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Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

Supreme Court Chamber

TRANSCRIPT OF APPEAL PROCEEDINGS - KAING GUEK EAV "DUCH"

PUBLIC

Case File N° 001/18-07-2007-ECCC/SC

28 March 2011, 0900H

Proceedings



Before the Judges: KONG Srim, Presiding
Motoo NOGUCHI
SOM Sereyvuth
Agnieszka KLONOWIECKA-MILART
SIN Rith
Chandra Nihal JAYASINGHE
YA Narin
MONG Monichariya (Reserve)
Florence MUMBA (Reserve)

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CHEA Leang
Andrew CAYLEY

The Accused: KAING Guek Eav

Lawyer for the Accused:
KAR Savuth
KANG Ritheary

*Extraordinary Chambers in the Courts of Cambodia
Supreme Court Chamber - Appeal*

*Case No. 001/18-07-2007-ECCC/SC
KAING GUEK EAV
28/3/2011*

List of Speakers:

Language used unless specified otherwise in the transcript

| Speaker | Language |
|--------------------------------------|-----------------|
| THE ACCUSED (Kaing Guek Eav) | Khmer |
| MR. CAYLEY | English |
| MS. CHEA LEANG | Khmer |
| MS. JACQUIN | French |
| JUDGE JAYASINGHE | English |
| MR. KANG Ritheary | Khmer |
| MR. KAR Savuth | Khmer |
| MR. KIM MENGKHY | Khmer |
| JUDGE MILART | English |
| JUDGE NOGUCHI | English |
| THE PRESIDENT (KONG Srim, Presiding) | Khmer |
| JUDGE SOM Sereyvuth | Khmer |

Extraordinary Chambers in the Courts of Cambodia
Supreme Court Chamber - Appeal

Case No. 001/18-07-2007-ECCC/SC
KAING GUEK EAV
28/3/2011

1

1 (Judges enter courtroom)

2 MR. PRESIDENT:

3 Please be seated. In the name of the United Nations and the
4 Cambodian people, the Supreme Court Chamber of the Extraordinary
5 Chambers in the Courts of Cambodia declares open an appeal
6 hearing against the Trial Judgment dated 27 July 2010 in case
7 file number 001, dated 18 July 2007, against the accused, Kaing
8 Guek Eav alias Duch.

9 The Bench is composed of I, Kong Srim, the President, Judge Motoo
10 Noguchi, Judge Som Sereyvuth, Judge Agnieszka Klonowiecka-Milart,
11 Judge Sin Rith, Judge Chandra Nihal Jayasinghe, Judge Ya Narin,
12 reserve Judge Mong Monichariya and reserve Judge Florence Mumba.
13 The Greffiers are Mr. Sea Mao, Mr. Christopher Mark Ryan, and Mr.
14 Phan Thoeun.

15 The Greffier, could you please report the presence of the parties
16 and lawyers.

17 MR. SEA MAO:

18 Good morning, Mr. President. All parties are present. For the
19 Co-Prosecutors there are Ms. Chea Leang and Mr. Andrew Cayley.
20 On the accused, there are co-defence counsel, Mr. Kar Savuth and
21 Mr. Kang Ritheary. And the accused himself, Kaing Guek Eav alias
22 Duch.

23 The counsel for civil party group 1, Ms. Ty Srinna, Mr. Karim
24 Khan, and Mr. Alain Werner is absent. For group 2, Ms. Silke
25 Studzinsky, Mr. Hong Kimsuon, and Ms. Moch Sovannary. Counsel

*Extraordinary Chambers in the Courts of Cambodia
Supreme Court Chamber - Appeal*

*Case No. 001/18-07-2007-ECCC/SC
KAING GUEK EAV
28/3/2011*

2

1 for civil party group 3, and Mr. Kim Mengkhy. And Ms. Elizabeth
2 Rabesandratana, she is in place of Martine Jacquin for civil
3 party group 3. And Mr. Philippe Cannone is also counsel for
4 civil party group 3.

5 Thank you, Mr. President.

6 [9.05.23]

7 MR. PRESIDENT:

8 The Judgment of the Trial Chamber against the accused Kaing Guek
9 Eav alias Duch was pronounced on the 26th July 2010. The trial
10 started and ended on the 28th November 2009, and the Trial
11 Chamber issued its Judgment on the 26th of July 2010. The
12 Chamber finds Kaing Guek Eav guilty pursuant to Articles 5, 6 and
13 29(new) of the ECCC law on crimes against humanity, persecution
14 on political grounds, subsuming the crimes against humanity of
15 extermination, encompassing murder, enslavement, imprisonment,
16 torture, including one incidence of rape, and other inhumane
17 acts, and grave breaches of the Geneva Conventions of 1949,
18 willful killing, torture and inhumane treatment, willfully
19 causing great suffering or serious injury to body or health,
20 willfully depriving a prisoner of war or civilian of the rights
21 of a fair and regular trial, and unlawful confinement of a
22 civilian.

23 [9.07.28]

24 These crimes were committed in Phnom Penh and throughout the
25 territory of Cambodia from 17 April 1975 to 6th January 1979.

3

1 The Chamber sentences Kaing Guek Eav to a single sentence of 35
2 years of imprisonment, with a reduction of five years due to the
3 violation of Kaing Guek Eav's rights occasioned by his illegal
4 detention by the Cambodian military court between 10 May 1999 and
5 30 July 2007.

6 The accused is entitled to credit for the entirety of his time
7 spent in detention, that is, from 10 May 1999 to 30 July 2007
8 under the authority of the Cambodia military court, and from 31
9 July 2007 until the Judgment becomes final, under the authority
10 of the ECCC. For the national crimes, the Judgment does not
11 assess the national crimes. In regards to Article 501, 506 of
12 the 1956 Penal Code, and Article 3(new) of the ECCC Law.

13 Reparations. All civil parties named under paragraph 645 to 650
14 have suffered harm as a direct consequence of the crimes for
15 which Kaing Guek Eav has been convicted. The Chamber shall
16 compile all statements of apology and acknowledgements of
17 responsibility made by Kaing Guek Eav during the course of the
18 trial. This compilation shall be posted on the ECCC official
19 website within 14 days of the date of this Judgment becoming
20 final. It rejects all other civil party claims.

21 Detention. The Trial Chamber convicts Kaing Guek Eav in
22 detention until the Judgment becomes final, or until the Supreme
23 Court Chamber decides on the appeal.

24 Civil party status. 24 civil party applications listed in
25 paragraphs 647, 648 and 649 have been rejected by the Trial

*Extraordinary Chambers in the Courts of Cambodia
Supreme Court Chamber - Appeal*

*Case No. 001/18-07-2007-ECCC/SC
KAING GUEK EAV
28/3/2011*

4

1 Chamber. The Judgment was pronounced in public on 26 July 2010
2 and subject to appeal, as set out in the Internal Rules of the
3 ECCC.
4 The Appeal. The Supreme Court Chamber was seized of the appeal
5 against the Judgment by the following parties. The
6 Co-Prosecutors filed notice of appeal on 16 August 2010 on the
7 error of law made by the trial Judgment, including the discretion
8 and the cumulative conviction. The Co-Prosecutors filed the
9 notice of appeal and the appeal in October 2010 and in Khmer on
10 18 October 2010. There is no response from other concerned
11 parties to filing of the Co-Prosecutors.
12 The co-defence lawyers filed their notice of appeal on 24 August
13 2010 on the error of law that the Judgment cannot be accepted, in
14 particular on the personal jurisdiction and the single sentence
15 of 35 years imprisonment. The appeal was made on 18 November
16 2010 and with the amendment subsequently.
17 The co-lawyers for civil party group 3 filed their response in
18 December 2010, and then the Co-Prosecutors filed their
19 observations on the appeal, the corrected appeal, dated 16 March
20 2011. The co-lawyers to the accused replied to the response by
21 the Co-Prosecutors on 14 January 2011 in Khmer and in English on
22 17 February 2011.
23 Co-lawyers for civil party group 1 filed their immediate appeal
24 on 16 September 2010 against the rejection of civil party status.
25 This immediate appeal, dated 30 September 2010, of the Supreme

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1 Court Chamber, the lawyers for the civil party group 1 filed
2 additional brief on 18 October 2010. There is no response from
3 other parties to that filing.
4 The co-lawyers for civil party group 2 filed their notice of
5 appeal on 24 August 2010 and on 6 September 2010 against the
6 Judgment in regards to the rejection of 5 civil party
7 applications. And on the issue of reparations they filed the
8 appeal on 25 October 2010 and on 5 November 2010 in English, in
9 Khmer on 22 October 2010. There is no response by other parties
10 to these filings.
11 The co-lawyers for civil party group 3 filed their notice of
12 appeal on 20 August 2010 against the rejection of six civil party
13 applications, and on the decision on reparations, and they filed
14 their appeal in October 2010 in English and in the Khmer language
15 on 6 October 2010. There is no response by other parties.
16 [9.16.00]
17 On the appointment of the rapporteur Judges, according to Rule
18 108, the Supreme Court Chamber's President appoints rapporteur
19 Judges to review the appeals into four categories. One, on the
20 personal jurisdiction, by Judge Som Sereyvuth and Judge
21 Jayasinghe. And on the issue of crimes against humanity by Judge
22 Sin Rith and Judge Milart. On the issue of the sentencing, Judge
23 Sin Rith and Judge Noguchi. And on the status of civil parties
24 and reparations, Judge Ya Narin and Judge Milart.
25 On the additional material and evidence, based on the request by

Extraordinary Chambers in the Courts of Cambodia
Supreme Court Chamber - Appeal

Case No. 001/18-07-2007-ECCC/SC
KAING GUEK EAV
28/3/2011

6

1 the lawyers for the civil parties group 1, 2 and 3, they request
2 to file additional material to the Supreme Court Chamber, and on
3 25 March 2011 we accepted to receive those new evidence and
4 materials. The Supreme Court Chamber would like to remind all
5 parties that during their oral submission they need to bring to
6 light those new evidence.

7 [9.18.25]

8 Now we will open the floor for the first section of the Appeal,
9 that is in regards to personal jurisdiction, and I would like now
10 to give the floor now to the rapporteur Judge.

11 JUDGE SOM SEREYVUTH:

12 With the agreement from my co-rapporteur, I would like to now
13 present the personal jurisdiction section of the appeal.

14 The Trial Chamber observed that no preliminary objection to
15 personal jurisdiction had been raised by the Defence at the
16 initial hearing, and the Trial Chamber rejected the later
17 submissions on personal jurisdiction by the Defence as belated.
18 The Trial Chamber addressed the issue of personal jurisdiction on
19 its own motion pursuant to Internal Rule 98(3) and concluded that
20 the accused was among "those who were most responsible." The
21 Trial Chamber considered that there was no need to examine the
22 issue of whether the accused was also a senior leader of
23 Democratic Kampuchea.

24 Submissions by Appellants. The Defence appeals against the Trial
25 Judgment on the ground that the Trial Chamber erred in fact and

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1 in law by deciding that the accused falls within the personal
2 jurisdiction of the ECCC. The following are the Defence's
3 supporting arguments in the accused's Appeal Brief:
4 The Trial Chamber erred in rejecting the Defence's jurisdictional
5 challenge as untimely under Internal Rule 89; The Trial Chamber
6 erred in construing the personal jurisdiction of the ECCC as two
7 separate and distinct categories of persons ('senior leaders' and
8 'those who were most responsible'), and since the Appellant was
9 not a senior leader of Democratic Kampuchea he therefore cannot
10 be among those who were most responsible; and The Trial Chamber
11 erred by failing to consider exculpatory evidence.

12 [9.21.24]

13 The Defence requests that the Supreme Court Chamber order the
14 release of the accused and find that the detention of Kaing Guek
15 Eav has been a form of protection accorded to a witness.

16 The Co-Prosecutors respond that Defence arguments on personal
17 jurisdiction that fail to meet minimum pleading requirements
18 should be disregarded by the Supreme Court Chamber and also
19 submit that under Internal Rule 89, the Defence was required to
20 raise any objections to jurisdiction in the initial hearing. Not
21 only did the Defence fail to do this, but the Defence also
22 indicated that it did not intend to challenge personal
23 jurisdiction.

24 [9.22.30]

25 The Trial Chamber correctly constructed the personal jurisdiction

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1 of the ECCC as two distinct categories of persons 'senior
2 leaders' and 'those who were most responsible'; and the Trial
3 Chamber correctly determined that the accused was among those who
4 were most responsible.

5 In its written Reply to the Co-Prosecutors' Response, the Defence
6 submits that the Co-Prosecutors rely too heavily on the
7 jurisprudence of international courts. International law should
8 only be used at the ECCC in certain circumstances that are not
9 present in this case. As such, international jurisprudence
10 cannot be used to place the accused within the category of those
11 who were most responsible, and the Co-Prosecutors misinterpreted
12 Internal Rule 89 in that personal jurisdiction is challenged on
13 the basis of evidence adduced during trial.

14 [9.23.45]

15 Civil party group 3 filed a written Response to the accused's
16 Appeal Brief, requesting the Chamber to reject the defence
17 arguments as manifestly unfounded. Thank you.

18 [9.24.13]

19 MR. PRESIDENT:

20 The security official, can you bring the accused to the dock?

21 (The accused is taken to the dock)

22 MR. PRESIDENT:

23 Before the accused is invited to make his observations regarding
24 the appeal, in this proceeding you are innocent until found
25 guilty. You have the right to be informed of the charges against

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1 you, as I just read out, and you have the right to legal
2 representative of your choosing. And during each stage of the
3 proceedings you can exercise the right to remain silent. And you
4 are invited to make a brief observation for the appeal, and you
5 have five minutes. So please use the time appropriately.

6 [9.26.25]

7 THE ACCUSED:

8 Good morning, Mr. President, good morning Your Honours.

9 Regarding the appeal, my main point in the appeal is on personal
10 jurisdiction. So this is purely a legal matter. And I give the
11 authority to my legal representatives to act on my behalf, and
12 that is the stand that I am maintaining. Thank you.

13 MR. PRESIDENT:

14 Thank you for your observation. We just observe that the accused
15 maintains his position regarding the points raised in the appeal,
16 and he gives the authority to the co-lawyers to act on his
17 behalf. You may now return to your seat.

18 (The accused leaves the dock)

19 [9.28.00]

20 MR. PRESIDENT:

21 The defence counsel is now given the floor to make his oral
22 submission in relation to the personal jurisdiction matter. The
23 floor is his.

24 MR. KAR SAVUTH:

25 Good morning, Mr. President. Good morning, Your Honours,

*Extraordinary Chambers in the Courts of Cambodia
Supreme Court Chamber - Appeal*

*Case No. 001/18-07-2007-ECCC/SC
KAING GUEK EAV
28/3/2011*

10

1 national and international Judges, and good morning to everyone
2 in and outside this courtroom. My name is Kar Savuth. I am
3 representing Kaing Guek Eav alias Duch, the accused, who has
4 found, in the Judgment of the Trial Chamber, guilty, and
5 sentenced to 35 years of imprisonment regarding the crimes
6 against humanity and grave breaches of the Geneva Convention of
7 12 August 1949.

8 According to Articles 5, 6 and 29(new) of the ECCC Law, Your
9 Honours, under the agreement between the United Nations and the
10 Royal Government of Cambodia, the Extraordinary Chambers in the
11 Courts of Cambodia has been established for the purpose of
12 prosecuting those people who have committed crimes against
13 humanity, war crimes, genocide and grave breaches of the Geneva
14 Convention of 12 August 1949.

15 [9.30.10]

16 Under the same agreement, both parties have a shared and common
17 goal to find justice for Cambodian people and at the same time to
18 bring the national reconciliation and peace to Cambodian people
19 and at the same time respect the sovereign of Cambodia. Under
20 the agreement between the United Nations and the Royal Government
21 of Cambodia Articles 1 and 2(new) of the ECCC Law, the power has
22 been vested with the Chamber and that the jurisdictions matter
23 have already been well said first.

