comrade Chey: agriculture
 12. Comrade Yem: Office 870
 13. Comrade Pang: Government Office
85. In conclusion, Kaing Guek Eav was the S-21 chief, in charge of security and political affairs. Kaing Guek Eav was responsible for receiving orders from the General Staff of the Revolutionary Army and transmitting them to the lower echelons, then reporting back to the upper echelons. He held the lowest position amongst the officials of the Revolutionary Army within the Ministry of National Defence and under the army General Staff and Military Staff.

⁶⁶ Report by Craig C. Etcheson, para. 122, ERN 00314827, E3/32.

⁶⁷ Report by Craig C. Etcheson, para. 123, ERN 00314827, E3/32.

⁶⁸ Report by Craig C. Etcheson, para. 129, ERN 00314831, E3/32.

86. From an administrative standpoint, S-21 was under S-71, with Pang as the chairman, and S-71 controlled all ministries because it shared offices with Entity K1; this is where both the Party Central Committee and the Prime Minister had their offices. The secretary of S-21 had no personal decision-making power. Within the CPK organisational structure, the position of Secretary of S-21 was equivalent to that of regiment secretary. That means that the position of secretary of S-21 was at the bottom of the CPK hierarchy.

B. Sources of additional evidence

(1) Documentation Center of Cambodia

• According to the materials submitted by the Documentation Center of Cambodia (DC-Cam) to the UN Committee of Experts:

1. Kaing Guek Eav was the chief of the S-21 Security Centre, while its top officials were Son Sen and Pol Pot.

(2) Expert Craig C. Etcheson

• According to the report submitted by the Expert of the Office of the Co-Prosecutors, Craig C. Etcheson, S-21 was under the control of the Ministry of National Defence of Democratic Kampuchea.⁶⁹

1. It received orders directly from the General Staff, of which Son Sen was the Chairman, and was under the Ministry of National Defence, of which Son Sen was the Minister.
2. It received orders from the Prime Minister, Pol Pot, via a support office, S-71, which was headed by Pang and Lin.
3. It was under the command of Nuon Chea who was Pol Pot's Controller General and Member of the Military Committee within the Central Committee.
4. Security was provided by Division 703.

⁶⁹ Report by Craig C. Etcheson, para. 133, ERN 00314833-00314834, E3/32.

(3) Confession of KAING Guek Eav

• The confession Kaing Guek Eav reveals the following about his role at S-21

1. He was in charge of administrative affairs;
2. He reviewed confessions, prepared summaries and submitted reports about their content to Son Sen and Nuon Chea;
3. He transmitted the orders he received from his superiors to his subordinates, and then reported back to the upper echelons;
4. He only had such decision-making power as delegated to him by **Son Sen** or Nuon Chea;
 - A unique feature of S-21 was that it was directly under the Central Committee, pursuant to the resolution of the Standing Committee.⁷⁰
 - As secretary of S-21, Kaing Guek Eav could not contact other units chiefs directly regarding arrests; this was an “inviolable discipline”.⁷¹

87. The evidence showed that Kaing Guek Eav had no decision power concerning the establishment and the operation of S-21, as well as the commission of crimes at S-21.⁷²

88. The evidence shows that Kaing Guek Eav had no personal decision-making power concerning the establishment of S-21 and its operation, or even administration.⁷³

89. Other evidence shows that Kaing Guek Eav had no personal decision-making power concerning the establishment of S-21 and its functioning. He had no

⁷⁰ E3/217 Written Record of Interview of Charged Person, 2 April 2008, p. 3, ERN 00178047 (Khmer).

⁷¹ E3/217 Written Record of Interview of Duch, 2 April 2008, p. 7, ERN 00178051 (Khmer).

⁷² Confession by Teanh, ERN 00025620 (Khmer).

