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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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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

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I. INTRODUCTION

1. The Co-Prosecutors submit this Response to the Appeal Brief by the Co-Lawyers for Kaing Guek Eav Alias "Duch" Against the Trial Chamber Judgement of 26 July 2010 ("Defence Appeal") pursuant to Article 8.3 of the Practice Directions on the Filing of Documents ("Practice Directions").[1] The Co-Prosecutors' response is timely as they requested and received a 15-day extension of their allotted time to reply to the Appeal.[2]

2. The issue raised in the Defence Appeal is not the guilt or innocence of the Accused. The Appellant has admitted his responsibility for the grave crimes that occurred under his close scrutiny and direction. Nor is the issue raised in the Defence Appeal the length of the prison sentence that the Accused should serve.[3]

3. Rather, the issue raised by the Appellant is whether the ECCC has the authority to prosecute him at all—in other words, whether the ECCC has authority to impose any punishment on him for his criminal conduct. The Appellant claims that this Court does not have this authority. 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."[4] 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.[5]

4. The Appellant's submission in the Defence Appeal is inconsistent with the position he took at the beginning and throughout most of the Case 001 proceedings. It is also unsustainable as a matter of law.

5. Furthermore, the nature of how the Appellant's personal jurisdiction objection was raised—on the last day of over nine months of trial proceedings, after the parties' final written submissions had already been made, and after the Appellant's prior express denials of any

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1 Practice Directions, article 8.3.

2 Decision on Co-Prosecutors' Application for Extension of Time to Respond to the Accused Appeal Brief, Case File No. 001/18-07-2007-ECCC/SC, Supreme Court Chamber, 7 December 2010, F14/3.

3 This issue is discussed at length in the Co-Prosecutors' appeal of the Trial Judgement. *See* Co-Prosecutors' Appeal Against the Judgement of the Trial Chamber in the Case of Kaing Guek Eav Alias Duch, Case File No. 001/18-07-2007-ECCC/SC, Supreme Court Chamber, 13 October 2010, F10 [hereafter "Co-Prosecutors' Appeal Brief"], paras. 8-45.

4 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, Supreme Court Chamber, 18 November 2010, F14 [hereafter "Defence Appeal Brief"], para. 22. The Appellant even goes so far as to assert that he was one of the "least responsible." *Id.*, para. 22.

5 Defence Appeal Brief, para. 100.

intent to challenge personal jurisdiction—demonstrates a lack of good faith on the part of the Appellant in dealing with the ECCC. Similarly, his claim that the Supreme Court Chamber should release him despite his concession that he is guilty of mass atrocities demonstrates the insincerity of his declarations of remorse. As the Co-Prosecutors argued in their appeal of the Trial Judgement of 26 July 2010 ("Judgement"), this lack of good faith and sincerity should be taken into account when the Supreme Court Chamber considers the adequacy of the sentence imposed on the Appellant.[6]

6. The Co-Prosecutors will address the merits of the Defence Appeal below, beginning at Section II. However, as a preliminary issue, the Co-Prosecutors seek to address a matter of concern pertaining to the admissibility of the submissions made in the Defence Appeal.

7. In particular, the Defence Appeal does not reflect the minimum standard of pleading required to sustain many if not all of the arguments contained therein.[7] Rule 105 states that an appeal brief must set out the arguments and authorities in support of each of its grounds and that the findings or rulings challenged by the appellant must be identified "with specific reference to the page and paragraph numbers of the decision of the Trial Chamber."[8] Similarly, it is a well-accepted principle in international practice—which, as the Co-Prosecutors have argued, is relevant here[9]—that an appeals brief must support its grounds for appeal with precise references to (1) the relevant transcript pages or paragraphs challenged and (2) the parts of the record invoked in support of its arguments.[10] If an appellant only makes general

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6 Co-Prosecutors' Appeal Brief, paras. 63, 77.

7 Relatedly, because the Appellant's arguments are at times not clearly expressed, it is difficult to assess whether the submissions made in the Appeal fall within the scope of the grounds in the Notice of Appeal. For example, it is unclear whether the evidentiary issues raised in Ground 2 of the Appeal are reasonably referenced in the Notice of Appeal, which was titled "error concerning single prison sentence of 35 years." *See* Notice of Appeal 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/TC, Trial Chamber, 24 August 2010, E188/8 [hereafter "Defence Notice of Appeal"], Ground 2 (heading). The Co-Prosecutors note that—pursuant to Rule 110—the Supreme Court Chamber should disregard the Defence Appeal's development of any issues not encompassed by the initial Notice of Appeal. *See* ECCC Internal Rules (Rev.6), 17 September 2010 [hereafter "Rules"], rule 110 ("The scope of the appeal shall be limited to the issues raised in the notice, and the status of the appellant.").

8 Rules, rule 105.

9 As the Co-Prosecutors explained in their Appeal, the jurisprudence of the ICTY and ICTR can provide useful guidance to the Supreme Court Chamber in adjudicating appeals at the ECCC. *See* Co-Prosecutors' Appeal Brief, para. 18 (explaining that the ECCC Rules with respect to appellate review purposely depart from the typical Cambodian practice of de novo review and instead track the language of other international criminal tribunals that provide for a more limited form of review). *See also* International Criminal Tribunal for the Former Yugoslavia [hereafter "ICTY"] Statute, 25 May 1993, *amended* 7 July 2009, article 25; International Tribunal for Rwanda [hereafter "ICTR"] Statute, 8 November 1994, *amended* 31 January 2010, article 24.

10 *See, e.g. Prosecutor v. Ntakirutimana*, Judgement, ICTR-96-10-A and ICTR-96-17-A, ICTR Appeals Chamber, 13 December 2004, para. 396 ("Absent a specific reference, the Appeals Chamber cannot be expected to consider the given submission."); *Prosecutor v. Kordić,* Judgement, IT-95-14/2-A, ICTY Appeals Chamber, 17 December 2004, para. 23 ("The parties must provide the Appeals Chamber with exact references to the parts of the records on appeal invoked in its support. The Appeals Chamber must also be given references to exhibits or

reference to trial submissions or otherwise fails to substantiate his or her arguments by providing specific references to the transcript, record or judgement, the Appeals Chamber may disregard the argument.[11] Furthermore, an Appeals Chamber "cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."[12]

8. In contravention of the aforementioned standards, the Appellant consistently: (1) fails to support his arguments with specific reference to the record, transcript, evidence or judgement;[13] (2) makes obscure, contradictory, vague or otherwise insufficient arguments;[14] (3) criticizes the Trial Chamber's reasoning without providing substantiation or argument as

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other authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made."); *Prosecutor v. Nahimana*, Judgement, ICTR-99-52-A, ICTR Appeals Chamber, 28 November 2007 [hereafter "*Nahimana* Appeals Judgement"], para. 511 ("[T]he Appellant omits to indicate the specific reference to the transcripts which mention these acts, and hence has not complied with the requirements for making submissions at the appeal stage.").

11 *See, e.g. Prosecutor v. Kvočka*, Judgement, IT-98-30/1-A, ICTY Appeals Chamber, 28 February 2005 [hereafter "*Kvočka* Appeals Judgement"], para. 425 (stating that "general references to the submissions made during the trial clearly do not fulfil [the requirement to transparently set out grounds of appeal and the arguments supporting them], and therefore will be disregarded by the Appeals Chamber").

12 *Prosecutor v. Galić*, Judgement, IT-98-29-A, ICTY Appeals Chamber, 30 November 2006, para. 11. *See also Prosecutor v. Muvunyi*, Judgement, ICTR-2000-55A-A, ICTR Appeals Chamber, 29 August 2008 [hereafter "*Muvunyi* Appeals Judgement"], para. 12 (stating that the Appeals Chamber "will dismiss arguments which are evidently unfounded without providing detailed reasoning"); *Prosecutor v. Vasiljević*, Judgement, IT-98-32-A, ICTY Appeals Chamber, 25 February 2004, para. 12 (stating that an appeals chamber may summarily dismiss arguments where an appellant only suggests an alternative assessment of the evidence, without indicating in what respects the Trial Chamber's assessment of the evidence was erroneous).