24 The ECCC has jurisdiction to only bring to trial in relation to
25 crimes against humanity, war crimes, genocide, grave breaches of

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1 the Geneva Convention of 12 August 1949. Two, the ECCC has the
2 power to prosecute only the crimes that were committed between 17
3 April 1975 through 6 January 1979. Three, the ECCC has the power
4 to prosecute only crimes that have been committed within the
5 territory of Cambodia. Four, the ECCC has the power to prosecute
6 only the senior leaders of the Democratic Kampuchea, and those
7 who were most responsible for the crimes.

8 [9.32.35]

9 These are the jurisdictional conditions the Supreme Court Chamber
10 shall reconsider. As a matter of fact, the jurisdiction
11 comprises of, first, personal jurisdiction, territorial
12 jurisdiction, three, temporal jurisdiction, and four, material or
13 subject matter jurisdiction. If the Chamber has to (indistinct)
14 admission by ending the culture of impunity, it shall consider
15 carefully the crimes committed, and also the personal
16 characteristics of the accused.

17 The scope of the jurisdiction has to be well determined by the
18 criminal court, because this is very important, otherwise it
19 would infringe the rule of law or the legality of the Chamber
20 itself. Regarding the temporal jurisdiction, and the territorial
21 jurisdiction, and subject matter jurisdiction, and at the same
22 time, determining the crimes committed are very important before
23 a trial court or a court of law. This matter of personal
24 jurisdiction may not include individuals or some key individuals
25 who do not fall within the jurisdiction of the court.

12

1 The material or subject matter jurisdiction will guide the Court
2 in relation to the crimes or the offences committed by the
3 accused person, and that the Chamber shall make a decision to
4 identify whether such crimes are international or domestic
5 crimes, or just very simple or ordinary crimes, domestically. In
6 order to achieve this purpose, and to eliminate impunity, the
7 interpretation of jurisdiction has to be rather broad and well
8 considered, and it shall cover both geographical features of the
9 locations, the offences themselves, and the people concerned.

10 [9.35.32]

11 However, according to our study, other tribunals have not
12 maintained their position according to its wisdom and conscience.

13 Other hybrid tribunals have compromised a lot during the course
14 of admission when it comes to these matters. According to Rule
15 11bis and jurisprudence of ICTY, the term 'senior leaders' have
16 been very well defined. They refer to those people whose roles
17 and responsibilities were in the administrative hierarchy,
18 according to the law, de facto and de jour.

19 And they were within the positions that could be considered as
20 the most senior people, not the middle level people. Duch
21 himself hold the very lowest rank at the -- during his time.

22 According to the same jurisprudence at the ICTY, the
23 identification of the roles, for example these people who hold
24 position in the Standing Committee or senior positions, and
25 political positions. For example.

13

1 According to the negotiation with the international components,
2 only after such negotiation that people positions could have been
3 verified. For example, if the accused have negotiated with
4 international counterparts that the Chamber may find him
5 responsible or be in the position of the very senior ones.
6 According to the decision, resolution 1531, the Security Council
7 identified the criteria when it define the senior positions. So
8 who would be in the senior positions?
9 [9.38.35]
10 Any order issued against a person must be issued against someone
11 who was the senior leader of the regime. According to the
12 personal jurisdiction by the Sierra Leone court, it said this
13 clearly that individuals who have committed crimes, grave
14 breaches against the humanitarian law, and that the Sierra Leone
15 law also include, or covers individuals who have committed crimes
16 which have threatened the construction and the peace
17 implementation within Sierra Leone.
18 The personal jurisdiction of the ECCC has been referred to, or
19 has been stemming from the other important sources, the very
20 controversial sources where the international bodies and
21 Cambodian government had strong arguments, and at the beginning
22 when Cambodian government appealed the United Nations to help
23 establish the court to prosecute only the senior leaders of the
24 Khmer Rouge, and at the same time the United Nations consequently
25 agreed with such determination by the Cambodian government so

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1 that such agreement could be reached.

2 [9.40.40]

3 Ultimately, this Chamber has been established. The personal
4 jurisdiction of the ECCC has its limitation to strictly prosecute
5 only senior leaders of the Democratic Kampuchea regime, and those
6 who were most responsible for the crimes within its temporal
7 jurisdiction.

8 Even there has been request for a broader interpretation of the
9 jurisdiction, so that the Co-Prosecutors could really have bigger
10 margin to maneuver when they would like to interpret this
11 jurisdiction, however such request was bluntly rejected by the
12 Cambodian government.

13 Article 6.3 of the ECCC restricts the scope of investigation of
14 the Co-Investigating Judges and the Co-Prosecutors to only
15 investigate crimes against senior leaders of the Khmer Rouge
16 regime, and those who were most responsible for the crimes under
17 the ECCC law.

18 [9.42.24]

19 Therefore, the law bind the OCP, the Co-Prosecutors' discretion,
20 and the discretion of the Co-Investigating Judges. These two
21 bodies have to really stick to what's said in the rule, otherwise
22 they would stray away from the law as set forth by the ECCC law.
23 During the trial proceedings before the Trial Chamber, the
24 defence counsel for the accused challenged the Court in relation
25 to the personal jurisdiction over Kaing Guek Eav alias Duch.

15

1 The defence argued that the Court had no jurisdiction over the
2 accused, and that there were ample evidence to prove that Duch
3 ahs not been bound by Articles 1 and 2 of the ECCC Law.
4 However, the Judges failed to consider such argument, and that
5 the proceedings continued until its completion.
6 Finally, the defence counsel tried again to include in our
7 closing statement to request the Judges to re-examine the
8 exculpatory evidence proving that the accused should not be bound
9 by Article 1 of the agreement between the Royal Government of
10 Cambodia and United Nations and Articles 1 and 2 of the ECCC Law.
11 [9.44.15]
12 As the result, time again, the Judges failed to review the
13 exculpatory evidence as requested by the defence counsel. On 26
14 July 2010, the Trial Chamber issued its Judgment in case file
15 001, sentencing Duch, the Chairman of S-21, which was under
16 direct control of the general staff, and the national defence
17 head Son Sen, Duch was sentenced to 35 years of imprisonment.
18 The Trial Chamber's Judgment of 26 July 2011 (sic) convicts Duch,
19 and that although he has not been falling within its
20 jurisdiction. The defence would like to maintain our position
21 that the Chamber shall review its consideration in relation to
22 the definition of the senior leaders and those who were most
23 responsible for the crimes before this Court. At the trial
24 court, the defence counsel only challenged the methods employed
25 by the Co-Prosecutors and the Co-Investigating Judges and the

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1 Trial Chamber in defining personal jurisdiction over Duch.

2 [9.46.18]

3 They tried to include Duch in their jurisdiction ambit. However,
4 the defence counsel is still convinced that Duch does not fall
5 within such jurisdiction as follows. One, error on the personal
6 jurisdiction by the Trial Chamber. Personal jurisdiction has
7 been set against the senior leaders of the Khmer Rouge and those
8 who were most responsible for the crimes and the grave breaches
9 of violence against national and international laws.

10 The agreement between the United Nations and the Royal Government
11 of Cambodia regarding the prosecution under Cambodian laws, the
12 crimes committed during the period of Democratic Kampuchea and
13 the ECCC Law do not really set clearly the senior leaders and
14 those who were most responsible for the crimes. In the agreement
15 itself, and in the ECCC Law, no such provision are found that
16 Kaing Guek Eav was the most person responsible for the crimes
17 committed.

18 [9.48.03]

19 The question is who were the senior leaders of the Democratic
20 Kampuchea, and who were those who were most responsible for the
21 crimes? According to other tribunals, the senior leaders could
22 be defined as those who have been suspected of being responsible
23 for the senior positions. It means that those people must have
24 been the senior leaders. Only when those people were holding
25 senior positions that they could really have the power to render

*Extraordinary Chambers in the Courts of Cambodia
Supreme Court Chamber - Appeal*

*Case No. 001/18-07-2007-ECCC/SC
KAING GUEK EAV
28/3/2011*

17

1 orders, or command, and that they were vested with such power
2 which was part of the criteria to define them as senior leaders.
3 Otherwise, they would not have been suspected of being the most
4 senior people, or people most responsible for the crimes. Duch
5 was the chairman of a prison, of a security centre, how could he
6 be considered as one of the person who is most responsible for
7 the crimes? I would like to draw Your Honours attention and the
8 court attention to the categories of those who were most
9 responsible for the crimes and senior leaders. I would like to
10 start from the senior leaders first.

11 [9.50.00]

12 Person who had the decision, or vested with powers to issue
13 orders or commands. We may refer you to paragraph 256 of the
14 Judgment. Anyone who ordered Duch to commit crimes shall be
15 prosecuted. Duch who implemented the orders shall not be
16 prosecuted, because he received order from the Standing Committee
17 or Party Centre, and he was of course a perpetrator, but he shall
18 not fall under the jurisdiction of the ECCC, because he received
19 orders from his superiors like the other chief of prisons. We
20 therefore would like to request that the Supreme Court Chamber
21 reconsider this.

22 The Trial Chamber concluded that Duch was the most person
23 responsible for the crimes. They did so only to make sure that
24 the proceedings were positive, however by doing so they have
25 infringed the rule of law, and also the Paris Peace Accord of

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1 1991, which states that the constitutions prohibit any crimes
2 committed in the past. This appendix 5 really grants the amnesty
3 to all the Khmer Rouge former soldiers and leaders, or cadres.
4 Article 21 of the agreement, the Paris Peace Accord, states very
5 firmly that all prisoners of war shall be released and civilians
6 who were detained have to also be released.

7 And when UNTAC came to Cambodia, these people were finally
8 released, and some of them were seen sitting at the table, the
9 negotiation table, and the Khmer Rouge was part of the party who
10 also involved in the election. This suggests that these people
11 were already pardoned, otherwise they could not be allowed to
12 take part in the election. But I would like to stress that the
13 Khmer Rouge at that time boycott the election.

14 [9.53.25]

15 So I can conclude that the law itself has already found them not
16 liable for any crimes from 1991 until today. Article 7 of the
17 Penal Code of 2007 states about the determination of criminal
18 action, and that since the law already been in favour of the
19 senior leaders of the Khmer Rouge, it means that they have
20 already been free, and from being prosecuted.

21 The Judgment of the Trial Chamber in case 001 is a sign of
22 infringement against Paris Peace Accord of 1991. And at the same
23 time it infringes Article 7 of the Criminal Procedural Code of
24 2007. Allow me to make it clear that 20 countries signed on the
25 agreement, or the accord, on 23 October 1991. It means that

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1 these 20 countries have to abide by this law, and when the Thai
2 invades -- there was a dispute between Thailand and Cambodia at
3 the border, there has been an appeal to the international
4 community to really force Thailand to respect this law.

5 [9.55.30]

6 And now, it is the same, at this tribunal, that the ECCC shall
7 also respect this rule, because when Thai does not really obey
8 this regulation, we say that Thai was illegal, and we believe
9 that this tribunal would not really follow the footsteps of
10 Thailand.

11 So I can conclude that when Duch, being implicated as the person
12 falling under personal jurisdiction of the Court, it is really
13 not acceptable, and that the Supreme Court Chamber is now vested
14 with the power to review these jurisdictional matters, and in
15 particular to define the persons those who were most responsible
16 for the crimes and senior leaders under this ECCC law.

17 [9.56.55]

18 During Duch time, during the Khmer Rouge, there was no law. It
19 was a line. The Party line was used instead of the law. There
20 was no court of law. And if there was no law, there was no
21 crime. So Duch did not really violate Geneva Convention of 1949.
22 Duch must fall outside the jurisdiction of the ECCC.

23 The defence counsel is optimistic that the Supreme Court Chamber
24 will consider the law as in the case of Fenta (Phonetic) in
25 Canada court of law, when the Supreme Court Chamber of Canada

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1 found that Sunta (Phonetic) fell outside the jurisdiction of the
2 court, and that he was released immediately.

3 Appendix 5 of the agreement states further that an individual who
4 violates, or has been violated, can appeal such a decision. Now,
5 Duch has already appealed before the Supreme Court Chamber,
6 asking this Chamber to respect his right as envisaged in Appendix
7 5 of the Paris Peace Accord of 1991.

8 [9.58.45]

9 According to Article 5 on the law on the outlawing of the
10 Democratic Kampuchea group, this states that this law allows six
11 months after its being enforced, that the Khmer Rouge leaders or
12 military groups of the Democratic Kampuchea to return or to
13 integrate to live under the administration or rule of the Royal
14 Government of Cambodia. And that they would not be punished for
15 any crimes they have committed. This standard shall be also
16 considered, however the Trial Chamber failed to do so, and this
17 really harm the Cambodian law enforce, and it's really against
18 Rule 87(1) of the Internal Rules of the ECCC.

19 Therefore for the spirit of Article 5 on the outlaw of the
20 Democratic Kampuchea group, it clearly states that there will be
21 no punishment for offences they committed. For that reason, even
22 if Duch committed any crime, the law would not punish him. Duch
23 therefore should fall outside the jurisdiction of the ECCC,
24 pursuant to Article 7 of the code of criminal procedure that is
25 the extinction of the criminal action. Because of the general

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1 pardon stipulated in that law.

2 [10.01.05]

3 According to Article 6 of the same law, for leaders of the
4 Democratic Kampuchea group, they cannot be pardoned. So, in the
5 spirit of this law, all the perpetrators, co-perpetrators,
6 accomplices, they shall not be punished for crimes they
7 committed. Only the leaders of the Democratic Kampuchea group
8 shall be prosecuted. And Duch he was merely the chief of a
9 prison, similar to those chiefs of the 195 prisons throughout
10 Cambodia, that they were considered by the Trial Chamber as
11 perpetrators and they fell outside the jurisdiction of the ECCC.
12 And why only Duch, out of those 195 prison chiefs, fell within
13 the jurisdiction? And I would like Your Honours to pay attention
14 to this point. Article 9 of the law on the outlawing of the
15 Khmer Rouge clearly states to that effect any person who violates
16 the law and violates the rights of the people by wrongly accused
17 or wrongly making arrest or detention of people will be punished
18 from two to five years imprisonment.

19 [10.12.55]

20 I don't want to again repeat all those Articles, and for Article
21 2 from the date the law comes into effect any person who is
22 member of a political party or a military force of Democratic
23 Kampuchea shall be considered offences against the constitution
24 and the Cambodian law. And Duch came into Cambodia two years and
25 six months before the law comes into effect. And if Duch

1 resisted and still continued committing offences then Duch would
2 violate the law. However, from the date of the law coming into
3 effect Duch did not commit any offence against the constitution
4 or the law of the Kingdom of Cambodia.

5 Therefore, Duch who the Chief of S-21, he should fall outside the
6 jurisdiction of the ECCC as those of the 195 chiefs of other
7 prisons, and that is the main point on the jurisdiction for Your
8 Honours' review.

9 [10.04.25]

10 And on another point, the appeal by the Co-Premiers of Cambodia
11 dated 27 July 1999 that all civilians or military officials
12 living under the supervision of the Khmer Rouge to find all means
13 to return to integrate with the government, and at that time the
14 government publicly made an announcement, and they will not be
15 punish. Instead, their status and rank will be preserved, and
16 even now at the Ministry of Defence there are still Khmer Rouge
17 cadres who have their rank and status.

18 Duch entered more than two years before such an appeal, and now
19 he is punished. He shall only be punished for his resistance to
20 integrate in the society and continued committing offences, and
21 the Article 7 of the Code of Criminal Procedure 2007 states that
22 the extinction of the criminal action and the reason for such
23 extinction is that the government appealed, made an appeal, and
24 also the government issued such a law in 1999, and also the Paris
25 Peace Accord dated 23 October 1991, which prohibits the

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1 constitution and a law to punish for those who commit the crimes
2 in the past.

3 [10.06.25]

4 For the aforementioned reasons Duch should fall outside the
5 jurisdiction of the ECCC. And I urge Your Honours to review this
6 matter seriously.