⁷³ Annex 5, ERN 00548892-0054882, D91/I.

staff under his control, except the S-21 staff. Moreover, and task of providing security for the entire S-21 was that of Division 502.⁷⁴

90. The evidence shows that Kaing Guek Eav had no personal decision-making power. For example, when some interrogators raped a female prisoner, he tried to stop them, and he reported the matter to his superior, Son Sen, but to no avail. This shows that Kaing Guek Eav had no decision-making power whatsoever to prevent crimes from being committed at S-21. Therefore, he is not among those most responsible for the crimes committed there.

2. The Trial Chamber erred by its arbitrary sentence against KAING Guek Eav

91. Not only did the Trial Chamber commit an error in the exercise of its jurisdiction by omitting to consider the provisions of Rule 87 of the Internal Rules before recording a finding of guilty against KAING Guek Eav, but it also, by majority decision, sentenced him to a single term in utterly arbitrary fashion. Ignoring the Dissenting Opinion of their colleague, an international judge of the Trial Chamber concerning the legal provisions on sentence,⁷⁵ the other judges contented themselves with relying on international jurisprudence in fixing the single term without regard to the provisions of Article 95 of the current Criminal Code of the Kingdom of Cambodia.⁷⁶
92. The Co-Lawyers for the Defence have deemed it important to raise these additional issues concerning sentence before the Supreme Court Chamber for it to take account of the rules and principles of current Cambodian law concerning the matter at hand.

⁷⁴ Command structure of S-21 – “secret military prison” also known as Tuol Sleng Prison – operated by the Government of Democratic Kampuchea from March 1976 to 15 August 1977, and from 15 August 1977 to 6 January 1979, Annex A (available in Khmer only).

⁷⁵ Separate and Dissenting Opinion of Judge Jean-Marc Lavergne, paras. 2-9, E188.1.

⁷⁶ Judgement, 26 July 2010, para. 591.

GENERAL CONCLUSION

93. In their preliminary investigation, the Co-Prosecutors did not focus their investigation on the senior leaders who are most responsible for crimes at the S-21 centre (Tuol Sleng Prison), but only on role and functions of KAING Guek Eav there during the period from 17 April 1975 to 6 January 1979. It was precisely this error which led to their mistaken belief that he was among those most responsible for the crimes committed at S-21, without he or his Lawyers being afforded the opportunity to adduce evidence to the contrary. Hence, the Co-Prosecutors were misled into thinking that the ECCC had jurisdiction prosecute and try KAING Guek Eav, since he was to answer for his acts as one of those most responsible for the crimes committed during the Democratic Kampuchea regime. The Co-Prosecutors even held the view that that KAING Guek Eav comes under the category of senior leaders of Democratic Kampuchea.⁷⁷ For their part, the Co-Investigating Judges revisited the above conclusion, indicating in their Closing Order that KAING Guek Eav could be considered in the category of most responsible for crimes.⁷⁸ All the foregoing elements show that neither the Co-Prosecutors nor the Co-Investigating Judges were able to show irrefutable proof – by means of precise legal arguments or sufficient evidence – that KAING Guek Eav is within the jurisdiction of the ECCC.
94. Influenced by all these elements, 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. We wish to recall that the Defence was not afforded the opportunity from the outset to respond to the Co-Prosecutors' charges; the Co-Prosecutors maintained those charges when they forwarded the case file containing the charges against KAING Guek Eav. The Defence did subsequently raise its objections, and did not do so belatedly, contrary to the assertion of the Pre-Trial Chamber. Moreover, the Trial Chamber's reasoning

⁷⁷ Co-Prosecutors' Introductory Submission, paras. 114-115, D3.