13 *See, e.g.* Defence Appeal Brief, paras. 4-6 (referring generally, with no specific reference or citation, to "supporting evidence" and "exculpatory evidence" allegedly raised by the Appellant during the proceedings); para. 21 (claiming that personal jurisdiction is based fundamentally on national administrative norms without providing reference to such norms); 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); 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); paras. 46-50 (claiming, without any specific reference to witness testimony or other evidence, that a group of 10 people attacked Phnom Penh and Battambang and thereafter implemented their criminal plan); para. 90 (referring generally, with no specific reference or citation, to "evidence" allegedly showing that Duch had no power to make decisions independently).

14 *See, e.g.* Defence Appeal Brief, paras. 19, 60-62 (inconsistently claiming that the Trial Chamber should not look outside the ECCC Law for guidance in determining jurisdiction after previously citing the jurisprudence of other international tribunals); 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); para. 30 (obscurely arguing that because the Appellant was unaware of a particular directive, he was not a person most responsible); para. 93 (stating, without providing further support or explanatory argument, that the Appellant was unable to present exculpatory evidence promptly because the Co-Prosecutors failed to investigate the senior leaders and the most responsible persons for crimes at S-21, leading the Co-Prosecutors to believe that the Appellant was among the persons most responsible for the crimes); paras. 14-15 (failing to explain how it can be discerned that the Trial Chamber did not consider the Cambodian Constitution or the Law on the Outlawing of the Democratic Kampuchea Group or how the purported failure to examine those authorities resulted in an invalid judgement).

to the alleged error committed;[15] and (4) misstates and mischaracterizes facts and law to support his arguments.[16] Some of the most glaring insufficiencies and/or inaccuracies in the Defence Appeal include the following:

- The 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.[17]
- The Appellant falsely asserts that Judge Lavergne's dissent "admitt[ed]" that the Trial Chamber lacked jurisdiction over the Appellant.[18] On the contrary, the dissent was limited solely to discussing the quantum of the sentence imposed on the Appellant.[19]
- The Appellant claims that the ECCC Law does not allow the prosecution of a person where he acted on orders in committing the crimes of which he was convicted.[20] However, the ECCC Law states precisely the opposite. In particular, Article 29 of the ECCC Law specifies that "[t]he fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility."[21]

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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); 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); para. 15 (asserting that the Trial Chamber failed to take into account the Law on the Outlawing of the Democratic Kampuchea Group in considering its personal jurisdiction over the Appellant without offering any argument or explanation about how this law applied to the Appellant or his crimes).

16 *See, e.g.* Defence Appeal Brief, para. 3(3) (claiming that the ECCC constitutive documents limit the ECCC's jurisdiction to crimes committed in Cambodian territory whereas those documents limit the Court's jurisdiction temporally and by subject-matter but not geographically); para. 26 (inaccurately stating that the Trial Chamber affirmed allegations that the Appellant participated in the planning of the establishment of S-21); 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"; on the contrary, article 14(a) of the ECCC Agreement and rule 98(4) merely require the affirmative vote of at least 4 judges, which was attained).

17 *See, e.g.* Defence Appeal Brief, para. 4-5, 66-71.

18 Defence Appeal Brief, para. 96.

19 Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence, Case File No. 001/18-07-2007-ECCC/TC, Trial Chamber, 26 July 2010, E188.1.

20 Defence Appeal Brief, paras. 37-38.

21 ECCC Law, article 29. Article 29 also provides that the "position or rank" of any Suspect shall not relieve him of individual criminal responsibility or mitigate punishment. *Id.*

- The Appellant claims that Article 290(6) of the Cambodian Code of Criminal Procedure supports its argument with respect to the ECCC's lack of personal jurisdiction even though Article 290(6) clearly deals with territorial jurisdiction, not personal jurisdiction.[22]

9. The Co-Prosecutors respectfully submit that—consistent with the jurisprudence of other international criminal tribunals—the Appellant's arguments that are evidently unfounded or that otherwise fail to meet minimum pleading requirements should be disregarded by the Supreme Court Chamber. The Appellant's failure to comply with these basic requirements places an unfair burden on the parties and the Supreme Court Chamber to investigate, substantiate and structure the Appellant's arguments for him and, at times, requires speculation as to the content of those arguments. This is inconsistent with the need to promote judicial and procedural economy at the ECCC.

10. Nevertheless, despite the lack of clarity and specificity in the Defence Appeal, the Co-Prosecutors have attempted to address the Appellant's principal points in this Response. The Co-Prosecutors are not waiving their right to supplement their submissions at a later time pending future clarification or substantiation by the Appellant.

II. RESPONSE TO GROUND 1: THE TRIAL CHAMBER DID NOT ERR "CONCERNING PERSONAL JURISDICTION."

11. As Ground 1 of the Defence Appeal, the Appellant alleges that "[t]he Trial Chamber erred concerning personal jurisdiction."[23] In response, the Co-Prosecutors submit that (1) the Trial Chamber did not err in finding that the Appellant's personal jurisdiction objection was untimely and therefore inadmissible; (2) alternatively, Ground 1 of the Defence Appeal fails because the Trial Chamber did not err in confirming its personal jurisdiction over the Appellant on the basis of his status as one of "those who were most responsible."

a. THE TRIAL CHAMBER DID NOT ERR IN FINDING THAT THE APPELLANT'S PERSONAL JURISDICTION OBJECTION WAS UNTIMELY AND THEREFORE INADMISSIBLE.

12. The Trial Chamber found that the Appellant's objection to the exercise of personal jurisdiction over him—which was presented on the last day of over nine months of trial proceedings—was "belated" and therefore inadmissible pursuant to Internal Rule 89.[24] The

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22 *See* Defence Appeal Brief, para. 70.

23 Defence Appeal Brief, para. 11.

24 Judgement, Case File No. 001/18-07-2007/ECCC/TC, Trial Chamber, 26 July 2010, E188 [hereafter "Case 001 Judgement"], paras. 14-15.

Defence Appeal challenges this determination, alleging that the Trial Chamber "applied Rule 89 at the wrong time and with procedural defect."[25]

i. Standard of Review

13. Rule 104(1) of the Internal Rules provides that the Supreme Court Chamber has competence to consider allegations of "an error on a question of law invalidating the judgement or decision."[26] When examining alleged errors of law, the ICTY and ICTR Appeals Chamber—which applies the same standard of appellate review as that provided in Rule 104—does not confine itself to assessing the reasonableness of the Trial Chamber's finding; rather, it makes an independent assessment of whether the Trial Chamber's conclusion is correct as a matter of law.[27] According to this same Appeals Chamber, a party alleging an error of law invalidating the judgement must, at the very least, identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the judgement.[28]

ii. Discussion

14. The Appellant's assertion that the Trial Chamber erred in rejecting his untimely personal jurisdiction objection is unfounded. The Trial Chamber correctly applied the relevant provision of the Rules, which required the Appellant to raise any jurisdiction objection at the initial trial hearing. The Appellant should not be allowed to depart from the established procedural framework at this late stage, particularly in light of his prior denial of any intention to challenge personal jurisdiction.

15. As the Trial Chamber recognized, pursuant to Internal Rule 89, the Appellant was required to raise any preliminary objection to jurisdiction at the initial trial hearing.[29] Accordingly, the President of the Trial Chamber opened the Initial Hearing in Case 001 by requesting the parties to raise any preliminary objections, including those "concerning a) the jurisdiction of the Chamber,"[30] and noting that "[f]ailure to raise any preliminary objection at the Initial

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25 Defence Appeal Brief, para. 71.