7 The Trial Chamber agreed with the charges by the Co-Prosecutors,
8 who are themselves unclear on the issue whether the accused shall
9 fall under the category of those most responsible which
10 (indistinct) stated within the jurisdiction of the ECCC, and it
11 states that even Duch is not the senior leader of Democratic
12 Kampuchea he should be considered falling the category of those
13 most responsible for the crimes. The concurrence of this unclear
14 stance is a serious error made by the Trial Chamber, and it
15 contradicts the Rule 87(1) of the Internal Rules of the ECCC and
16 it contradicts Article 38 of the Constitution of the Kingdom of
17 Cambodia which states that any doubt shall benefit the accused.

18 [10.08.00]

19 And the wording that he will be considered amongst the most
20 responsible, it meant it's like a fifty percent chance. It's
21 just a possibility. So there is a doubt. And in this case, if
22 doubt exists, the benefit shall be for the accused. And the
23 group of experts were also hesitant more than those stipulated in
24 Article 1. That is, on the determination of those who were most
25 responsible for crimes and grave breaches of national and

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1 international laws, state that if it were to be true -- and that
2 is the wording used by the group of experts -- if it were to be
3 true -- for such a language it means there is a doubt, and the
4 accused shall be acquitted and not found guilty.

5 Based on the ECCC Law, it is a combination of the administrative
6 and criminal standards for this election to prosecute those
7 senior leaders and most responsible for the crimes committed
8 during the Democratic Kampuchea regime, it requires the Chamber
9 to consider seriously on the matter of personal jurisdiction
10 based on the administrative law of the Kingdom of Cambodia in
11 order to identify those people.

12 [10.09.45]

13 In the case of Duch, there are national documents clearly
14 identifying the role and the status. That is, he is not part of
15 the senior leadership structure or most responsible for the
16 crimes committed during the Democratic Kampuchea regime. For
17 that reason, there is no doubt that the accused shall fall
18 outside the jurisdiction of the ECCC.

19 As Chief of S-21, which is one of the almost 200 prisons
20 throughout Cambodia during the Democratic Kampuchea, S-21 has a
21 large number of casualties who died, and in Chung Chroy, for
22 example, in Kampong Chnang, 150,000 prisoners were killed. And
23 in other prisons, more prisoners died. The point is that the
24 ECCC law does not determine those people who were chiefs of
25 prisons falling under the category of those who were most

25

1 responsible. They were considered falling outside the
2 jurisdiction of the ECCC.

3 [10.11.20]

4 This is another point that Your Honours should consider regarding
5 the personal jurisdiction of this Court. The 195 prisons fall
6 outside the jurisdiction of the ECCC, and S-21, which is also
7 another prison, it should automatically fall outside the
8 jurisdiction as well. Or is it because S-21 killed less people?
9 That's why it falls under the jurisdiction of the ECCC? Maybe if
10 there were more than 100,000 or 200,000 people died there, then
11 they would fall outside the jurisdiction?

12 In paragraph 119 of the Trial Chamber Judgment states that
13 amongst those security centres, S-21 is the only one with
14 specific characteristic, as it has a direct connection with the
15 Centre and which had a right to detain the cadres of the
16 Communist Party of Kampuchea, so it clearly states that S-21 is
17 special, it's specific, that's why Duch has been prosecuted, and
18 the specificity is that it had a direct connection with the
19 Centre, and that is the only point that the Trial Chamber rely to
20 prosecute Duch, and the other chiefs of prisons did not have
21 direct connection with the Centre, and for that reason they were
22 not prosecuted. And I would urge Your Honours to review that as
23 well.

24 [10.13.10]

25 Sao Phim, who was the third person in the Standing Committee of

26

1 the Communist Party, it did not have a direct connection with the
2 Centre, or is it? Chhit Chhuon alias Mok, also controlled a
3 Zone, and he was the fourth person in the Centre. Why these two
4 fell outside the jurisdiction of the ECCC? Don't you think it
5 has a direct connection with the Centre? And why only S-21
6 controlled by Son Sen who was the seventh member of the Standing
7 Committee?

8 And another point is that S-21 had the role to detain the Khmer
9 Rouge cadres, and if we were to prosecute the Chief of S-21 it
10 means we try to find justice for those Khmer Rouge cadres? A
11 handful of innocent people were killed, but the majority of those
12 who were killed, based on my estimation, they had the blood on
13 their hand. For example, Kuy Thuon, Vorn Vet. Before they were
14 brought to S-21 they made decision to kill several people
15 outside.

16 [10.15.00]

17 Your Honour, I am of the view that this is one of the factors we
18 require the Bench to provide further consideration. And in
19 paragraph 677 of the Trial Chamber Judgment it finds that Kaing
20 Guek Eav alias Duch guilty for crimes against humanity. And
21 what is that? Because it states that Duch enslaved those who
22 were sent to him. And what happened to the other 195 prisons,
23 were those detainees became millionaires? And why the Chamber
24 doesn't find justice for them?

25 And it accused that Duch detained those people at his centre, so

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1 it means that the 195 centres, those people were detained
2 outside, or were they kept in a hotel or something? And also, in
3 the same Judgment, it states that Duch was accused of the grave
4 violation of the Geneva Convention of 1949 for wilful killing.
5 [10.16.30]
6 Let me ask Your Honour that -- what happened to the other 195
7 prisons? It means, were they unwillful killings existed in those
8 centres or prisons? And it said that at S-21, Duch tortured the
9 prisoners. Does it mean that torture was not committed at the
10 other prisons? And for inhumane treatment at S-21, it means
11 those inhumane treatments were not committed at the 195 prisons?
12 And why the ECCC doesn't try to find justice for the other 195
13 prisons? It also states that S-21 illegally detains the
14 civilians. What happened in the other 195 prisons? Were those
15 detainees detained legally? Please consider this. Also in the
16 Judgment, 12,373 people were killed at S-21, that's why Duch was
17 prosecuted. What about the killings of those thousands, hundred
18 thousands, at other prisons. Why those chiefs of the prisons
19 were not prosecuted?
20 It means, in this Judgment, the prison chiefs of other prisons
21 were considered perpetrators and they were not prosecuted. And
22 once again, they were considered perpetrators. And only Duch at
23 S-21, and his chief of S-21, he also shall be considered
24 perpetrator. The Judgment said Duch is not the perpetrator in
25 the categories for those 195 prisons. Do you think that it is

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1 fair? Of course not.

2 [10.18.40]

3 The Co-Prosecutors state in their response that there is no law
4 to charge those other 195 prison chiefs as perpetrators. And if
5 that is the case, how come Duch was charged for the same status?
6 So Duch was also a perpetrator as those of the 195 prison chiefs,
7 and he should fall outside the jurisdiction of the ECCC. These
8 are the conditions of personal jurisdiction that I would urge
9 Your Honours to review.

10 In the indictment, in the amended indictment, it states that, as
11 the Deputy Secretary of S-21 he made the interrogation team and
12 joined in establishment of S-21, and gave instruction to the
13 interrogation team how to interrogate. So as Deputy Chief of
14 S-21 he had an overall supervision of S-21 including making
15 annotation on the confessions, and the order to kill. S-21 is
16 the most important prison for Democratic Kampuchea, and
17 considered as part of the infrastructure of the Communist Party
18 of Kampuchea, as it reported directly to the highest echelon of
19 the regime, and it operated throughout the country, and it
20 received senior people throughout the country.

21 The Trial Chamber agreed to that allegation in the indictment
22 without relying on any legal basis, in order to make the accused
23 fall within the category of the most responsible person, as it
24 considered actually one was an important centre. And there is no
25 legal basis for such assertion in identifying those who were most

1 responsible. Does the law have to adjudicate the prison
2 management throughout the country, or does it only adjudicate the
3 person or persons who were most responsible.

4 [10.21.45]

5 In theory, the law on identifying those who were most responsible
6 relied on the discretion of the person based on his authority
7 within the status determined in the administrative structure and
8 law, and as the Secretary of S-21, Duch had the role to only
9 receive the prisoners who were sent throughout the country, then
10 they would be interrogated, and they would be sent to be smashed
11 based on the orders from the upper echelon.

12 This does not mean he is the one who had the most responsibility,
13 as the acts did not arise from his own discretion. And his acts
14 were identical to those acts performed by chiefs of other prisons
15 throughout the country.

16 [10.22.45]

17 Another mistake is that S-21 was considered that it was formed
18 with the participation of the accused. That is incorrect. Based
19 on his minor role as Deputy Secretary of S-21, and within the
20 political framework that he is not a member of the Standing
21 Committee, the accused had no ability to provide opinions to the
22 Party on all issues in relation to the security policy and
23 measure. Such allegation is preposterous.

24 In fact, lawyers acknowledge that the prison section is an
25 apparatus of the state, and all establishments or dissolutions or

30

1 modifications are within the decision of the state, no single
2 person or two persons can form such an establishment. S-21 was
3 established according to the decision of the Standing Committee
4 during their meeting in October '75, giving the authority to Son
5 Sen who is a member of the Standing Committee to be in charge of
6 the security.

7 [10.24.25]

8 Throughout the world, the prison, the police, or the military
9 police, they are the tools of the state. They're under the
10 command of the state. And the state shall be the legal entity to
11 be responsible, and that means Pol Pot, Son Sen, etcetera. They
12 were the ones who issued order. And now when mistakes were made,
13 and only the two were to blame and Duch was just a tool used by
14 those people, and he so fall outside the jurisdiction of the ECCC
15 for that reason.

16 In paragraph 2 of 33, of the indictment, Duch, as Secretary of
17 S-21, he had no de facto authority for the overall supervision.
18 He only had the authority to disseminate information from the
19 upper echelon. But here if we have to look at the structure of
20 the Party, there would be the Secretary, that is Pol Pot, and
21 then there is Zone Secretary, or the Division Secretary, and
22 number three, the Sector Secretary, and then the regiment
23 etcetera. And number four, the secretary of the district
24 committees, or the office committee as in the case of Duch. So
25 Duch would fall in the fourth category, which is the lowest rank

31

1 within the Party hierarchy.

2 [10.26.30]

3 Duch was just a minor Secretary who had no real authority to make
4 decisions or to do anything contradictory to the directions from
5 -- or the orders from the upper echelon. Therefore he could not
6 be considered the most responsible person.

7 According to the opinion of Judge Cartwright, who states that
8 "the Communist Party of Kampuchea was the one who identified the
9 enemies, and who ordered the arrest of those enemies". And she
10 states that "the accused was not aware of the secret decision
11 dated 30 March '76, therefore he could not be said he
12 participated in the planning of such policy". This clearly
13 states that Duch was not the one who was most responsible for the
14 crimes mentioned about. This is another condition to be
15 considered in regard to jurisdiction, and I would urge Your
16 Honours to review that as well.

17 [10.27.50]

18 There are other evidence that proves that Duch had no power to
19 make any decision for any arrest, or detention of prisoners. For
20 example, in the case of Koy Thuon, Vorn Vet and Nath, they were
21 arrested upon orders from superiors, including Son Sen. And
22 Phuong Thon, Rut Kut and other people including Duch in-law were
23 also arrested, and that he had no power to intervene.

24 For this reason, it is true that Duch was not most responsible
25 for the crimes and grave breaches of domestic and international

32

1 laws. And these are part of the jurisdictional condition that
2 need to be well reviewed by the Chamber.

3 [10.28.55]

4 MR. PRESIDENT:

5 Counsel, please be informed that it is now time for morning
6 adjournment, and you still have 50 minutes left. I think you may
7 take the opportunity after the break to proceed with the
8 remaining of your oral submission. We will now take the morning
9 adjournment.

10 (Judges exit courtroom)

11 (Court adjourns from 1029 to 1059)

12 (Judges enter courtroom)

13 MR. PRESIDENT:

14 Please be seated. The Court is now back in session. The
15 defence counsel may now resume his oral statement.

16 MR. KAR SAVUTH:

17 Thank you, Your Honour. I would like now to continue my oral
18 submission. We would like the Bench to review Article 99 of the
19 previous penal code. Acts are not considered criminal offences
20 when they are ordered. Based on that 1956 penal code, only the
21 person or the entity who ordered shall be punished. For
22 example, Son Sen, who ordered Duch to commit those acts.
23 And number two, I would like also the Chamber to consider the
24 same 1956 penal code of Article 238, and Article 24 of the penal
25 code of 2009. It means only those who ordered shall be punished,

1 and not the perpetrators. The 2009 penal code, Article 24,
2 person shall be responsible for criminal action for which he or
3 she commits. The acts that Duch committed was not of his own
4 initiative. They were from his superior. And between 1970 to
5 1975 the US President Richard Nixon, who ordered the bombing in
6 Cambodia by the military commander Kirton Abraham and the order
7 was from the authority of the US Presidency.

8 [11.01.50]

9 And it means that he knew the act was wrong but he had no choice
10 but to drop those bombs, to follow those orders. So therefore
11 the one who issued the commands shall be the guilty one, not the
12 one who committed the act.

13 And another point, that is from 17 April '75 to 30 March '76,
14 within that period, Duch was at Amleang. And when he entered
15 Phnom Penh he was the deputy chief of prison, for that reason he
16 did not involve in the establishment of the prison. And at that
17 time he was at Amleang, and he was not aware of the evacuation of
18 the people from the city. He was at a lower rank, as I stated
19 earlier, and from 30 March '76 to 6 January '79, please review
20 the document 00003136 of the Office of Co-Prosecutors, and the
21 document is in the case file, it has a list of the names of the
22 senior leadership of Democratic Kampuchea, and those who were
23 most responsible.

24 So they were the senior leaders of Democratic Kampuchea, that
25 document is the decision of the Central Committee, and with the

34

1 list they are the names of those who were the members. And they
2 were the leaders who lead to the killing. And then for those who
3 were most responsible -- what are they? The names are listed
4 there. The seven persons ordered four groups of people to commit
5 the acts of killing throughout Cambodia, that is the decision to
6 kill inside and outside the rank.

7 [11.04.10]

8 Within the framework of the basis, the Central Committee shall
9 decide. And how many Zones? There are seven zones. And within
10 the seven Zones, was Duch amongst those Zones? No. S-21 fell
11 outside of those seven Zones. And for the second group, it means
12 in the area surrounding the Office shall be decided by the Office
13 of the Centre, that is the Office 870. And Duch did not work
14 within that Office.

15 And for the autonomous zones, how many? They were Kampong Saom,
16 Siem Reap, Preah Vihear and Udom Meanchey. That's the autonomous
17 zones. Duch was not within that zone. And for those autonomous
18 zones, the Standing Committee shall decide. And for the fourth
19 group, therefore the central army, and who would be the general
20 staff? That would be Son Sen.

21 [11.05.10]

22 Duch did not have the authority to issue any decision, he only
23 received the order from his superior. So that is a critical
24 document, it has all the names of those people for the categories
25 I just mentioned. So I please urge Your Honours to review the

*Extraordinary Chambers in the Courts of Cambodia
Supreme Court Chamber - Appeal*

*Case No. 001/18-07-2007-ECCC/SC
KAING GUEK EAV
28/3/2011*

35

1 document in order to determine who were the senior leaders and
2 who were those most responsible for the crimes. Duch was not one
3 of them.

4 Also I would like to urge Your Honours to enforce the new Article
5 of the constitution, that is Article 129(new), which states that
6 the trial shall be fair and regular, and it shall be conducted in
7 behalf of the Cambodian people, based on the existing law and
8 procedures. Fair justice shall be done based on the procedures
9 and Article 12 of the agreement between the UN and the Cambodian
10 government clearly states to that effect, that the Cambodian law
11 shall be used. Because this is a national court, it is not an
12 international court. Therefore it has to use the domestic law.

13 [11.06.45]

14 And the existing law, as I said, there are a number of existing
15 laws, that is, our penal code, the criminal procedure, the law on
16 the outlawing of the Khmer Rouge, the Paris Peace Accord and
17 etcetera and etcetera. There is no need to refer to the
18 international law. That is my appeal to Your Honours.