⁷⁸ Closing Order, para. 129, D99.

in its Judgement of 26 July 2010 is quite revealing: “No preliminary objection to the jurisdiction of the ECCC as such was raised at the initial hearing pursuant to Internal Rule 89”⁷⁹ and “The Chamber does not consider these belated submissions to constitute a preliminary objection. The Chamber notes that these arguments were also belated and consequently rejects them”.⁸⁰

95. Furthermore, if indeed the Chamber rejected the Defence submissions challenging the conclusion that KAING Guek Eav is in the category of those most responsible for the crimes on the ground that it considered them belated, this raises the question as to the evidence it relied upon in deciding that it had jurisdiction to hear the case. It is therefore safe to say that, in any event, the Chamber failed to fulfil the obligation of verifying, before accepting to be seised of Case. 001, whether the requisite jurisdictional requirements were fulfilled enabling it to exercise personal jurisdiction over KAING Guek Eav, in accordance with the provisions of Article 1 of the Agreement, Articles 1 and 2 (new) of the ECCC Law and Rule 87 of the Internal Rules. It therefore acted in violation of the fundamental civil law principle of legality and of Article 38, paragraph 6, of the Constitution of the Kingdom of Cambodia.
96. Finally, we wish to highlight the fact that in its Judgement, in which it invokes common law principles as legal foundation, the Trial Chamber states: “The basis of this finding is expressed differently in common law and civil law systems, and within the different language versions of Internal Rule 87(1). Cambodian law derives from civil law and, in particular, from the notion of the judge’s *intime conviction*”.⁸¹ This means that it is not possible to apply common law norms without being totally at odds with Cambodian legal norms as recognized by the United Nations, Cambodia and the Chamber itself, in that it emerges from those norms that Cambodia has *de facto* adopted the civil law system. Moreover, the Dissenting Opinion of the international judge,⁸² reflecting his belief that the Trial Chamber did not have jurisdiction to try

⁷⁹ Judgement, 26 July 2010, para. 14.

⁸⁰ Judgement, 26 July 2010, para. 15.

⁸¹ Judgement, 26 July 2010, para. 45.

⁸² Dissenting Opinion of Judge Jean-Marc LAVERGNE, E188.1.

KAING Guek Eav, amounts to proof that all the trial judges, both national and international, knew and recognised that the ECCC lacked the personal jurisdiction to be seized of Case 001.

97. The Trial Chamber relied on the speculative conclusions of the Co-Prosecutors, the equally uncertain conclusions of the Co-Investigating Judges and the not entirely unambiguous conclusions contained in the psychological assessment report; it therefore acted in error in that it did not apply the reasonable doubt standard in favour of KAING Guek Eav.
98. The procedure by which the Trial Chamber decided that KAING Guek Eav comes under the jurisdiction of the ECCC was legally specious.
99. The Trial Chamber Judges did not reach a unanimous decision. This proves that the trial of KAING Guek Eav was vitiated by irregularities.

FINAL CONCLUSION

100. According to Article 1 of the Agreement, Articles 1 and 2 (new) of the ECCC Law, Rule 87 of the Internal Rules and the fundamental civil law principle of legality, the Chamber had no jurisdiction over KAING Guek Eav. 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.
 - Therefore, the Judgement against Kaing Guek Eav in Case No. 001/18-07-2007/ECCC/TC ought to be set aside, and the Accused ought to be released.
 - The detention of Kaing Guek Eav from the date of his arrest until the present should be considered as a form of protection accorded to a witness who provided information conducive to identifying the senior leaders of

Democratic Kampuchea and those most responsible for the crimes committed at S-21 (Tuol Sleng Prison).

- The proceedings in Case File No. 001/18-07-2007/ECCC/TC, conducted before the Trial Chamber from 30 March 2009 to 27 November 2009, must be considered as the result of an error by the Chamber in the exercise of its personal jurisdiction.

REQUEST

101. We hereby request the Supreme Court Chamber:

- a) To set aside the Judgement in Case File No. 001/18-07- 2007/ECCC/TC and to release Kaing Guek Eav.
- b) To find that the detention of Kaing Guek Eav is a form of protection accorded to a witness who provided information conducive to identifying the senior leaders of Democratic Kampuchea and those most responsible for the crimes committed at S-21.

WITHOUT PREJUDICE

18 November 2010	National Co-Lawyers KAR Savuth KANG Ritheary	Phnom Penh	
Date	Name	Place	Signature