26 Rules, rule 104(1).

27 *Rutaganda v. Prosecutor*, Judgement, ICTR-96-3-A, ICTR Appeals Chamber, 26 May 2003 [hereafter "*Rutaganda* Appeals Judgement"], para. 21 (stating that the Appeals Chamber's responsibility when confronted with an alleged error of law is not to "cross-check the findings of the Trial Chamber on matters of law merely to determine whether they are reasonable, but indeed to determine whether they are correct").

28 *Rutaganda* Appeals Judgement, para. 21. *See also Prosecutor v. Galić,* Judgement, IT-98-29-A, ICTY Appeals Chamber, 30 November 2006, para. 7.

29 Rule 89(1) then provided that "[a] preliminary objection concerning: a) the jurisdiction of the Chamber . . . shall be raised at the initial hearing, failing which it shall be inadmissible." ECCC Internal Rules (Rev.2), 5 September 2008 [hereafter "Rules (Rev.2)"], rule 89(1).

30 Trial Transcript, Initial Hearing, 17 February 2009, T.6.

Hearing shall render them inadmissible."[31] In response, the Appellant raised one preliminary objection, which related to the statute of limitations for national crimes.[32] He made no mention of any objection to the jurisdiction of the Chamber.[33]

16. The trial record demonstrates that the Appellant knowingly and deliberately chose not to challenge personal jurisdiction. During opening statements on 1 April 2009, in response to a request for clarification from the Trial Chamber, the Appellant expressly confirmed that he did not intend to challenge the jurisdiction of the ECCC.[34] In particular, the National Co-Lawyer stated: "when the Co-Prosecutors asked whether I challenge the jurisdiction, I am not intending to challenge it because I am quite aware already and I could have raised it in the initial hearing already if I wished to do so."[35] Notably, despite the fact that the Trial Chamber expressly relied on this statement in its analysis of personal jurisdiction,[36] the Appellant fails to address it in the Defence Appeal or explain why the Trial Chamber erred in relying upon it.

17. The Co-Prosecutors also note that—in addition to the Appellant's opportunities to raise personal jurisdiction as an issue before the Trial Chamber—he had prior opportunities to raise this same objection during the pre-trial stage and failed to do so. For example, the Appellant elected not to appeal the Closing Order on jurisdictional grounds.[37]

18. Moreover, there is nothing unusual or unfair about the concept that a party may lose its right to challenge personal jurisdiction if it fails to raise the issue in a timely fashion. International criminal courts customarily require parties to raise jurisdictional objections prior to the outset

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31 Trial Transcript, Initial Hearing, 17 February 2009, T.6.

32 Trial Transcript, Initial Hearing, 17 February 2009, T.7.

33 Trial Transcript, Initial Hearing, 17 February 2009, T.6-7, 11 (the Defence raised the issue of the statute of limitations for national crimes as well as the length of the Appellant's pre-trial detention but did not raise the issue of whether the Appellant constituted a "senior leader" or one of "those most responsible").

34 Trial Transcript, 1 April 2009, T.18-19 (Mr. Kar Savuth).

35 Trial Transcript, 1 April 2009, T.18 (Mr. Kar Savuth); Case 001 Judgement, para. 14, fn. 18. The National Co-Lawyer went on to state: "[s]o what I raised was not to challenge the jurisdiction. I only wanted the Court to follow the Rule 98.7 regarding the jurisdiction of the Court over my client because if he is not the most senior person or most responsible person to be prosecuted then he should not be prosecuted." Trial Transcript, 1 April 2009, T.18 (Mr. Kar Savuth). The Co-Prosecutors note that Rule 98.7 has nothing to do with personal jurisdiction; rather, it pertains to the scope of crimes that can be prosecuted before the ECCC. Furthermore, although some of the language of this statement on its face appears to pertain to personal jurisdiction, the National Co-Counsel removed any ambiguity in the defence's position by reiterating at the end of his comments that "finally, I do not intend to challenge the jurisdiction [of the ECCC]." Trial Transcript, 1 April 2009, T.19 (Mr. Kar Savuth). *See also* Defence Appeal Brief, para. 94 (stating that the Defence "did not oppose the Co-Prosecutors at the beginning").

36 Case 001 Judgement, para. 14, fn. 18.

37 Rules (Rev.2), rule 74(3)(a) (describing the grounds for pre-trial appeals and providing, *inter alia*, that the Charged Person or Accused may appeal against orders or decisions of the Co-Investigating Judges "confirming the jurisdiction of the ECCC").

of the trial.[38] This practice promotes judicial expediency and efficiency, the importance of which cannot be understated in the context of mass atrocity trials that by their very nature are long, complicated, and expensive. As an ICTY Trial Chamber explained in the *Milutinović* case, jurisdictional objections must be raised prior to the commencement of the trial "in order not to render moot the monumental undertaking of an international criminal trial."[39]

19. In this same vein, by requiring that parties at the ECCC raise any jurisdictional objections at the initial hearing, Rule 89 ensures that the Trial Chamber is apprised of and has the opportunity to consider any objection to the fundamental question of its own legitimacy prior to embarking on a full-fledged, resource-intensive trial.[40] Rule 89 also serves another key purpose: it ensures that other parties have adequate notice that certain issues are disputed and the opportunity to treat them accordingly when arguing their case before the Trial Chamber. The Appellant's decision to raise a personal jurisdiction objection at the very end of his trial, in clear contravention of Rule 89, is inconsistent with these key objectives and raises serious abuse of process issues.

20. Accordingly, for the above-mentioned reasons, the Co-Prosecutors maintain that there was no error in the Trial Chamber's determination that the Appellant's personal jurisdiction objection was untimely and therefore inadmissible.

b. THE TRIAL CHAMBER DID NOT ERR IN INTERPRETING ARTICLES 1 AND 2 OF THE ECCC LAW AND AGREEMENT AS ESTABLISHING TWO DISCRETE CATEGORIES OF PERSONS SUBJECT TO THE JURISDICTION OF THE ECCC.

21. Although the Trial Chamber found that the Appellant's personal jurisdiction claim was barred pursuant to Rule 89, on its own initiative, it made an independent assessment of personal jurisdiction. In so doing, it determined that the ECCC has personal jurisdiction over the Appellant as "one of those most responsible for crimes committed" during the relevant

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38 *See* ICTY Rules of Procedure and Evidence (Rev.44), 10 December 2009 [hereafter "ICTY Rules"], rule 72 (providing that preliminary motions challenging jurisdiction must be filed within a specified time period and shall be disposed of prior to the commencement of opening statements); ICTR Rules of Procedure and Evidence, *amended* 1 October 2009 [hereafter "ICTR Rules"], rule 72; Special Court for Sierra Leone [hereafter "SCSL"] Rules of Procedure and Evidence, *amended* 28 May 2010, rule 72; Special Tribunal for Lebanon, Rules of Procedure and Evidence, (Rev.3), 10 November 2009, rule 90.

39 *Prosecutor v. Milutinović*, Decision on Nebojša Pavković's Motion for a Dismissal of the Indictment Against Him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the Former Yugoslavia, IT-05-87-T, ICTY Trial Chamber, 21 February 2008, para. 15.

40 While it is of course possible that the Trial Chamber may decide to defer the resolution of certain jurisdictional issues until after the trial has started, this is a decision for the Trial Chamber—and not the Defence—to make. *See Prosecutor v. Kordić*, Decision on Defence Motion to Clarify, IT-95-14-2, ICTY Trial Chamber, 15 January 1999, p. 2 (confirming that—while the Trial Chamber has the discretion to decide on jurisdictional issues during rather than before the trial—the parties are still required to raise jurisdictional objections prior to the commencement of the trial).

period, and that consequently there is "no need to examine the issue of whether the Accused was a senior leader of the DK."[41]

22. Although the Appellant's submissions are not entirely clear in this area, he appears to take the position that there is no (or no meaningful) distinction between the concept of "those who were most responsible" and "senior leader"[42] and that it is necessary to show that an accused possessed the attributes of a "senior leader" in order for him to fall under the personal jurisdiction of the ECCC.[43]

23. The Co-Prosecutors have consistently maintained that the Accused was one of "those who were most responsible" and a "senior leader."[44] However, the Co-Prosecutors submit that—regardless of whether the Accused constituted a "senior leader" for the purposes of the ECCC Law and Agreement—the Trial Chamber correctly determined that personal jurisdiction at the ECCC can be established solely on the basis of an individual's status as one of "those who were most responsible."

i. Standard of Review

24. The question of the proper construction of a statutory provision is an issue of law. As stated above, pursuant to Rule 104(1), the Supreme Court Chamber has authority to consider allegations of "an error on a question of law invalidating the judgement or decision" and is expected to assess whether the Trial Chamber's finding is correct, not just whether it is reasonable.[45]

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41 Case 001 Judgement, para. 25.