19 That is based on the interpretation of Article 129(new) of the
20 constitution, and I would like to urge Your Honours to set aside
21 the Judgment in case 001 and to acquit Duch. And, number two, I
22 would urge Your Honours to consider the detention of Duch is a
23 form of protection for potential witness in identifying senior
24 leaders of the Democratic Kampuchea and those who were most
25 responsible for crimes.

36

1 And finally, I would like to give the floor to my colleague, to
2 Mr. Kang Ritheary.

3 MR. KANG RITHEARY:

4 Good morning, Mr. President. Good morning, Your Honours. I
5 would like to apologise to the families of the victims, who were
6 victims at S-21. I stand here today not to hide the heinous
7 crimes committed at S-21, and even if I want to hide the crimes,
8 I can't do it, and I hope right now, here, everybody knows about
9 the crimes committed at S-21. I am standing here as a defence
10 lawyer to my full capacity to defend my client based on the law,
11 on the Universal Declaration of Political and Civil Rights, and I
12 can assert that my client does not fall under the jurisdiction of
13 this Chamber, of this Court.

14 [11.09.10]

15 I am here in order to make sure that my client enjoys the full
16 rights accorded to him, and also to provide legal assistance to
17 my client. I will try to do it to my best capacity, in order to
18 make sure that the Supreme Court Chamber will use this forum not
19 for political vengeance or to lend a hand to the ECCC to make a
20 political cleansing. And I thank you for that.

21 Based on the agreement between the UN and Government of Cambodia,
22 the ECCC was established to prosecute, to bring to trial those
23 who committed the crimes, war crimes and genocide and grave
24 breaches of the Geneva Convention of 1949. The agreement is to
25 find justice for the Cambodian people, for reconciliation, peace,

1 and to respect the sovereignty of Cambodia.

2 [11.10.35]

3 In the preamble of the agreement between the UN and the
4 government, as in the decision of the Security Council, it
5 expressed a concern in relation to the grave breaches of the
6 Cambodian law and for the crimes committed between '75 and '79.
7 The concerns led to the Security Council to issue its decision
8 number 57/228, recognising the concern by the Cambodian people
9 and the government for finding the justice, and for the stability
10 and peace and sovereignty of Cambodia.

11 And that is the official recognition of the concerns expressed by
12 the Cambodian government, by the United Nations, that is the
13 proper recognition as the first stage for the establishment of
14 the ECCC. And also it stated in Article 1, it means that for the
15 concerns of the Cambodian government, of Cambodia, to bring to
16 trial, is stated in Article 1, and the establishment is the
17 achievement between the UN and the Royal Government of Cambodia,
18 and that is expressed in Article 1 and 2 of the law of the ECCC
19 Law on the restriction on the authority of the ECCC.

20 [11.12.33]

21 Article 2 of the agreement, and Article 1 and 2 of the ECCC Law,
22 the ECCC is empowered with restrictions on the jurisdiction for
23 the prosecution. ECCC has the power to bring to trial for the
24 crimes, for the war crimes, genocide, crimes against humanity,
25 and the grave breaches of the Geneva Convention of 1949. And the

1 ECCC has the power and authority to bring to trial for the crimes
2 committed within the period of 17 April '75 through 6 January
3 1979, and three, the ECCC has the power to bring to trial,
4 prosecute for crimes committed within the territory of Cambodia,
5 and number four, the ECCC has the power to bring to trial those
6 senior leaders and those who were most responsible for the crimes
7 committed.

8 [11.13.35]

9 During the controversial hearing, the defence team raised the
10 issue of the personal jurisdiction for the accused Kaing Guek Eav
11 alias Duch, and that they shall review and examine the evidence
12 in relation to the Articles 1 and 2 of the ECCC Law. And Judge
13 Cartwright accord to the assertion raised by the defence that
14 Duch had no authority on the decision to kill those people who
15 were found to be committed in the secret document dated 30 March
16 1976. And the identification of the document was already
17 provided by my colleague.

18 So it means that he did not have the most responsibility for
19 those crimes committed. And that is also stated in the Judgment
20 in paragraph 397-99. So the request by the defence team to
21 review the personal jurisdiction, it clearly states that there is
22 ample evidence that the Trial Chamber did not have the
23 jurisdiction over Duch, but they failed to examine those
24 evidence, and the trial was subsequently concluded.

25 [11.15.05]

1 The defence team also tried again in their closing argument,
2 appealing the Bench to examine those exculpatory evidence on the
3 issue of jurisdiction based on the spirit of the establishment of
4 the ECCC and the ECCC Law. Once again, the Trial Chamber failed
5 to examine the exculpatory evidence as requested by the defence
6 team, and the opinion of Judge Cartwright, and as a result on 26
7 July 2010 the Trial Chamber pronounced a Judgment in case 001
8 dated 18 July 2007 finding Kaing Guek Eav alias Duch guilty for
9 the crimes committed at S-21 under the direct supervision of Son
10 Sen, of the general staff, and he is convicted for a single
11 sentence of 35 years of imprisonment.

12 [11.16.15]

13 Based on the notice of appeal against the Judgment dated 26 July
14 2010 of the Trial Chamber, in that the defence team argues that
15 the conviction made by the trial Judgment as Duch fell outside
16 the jurisdiction of the ECCC. And we also provided the following
17 arguments. One, that is on the error of the jurisdiction, the
18 personal jurisdiction by the Trial Chamber.

19 The Trial Chamber expands its authority, expanded outside the
20 Article 1 of the agreement and Article 1 and 2 on establishment
21 of the ECCC Law, so that Duch would fall under the jurisdiction
22 of the ECCC, despite the document dated 30 March 1976 on the
23 decision to smash inside and outside the rank. Duch was not
24 within that structure or hierarchy, and based on the report by
25 the expert Craig Etcheson, who works for the Office of

40

1 Co-Prosecutors, Son Sen had the decision to make, and Phuong and
2 Lin was the one who was in charge above Duch.

3 [11.18.00]

4 Under the general staff of the Ministry of Defence, for those who
5 were arrested and sent to S-21, those arrested we made after the
6 decision made at the Central Committee. The Trial Chamber fails
7 to properly examine the personal jurisdiction as stated in
8 Article 1 of the agreement, and Articles 1 and 2(new) of the ECCC
9 Law, and against the customary law that was used in Tokyo as
10 well.

11 In Nuremberg and Tokyo trials, the court did not prosecute those
12 who were the soldiers of the Allies, even if they knew that they
13 committed the same crimes as the enemy in Europe, and for the war
14 criminals, because of the restriction of the personal
15 jurisdiction imposed upon those courts.

16 [11.19.05]

17 And there is no person who were leaders at the lower level were
18 prosecuted, only the senior leaders who committed those crime,
19 or the general, military generals who were prosecuted. And the
20 court itself is not allowed to expand its authority in order to
21 prosecute the Allies soldiers or to bring to trials for those
22 soldiers even if they committed the same crimes, even if some
23 were more serious.

24 It means that in general the court had to abide by t he
25 jurisdiction set upon them. They could only charge those who

41

1 were within the jurisdiction, even if other people committed the
2 same or more serious crimes. However, at the ECCC, it acts
3 contradictorily. It did not have any evidence to link to Article
4 1 of the agreement or Articles 1 and 2(new) of the ECCC Law on
5 the issue of the jurisdiction of my client.

6 [11.20.30]

7 Also, the ECCC also relied a lot on the jurisprudence of the ICTR
8 and the ICTY on the jurisdiction in regards to the subject
9 matter, but not on the personal jurisdiction. It means the
10 statute of the ICTY and the ICTR are not similar to the ECCC Law.
11 The distinction is the restriction of the personal jurisdiction.
12 At ICTR and ICTY and Nuremberg and Tokyo, there was no
13 restriction on personal jurisdiction.

14 In fact, in ECCC, there is sufficient and ample jurisdiction, and
15 there is no need to refer to other law or jurisprudence. If it
16 is needed then it has to be consistent with the assisting law and
17 legal instruments in Cambodia based on the agreement in Article 1
18 between the UN and Cambodia. The use in other international law
19 is only to implement, to compliment the lacunae in the domestic
20 existing laws, or the laws at the ECCC, and they have to be
21 consistent with the ECCC.

22 [11.22.05]

23 The system which is used in the ECCC, which is a sovereign state,
24 is the priority, as we all know, ECCC is not an independent court
25 like an ICTR or ICTY. This is a domestic court. So it is within

42

1 the territory of the country which utilises the civil law system.
2 The use of the common law system by the Trial Chamber is a
3 distraction of the civil law system that is currently used in the
4 state which the ECCC Law falls under, and which set out in the
5 agreement between the UN and the government of Cambodia.
6 ECCC shall use a complete civil law system. Therefore, the
7 principle of legality shall be respected. Based on that, it
8 shows that the Trial Chamber violated Article 2(new) of the ECCC
9 Law, in that it extends, it expanded its power beyond what is set
10 out in the law.

11 [11.23.35]

12 The use of the international legal instrument is not appropriate,
13 because the jurisprudence or case law is to be used only when it
14 has to examine in details for the crimes committed. That is the
15 first option. And the second option is to examine the legal
16 system which is in existence, whether it is parallel or
17 consistent. And the third point is in order to determine whether
18 there is a lacunae for the Judgment that is issued based on the
19 options 1 and 2 above.

20 ECCC restricts the personal jurisdiction which is not the same as
21 the statute of the ICTR, ICTY, the Nuremberg or the Tokyo, as
22 personal jurisdiction is not considered. But here they are set
23 out clearly in the ECCC Law. The Trial Chamber failed to
24 examine and review these three points, which were taught clearly
25 in any law school throughout the world.

43

1 [11.24.53]

2 The civil law and the common law system are not the same, and for
3 the judge to interpret a law based on the civil law system, we
4 all know that the judge cannot create a law by himself or
5 herself, and cannot expand the authority of the law by himself or
6 by herself as well.

7 And this practice has been taught in the legal law, that a judge
8 cannot expand his or her authority. And that also is applicable
9 only to the common law system. ECCC is within the sovereign
10 state that use the civil law system. This has been expressly
11 reflected in Article 12 and 13 of the agreement between the UN
12 and the government, and Article 5 of the Cambodian penal code.
13 Article 12 of the agreement allows the ECCC to apply the
14 Cambodian law. And only where there is a lacunae in Cambodian
15 law, that guidance can also be sought at the international level.

16 [11.26.15]

17 This means that one cannot seek any international law unless the
18 above situation prevails; otherwise it is in contradiction to the
19 Cambodian law. The excessive application by analogy at the ECCC
20 runs counter to Article 5 of the Cambodian penal code. It can
21 also be viewed that the ECCC, by following the common law
22 tradition, *proprio motu* expands its jurisdiction, and arbitrarily
23 adjudicates cases.

24 It means that they have to look also at the evidence filed and
25 submitted by the defence team. Also the new documents that we

44

1 submit to the Supreme Court Chamber, the documents that we
2 receive from DC-Cam, that is F.14.2.4, ERN 00626210, that is the
3 selected 31 biographies of Khmer Rouge leaders and other. And
4 they made a conclusion for those who shall be prosecuted.

5 [11.27.45]

6 The assertion that Article 1 and 2(new) of the ECCC Law is not
7 clear is not appropriate. According to Rule 87 the judges shall
8 examine the evidence and use his or her profession before a
9 person can be charged under Articles 1 and 2, and also Article 28
10 of the new penal code of Cambodia defines the person who would be
11 the perpetrator or is the instigator.

12 That is those who gives an instruction to commit a felony or
13 misdemeanour or provokes the commission of a felony or a
14 misdemeanour by means of a gift, promise, threat, incitement,
15 coaxing or abuse of his or her authority or power. That is
16 consistent to the decision dated 30 March 1976 of the Standing
17 Committee as my colleague raised earlier.

18 [11.29.00]

19 The decision actually determined who issued orders, and who shall
20 be responsible for the crimes, or most responsible for the
21 crimes, and for that reason we should not resort to other
22 criminal laws to interpret such a case. We only need to look at
23 the law available before us.

24 An instigator shall only be liable to punishment if the
25 commission of or attempt to commit felony or misdemeanour is

45

1 established. Articles 1 and 2 of the ECCC Law and the response
2 by the Office of Co-Prosecutors to the appeal brief by the
3 defence counsel, the Co-Prosecutors indicated that there is no
4 provision binding it to prosecute perpetrators of security
5 centres all across the country. For that reason, we can conclude
6 that perpetrators do not fall within the jurisdiction of this
7 particular tribunal.

8 [11.30.20]

9 According to Article 28 of Cambodian penal code, which states
10 that only the instigators shall be liable for the crimes. So
11 reading this and the code and the law of the ECCC all together we
12 can feel that they are enough to interpret who shall be
13 responsible for the crimes. This Article is very consistent with
14 Articles 1 and 2 of the ECCC Law and Article 1 of the agreement
15 which is said to prosecute two categories of people: the senior
16 leaders of DK and those who were most responsible for the crimes.
17 The most responsible people for the crimes as referred to Article
18 1 and 2 of the ECCC Law and Article 1 of the agreement are those
19 who instigated or initiated or ordered the commission of the
20 crimes set forth in Article 28 of the Cambodian criminal code and
21 Rule 87 of the ECCC Internal Rules. The Prosecution and the
22 Trial Chamber must examine the evidence submitted by the parties,
23 and particularly the evidence the Co-Prosecutors have located:
24 the secret decision of the CPK of 30 March 1976.

25 [11.31.45]

46

1 There are a lot of prisons, and the prosecutors submitted that
2 S-21 was a unique prison. However, the defence counsel believed
3 that both the accused and other civil parties were victims of the
4 crimes committed at those detention facility. My family members
5 have also been victims of other prison centres, or security
6 centres. I believe that there are more than 200 security
7 centres, and there is another security centre which is also part
8 of the Centre Party, it was near Wat Botum. We call it S-71. It
9 was not included.

10 International law cannot be applied to an individual, but a
11 state, an international organisation and multinational company.
12 It is therefore only senior members and head of the government
13 who shall be held accountable for crimes against humanity as they
14 represent the state. Likewise, only the leaders of the Party who
15 hold senior positions of power and who made -- (no
16 interpretation)

17 Thank you for reminding, I was rather fast, because we had much
18 to say during the time limit.

19 Likewise, only the leaders of the Party who hold senior positions
20 of power and who made decision on policies which gave rise to the
21 commission of crimes against humanity, grave breaches of the
22 Geneva Convention of 12 August 1949 shall be bound by Article 1
23 of the agreement, Articles 1 and 2 of the ECCC Law, Articles 24
24 and 28 and Cambodian penal code.

25 [11.34.05]

1 Duch were only chief of prison guards. He was among the chiefs
2 of the guards of the 196 security centres across Cambodia. He's
3 therefore not bound by Article 1 of the agreement, and Articles 1
4 and 2 of ECCC Law. Does not mean that judges shall make sure
5 they hand down their decision with the adoption of a decision by
6 any of the other proceeding tribunals.

7 Furthermore, there is no provision whatsoever in the agreement
8 and the ECCC Law obliging the Co-Prosecutors to charge a former
9 chief of security centre. Even the Chamber itself is not legally
10 obliged to try perpetrators who were the heads of the security
11 centres around the country, including the chief of S-21.

12 [11.35.01]

13 The applications of international laws can only be resorted to
14 when the laws in Cambodia are not enough, and that there must be
15 consistent with the tradition of the law being in use. Because
16 the ECCC is not an independent tribunal as ICTY, according to
17 Article 12.1 of the agreement, the ECCC is within the sovereign
18 of the country which follows the civil law tradition. And for
19 that reason, ECCC is bound to apply the civil law. And if the
20 Chamber tries to resort to using other international laws on top
21 of what the available existing law, it violates or disregards all
22 the existing laws.