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."); *id.*, 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").

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); *id.*, 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"); *id.*, 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."); *id.*, 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").

44 Co-Prosecutors' Final Trial Submission with Annexes 1-5, Case File No. 001/18-07-2007-ECCC/TC, Trial Chamber, 11 November 2009, E159/9, paras. 240, 244; Co-Prosecutors' Appeal Brief, para. 64 (arguing that the Trial Chamber should have found that the Accused was a senior leader; the Co-Prosecutors' claim assumed that such a determination was necessary not for the purpose of establishing personal jurisdiction, but for the purpose of assessing mitigating factors related to sentencing).

45 *See supra*, section II(A)(i).

ii. Discussion

25. Articles 1 and 2 of the ECCC Law and Agreement establish the personal jurisdiction of the court over "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."[46]

26. As is evident from the Judgement, the Trial Chamber understood the use of the conjunctive "and" in these provisions as establishing that there are two separate categories of persons that fall within the jurisdiction of the ECCC: "senior leaders of Democratic Kampuchea" and "those who were most responsible" for the crimes committed during the DK period.[47] The Trial Chamber's analysis also indicates that it understood that some individuals may fall into both categories, but that an Accused does not have to be both a senior leader and one of those most responsible to fall within the jurisdiction of the ECCC.[48]

27. In addition to the plain language of the ECCC Law and Agreement, the Trial Chamber also relied on the drafting history of the ECCC for guidance as to the meaning of "senior leaders" and "those who were most responsible."[49] In particular, the Trial Chamber cited the 1999 UN Group of Experts' conclusion that two types of targets should be prosecuted, namely "senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities."[50]

28. The Trial Chamber's understanding is further supported by the October 2004 National Assembly debates on the ECCC Law. During these debates, Deputy Prime Minister Sok An explained that Article 2 of the proposed law was intended to allow the prosecution of "two types of targets": (i) "senior leaders," as opposed to persons who held "ordinary positions" and (ii) "those who were not the senior leaders, but who committed crimes as serious as the

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46 ECCC Law, articles 1, 2 new; 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, 6 June 2003 [hereafter "ECCC Agreement"], articles 1, 2(1).

47 The Trial Chamber repeatedly referred to "senior leaders of DK" and "those who were most responsible" as distinct categories. *See* Case 001 Judgement, para. 17 ("Personal jurisdiction is confined either to 'senior leaders of DK' or 'those who were most responsible. . .") (emphasis added); *id.*, para. 19 ("Neither the ECCC Agreement nor the ECCC Law expressly defines 'senior leaders of DK' or 'those who were most responsible.'") (emphasis added).

48 *See* Case 001 Judgement, para. 25 (finding that the Accused fell within the personal jurisdiction of the ECCC as "one of those most responsible" and that, consequently, there was no need to examine the additional question of whether the Accused was also a senior leader).

49 Case 001 Judgement, paras. 19-21.

50 Case 001 Judgement, para. 20 (emphasis added); UN Group of Experts Report, para. 110.

senior ones."[51] Similarly, the UN Group of Experts Report explained that the "list of top governmental and party officials may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and others not in the chart of senior leaders may have played a significant role in the atrocities."[52]

29. The Appellant fails to explain the error in the Trial Chamber's understanding that "senior leaders" and "those who were most responsible" are distinct categories. Instead, he relies on misleading citations[53] and a generalized critique of the Trial Chamber's reasoning in finding personal jurisdiction.[54] As such, he has failed to meet his burden of proof in alleging an error on the part of the Trial Chamber. In fact, as discussed above, there was no error in the Trial Chamber's conclusion that it could find personal jurisdiction over the Appellant as one of "those most responsible," regardless of whether he was a senior leader.

c. THE TRIAL CHAMBER DID NOT ERR IN FINDING THAT IT HAD PERSONAL JURISDICTION OVER THE APPELLANT ON THE BASIS OF HIS STATUS AS ONE OF "THOSE WHO WERE MOST RESPONSIBLE."

30. Rule 89 does not specify which standard should apply to the review of jurisdictional challenges. However, the Appellant assumes that the same standard of proof for determining the guilt of an accused—"beyond reasonable doubt"—also applies to the Trial Chamber's

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51 Transcript: The First Session of the Third Term of Cambodian National Assembly, 4-5 October 2004, pp. 15-16 [hereafter "2004 National Assembly Debate"].

52 Group of Experts Report, para. 109.

53 For example, as mentioned in Section I of this Response, the Appellant claims 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." Defence Appeal Brief, para. 37. In fact, Article 29 of the ECCC Law provides precisely the opposite and clearly bars the use of the superior order defence as a means of escaping accountability. *See* ECCC Law, article 29(4) ("The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility."); *see also* Case 001 Judgement, paras. 551-552 (quoting Article 29 of the ECCC Law and finding that the Accused "knew that orders of the Government of DK to commit these [criminal] offences were unlawful"). Similarly, at para. 35 of the Defence Appeal Brief, the Appellant selectively cites to article 99 of the 1956 Penal Code and fails to mention that the following article, article 100, clarifies that an individual who carries out illegal orders is not immune from criminal liability. *See* 1956 Penal Code, article 100 ("In the case of illegal orders given by a lawful authority, the judge shall determine, on a case-by-case basis, the criminal responsibility of those executing the orders.").

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); *id.*, 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).

assessment of personal jurisdiction.[55] The Appellant provides no support for this position, which is far from self-evident.

31. While the Co-Prosecutors are not aware of any international or Cambodian authority directly on point, the institutional framework of the ECCC—in particular, the distinct role played by the Co-Prosecutors and Co-Investigating Judges in selecting and confirming suspects for prosecution—suggests that either a *prima facie* or balance of probabilities standard would be more appropriate.[56]

32. Regardless, even assuming that the standard for review of jurisdictional determinations is indeed "beyond reasonable doubt" as the Appellant claims, the Trial Chamber's determination that it had personal jurisdiction over the Accused is well-supported by factual findings made in the Judgement and thus satisfies the relevant standard of review. Accordingly, the Appellant fails to show that the Trial Chamber's determination that it had personal jurisdiction was erroneous.

i. Standard of Review

33. The Co-Prosecutors submit that the question of whether the Appellant was one of "those who were most responsible" for the serious crimes committed during the DK period is a question of fact.[57] Pursuant to Rule 104, the Supreme Court Chamber has authority to review

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55 *See* Defence Appeal Brief, paras. 68-69, 97.