23 So in conclusion, the ECCC Law is fully employing the civil law
24 tradition. For that reason, we have to be bound by the principle
25 nullem crimen sine lege. The exercise of power expansion by the

1 Chamber violates the Cambodian penal code concerning the exercise
2 of power by the judges, and that only the Constitutional Council
3 is obliged to interpret the law, not the judges themselves.
4 [11.36.55]
5 So the interpretation that Article 1 of the agreement, which
6 reads that crimes under DK shall be prosecuted, and that the
7 Trial Chamber indicated that the definition itself is not clear,
8 that it had to resort to the interpretation of decisions made by
9 ICTY and ICTR, to the defence counsel it is not proper, because
10 it's against the rule of nullum crimen sine lege, and the accused
11 himself does not fall within the jurisdiction of the Court. And
12 since there is no law applicable can be sought to prosecute the
13 accused, there is no other law that can be used in this context.
14 Article 1 of the agreement between the United Nations and the
15 Royal Government of Cambodia and Articles 1 and 2 of the ECCC Law
16 have to be well applied, otherwise it really infringes the rule
17 of laws. Also it infringes the law of treaties. And the
18 interpretation of the law shall not fall out of the context of
19 the law as set forth in the treaty signed by the government and
20 the United Nations. Both in Tokyo and Nuremberg, the tribunals
21 ban the Chamber to expand its power autonomously. And as a
22 result, these tribunals strictly obey the rule by not allowing
23 judges to expand its exercise of power or discretion.
24 For example, after all, they did not really bring to trial other
25 forces during the war, although a lot of people were killed under

1 the forces. The criminal jurisdiction under ICTY and ICTR is not
2 different from this court. And at that tribunals, there has no
3 personal jurisdiction against individuals, because the crimes
4 were committed from political ideology.

5 [11.40.15]

6 However, at the ECCC, personal jurisdiction has been well
7 established, and the purpose of the establishment of the
8 Extraordinary Chambers in the Courts of Cambodia is to prosecute
9 senior leaders of the Khmer Rouge and those who were most
10 responsible for the crimes. So the application of international
11 instruments, for example customary laws, is against the ECCC Law.
12 Second ground. The error on sentencing. Paragraphs 30 and 31 of
13 the Judgment reads -- so on and so forth -- the jus cogens, which
14 is a general principle of international law, is de facto a norm
15 which cannot be violated, and from which no derogation is ever
16 permitted. Every individual involved shall be punished
17 regardless of privilege, social status, duress or circumstance.
18 Nonetheless, it is noted that in the ECCC has personal
19 jurisdiction over an individual.

20 It is noted in the preamble part of the agreement between the
21 United Nations and Royal Government of Cambodia that the General
22 Assembly of the United Nations, in its resolution 57/228 of 18
23 December 2002, recalled that the serious violations of Cambodian
24 and international humanitarian law during the period of
25 Democratic Kampuchea from 1975 to 1979 continued to be matters of

50

1 vitally important concern to the international community at a
2 whole.

3 Whereas in the same resolution, the General Assembly recognised
4 the legitimate concern of the government and the people of
5 Cambodia in the pursuit of justice and national reconciliation,
6 stability, peace and security, and whereas the Cambodian
7 authority had requested assistance from the United Nations in
8 bringing to trial senior leaders of Democratic Kampuchea and
9 those who were most responsible for the crimes and serious
10 violations of Cambodian penal code, international humanitarian
11 law, and custom and international conventions recognised by
12 Cambodia that were committed during the period from 12 (sic)
13 April 1975 to 6 January 1979.

14 The preamble expressly states that there are only two categories
15 of people who shall be brought to trial, although the universal
16 principle contemplates prosecuting anyone who has committed any
17 of the aforementioned crimes in the preamble. The United
18 Nations' task is therefore limited to assisting Cambodia, and
19 that the trials shall be compliant with international customary
20 law, not the common law. This tribunal is not bound by the
21 common law. The civil law principle of *nullem crimen sine lege*, or
22 no crime without law, is always applied, in accordance with the
23 existing national and international laws.

24 [11.43.32]

25 Since the ECCC Law observes the prosecution of only two groups of

51

1 people, no one is authorised to seek a supplementary decision
2 from any other judges to enable them to find the personal
3 jurisdiction other than those at the ECCC. I'm very sorry for
4 speaking that fast because of time constraints.
5 In the introductory part of the Trial Chamber's Judgment in case
6 001, the Trial Chamber has failed to make use of the ECCC Law or
7 Cambodian penal code such as Articles 4, 5, 24, 25, 26, 28, 32,
8 35, 36 and 46 to prove the legality of the evidence. Instead the
9 Judgment is flooded with jurisprudence from ICTY, ICTR, ICTS
10 (sic), Tokyo and Nuremberg. Such a decision has not only called
11 into question the right to receive international assistance, but
12 it also expands the scope of interpretation of the law by
13 analogy, when the power of the Chamber has been expanded through
14 its application of arguments from jurisprudence.
15 [11.44.45]
16 By so doing, this Chamber totally applies common law which is
17 contradictory to the civil law, which has been the exclusive law
18 of Cambodia for a long time.
19 The report by Mr. Craig Etcheson has been placed in the case
20 file, but the evidence itself has not been brought before the
21 Trial Chamber during the trial hearings. Document number 2 is
22 about F.14.14 or ERN 00626210. This document was submitted to
23 the UN commission of experts prepared by DC-Cam experts. In that
24 statement, Kaing Guek Eav was the chief of Santebal, or the
25 prisons guard. And those who were most responsible for S-21 were

52

1 Son Sen and Pol Pot.
2 According to the transcript of the hearing and the statement by
3 the experts, before the Co-Investigating Judges and
4 Co-Prosecutors, Kaing Guek Eav alias Duch made it clear, and also
5 according to the report of Dr. Craig Etcheson, it stated that
6 Nuon Chea was also involved in overseeing S-21. Kaing Guek Eav
7 also indicated to me that Nuon Chea told him that the genuine
8 chief of S-21 was Nuon Chea himself, not Duch. And because Duch
9 actually at one point challenged the interrogation of the
10 prisoners at S-21, and that incident prompted Nuon Chea to claim
11 that Nuon Chea himself was the chief of the facility, and that he
12 said that you, Duch, were not the Chairman of S-21.
13 This incident happened when Son Sen was transferred to the
14 battlefield, and Nuon Chea was his successor. I mean Son Sen.
15 And Nuon Chea made it very clear before Duch at that moment. As
16 Duch indicated.
17 [11.47.30]
18 By conclusion I would like to submit that the Judgment by the
19 Trial Chamber has been rendered from erroneous ruling concerning
20 personal jurisdiction over the accused, because the Chamber has
21 failed to review exculpatory evidence. There is another piece of
22 evidence to prove that exculpatory evidence has not been subject
23 of the debate before the Chamber.
24 According to the statement by the judicial police, Mr. Bastin,
25 who indicated that Co-Investigating Judges Marcel Lemonde and

53

1 Mrs. Anna Austin ordered, or advised their colleagues not to
2 investigate exculpatory evidence. It is a very stupid act by
3 them, and it's really against the due process, because the
4 Co-Investigating Judges shall investigate exculpatory and
5 inculpatory evidence, and these pieces of evidence shall be
6 presented before the Chamber.

7 [11.48.44]

8 These are the subject of our argument, and that's why our client
9 does not receive a fair trial. Thank you, Your Honours.

10 [11.48.55]

11 MR. PRESIDENT:

12 Next we would like to proceed with the Co-Rapporteur Judge to put
13 any questions to the defence counsel should they wish to do so.

14 Judge Jayasinghe, you may proceed.

15 [11.49.15]

16 JUDGE JAYASINGHE:

17 Mr. Kar Savuth. Mr. Kar Savuth, defence counsel, may I have your
18 attention please? Your main argument is that the jurisdiction of
19 the ECCC is limited to senior leaders of the Democratic Kampuchea
20 who were most responsible. That was your main argument. Now
21 what is the legal basis on which you said that the senior leaders
22 of Democratic Kampuchea and those who were most responsible
23 should be read conjunctively instead of disjunctively, because
24 your main argument is that the jurisdiction of the ECCC is ousted
25 on the basis that you are not a senior leader of Democratic

54

1 Kampuchea.

2 So is there a -- could you tell us the legal basis on which you
3 sought to oust the jurisdiction of this Court?

4 [11.50.55]

5 MR. KAR SAVUTH:

6 Mr. President, Your Honours, and the Court. To respond to your
7 inquiries, regarding this Tribunal, Article 1 states that only
8 senior Khmer Rouge leaders, and those who were most responsible
9 for the crimes shall be prosecuted. And this piece of document,
10 as I indicated, is the grounds, and this document has been from
11 the Party Centre, from Pol Pot, the decision made by him.

12 So the Standing Committee of the Party Centre issued the
13 decision, and the details of which can be found in this piece of
14 document. So the senior leaders of the DK were the Standing
15 Committee, seven people, and include another three one. And I
16 think we have already submitted in our submission these names of
17 people involved.

18 During communist regime, the Party ruled the country, leads the
19 country, and we people had to abide by the Party's rule. This
20 means that the DK order or ruled that people within and outside
21 the ranks could be smashed. So the Standing Committee issued or
22 rendered power to four groups of people to smash. For example,
23 there was seven zones, and the secretary of each zone is liable
24 for smashing within and outside the ranks. And number two, the
25 office surrounding the Centre. So office 870 and its secretary

55

1 was in charge of the execution of the order.

2 [11.53.20]

3 MR. PRESIDENT:

4 Mr. Counsel, actually the document has already been put before
5 us. The question before you is more about whether the term, the
6 language 'senior leaders of Democratic Kampuchea and those who
7 were most responsible' should be read disjunctively instead of
8 conjunctively, and if so would there be any other laws that you
9 can really refer to, and you already indicated that Article 1 of
10 the ECCC law as the reference, but would you wish to refer to
11 other laws? And please be brief.

12 MR. KAR SAVUTH:

13 I think I have already made it clear, according to Rule 11bis,
14 concerning the jurisprudence of ICTY, concerning the
15 interpretation regarding senior leaders. Senior leaders here
16 refer to those who have high positions, de facto and de jure,
17 holding the power that can be regarded as the senior leaders, not
18 the middle level people. So I am referring to Article 11bis of
19 the international jurisprudence.

20 JUDGE JAYASINGHE:

21 Counsel, you would observe that in the middle, there is the word
22 'and'. 'Senior leaders of Democratic Kampuchea, and those who
23 were most responsible'. It is in view of the presence of the
24 word 'and' that I asked whether this expression should be read
25 conjunctively or disjunctively, so without referring to

56

1 documents, would you give us a legal basis please?

2 MR. KANG RITHEARY:

3 Your Honours, to respond to this, we fully agree that the
4 conjunction 'and' is well used, which means even those who were
5 most responsible for the crime shall be prosecuted, and that we
6 look at the mens rea of the person who committed the crime.
7 Those who only hold a senior position could issue order, and that
8 people at a lower rank could not really make any decision to kill
9 people.

10 [11.56.28]

11 That's why such people would be subject to the orders. And in
12 the ECCC law, the expression, the language has been well-framed,
13 that senior leaders are the DK and those who were most
14 responsible. So people who were most responsible for the crimes
15 should be separate from those senior leaders.

16 JUDGE JAYASINGHE:

17 Say that again, Mr. Counsel? Your last statement?

18 MR. KANG RITHEARY:

19 The word 'and', based on the Article 1 of the agreement between
20 the UN and the government, and Article 1 and Article 2 of the
21 ECCC law, that the senior leaders of Democratic Kampuchea and
22 those who were most responsible for the crimes. The word 'and',
23 it means they are -- it is conjunctive. It means those who were
24 most responsible for the crimes must be those who were senior
25 leaders of Democratic Kampuchea. Otherwise they would not be

57

1 most responsible for the crimes. I hope I am clear, Your
2 Honour.

3 [11.58.05]

4 MR. PRESIDENT:

5 Thank you for your clarification. It is now appropriate for the
6 adjournment. The Court shall resume at 1.30 pm this afternoon.

7 MR. KANG RITHEARY:

8 May my client also have a break and go for lunch? Without your
9 permission he won't be able to go.

10 INTERPRETER:

11 The President's microphone is off.

12 THE GREFFIER:

13 All rise.

14 (Judges exit courtroom)

15 (Court adjourns from 1159 to 1327)

16 (Judges enter courtroom)

17 MR. PRESIDENT:

18 Please be seated. The Court is now in session. This morning
19 when we adjourned it was when the Judge asked question to the
20 co-counsel for the accused. I would like now to give the floor
21 to the Judges of the Bench.

22 JUDGE JAYASINGHE:

23 Mr. Kang Ritheary, you mention that there was violation of
24 international customary laws. Where would you -- how would you
25 explain -- where would you see this violation of the

58

1 international customary law?

2 [13.29.05]

3 MR. KANG RITHEARY:

4 Thank you, Your Honour, for your question. Regarding the
5 application of the international customary law, it is
6 contradictory to the civil law system practised in Cambodia. The
7 international customary law and the case law used shall not be
8 inconsistent with the practice used in Cambodia. Even relying on
9 the interpretation of the common law, there is the case law on
10 the international customary law, this shall compare and see the
11 distinction in the commission of an offence and that the law
12 shall be formed for the court which use a similar system.
13 However, here at the ECCC, it's a mixture of the application of
14 those laws, that is the combination of common law and civil law
15 systems, and therefore the application of the international or
16 customary law which is a violation is that they do not examine
17 the existence of the offence.

18 [13.30.25]

19 If the crime committed in Yugoslavia or Rwanda cannot -- if the
20 system cannot be comparable to the crimes committed during the
21 Democratic Kampuchea, unless a similarity exists then the law
22 cannot be applied. That is in regards to the violations of the
23 international customary law. Decisions made in other judges
24 cannot always be applicable to the decisions made in this Court,
25 because of the definitions of those offences. Thank you.

59

1 JUDGE JAYASINGHE:

2 Mr. Kar Savuth, may I ask you -- suppose we are to hold that the
3 appellant is not one of the senior leaders of Democratic
4 Kampuchea, but he is one of those most responsible for crimes
5 committed during '75 and '79. What would you say, or how would
6 you explain that, or what would be your defence, that he was not
7 one of those most responsible? I ask you this question because
8 when you are talking about those who are most responsible, there
9 can be degrees of responsibility. So whether the conduct of
10 others outweighed your responsibility. Could you elucidate on
11 that point please.

12 [11.32.21]

13 MR. KAR SAVUTH:

14 In 1975, the period that Your Honour ask, I would like to
15 reiterate that in 1975, Kaing Guek Eav alias Duch, was at M13, in
16 Amleang, in Poev district, Kampong Speu province. He did not
17 participate in the evacuation of people, nor the killing of
18 people. In the Judgment, as well as in the indictment, it states
19 that those who killed the people were the military officials, and
20 Duch at that time was a police man in Kampong Speu. He was not
21 involved in the killings of people in 1975. Thank you, Your
22 Honour.

23 [13.33.30]

24 JUDGE JAYASINGHE:

25 May I ask you, Mr. Kar Savuth, that when the appellant gave

60

1 evidence before the Trial Chamber, he stated "there were more
2 than the number that already indicated who died in S-21, and I am
3 responsible for the crimes without denial. I was the person,
4 alone, who was in charge of the crimes, and I still maintain that
5 position." Well, is there any explanation that you could, as
6 this stage, adduce, to why you made that admission before the
7 Trial Chamber?

8 [13.34.35]

9 MR. KAR SAVUTH:

10 Thank you, Your Honour. What I raised in my oral submission this
11 morning, that Duch is a perpetrator, because those prison chiefs
12 of 195 prisons are considered perpetrators and fall outside the
13 jurisdiction of the ECCC, therefore staff and Duch of S-21 should
14 be perpetrators and fall outside the jurisdiction of the ECCC.
15 Thank you.