56 The application of a *prima facie* or balance of probabilities standard here would be consistent with general international practice, whereby trial chambers give substantial deference to the prosecutor's determination that an individual falls within statutory limiting language, particularly if that determination has been reviewed by a confirming judge. *See, e.g. Prosecutor v. Brima*, Judgment, SCSL-2004-16-A, SCSL Appeals Chamber, 22 February 2008 [hereafter "*Brima* Appeals Judgment"], paras. 280-284, esp. 281 (finding that the Prosecutor had the sole discretion to determine who fell within the scope of the "those who bear the greatest responsibility" language in the SCSL statute since, in contrast to the Trial Chamber, the prosecutor has the benefit of the broad knowledge gained through his pre-trial investigation into the conflict); ICTY Rules, rule 28 (stating that the Bureau—which is comprised of the President, Vice-President, and Presiding Judges of the ICTY—must determine "whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible"); ICTY Rules, rule 47 (stating that the prosecutor's indictment shall be confirmed by a judge who must be satisfied that there is "sufficient evidence to provide reasonable grounds for believing that a suspect has committed crimes within the jurisdiction of the Tribunal"). *See also Prosecutor v. Brđanin*, Decision on Motion to Dismiss Indictment, IT-99-36, ICTY Trial Chamber, 5 October 1999, para. 15 (holding that when a trial chamber is examining an objection to jurisdiction, it is not necessary for the chamber to examine whether there is evidence available to prove the facts alleged since "the jurisdiction of the Tribunal [...] depends solely on what is pleaded in the indictment"); *Prosecutor v. Delić*, Decision of Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, IT-04-83-AR72, ICTY Appeals Chamber, 8 December 2005, para. 11 (finding that while the sufficiency of the allegations in the indictment constitutes a jurisdictional issue, the question of the sufficiency of the evidence supporting the indictment is not a jurisdictional issue).

57 *See, e.g. Kvočka* Appeals Judgement, paras. 192-196 (applying an error of fact standard of appellate review when examining whether the trial chamber erred in applying a legal standard to the facts of the case; the legal standard at issue was whether an accused's conduct "furthered the common purpose, so as to entail his criminal responsibility as a co-perpetrator in the joint criminal enterprise").

allegations of an "error of fact which has occasioned a miscarriage of justice."[58] International criminal courts review allegations of such errors pursuant to a highly deferential standard of review.[59] As the ICTR Appeals Chamber has stated when interpreting identical appellate review language, "the Appellant will only be successful if he can show that no reasonable trier of fact would have decided as the Trial Chamber did."[60] In the *Kupreškić* case, the ICTY Appeals Chamber further explained the rationale for deferring to a trial chamber's factual findings:

> The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.[61]

34. The language of "miscarriage of justice" has been interpreted as meaning a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[62]

ii. Discussion

35. As mentioned above, in its Judgement, the Trial Chamber made an independent determination of personal jurisdiction, finding that jurisdiction had been established since the Accused was one of "those who were most responsible."[63] The Trial Chamber's assessment is eminently reasonable and supported by a wealth of factual findings.

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58 Rules, rule 104(1).

59 *See, e.g. Rutaganda* Appeals Judgement, para. 21 (stating that an Appeals Chamber must show "a high degree of deference . . . to the factual findings of a Trial Chamber"); *Prosecutor v. Tadić*, Judgement, IT-94-1, ICTY Appeals Chamber, 15 July 1999 [hereafter "*Tadić* Appeals Judgement"], para. 64 (stating that an Appeals Chamber can only substitute its own finding for that of the Trial Chamber "where the evidence relied upon by the Trial Chamber *could not reasonably have been accepted by any reasonable person*") (emphasis added).

60 *Prosecutor v. Ndindababizi*, Judgement, ICTR-01-81-A, ICTR Appeals Chamber, 16 January 2007 [hereafter *Ndindabahizi* Appeals Judgement"], para. 86 (emphasis added). *See also Tadić* Appeals Judgement, para. 64 (stating that "it is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence").

61 *Prosecutor v. Kupreškić*, Appeal Judgement, IT-95-16-A, ICTY Appeals Chamber, 23 October 2001, para. 32.

62 *Prosecutor v. Furundžija*, Judgement, IT-95-17/1-A, ICTY Appeals Chamber, 21 July 2000, para. 37 (citing BLACK'S LAW DICTIONARY (7th ed. 1999) (internal quotation marks omitted); *Prosecutor v. Musema*, Judgement, ICTR-96-13-A, ICTR Appeals Chamber, 16 November 2001, para. 17, fn. 24 (quoting the same language). Although the Co-Prosecutors maintain that the application of Articles 1 and 2 of the ECCC Law and Agreement to the Accused is an issue of fact that should be reviewed pursuant to the error of fact standard, the same conclusion would be reached if the error of law standard were applied.

63 *See* Case 001 Judgement, paras. 16-25. The Appellant misleadingly suggests in the Appeal that the Trial Chamber's determination that it had personal jurisdiction was based solely on its rejection of the Defence

36. Specifically, the Trial Chamber's conclusion that the Accused was one of "those who were most responsible" is supported by its findings with respect to (1) the gravity of his crimes, including the number of victims and incidents and the geographic and temporal scope of the crimes; and (2) the level of involvement of the Accused in those crimes, including (a) the significant number of subordinates below the Accused and the few hierarchical echelons above him, and (b) the stability and permanency of the Accused's position throughout the DK period.[64]

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."[65] In the present case, the Trial Chamber found that "[a]s Deputy and then Chairman of S-21, the Accused managed and refined a system over the course of more than three years that resulted in the execution of at least 12,272 victims, a majority of whom were also systematically tortured."[66] Torture at S-21 included tactics such as beating with a rattan stick, electrocuting, water-boarding, and asphyxiation with a plastic bag.[67] The Trial Chamber further noted that "many of the crimes committed at S-21 were [...] carried out in a

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objection pursuant to Rule 87 of the Rules. *See* Defence Appeal Brief, para. 66. The Appellant's Notice of Appeal took this position more explicitly, stating that the "Trial Chamber only considered its subject-matter, temporal and territorial jurisdictions and relied thereupon to convict [the Appellant] for the crimes committed at S-21 . . . ." *See* Defence Notice of Appeal, para. 8.

64 The ICTY Referral Bench focuses on these two concepts—gravity of crimes and level of involvement—when examining whether an accused falls under similar limiting language—i.e. "the most senior leaders suspected of being most responsible." For gravity of crimes, *see Prosecutor v. Lukić*, Decision on Milan Lukić's Appeal Regarding Referral, IT-98-32/1-AR11*bis*.1, ICTY Appeals Chamber, 11 July 2007, para. 25 (finding that the Accused's alleged crimes were "grave indeed" as they "including a number of horrific incidents that resulted in the deaths of a total of more than 150 people"); *Prosecutor v. Janković*, Decision on Referral of Case under Rule 11*bis*, IT-96-23/2-AR11*bis*.2, ICTY Appeals Chamber, 15 November 2005, para. 22 (taking into account "both the geographic and temporal scope of the alleged crimes, as well as the number of victims affected" when assessing the gravity of the alleged crimes). For the accused's level of involvement, *see Prosecutor v. Ademi*, Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11*bis*, IT-04-78-PT, ICTY Referral Bench, 14 September 2005, para. 29 (stating that the issue of the level of the accused's responsibility should be interpreted so as to include both the formal rank of the accused and his "actual role" in the commission of the crimes); *Prosecutor v. Dragomir Milošević*, Decision on Referral of Case Pursuant to Rule 11*bis*, IT-98-29/1-PT, ICTY Referral Bench, 8 July 2005 ["*Dragomir Milošević* Referral Decision"], para. 22 (confirming that the analysis of whether an accused falls within the class of "most senior leaders suspected of being most responsible" requires an assessment of the *de jure* and *de facto* position and function of the accused); *id.*, para. 23 (taking into account the fact that there was only "one echelon" of leadership above the accused in determining that he should be prosecuted at the international level); *id.*, para. 23 (noting, in particular, that the accused was "the permanent, as opposed to an *ad hoc* or acting, commander" of the military corps at issue for "a prolonged period exceeding a year" in determining that the accused should be prosecuted at the international rather than the domestic level).

65 Defence Appeal Brief, para. 19.

66 Case 001 Judgement, para. 597.

67 Case 001 Judgement, para. 241.

particularly cruel manner"[68] and that the "S-21 detainees, who included the children, spouses and family members of other detainees, were clearly defenceless and vulnerable."[69]

38. The Trial Chamber also described the importance of S-21 to the Communist Party of Kampuchea ("CPK") and how the impact of the crimes at S-21 reverberated throughout the country. It affirmed that S-21 was a "very important security centre of DK" and that the Accused, as its Chairman, reported to the "very highest level of CPK leadership."[70] It further found that S-21 was considered vital to achieving CPK political objectives and carrying out the CPK policy of "smashing" enemies;[71] that S-21 confessions were used to decide upon the arrest of those denounced as enemy agents;[72] and that "those detained at S-21 were drawn from all parts of the country and from all sectors of Cambodian society."[73] It also noted that "one of the defining characteristics of S-21 within the Santebal security apparatus" was that it interrogated and executed high-ranking CPK cadre.[74]

39. Similarly, the Trial Chamber made multiple findings related to the heavy involvement of the Accused in the grave crimes committed at S-21. The Trial Chamber affirmed that, as Chairman of S-21, the Accused oversaw "the entire S-21 operation including the annotation of confessions and the ordering of executions."[75] It found that he "led the Interrogation Unit" of S-21; "participated in the planning of S-21 operations and training of staff on interrogation techniques";[76] and "reviewed the detainees' confessions and provided continued instructions to the interrogators."[77] It also found that "the Accused reviewed and passed on to his superiors the detainees' confessions and lists of 'traitors,' which informed and facilitated further arrests."[78] Furthermore, although the Trial Chamber acknowledged that the Accused's superiors generally made the decisions regarding whom to arrest and send to S-21,[79] it noted that "there is nevertheless evidence indicating that the Accused played a more active role in initiating arrests and that his views were sought and acted upon by his

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68 Case 001 Judgement, para. 603.
69 Case 001 Judgement, para. 604.
70 Case 001 Judgement, para. 25.
71 Case 001 Judgement, para. 328.
72 Case 001 Judgement, para. 179.
73 Case 001 Judgement, para. 323.
74 Case 001 Judgement, para. 211.
75 Case 001 Judgement, para. 25.
76 Case 001 Judgement, para. 25. *See also id.*, paras. 176, 181 (finding that "the Accused reviewed the detainees' confessions and provided continued instructions to the interrogators" and that "the Accused insisted on personally acknowledging that the interrogation was complete before a detainee could be executed").
77 Case 001 Judgement, para. 181.
78 Case 001 Judgement, para. 173.
79 Case 001 Judgement, para. 168.

superiors."[80] It also found that the "Accused worked tirelessly to ensure that S-21 ran as efficiently as possible"[81] and that although the Accused did so out of "unquestioning loyalty to his superiors and CPK ideology,"[82] he carried out his crimes with a specific discriminatory intent,[83] and his actions were conducted "without regard to the humanity of the detainees he oversaw."[84]

40. With respect to the role of the Accused in the hierarchy of the DK, the Trial Chamber made findings demonstrating that he had a number of subordinates reporting to him and few hierarchical echelons above him. For example, the Trial Chamber found that the Accused had "full authority over all S-21 staff,"[85] which numbered 2,327 persons in March 1977,[86] and that he "ran S-21 along hierarchical lines and established reporting systems at all levels to ensure that his orders were carried out immediately and precisely."[87] The Trial Chamber further found that the Accused reported directly to members of the Standing Committee[88] and that there was evidence that the Accused's views with respect to who should be arrested "were sought and acted upon by his superiors."[89] The Trial Chamber also noted that the Accused had "significant influence with regard to the arrest of S-21 staff."[90]

41. The Trial Chamber also made findings with respect to the stability and permanence of the Accused's position over the course of more than three years, which further demonstrates the reasonableness of its finding that the Accused was one of "those who were most responsible." The Trial Chamber noted that the Accused admitted that SON Sen appointed him as deputy in charge of the interrogation unit at S-21 in August 1975[91] and that he became Chairman of S-21 by March 1976[92] and oversaw S-21 through 7 January 1979.[93]

42. The Trial Chamber's conclusion that the Accused fell into the category of one of "those who were most responsible" is also consistent with international criminal jurisprudence where tribunals have interpreted language designed to restrict the scope of international prosecution.

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80 Case 001 Judgement, para. 169.
81 Case 001 Judgement, para. 597.
82 Case 001 Judgement, para. 597.
83 Case 001 Judgement, para. 605.
84 Case 001 Judgement, para. 597.
85 Case 001 Judgement, para. 132.
86 Case 001 Judgement, para. 200. The Accused confirmed this number. *Id.*
87 Case 001 Judgement, para. 144.
88 Case 001 Judgement, paras. 131, 328.
89 Case 001 Judgement, para. 169.
90 Case 001 Judgement, para. 171.
91 Case 001 Judgement, para. 119-120.
92 Case 001 Judgement, para. 130.
93 Case 001 Judgement, para. 203.

For example, the ICTY Referral Bench has found that the class of people covered by narrower terminology—"the most senior leaders suspected of being most responsible"[94]—is not restricted to individuals who are "architects" of the overall policy which forms the basis of the alleged crimes.[95] Similarly, the Special Court for Sierra Leone has interpreted language that is more restrictive than Articles 1 and 2 of the ECCC Law and Agreement in a way that makes it clear that it would encompass an individual in the Accused's category. The Statute of the Special Court for Sierra Leone ("SCSL") provides for prosecution of "those who bear the greatest responsibility;"[96] this language was understood to cover a more limited group of individuals than would be covered by the phrase "persons most responsible."[97] Although the Appeals Chamber of the SCSL eventually determined that the "greatest responsibility" language was a guide to prosecutorial discretion and was not subject to judicial review,[98] an idea of the scope of the language can be seen in a prior decision of Trial Chamber II, where it interpreted the provision to cover an "array of individuals from military and political leaders *down to individuals as young as 15.*"[99]

43. It is also clear from the drafting history of the ECCC constitutive documents that the language in Articles 1 and 2 of the ECCC Law and Agreement was intended to cover persons in roles such as that held by the Appellant. In fact, the UN Group of Experts expressly referred to "officials of torture and interrogation centres such as Tuol Sleng" as an example of the type of individuals that the ECCC should be empowered to prosecute.[100]

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94 *Dragomir Milošević* Referral Decision, para. 2.

95 *Dragomir Milošević* Referral Decision, para 22.

96 *See* Special Court Agreement, article 1; Statute of the SCSL, annexed to the *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, United Nations and Sierra Leone, 16 January 2002, 2178 U.N.T.S. 138 ["SCSL Statute"], article 1.1.

97 See *Prosecutor v. Brima*, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, SCSL-04-16-T, SCSL Trial Chamber, 31 March 2006 [hereafter "*Brima* Rule 98 Decision"], para. 32 (stating that "the 'most responsible' formulation suggested by the Secretary-General of the United Nations was rejected by the Security Council, which insisted upon the [narrower] 'greatest responsibility' formulation.").

98 *See Brima* Appeals Judgement, paras. 280-284.

99 *Prosecutor v. Brima,* Judgement, SCSL-04-16-T, SCSL Trial Chamber, 20 June 2007 [hereafter "*Brima* Trial Judgement"], paras. 658-659 (emphasis added); *see also Brima* Rule 98 Decision, paras. 34-35 (stating that the "persons who bear the greatest responsibility" language is by no means limited to military and political leaders and that there may be other persons who fall into that category); *id.*, para. 38 (appearing to suggest that an individual who is "implicated in serious crimes" could fall within the "greatest responsibility" category).

100 UN Group of Experts report, para. 109. This position is also consistent with H.E. Eng Chhay Eang's comments during the 4-5 October 2004 legislative debates, which assume that certain security guards at Tuol Sleng would be among those that fall within the jurisdiction of the ECCC; presumably, it was considered even more obvious that the "most responsible" language in the ECCC Law would encompass the head of Tuol Sleng. *See* 2004 National Assembly Debate, pp. 28-29.