16 MR. PRESIDENT:

17 You may now proceed, Judge Som Sereyvuth.

18 JUDGE SOM SEREYVUTH:

19 I have a question to the co-lawyers of the accused. In part (b)
20 of the paragraph 109 of the document F.14, and during the hearing
21 this morning, you request the Supreme Court Chamber to consider
22 that the detention of Kaing Guek Eav alias Duch is a form of
23 protection for a potential witness in identifying senior leaders
24 and those who were most responsible for crimes committed at S-21.
25 The question is can you clarify if there is any legal basis for

61

1 your argument?

2 MR. KANG RITHEARY:

3 Thank you, Your Honour, for your question. I would like to
4 respond to your question. Our submission, I request that the
5 detention shall be considered as a form of protection for a
6 potential witness because Duch was arrested and detained
7 illegally by the government.

8 And secondly, he also provided testimony in regards to the S-21
9 crimes, and also to overcome the interview by Nate Thayer with
10 Pol Pot, that it was formed by the Vietnamese group. But in fact
11 Duch said S-21 was established during the Khmer Rouge regime,
12 with him as the Chief of Santebal, and Nuon Chea and Son Sen were
13 his superiors.

14 [13.37.20]

15 Also if we consider the legality of evidence, we can also review
16 the document stated by my colleague this morning, that is a
17 document dated 30 March '76, which list a number of people who
18 could smash the people inside and outside the rank. There were
19 those who were within the Standing Committee of the Party, that
20 is for the smashing in the autonomous zones and around the
21 central office.

22 And for the second line, that is for the military, the central
23 military with Son Sen as the general staff to conduct those
24 operations. So Son Sen was actually the one who directly
25 supervised S-21, and once he was transferred to the border to

*Extraordinary Chambers in the Courts of Cambodia
Supreme Court Chamber - Appeal*

*Case No. 001/18-07-2007-ECCC/SC
KAING GUEK EAV
28/3/2011*

62

1 counter-attach the Vietnamese, Nuon Chea told Duch that he was
2 the Chief of S-21. Because Duch, sometimes he protested to the
3 order to kill some people at S-21, that's why Nuon Chea made a
4 declaration that he was the Chief of S-21, and not Kaing Guek Eav
5 alias Duch.

6 [13.38.50]

7 And this is the evidence attached to the legality that Duch could
8 be a potential witness. And the second point is that Kaing Guek
9 Eav alias Duch always cooperates with the Court. And actually
10 the Court put some questions regarding the crimes committed at
11 S-21 as well as the hierarchy of the S-21, which were fully
12 cooperative and responded by my client.

13 That is the reason the previous detention should be considered a
14 form of protection for the witness. Thank you, Your Honour.

15 JUDGE NOGUCHI:

16 I have one question to the defence counsel. In your argument in
17 this morning's session, you emphasized that the accused was not a
18 senior leader, and he was instead in a position to receive orders
19 from his superiors. I would like to ask you, your observation on
20 Article 29 of the ECCC law. In the second sentence of Article 29
21 of the ECCC law, it says the position or rank of any suspect
22 shall not relieve such person of criminal responsibility or
23 mitigate punishment.

24 In the fourth sentence of the same provision, it says the fact
25 that a suspect acted pursuant to an order of the government of

63

1 Democratic Kampuchea or of a superior shall not relieve the
2 suspect of individual criminal responsibility.

3 I would like to ask the defence counsel to clarify how your
4 presence position could reconcile with these provisions. Thank
5 you.

6 MR. KAR SAVUTH:

7 Thank you, Your Honour. I would like to respond that the word
8 'suspect', according to Article 2 of the ECCC law, which defines
9 that the senior leaders of Democratic Kampuchea and those who
10 were most responsible for the crimes, they are considered as
11 suspects. That is point number one, Your Honour.

12 [13.42.05]

13 The persons who committed the offences, is that in this law, the
14 law defines the suspects for the crimes they commit. If a person
15 commits a crime in another country, the person shall be arrested
16 and prosecuted. However, the ECCC law is specific, and it
17 restricts the types of people that commits the crimes. That is,
18 the senior leaders and those that were most responsible. So the
19 rest are considered perpetrators.

20 And the perpetrators, co-perpetrators, accomplices, for example,
21 they are outside the jurisdiction of the ECCC, and as I stated
22 previously, 195 other prison chiefs were considered perpetrators,
23 and Duch's subordinates are also considered perpetrators, and
24 Duch -- Duch himself receives the orders from Son Sen and Nuon
25 Chea, so he should also be considered perpetrator and fall

64

1 outside the jurisdiction.

2 MR. KANG RITHEARY:

3 I would like to add to the comments made by my colleague. In
4 Article 29, as the Judge quoted, regarding the rank or the
5 position of the person, I think it is barred by the domestic law
6 and the international customary law, however, Your Honours also
7 review Article 1 of the agreement and Articles 1 and 2 of the
8 ECCC law, that this Court shall only prosecute those who were
9 senior leaders and most responsible for the crimes committed.
10 This means that if he is found to be amongst these two groups,
11 and that he acted without duress, then he shall be prosecuted.
12 But the evidence reveals that he is not within the two groups,
13 and according to the general principle of legality, or the
14 necessity defence, then he shall not be prosecuted.

15 [13.45.00]

16 Here we are not talking about the subject matter jurisdiction, we
17 are referring to the personal jurisdiction. If my client does
18 not fall under the personal jurisdiction, then there is no need
19 to examine other jurisdictions. Thank you.

20 MR. PRESIDENT:

21 I would like now to give the floor to the Co-Prosecutors to
22 respond to the statement made by the defence team.

23 [13.45.45]

24 [13.45.45]

25 MS. CHEA LEANG:

65

1 Good afternoon Your Honours, good afternoon everyone. After
2 hearing the oral submissions by the defence team for Kaing Guek
3 Eav alias Duch and the statement made by the accused, we would
4 like to make the following response.
5 Today, the Supreme Court Chamber of the Extraordinary Chambers in
6 the Courts of Cambodia opens a public hearing on the appeals by
7 the parties. From 26 July 2010, the date on which the Trial
8 Chamber pronounced its Judgment, the defence team and the civil
9 party lawyers appealed against the Judgment of the Trial Chamber.
10 The Co-Prosecutors filed our brief on 13 October 2010, and the
11 defence team filed their brief on 18 November 2010.
12 On 20 December 2010 the Co-Prosecutors filed our response to the
13 appeal brief by the defence team for Duch, and on 18 January
14 2011. Duch's defence team also replied to the response by the
15 Co-Prosecutors dated 20 December 2010. Lastly, the defence team
16 also submitted new evidence on 25 February 2011, and the
17 Co-Prosecutors would like to respond the submission and the
18 briefs to the response of the Co-Prosecutors dated 20 December
19 2010 with the following arguments.
20 [13.48.10]
21 On the issue of personal jurisdiction over Duch. The defence
22 team in their written submission, referring to Article 209 of the
23 code of criminal procedure and the ECCC Law that Duch falls
24 outside the jurisdiction, and Duch shall be released, and that
25 the previous detention shall be considered as a form of

66

1 protection for a potential witness to identify the senior leaders
2 and those who were most responsible for the crimes committed
3 within the framework of S-21.

4 The arguments raised by the defence team, we would like to
5 respond that in regards to Article 290 of the code of criminal
6 procedure and the ECCC Law that Duch falls outside the
7 jurisdiction is contradictory to Article 1 of the ECCC Law, which
8 is a special law for the enforcement and implementation in this
9 ECCC. In addition, Duch cannot be considered a potential witness
10 in case 001 as Duch recognised his role and responsibility, in
11 particular the recognition of the crimes committed at S-21 as
12 chief of the Santebal office of S-21.

13 Therefore, Duch is the most responsible person for the crimes
14 committed within the framework of S-21, which is a special centre
15 within the hierarchy and structure of all the security centres
16 within Democratic Kampuchea. For the determination of the
17 responsibility of Duch within the framework of S-21, the
18 Co-Investigating Judges categorised the dossier into separate
19 files and, as a result, Duch was sentenced by the Trial Chamber
20 to a single sentence of 35 years of imprisonment.

21 And in case 002, Duch can be a potential witness to identify
22 those who were the senior leaders involved in the crimes
23 committed within the framework of S-21. And Duch was not charged
24 in case 002 by the Co-Investigating Judges.

25 [13.51.07]

67

1 During the initial stage of the hearing of the Trial Chamber, the
2 defence team for lawyer only raised the issue of preliminary
3 objection on the statute of limitation of the 1956 penal code on
4 genocide and on murder and torture, which was stated in Article 3
5 of the ECCC Law, which at that time these two offences were
6 rejected by the Co-Investigating Judges to include in the
7 indictment or the Closing Order. And which we appealed.
8 And finally, the Pre-Trial Chamber agreed with the appeal of the
9 Co-Prosecutors to include these two offences in the indictment.
10 Therefore, the submission by the defence on the personal
11 jurisdiction in their response to the appeal of the Trial Chamber
12 cannot be accepted, because it is contradictory to the spirit of
13 Rule 89 of the Internal Rules, which states that parties need to
14 raise their preliminary objection during the initial hearing,
15 otherwise they cannot be accepted.
16 [13.52.30]
17 In addition, the defence team did not appeal the sentence or the
18 conviction as the Trial Chamber sentenced him to 35 years
19 imprisonment, and the defence team raised the issue of error of
20 the determination of personal jurisdiction of Duch. And on this
21 particular personal jurisdiction issue, the Trial Chamber decided
22 appropriately, as it had formed a view that Duch fell within the
23 jurisdiction of the ECCC as a person who is most responsible for
24 the crimes committed within the framework of S-21, committed from
25 17 April 1975 to 6 January 1979.

68

1 In addition, Duch himself frequently acknowledged his
2 responsibility for crimes committed within the framework of S-21
3 as Chief of the centre, even during the investigative stage. And
4 on the last day of the hearing, after a nine month period from 30
5 March 2009 to 23 November 2009, which was the last day of the
6 presentation on the oral argument. For the final oral arguments
7 the defence team raised the issue of personal jurisdiction over
8 him, and that he did not fall under the jurisdiction he shall be
9 acquitted.

10 [13.54.25]

11 Duch himself also stated that the Trial Chamber should release
12 him. In contrary, the international co-lawyer stated that he
13 only seek the mitigating or lenient sentence for Duch. Duch's
14 defence team raised the objection raised by Judge Lavergne in the
15 conviction which shall not be more than 30 years, indicates that
16 the Trial Chamber cannot find sufficient vote on the
17 determination of jurisdiction over Duch.

18 This means, as we understand, the arguments raised are not
19 correct, as the Trial Chamber found that Duch falls within the
20 jurisdiction of the ECCC as a person who is most responsible for
21 the crimes committed from 17 April 1975 to 6 January 1979 within
22 the framework of S-21. However, in fact, Judge Lavergne and
23 Judge Cartwright objected to the application of the 1956 penal
24 code, which is stated in Article 3 of the ECCC Law on murder and
25 torture, as it violates the principle of retroactivity as raised

1 in the preliminary objection raised by Duch defence team during
2 the hearing.

3 [13.56.15]

4 We also would like to submit that the interpretation of the law
5 stated in Article 3 of the ECCC Law pursuant to Article 12 and
6 Article 30 of the agreement, this Tribunal shall apply the
7 domestic Cambodian law in case there is a lacuna, then
8 international law shall supplement. And the ECCC Law was adopted
9 by the Cambodian National Assembly, which the use of the civil
10 law system in Cambodia, and judges shall not interpret
11 differently the rest by the defence team that Duch was at the
12 lowest level of the Communist Party's hierarchy within the
13 Democratic Kampuchea government as relying on the document of Mr.
14 Craig Etcheson, that Duch's position is similar to that of a
15 regiment commander.

16 And he is not of any higher position or a minister of any
17 ministry. In contradiction, Duch only had a role similar to that
18 of a commander of a regiment. And how many people under in one
19 document is uncertain. The actual number of soldiers within the
20 regiment is always unclear. However, based on the testimony of
21 Duch before the Co-Investigating Judges, that the staff of S-21
22 comprised of those from Division 703 of Nat, and there were about
23 300 of them, and from M-13, about 10, and some forces were led by
24 Comrade Sok.

25 [13.58.25]

1 In addition, according to the document, regarding the forces at
2 S-21, there were a total of 2,327 work forces under S-21. Even
3 if Duch raised the issue that Duch was at the lowest rank, Duch
4 supervised the effective operation of S-21, as chief of that
5 security centre, with its power throughout the country, and with
6 specificity that no other prisons had. And the Co-Investigating
7 Judges, as well as the Co-Prosecutors, and the Trial Chamber, all
8 had the view that he falls under the jurisdiction of the ECCC as
9 a person who is most responsible for crimes committed from 17
10 April 1975 to 6 January 1979 as chief within the framework of
11 S-21. By considering all the facts and the specificity of S-21.
12 Before the Trial Chamber issued its Judgment on 26 July 2010, the
13 Trial Chamber had conducted the proceedings, including the
14 initial hearing where parties were allowed to raise the matter of
15 preliminary objection as set forth in the Internal Rules. The
16 full substantive hearing lasted for six months, starting from 30
17 March 2009 through 17 September 2009. Parties had three months
18 to make their oral closing statements and the final hearing was
19 conducted on 23 November 2010. And the Judgment was pronounced
20 on 26 July 2010.

21 Duch was arrested and sent before this Chamber on 31 July 2007.
22 He himself and his lawyers have been participating in the
23 procedures before the Co-Investigating Judges, including
24 participation in the questioning of the accused, the re-enactment
25 at the killing fields, Choeng Ek and S-21 facility, or Tuol

71

1 Sleng, and the confrontation or adversarial hearings.

2 [14.01.35]

3 These procedures were conducted following the more than one year
4 of investigation, and finally the Co-Investigating Judges issued
5 a Closing Order on 8 July 2008. So the entirety of the
6 investigation phase, the defence counsel for the accused failed
7 to submit any request for investigative action on the
8 determination of personal jurisdiction over Duch by calling Nuon
9 Chea, summoning Nuon Chea as the person who was superior than
10 Duch. Although the defence claimed so in their submission.
11 Further than that, during the proceedings, especially during the
12 initial hearing, the defence could have raised the matter of
13 preliminary objection on personal jurisdiction rather than on the
14 statute of limitation on the penal code of 1956. Also, the
15 defence counsel, the national and international defence counsel
16 acknowledged several facts proposed by the prosecutor that the
17 accused himself also acknowledge, the responsibilities of crimes
18 committed at S-21.

19 [14.03.15]

20 It is therefore the defence counsel fails to exercise the right
21 to make sure the accused exercise his right properly from the
22 very beginning during the investigation phase, as envisaged in
23 the Internal Rules, and also before the Supreme Court Chamber,
24 because according to the rule, parties are allowed to raise
25 preliminary objection during the initial hearing.

72

1 Before us today, during this Supreme Court Chamber, the
2 preliminary objection is the subject matter for discussion, and
3 the matter is about the personal jurisdiction over the accused,
4 which is against the Internal Rules. Therefore the prosecutor
5 would like to request that such submission be rejected.

6 [14.04.10]

7 Defence counsel for the accused maintain its position concerning
8 the interpretation of the message of Rule 87 and Rule 89 of the
9 Internal Rules. According to Rule 89, the preliminary objection
10 matter shall be raised during the initial hearing, and according
11 to Rule 87 of the Internal Rules parties are allowed to present
12 evidence during hearings.

13 In order to ensure that the accused is acquitted, defence counsel
14 must prove, or must produce the exculpatory evidence as charged
15 in the Closing Order, or the Judgment of the Trial Chamber, not
16 raising this after nine months, after the proceedings of the
17 Trial Chamber. This really has harmed the harmony of the
18 Internal Rules of the ECCC.

19 Above all else, the defence counsel made the final conclusion in
20 relation to the preliminary objection by referring to the
21 practice at national level. This is not correct. Because the
22 defence counsel made the final submission, but in their
23 submission they shall not raise any matter of preliminary
24 objection, as according to Article 344 of the criminal procedural
25 code which states that preliminary objection shall be raised

73

1 during the substantive hearing, otherwise it shall be rendered
2 inadmissible.