44. Furthermore, although the Appellant asserts that he cannot be considered one of "those most responsible" since other former prison heads have not been prosecuted,[101] this claim is unfounded. As the Trial Chamber recognized, the ECCC Agreement and the ECCC Law impose no obligation to try all potential perpetrators of crimes falling within its jurisdiction.[102] Like any other international or domestic prosecutor, the Co-Prosecutors at the ECCC are expected to make a selection as to which suspects to prosecute on the basis of a preliminary examination of the available facts.[103] The exercise of prosecutorial discretion is not a mechanical exercise; rather, it requires the weighing of relevant factors, such as the quantity and quality of evidence available, the level of culpability of the offender, the gravity of crimes, and the likelihood of detaining the offender.[104]

45. Moreover, the Appellant's invocation of Article 31 of the Cambodian Constitution provides no support for his position.[105] The concept of equality before the law—as is evidenced by the text of Article 31—refers to the notion that all individuals are subject to the same laws regardless of their race, wealth, gender, or other status classification.[106] This principle guards against selective prosecution on the basis of impermissible discriminatory motives, but it

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101 *See* Defence Appeal Brief, para. 23.

102 Case 001 Judgement, para. 24. The ECCC Law states that the ECCC has the "power" to bring to trial all suspects who committed crimes falling within the jurisdiction of the court; importantly, however, it does not state that the ECCC has the "obligation" to do so. *See* ECCC Law, articles 3 new-8.

103 The principle of prosecutorial discretion is embodied in the constitutive documents and rules of the ECCC. *See, e.g.* ECCC Law, article 16 ("All indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors [...] who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers"); ECCC Agreement, article 6 (stating that the Co-Prosecutors are "responsible for the conduct of the prosecutions" and that they "shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source"); Rule 49(1) ("Prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint."); Rule 50(1) ("The Co-Prosecutors may conduct preliminary investigations . . . to identify Suspects and potential witnesses."); Rule 55(2) (stating that the Co-Investigating Judges shall only investigate the facts set out in the Co-Prosecutors' Introductory or Supplementary Submission); Rule 55(4) (stating that the Co-Investigating Judges can only charge persons not named in the Introductory or Supplementary Submission after seeking the advice of the Co-Prosecutors). *See also* 2004 National Assembly Debate (H.E. Sok An), p. 31 (indicating that the selection of suspects to be prosecuted is "the task of the Co-Prosecutors").

104 *See generally* John Ralston and Sarah Finnin, *Investigating International Crimes: A Review of International Law Enforcement Strategies, in* DAVID A. BLUMENTHAL, TIMOTHY L.H. MCCORMACK, THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OR INSTITUTIONALISED VIOLENCE? (2008), p. 50 (discussing some of the criteria used by prosecutors to guide them in the exercise of their discretion). *See also id.*, p. 49 (noting that "[t]he combination of the international system's particular capacity limitations and its commitment to individual criminal responsibility . . . means that international prosecutors must, as a matter of necessity, be highly selective in committing resources to investigating and prosecuting particular crimes. . . [they], like their domestic counterparts, must develop strategies for focusing their resources on prosecutions they consider to be the most important").

105 *See* Defence Appeal Brief, para. 39.

106 Article 31 of the Cambodian Constitution provides, in relevant part, that: "Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status." Constitution of the Kingdom of Cambodia, article 31.

does not mean that an individual can only be prosecuted if all others who committed the same type of crimes are also prosecuted.[107]

46. In any case, while the Appellant attempts to cast himself as just one of many security center leaders,[108] the evidence adduced at trial does not support this conclusion. Indeed, the same expert that the Appellant relies upon in the Defence Appeal[109] also testified that S-21 was "unique among all of the security offices of Democratic Kampuchea" because (1) it was the security office designated to smash people at the centre echelon, including the highest ranking individuals of the Communist Party of Kampuchea; (2) it was the only security office that was authorized to detain, torture and execute individuals from everywhere in Cambodia; and (3) it was in a category all by itself in terms of the size of its staff as compared to other security offices.[110] Similarly, this expert testified that he believed that the Appellant was different from the chairmen of other security offices because (1) he alone had a nationwide area of operations, (2) he alone reported to the very highest levels of leadership in the CPK on a daily and often personal basis, and (3) because he was in charge of a security office which had a physical size of between 50-200 times larger than all other security offices.[111]

47. Thus, for all the aforementioned reasons, the Co-Prosecutors submit that there is no error in the Trial Chamber's exercise of personal jurisdiction over the Appellant.

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107 *See* Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. Crim. Int'l Just. 145, 159-160 (2005) (describing the strict standard for establishing that a particular prosecution reflects an abuse of prosecutorial discretion and explaining that "merely establishing that similarly situated persons are not being prosecuted" does not demonstrate a violation of the principle of equality before the law). The Appellant's citation of article 14(1) of the ICCPR at para. 65 of the Defence Appeal is similarly inapposite. *See* United Nations Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), section II (making no mention of any conflict between the concept of prosecutorial discretion and the Article 14 guarantee of "equality before courts and tribunals" and interpreting that phrase as ensuring [1] that all individuals have equal access to courts without discrimination; [2] that all criminal defendants are prosecuted before a competent, independent and impartial tribunal established by law; and [3] that all individuals have the same procedural rights unless distinctions are based on law and can be justified on objective and reasonable grounds).

108 See Defence Appeal Brief, paras. 21, 25.

109 See, e.g. Defence Appeal Brief, paras. 66, 71, 72-86 (citing the expert report of Mr. Craig Etcheson).

110 Trial Transcript, 27 May 2009, Testimony of Craig Etcheson, T.69-71. See also id., p. 74 (stating that S-21 was in many respects unique among security offices because "of its unique function and the very high priority placed upon it by the top leaders of the revolution"); id., p. 75 ("S-21 was the only security office of the central government."); Trial Transcript, 28 May 2009, Testimony of Craig Etcheson, T.15 ("The interrogation and confession-producing process at S-21 was far more elaborate, detailed, and rigorous than at any other security office of which I am aware.").

111 Trial Transcript, 28 May 2009, Testimony of Craig Etcheson, T.46-47. The Defence's own expert, while maintaining that S-21 was not hierarchically superior to other security centers, conceded that one unique characteristic of S-21 was that it received people from all over the country who "had been sent there by the Standing Committee of the Central Committee." Trial Transcript, 14 September 2009, Testimony of Raoul Marc Jenner, T.83, 94. *See also* Trial Transcript, 6 August 2009, Testimony of David Chandler, T.13-14 (stating that the available information indicates that S-21 was distinct among security centers in that other prisons did not have the same volume of documentation, did not routinely imprison or interrogate the most high-ranking individuals, and were not administered directly by senior leadership).

III. RESPONSE TO GROUND 2: THE TRIAL CHAMBER DID NOT ERR "CONCERNING CONVICTION."

48. As Ground 2 of their Defence Appeal, the Co-Lawyers allege an "error concerning conviction."[112] 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."[113] 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."[114]

49. In response, the Co-Prosecutors submit that (1) Ground 2 of the Defence Appeal is not a separate ground of appeal and should be rejected for the same reasons as Ground 1 of the Defence Appeal; and (2) alternatively, contrary to the Appellant's claim, there is no indication that the Trial Chamber erred by failing to consider "exculpatory" evidence.

a. GROUND 2 OF THE DEFENCE APPEAL IS NOT A SEPARATE GROUND OF APPEAL AND SHOULD BE REJECTED FOR THE SAME REASONS AS GROUND 1 OF THE DEFENCE APPEAL.

50. The Appellant fails to show how "Ground 1" and "Ground 2" of the Defence Appeal constitute separate grounds of appeal. Although Ground 1 is described as alleging an "error concerning personal jurisdiction" and Ground 2 is fashioned to allege an "error concerning conviction," the arguments advanced under the rubric of both grounds are designed to demonstrate the same error—namely, that the Trial Chamber erred in exercising personal jurisdiction over the Appellant.