3 [14.06.15]

4 The defence counsel in their appeal brief also raised the matter
5 of the law outlawing the DK group. This morning their position
6 has been reiterated concerning Article 5 of the law on the
7 outlawing of the Democratic Kampuchea group. In its appeal
8 brief, paragraph 5, it states that the law allows the Khmer Rouge
9 soldiers six months to surrender and come to integrate with the
10 government.

11 The prosecutors submit that whether the person surrender or not
12 surrender, it was not really the authority of this Tribunal to
13 decide. The Co-Prosecutors charge Duch pursuant to the Internal
14 Rules. In the introductory submission, and the final submission,
15 and the indictment or Closing Order by the Co-Investigating
16 Judges there were no relevant to the facts regarding the law
17 outlawing the DK group. So the defence counsel raised these
18 matters which are opposing, which is different from the facts at
19 issue.

20 [14.08.00]

21 We therefore request that the Supreme Court Chamber reject such
22 matters being brought before this Chamber.

23 Regarding the prisoners released, as stated in the Paris Peace
24 Accord, there were some prisoners who were prisoners of war who
25 were released, but for those who committed crimes during the

74

1 period of 1975 through 1979, crimes falling under the
2 jurisdiction of the ECCC, has not been included in that Accord.
3 We would like to draw the attention of the defence counsel to
4 refer to this Paris Peace Accord, and in particular the preamble
5 part of that Accord.

6 The defence counsel also referred in their brief when they
7 referred to Article 99 of the penal code of 1956, and this is of
8 course contradictory to Article 100 of the same penal code. As
9 the defence already indicated, paragraph 35 of its brief, that
10 according to Article 99 of the penal code of Cambodia which
11 states that crimes could not be crimes if they were committed
12 under the orders, and that the order have been issued by the
13 legitimate authority.

14 [14.09.45]

15 The submission by the defence counsel gives rise to the question
16 that whether the Democratic Kampuchea regime exercised or
17 implemented any law, enforced any law, the answer is very simple.
18 The regime did not apply any law. The national and international
19 community have been fully aware that the regime killed, starting
20 from killing former officials of the People Republic in 1975,
21 while Cambodian people were evacuated from Phnom Penh, and the
22 execution of the former soldiers and officials were killed
23 because they were under the pretext that the American would bomb
24 the cities.

25 And later on, purges were carried out within their ranks. People

75

1 who were purged were accused of being the borne-within enemies.
2 Nuon Chea was the President of the People's Assembly, and
3 everyone is familiar already that the Assembly is the body to
4 make the law, however at that time the People's Assembly did not
5 really enforce or make any law, but they really followed the
6 rules and orders of the DK regime.

7 [14.11.30]

8 S-21 was established by the DK for the purpose of smashing all
9 the enemies of the regime. Civilians were arrested, as well as
10 soldiers also who were caught outside the battlefields, were
11 detained. Duch indicated that he did not want to elaborate
12 anything on that, even though the Khmer Rouge regime had its
13 legitimate seat that the UN, but later on the Khmer Rouge regime
14 itself has been known by the world that the regime without any
15 law, and a criminal organisation.

16 The reference to the above Articles by the defence counsel, for
17 example the spirit of Article 100 of the penal code of 1956 that
18 states clearly that subordinates who received orders and who knew
19 that the order were illegal, they would not be relieved from
20 being prosecuted. This Article links closely to the fact that
21 Duch falls within the investigating framework of the context of
22 S-21 because Duch was quite familiar of the criminal
23 implementation of the conduct of the Khmer Rouge regime, and he
24 was quite familiar with this even when he was at M-13.

25 [14.13.30]

76

1 He was familiar with the execution of people en masse, and also
2 the removal of right to ownership. Therefore, Duch must have
3 known very well about the orders his superior have imposed on
4 him. He shall not be falling out of the jurisdiction concerning
5 the crimes he committed at S-21 regardless of his working under
6 duress.

7 According to Article 29 of the ECCC, I quote, "The fact that a
8 suspect acted pursuant to order of the government of Democratic
9 Kampuchea or a superior shall not relieve the suspect of
10 individual criminal responsibility."

11 [14.14.45]

12 Your Honours, I would like now to proceed further but would like
13 to inform the Supreme Court Chamber that we would like to refer
14 to two documents, document regarding Khmer Rouge prisons and the
15 selected Khmer Rouge biographies. Since the Chamber has already
16 accepted the documents, the prosecution would like to touch upon
17 this.

18 We would like to submit that the policy by the Communist Party of
19 Cambodia is to be implemented by the security centre, and the
20 security apparatus was the heart of the policy of the CPK in
21 smashing the enemies and smashing those who were perceived as
22 enemies. S-21 was the most important office in this apparatus.
23 Although evidence did not indicate that S-21 played the role to
24 oversee all other security centres across the country, but it is
25 unequivocally clear that S-21 was in the highest hierarchy in

77

1 regarding the security centre of the CPK, and it has a very
2 unique characteristic.

3 [14.16.30]

4 As the Co-Prosecutor already found some special characteristics
5 as follow, for example the S-21 had to report directly to the
6 centre, and to meet directly with the Standing Committee as well,
7 and this communication had to be done through with Son Sen and
8 Nuon Chea.

9 S-21 was the only Party centre security office which was tasked
10 with arresting, detaining, interrogating and executing senior
11 cadres of the Communist Party of Kampuchea within the ministry,
12 committee and Revolutionary Army of Kampuchea, and from a zone
13 and other places. The prosecutor would like to refer to the name
14 of some people, important people who were killed at S-21,
15 including Vorn Vet, alias Pang, member of the Standing Committee
16 and Deputy Prime Minister in charge of Economy, Koy Thuon, alias
17 Thach, Minister of Commerce, Ho Nimh, alias Pos, Minister of
18 Propaganda and Information, Thoch Puon, alias Pin, Minister of
19 Public Works, Suo Vasi alias Duon, former head of Office 870 and
20 Minister of Commerce, Norng Suon alias Jei, alias San, Secretary
21 of the Agriculture Committee, Chum Som Auk alias Pang,
22 administrative office, Chai Kim Huor alias Hok, general staff of
23 the national defence, Si Chai alias Thom, general staff of the
24 Ministry of Defence, Cheng On, Minister of Industry Ministry, Nei
25 Saran alias Sann, alias Jah, Secretary of North West, Muol

78

1 Sambath alias Roth, Secretary of North West, Chu Jet alias Si,
2 Secretary of the West, Tun Son alias Nyam, committee of commerce,
3 Suos No alias Chuk, Kao Kim Hout alias Sot, Chang Chak Krei alias
4 Prom Bat, Im Lorn alias Nat, Ung Sok and Nyam To.

5 [14.19.15]

6 These are the names of the senior cadres who were killed at S-21,
7 but other security centre did not really oversee such executions
8 of senior people. Regarding the detail of the list of names of
9 prisoners at S-21 we may refer already to the list I submitted
10 before the Trial Chamber and the defence counsel also refers to
11 this list as well during the investigating phase.

12 S-21 was operated as tool to smash all the security elements
13 within its rank, with the support from Duch to make arrests and
14 smash any subordinates, several of whom were killed at S-21 and
15 Prey Sar. Duch himself admitted that some Prey Sar prisoners
16 were sent to Choeng Ek to be smashed. Duch referred to ERN
17 0006728, which indicated that 17 people were sent to be executed,
18 taken from S-27, or Prey Sar to Choeng Ek, and 160 children were
19 also sent to the smashed at Choeng Ek.

20 Without support from Duch, the superiors would not know what the
21 subordinates would have committed, or they would not be arrested.
22 This proves that Duch himself was familiar with this, and that
23 his request to his superior would never be rejected. It
24 indicates that Duch was vested with power to make a decision.

25 [14.21.25]

1 It is contradictory to what the defence has indicated, that their
2 client did not have any power to make any arrest or detention,
3 and it is also contradictory to Him Huy's testimony in which he
4 indicated that in some instances the accused himself went to
5 arrest people in person. S-21 was the only security centre
6 during the DK that has the scope to cover the whole country.
7 This centre provided advice and coordinated the smashes of the
8 people with the administration and other military all across the
9 country.
10 For example, Duch met in Divisions 290 and 170 to search for the
11 name of about 20 people to be arrested and executed. S-21 on top
12 of that received all prisoners from across the country.
13 Furthermore, S-21 employed a very broad resources, including the
14 interrogation, detention and torture, and it had employ real
15 organisational chart. The directives had been issued strictly to
16 be obeyed by his subordinates. There was three interrogators
17 group, including the cool, the chewing and the hot ones. And the
18 interrogators were trained by Duch.
19 [14.23.30]
20 Execution. Execution was carried through blood drawing, and
21 people were taken to be executed at Choeng Ek through annotation
22 by Duch. In one of the annotation Duch stated Uncle Pang, smash
23 them all. S-21 was the security centre of Democratic Kampuchea
24 that had the most people under its operation. There were 2,327
25 people working for S-21. No other security centre had this

80

1 number of people.

2 Also, S-21 received Vietnamese prisoners of war and westerners
3 who were arrested at the sea. For example, the three westerners
4 who were arrested from the coastal area of Kampong Saom were sent
5 directly to S-21, they were not sent to any other autonomous
6 security centre. So it is true that S-21 had the biggest power
7 than the other security centre across the nation.

8 [14.24.45]

9 As indicated as observed the special characteristics of S-21
10 above, the Co-Prosecutors submit that the defence counsel have
11 failed to prove any speciality, or special characteristic of
12 Chong Chroy security prison. The defence counsel indicated under
13 paragraph 43 of their appeal brief that Chong Chroy was another
14 important security centre. It indicated that if Duch were most
15 responsible for the crimes committed under the framework of S-21,
16 other security centre would have been also charged, or
17 prosecuted.

18 However, if it is, according to the submission by the
19 Co-Prosecutors that they had no bound to prosecute all the head
20 of the security centre all across the nation, I'm referring to
21 the 195 security prison, then Duch should be also free. The
22 prosecutors would like to draw your attention to the submission
23 by the defence counsel with reference to the prison of the Khmer
24 Rouge prepared by Pheng Pong Rasy who indicated the location of
25 security centres all across Kampuchea, and that the defence

81

1 picked Chong Chroy as the main prison to challenge with the
2 existence of S-21.
3 However, the Co-Prosecutors would like to submit that there is no
4 clear indication regarding the special characteristic of Chong
5 Chroy security prison to prove that it has different
6 characteristic as opposed to that of S-21. According to the
7 document entitled The Chain of Terror, written by Ea Meng Try,
8 which really list the structure of security centre of Democratic
9 Kampuchea, there were five kinds of security centres, including
10 the lowest one, the commune militia office, and then the security
11 centres at district level, and sectoral level, and also the zone
12 level.
13 [14.27.39]
14 And the highest security centre was at S-21, which is at the
15 centre party. Regarding Chong Chroy, which was admitted by the
16 defence counsel, it was only the district level security centre
17 located in Rolea Bier, Kampong Chnang, sector 31, West Zone.
18 This document is relating to the security centre I submitted in
19 the request for additional evidence by the defence counsel. The
20 prosecutors would like to submit that this evidence is not new at
21 all. It has already been put in the case file, and the
22 prosecutors have also been familiar with this document already.
23 And that Chong Chroy security centre could not be used as
24 reference to challenge the ECCC jurisdiction over the accused.
25 Regarding the documents in relation to the biography of 31

82

1 people, for this document, as Duch's lawyers requested in the new
2 evidence, and accepted by the Supreme Court Chamber, the
3 Co-Prosecutors maintain their same position that this document
4 already exists in the case file. The three page document,
5 although it is not in the case file, and that we are not
6 surprised by this three page document.

7 [14.29.21]

8 The reason is that we have already known the content that Kaing
9 Guek Eav alias Duch is chief of S-21 prison who worked on the
10 confessions implicated Chak Krei Chhauk, Ly Phen, in order to
11 conduct the purge, and for the senior people, Pol Pot, Nuon Chea,
12 and Son Sen, and those subordinates include Ho, Mom Nai alias
13 Chan, Pon, who executed Koy Thuon, Vorn Vet, Hu Nimh, with his
14 annotation that, "Smash them to pieces" as in the record of the
15 interview before the Co-Investigating Judges and during the
16 adversarial hearing before the Trial Chamber.

17 We would like to make the observation on the statement raised by
18 Duch's defence counsel at the Trial Chamber. During the hearing
19 on 1 April 2009, when asked by the Co-Prosecutors whether the
20 defence team objects to the personal jurisdiction, the response
21 was no. If I were to raise it, I would have raised it during the
22 initial hearing. So this is just a snapshot for Your Honours to
23 examine regarding the issue of personal jurisdiction.

24 [14.31.03]

25 And why now before the Supreme Court Chamber the defence would

83

1 like to reinstate the issue of personal jurisdiction, and that
2 Duch does not fall under the jurisdiction, and he shall be
3 released.

4 This submission is contradictory to the content of Article 89 and
5 Article 87 of the Internal Rules which, in 89, it states
6 preliminary objection with regards to personal jurisdiction shall
7 be raised during the initial hearing, otherwise it cannot be
8 accepted. The additional evidence shall have direct links to the
9 arguments, concrete arguments raised by the Trial Chamber.
10 Therefore for the new evidence submitted by the defence team only
11 the document that is already in the case file.

12 And the additional evidence that the defence team submitted we,
13 the Co-Prosecutors, would like the Supreme Court Chamber to
14 dismiss it, to reject it, and that the Supreme Court Chamber
15 should decide on the personal jurisdiction that Duch falls within
16 the jurisdiction of the ECCC as stipulated in Article 1 of the
17 ECCC Law.

18 I would like to take this opportunity also to make our
19 observation with regard to the transcript of 1 April 2009 on page
20 13 and 14, when the defence team clearly replied, and his reply
21 is in the transcript that he is not going to raise the issue of
22 preliminary objection on the personal jurisdiction and that his
23 objection is only to deal with the 1956 penal code.

24 [14.33.20]

25 The defence team always reiterated that Duch falls outside the

84

1 jurisdiction of the ECCC, and that S-21 also has a similar
2 hierarchical status of the other 195 prisons, in particular Chong
3 Chroy prison, and that Duch shall be acquitted. This
4 interpretation by the defence team cannot be accepted, and we
5 would like therefore the Supreme Court Chamber to dismiss the
6 appeal by the defence team. I'm obliged, Your Honour.

7 MR. PRESIDENT:

8 The international Co-Prosecutor, would you like to make a
9 statement or response?

10 MR. CAYLEY:

11 Not at this time, no. Thank you, Mr. President.

12 [14.34.30]

13 MR. PRESIDENT:

14 I would like now to seek the Judges of the Bench, if you have
15 questions to put regarding these matters.

16 JUDGE JAYASINGHE:

17 The Co-Prosecutors, we need some assistance from you on the
18 position taken up by the defence, that the senior leaders of the
19 Democratic Kampuchea and those who were most responsible should
20 be read conjunctively and not disjunctively. The whole basis of
21 the defence argument was on the basis that the appellant is not
22 one of those most responsible, so either Mr. Cayley or Madame
23 Chea Leang, would aid this Court on this please?

24 MS. CHEA LEANG:

25 Thank you, Your Honour, for the question. This is an important

85

1 question in regards to personal jurisdiction. The Co-Prosecutors
2 would like to respond as follows. We have the view that in
3 Article 1 of the law on the establishment of the ECCC, it states
4 that it is to prosecute those for crimes committed during the
5 Democratic Kampuchea regime, and there are two categories of
6 people to be prosecuted. That is, the senior leaders and those
7 who were most responsible.

8 [14.36.50]

9 We are of the view that, in this instance, in particular in this
10 case, we only focused on one of the two categories, that is the
11 most responsible, and we will rely on our discretion to charge
12 people in relation to this group. That is also in consistence
13 with Article 40, and we exercise our discretion it's based on the
14 facts and the existing law.