51. Indeed, the Appellant does not claim that the Trial Chamber would have acquitted him on the merits if it had properly considered certain evidence. Rather, he charges that the Trial Chamber would not have found personal jurisdiction over him after consideration of such evidence.[115] In other words, the Appellant alleges an error in the Chamber's determination of

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112 Defence Appeal Brief, p. 19 (heading). As mentioned in Section I, the characterization of Ground 2 in the Defence Appeal Brief differs from its characterization in the Notice of Appeal, where it was presented as an "error concerning the determination of a single prison sentence of 35 years." *See* Defence Notice of Appeal, p. 2 (heading).

113 Defence Appeal Brief, para. 66.

114 Defence Appeal Brief, para. 69.

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"); *id.*, para. 69 (alleging that the Trial

personal jurisdiction, which is the same error alleged in Ground 1 of the Defence Appeal. Thus, the Co-Prosecutors submit that Ground 2 cannot be seen as a discrete ground of appeal and is best considered a sub-argument falling under Ground 1 of the Appeal. Accordingly, the Co-Prosecutors' arguments in support of the rejection of Ground 1 of the Defence Appeal similarly apply to Ground 2.

52. In any case, regardless of how it is classified, Ground 2 of the Defence Appeal is inadmissible since, as discussed above, the Appellant has waived his right to contest the exercise of personal jurisdiction over him; logically, such a waiver encompasses any errors that purportedly led to the improper exercise of personal jurisdiction over him. This is so because the Supreme Court Chamber only has authority to examine errors of law that *invalidate* the judgement.[116]

b. THE TRIAL CHAMBER DID NOT ERR BY FAILING TO CONSIDER "EXCULPATORY" EVIDENCE.

53. To the extent that Ground 2 is distinguishable from Ground 1, the Co-Prosecutors submit that the Appellant has failed to demonstrate an error on the part of the Trial Chamber. Contrary to the Appellant's assertions, there is no indication that the Trial Chamber failed to consider the relevant evidence in making its finding as to personal jurisdiction. Indeed, the Trial Chamber's discussion of the Appellant's responsibility throughout the Judgement—and the evidence cited therein—indicates precisely the opposite.

54. The fundamental flaw in the Appellant's reasoning is that he erroneously assumes that if a document was not expressly mentioned in the Judgement—or was not mentioned in the precise section at issue—then it must not have been considered.[117] Such an inference would be dubious in any criminal system, but is especially illogical here in light of the exceptional size of Case 001 and the fact that hundreds of documents or pages of trial transcript could be cited for a multitude of points. Other international tribunals applying the same standard of appellate review have explained that while a trial chamber has the obligation to provide a reasoned opinion, this does not mean that the trial chamber must articulate "every step of its

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Chamber "failed to examine the exculpatory evidence about the entire personal jurisdiction presented by the Defence"); *id.*, 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").

116 See Rules, rule 104. See also Rutaganda Appeals Judgement, para. 20 ("An alleged legal error that does not have the potential to cause the impugned decision to be reversed or revised is, in principle, not legal and may thus be dismissed as such.").

117 See, e.g. Defence Appeal Brief, paras. 69, 71 (alleging that the Trial Chamber failed to examine "exculpatory" evidence presented by the Defence about personal jurisdiction).

reasoning or cite to every piece of evidence it considered."[118] The ICTR Appeals Chamber has held that "[i]t is to be presumed [on appeal] that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence."[119] The same Appeals Chamber also confirmed that the Appellant bears the burden of proving that the Trial Chamber did in fact disregard a piece of evidence.[120]

55. The Appellant does not explain how it can be discerned that the Trial Chamber failed to examine the evidence before it with respect to personal jurisdiction. The mere fact that the Trial Chamber disagreed with the Appellant about personal jurisdiction does not mean it erred in considering the evidence. Indeed, as the ICTY and ICTR Appeals Chamber have consistently recognized, "[a] party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber."[121]

56. Furthermore, even though it is not required that the Trial Chamber discuss every piece of evidence, it is evident from the Judgement that 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.[122] In fact, in its Judgement, Trial Chamber expressly referenced at least two of the documents cited by the Appellant.[123] In particular, the Report by Craig C. Etcheson, upon which the Appellant heavily relies, was cited at numerous points throughout the Judgement.[124] The Trial Chamber also explicitly referenced the 30 March 1976 directive

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118 *Prosecutor v. Seromba*, Judgement, ICTR-2001-66-A, ICTR Appeals Chamber, 12 March 2008, para. 94. *See also Ndindabahizi* Appeals Judgement, para. 75; *Kvočka* Appeals Judgement, para. 23.

119 *Ndindabahizi* Appeals Judgement, para. 75. *See also Niyitegeka v. Prosecutor*, Judgement, ICTR-96-14-A, ICTR Appeals Chamber, 9 July 2004, para. 124 (stating that "a Trial Chamber need not articulate in its Judgement every factor it considered in reaching a particular finding and the fact that the Chamber did not discuss [a] matter in the Judgement does not constitute an error").

120 *Rutuganda* Appeals Judgement, para. 536 ("Where evidence is not referred to in the Judgement, it is for the Appellant to show that the Trial Chamber indeed disregarded it.").

121 *Muvunyi* Appeals Judgement, para. 11. *See also Nahimana* Appeals Judgement, para. 395 ("A simple dismissal of . . . objections cannot amount to proof of an error invalidating the Trial Chamber's decision or of prejudice affecting the preparation of the Appellant's defence.").

122 Defence Appeal Brief, para. 72 (heading).

123 The ICTY Appeals Chamber has stated that "reference to a certain portion of the witness's testimony is prima facie evidence that the Trial Chamber was cognisant of the whole testimony and took it into account." See Prosecutor v. Miodrag Jokić, Judgement on Sentencing Appeal, ICTY Appeals Chamber, IT-01-42/1-A, 30 August 2005, para. 73. The same logic should apply where the issue is whether a portion of a particular document was considered.

124 *See* Case 001 Judgement, paras. 85-87, 90-92, 94-96, 99, 103, 105-106, 109.

mentioned by the Appellant.[125] Furthermore, the main points the Appellant seeks to highlight—namely, the fact that the Accused was not part of the highest echelon of the CPK hierarchy and that the Appellant carried out the orders of his superiors[126]—were woven into the Trial Chamber's analysis of the Appellant's culpability.[127]

IV. CONCLUSION

57. Therefore, for all the reasons discussed in this Response, the Co-Prosecutors request that the Supreme Court Chamber dismiss the Defence Appeal in its entirety.

Respectfully submitted,

Date	Name	Place	Signature
20 December 2010	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

125 Case 001 Judgement, para. 102. While the Trial Chamber did not cite the 2 April 2008 interview of the Accused, which is cited in the Appeal at para. 86, it expressly noted that it had assessed the probative value of the Accused's statements. *See* Case 001 Judgement, para. 50.

126 The Appellant also raises the issue of his level of culpability as compared to other prison leaders. For example, he suggests that his crimes were involuntary while the acts of other prison leaders were voluntary. *See* Defence Appeal Brief, para. 25. Even if the question of the comparative volition of Khmer Rouge prison leaders was relevant, which it is not, the Appellant fails to cite any authority to support his claim. Moreover, even if one were to assume the veracity of the Appellant's unsupported statement—at para. 23 of the Defence Appeal—that "the number of prisoners who died at S-21 is much lower than that in other prisons," the suggestion that S-21 was an ordinary prison—just one of many in Cambodia during the Khmer Rouge regime—is misleading and inaccurate. *See supra*, section II(C)(ii), paras. 38, 46.

127 *See, e.g.* Case 001 Judgement, paras. 168-169 (recognizing that the Accused's superiors generally made the decisions regarding whom to arrest and send to S-21 but also recognizing that there is evidence that indicates that the Accused's views were sought and acted upon by his superiors); para. 328 (recognizing that the Accused reported to a higher level of CPK leadership, i.e. members of the Standing Committee). The fact that these points were not specifically mentioned in the personal jurisdiction section of the Judgement cannot on its own demonstrate on an error on the part of the Trial Chamber.