15 We, as Co-Prosecutors, can assess the documents we collect during
16 the preliminary investigation, so that we can submit it to the
17 Co-Investigating Judges for further action, and during the
18 preliminary investigation, we considered that Duch was within the
19 category of those most responsible, based on the existing law and
20 facts.

21 [14.38.05]

22 And regarding our authority, or discretion to make such a
23 decision, as well as the view formed by the Co-Investigating
24 Judges and the Trial Chamber in agreement to our decision for the
25 charge against the accused. And with your permission I would

86

1 need about eight minutes to make this short statement, Your
2 Honour.

3 JUDGE JAYASINGHE:

4 May I ask the Co-Prosecutors again, now did the draftsmen of the
5 ECCC law and the agreement ever contemplate prosecution of
6 Democratic Kampuchean leaders who had not been guilty of any
7 culpability. So if you are saying that the two situations,
8 senior leaders of Kampuchea and those most responsible are
9 disjunctive, then what is the culpability that could have been
10 attached to the senior leaders of Democratic Kampuchea who did
11 nothing between 1975 and 1979.

12 [14.40.00]

13 MS. CHEA LEANG:

14 My response was in the intention to the interpretation of the
15 question put by Your Honour on the 23rd February (sic). Of
16 course, for us, there is no need for us to consider him for the
17 two groups, for the senior leaders or for those most responsible.
18 And of course these two groups are disjunctive. And I would like
19 to respond to Your Honour, in particular on the group for those
20 who were most responsible, and also I would present to you our
21 discretionary power based on the law and the facts to charge Duch
22 for the crimes committed within a framework of S-21.
23 Within the jurisdiction of the ECCC, the Co-Prosecutor clearly
24 stated, based on the existing law and facts, that Duch clearly
25 fall within the group of those who were most responsible. The

87

1 Co-Prosecutors exercised their discretionary power that Duch
2 falls within the group of the most responsible, relying on
3 several facts, that I would summarise as follows, if you would
4 grant us the time, then I would be able to make a brief
5 presentation.

6 MR. PRESIDENT:

7 Yes, you may proceed.

8 MS. CHEA LEANG:

9 We have reasons to believe that Duch did commit the crimes within
10 the framework of S-21 as Chief of the Security Office. In
11 identifying the persons in our preliminary objection before we
12 sent our introductory submission to the Co-Investigating Judges.
13 First we need to exercise our discretionary power to charge, and
14 then we need to assess the facts, based on the existing law. We
15 maintain the spirit of Article 1 of the law on the establishment
16 of the ECCC, and the spirit of the preamble of the agreement
17 between the United Nations expressing the concerns of the Royal
18 Government of Cambodia, as well as the willing of the Cambodian
19 people to find peace, national reconciliation and peace.
20 In our introductory submission we considered Duch, as Chief of
21 S-21 prison, which is at the Centre level, and it is at the
22 highest level of the Security Centre offices during the
23 Democratic Kampuchea regime. The exercise of the discretionary
24 power, as I stated about, we consider the circumstances in which
25 the crimes were committed, and that the charges does not

88

1 interfere with the peace or stability of the society.

2 [14.44.00]

3 The Co-Prosecutors also consider the views of other international
4 prosecutors, for example, the Special Court in Sierra Leone, that
5 it recognised the necessity to consider the extension of the
6 charges in regard to the stability and political stability in
7 society. And the charges shall not interfere in the national
8 reconciliation and peace within the country.

9 After deciding to open the investigation, by the virtue of the
10 introductory submission, with respect to the spirits of the
11 preamble of the agreement between the UN and the government, the
12 Co-Prosecutors also took into consideration the meaning of
13 Article 1 of the ECCC law, which does not require the
14 Co-Prosecutors to charge all suspects. In particular, in the
15 case that was submitted by the defence team for all the security
16 centres throughout Cambodia, that is 195 other security centres.
17 The statement is incorrect, because the security centres as
18 raised by the defence, including Chom Chroy in Rolea Bier
19 district, Kampong Chnang province, in the West Zone under the
20 supervision of the Central Zone, based on the decision dated 30
21 March 1976. In contradictory, S-21 is located within the Centre,
22 under the supervision of the Central Committee, and that is based
23 on that decision as I mentioned above.

24 [14.46.13]

25 So it falls under the jurisdiction of the ECCC, and the decision

1 to decide that Duch falls under the jurisdiction of the ECCC is
2 based on a number of reasons. We not only rely on the
3 international jurisprudence, as Sierra Leone, we also consider
4 the specificity at S-21, for example the role and authority, de
5 jour and de facto authority of the accused. For example, his
6 supervision over various sections of S-21, as well as the
7 numerous surviving documents, and these documents have already
8 been put in the case file.

9 On the contrary, the defence team did not find any remaining
10 document from the Chom Chrouy prison. And regarding the exercise
11 of the discretionary power, based on the spirit of the ECCC law
12 and the preamble of the UN and the government agreement, and
13 based on the other jurisprudence of the Special Court of Sierra
14 Leone, that we the Co-Prosecutors have the power to charge, or
15 not to charge, any person based on Article 40 of the Code of
16 Criminal Procedure of Cambodia, which clearly states the power to
17 charge or not to charge in the introductory submission.

18 [14.48.10]

19 Regarding the fact that Duch falling within the jurisdiction of
20 the ECCC, also agreed by the Co-Investigating Judges and found to
21 be appropriate by the Trial Chamber in its Judgment. After our
22 initial preliminary investigation, we charged five persons in our
23 introductory submission for the facts stated in that submission.
24 And after one year investigation, that is on the 8th of August
25 2008, the Co-Investigating Judges issued a Closing Order or

90

1 indictment, charging that although Duch was not a senior leaders
2 of Democratic Kampuchea, Duch is considered in the category of
3 those who were most responsible for the crimes committed. As
4 Duch -- that is, this is the reasoning of the Co-Investigating
5 Judges -- that Duch had the power as the deputy, and then as
6 Chief of S-21, which is under the direct supervision or the
7 Central Committee, and the Trial Chamber later agreed to the
8 evaluation or the assessment by the Co-Investigating Judges that
9 Duch falls under the jurisdiction of the ECCC as a person who is
10 most responsible for the crimes committed during '75 to '79.
11 The decision of the Co-Investigating Judges and the Trial Chamber
12 that Duch is the most responsible person, and under the
13 jurisdiction of the ECCC is a decision consistent with the
14 discretionary power of the Co-Prosecutors. These are the
15 reasons, based on facts and applicable existing law that Duch
16 fall under the jurisdiction of the ECCC. Thank you, Your Honour.

17 [14.50.35]

18 JUDGE NOGUCHI:

19 I have one question to the Co-Prosecutors. Both parties have
20 been discussing Article 2 of the ECCC law. The expression of
21 'senior leaders and those most responsible'. Could you provide
22 your understanding as to the nature of these words. Either these
23 are jurisdictional requirement, subject eventually to judicial
24 review, or these are merely a guidance for Co-Prosecutors in
25 exercising its prosecutorial discretion. Thank you.

91

1 MS. CHEA LEANG:

2 Thank you, Your Honour, for your question. I think the issue is
3 not related to the jurisdiction, rather it is related to the
4 competence and the prosecutorial discretion.

5 MR. PRESIDENT:

6 Judge Milart, you may proceed.

7 JUDGE MILART:

8 Madam Chea Leang answered my question. Thank you.

9 MR. CAYLEY:

10 Mr. President, may I add something very briefly?

11 MR. PRESIDENT:

12 (No interpretation)

13 MR. CAYLEY:

14 (Technical malfunction) question that was put by Judge Jayasinghe
15 earlier about whether or not this phrase 'senior leaders and most
16 responsible' is disjunctive or conjunctive. I can answer it very
17 briefly, and I certainly support all of the comments that have
18 been made by my learned friend the national prosecutor. But if I
19 could refer you, Judge, to paragraphs 27 and 28 of our response
20 to the defence appeal, and that gives insight, I think, into the
21 minds of both the United Nations and the Cambodian government.
22 Certainly, if one looks at the agreement between the Government
23 and United Nations on one side, and then the domestic legislation
24 passed by the Royal Cambodian Government on the other side, you
25 will find that, in fact, the UN group of experts, prior to the

92

1 agreement in 1999, stated very clearly that there were two types
2 of individuals who should be prosecuted. Namely, senior leaders
3 with responsibility over the abuses, as well as those at lower
4 levels who are directly implicated in the most serious
5 atrocities.

6 [14.54.15]

7 Subsequently, in debates in the Royal Cambodian Government
8 parliament, in the Cambodian parliament, Deputy Prime Minister
9 Sok An explained that Article 2 of the proposed law that followed
10 the agreement between the United Nations and the Royal Government
11 allowed the prosecution of two types of targets: one, senior
12 leaders as opposed to person who held ordinary positions; and
13 two, those who were not the senior leaders but committed crimes
14 as serious as the senior ones.

15 So I hope that helps you, Your Honour, in your determination of
16 this issue. Thank you.

17 MR. PRESIDENT:

18 It is now appropriate to have a break. We shall adjourn for half
19 an hour, and we shall return at 3.30. Security official, you
20 can now take the accused back to the waiting room.

21 (Judges exit courtroom)

22 (Court adjourns from 1455 to 1528)

23 (Judges enter courtroom)

24 MR. PRESIDENT:

25 The Court is now in session. We will now give the floor to the

93

1 civil parties counsel group 3 to make their response.

2 MR. KIM MENGKHY:

3 Thank you, Mr. President. I am representing civil party group 3,
4 together with Ms. Martine Jacquin, my colleague, we would like to
5 make our response to the statement by the defence on the issue of
6 personal jurisdiction over the accused Kaing Guek Eav alias Duch.
7 After having heard the statements and the response by the
8 Co-Prosecutors, we are of the view that the defence submission is
9 not based on any legal ground. The victims who are here are not
10 to seek any revenge, their only wish is to have justice and forms
11 of reparations.

12 [15.30.35]

13 One of the observations that we make is that repeatedly the
14 defence team raised the issue of the role and responsibility of
15 the accused in comparison to other prison chiefs, totaling 195
16 prisons. He is just one of those 190 something prison chiefs.
17 And on the point of law in identifying the suspects who are the
18 most responsible, they raise certain legal grounds, and we are of
19 the view that those certain legal grounds are inappropriate.
20 For instance, the law on the Paris Peace Accord, the law on
21 outlawing the Khmer Rouge, they did not provide any
22 identification of the people within the category of the most
23 responsible persons. Only the ECCC Law shall be raised in
24 contention with other relevant international jurisprudence.

25 [15.31.50]

94

1 The second point is that the defence team raised the issue of the
2 fact that their client is just one of the many prison chiefs. It
3 is groundless to raise such a matter before this Chamber. The
4 assertion that Duch, within the Party rank, is equivalent to a
5 commander of a regiment, and that there is no law during the
6 Khmer Rouge regime, if we consider these arguments, if there is
7 no law during the regime, what did they rely on? Of course, they
8 used the law of the wild. It means whoever is senior will defeat
9 the lower rank one, or the weak one. So the strong ones always
10 beat the weak one. Probably that is the argument raised by the
11 defence team.

12 And another point that the defence raised is that the
13 Co-Prosecutors only charge one of the many prison chiefs, and the
14 rest of the prison chiefs were not charged. I think that is
15 inappropriate. The charges against this person is the most
16 appropriate, because if we practice the law of the wild it means
17 the tigers would always eat the cows, and not the cows eat the
18 tigers. And that is clearly stated through his role and
19 responsibility as chief of S-21 that he arrested many other
20 senior cadres of the Khmer Rouge.

21 [15.33.58]

22 Regarding the details of the legal grounds of our response, I
23 would like to give the floor to my colleague, Ms. Martine
24 Jacquin.

25 MS. JACQUIN:

95

1 Mr. President, Your Honours, Mr. and Madam Co-Prosecutors,
2 counsel for the defence, counsel for the civil parties, my fellow
3 colleagues. On behalf of the interests of civil party group 3 it
4 is my honour to answer the Chamber's question asking for all
5 supplementary explanation on the following.

6 Is the language 'senior leaders of Democratic Kampuchea' and
7 'those who were most responsible' as indicated in the ECCC
8 agreement and the ECCC Law a jurisdictional requirement that is
9 subject to judicial review, or is this language a guide to the
10 discretion of the Co-Prosecutors and Co-Investigating Judges that
11 is not subject to judicial review.

12 [15.35.08]

13 Allow me to raise some legal points that have already been raised
14 by other parties but I hope that we will be able to bring forth
15 new elements and analysis that will allow you for greater
16 contemplation. We wish to recall some of the arguments raised
17 by Duch in his appeal brief with respect to the Trial Chamber's
18 personal jurisdiction. Indeed.

19 Personal jurisdiction is restricted to senior leaders of
20 Democratic Kampuchea, and to those who were most responsible for
21 the crimes and grave breaches of national and international law.
22 Neither the agreement nor the ECCC Law expressly defines 'senior
23 leaders of Democratic Kampuchea', or 'those who were most
24 responsible for the crimes'. It cannot be inferred from either
25 the agreements, nor the ECCC Law, that Kaing Guek Eav alias Duch

1 is one of those most responsible for the crimes committed.
2 Indeed, the defence claims that the Trial Chamber considered Duch
3 as forming part of those who were most responsible for the crimes
4 in order to try him at any cost. The reason why the Trial
5 Chamber refused to consider Rule 87, as requested by the lawyers
6 for the defence, was because the Judges knew fully well that in
7 reality, no elements allowed them to apply Article 1 of the
8 agreement and Articles 1 and 2(new) of the ECCC Law to Kaing Guek
9 Eav alias Duch.
10 [15.37.05]
11 Accordingly, in the introduction of its Judgment, the Trial
12 Chamber demolished the agreements between the United Nations and
13 the Royal Government of Cambodia. Indeed, it claims that it
14 violated the fundamental principle enshrined in the common law,
15 the principle of legality by relying on common law authorities
16 for its interpretation of this principle in such a way as to call
17 into question Article 1 of the agreements and Articles 1 and
18 2(new) of the ECCC Law which restrict the personal jurisdiction
19 of the Extraordinary Chambers to senior leaders and those who
20 were most responsible for the crimes.
21 Had the Trial Chamber considered by the defence in their final
22 submission, it would have recognised that it did not have
23 jurisdiction over Kaing Guek Eav alias Duch. This is indeed why
24 the Trial Chamber evaded the issue, claiming that the defence
25 preliminary objection was belated. The defence claims that there

1 is a large body of exculpatory evidence, adduced by Duch himself.
2 The evidence regards his role and real functions, there was
3 evidence adduced by the prosecution that reveals that the accused
4 is not within the purview of Article 1 of the agreement, nor of
5 Articles 1 and 2 of the ECCC Law, and unfortunately the Trial
6 Chamber omitted to consider that evidence, which amounts to a
7 grave error.

8 This situation arose because in the preliminary objection, the
9 Co-Prosecutors did not focus their investigation on the senior
10 leaders who were most responsible for crimes at the S-21 centre,
11 but only for the role and functions of Kaing Guek Eav Duch during
12 the period from 17 April 1975 to 6 January 1979. It was
13 precisely this error that led to their mistaken belief that he
14 was among those who were most responsible for the crimes
15 committed at S-21, without he, or his lawyers, being afforded the
16 opportunity to adduce evidence to the contrary.

17 [15.39.50]

18 Hence, the Co-Prosecutors were misled into thinking that the ECCC
19 had jurisdiction to prosecute and try Kaing Guek Eav since he was
20 to answer for his acts as one of those most responsible for the
21 crimes committed during the DK regime. The Co-Prosecutors even
22 held the view that he comes under the category of senior leaders
23 of Democratic Kampuchea. For their part, the Co-Investigating
24 Judges revisited this conclusion, indicating in their Closing
25 Order that Kaing Guek Eav could be considered in the category of

1 most responsible for crimes.

2 All of the foregoing elements show irrefutable proof presented by
3 the Co-Prosecutors and the Co-Investigating Judges by means of
4 precise legal arguments, or sufficient evidence, that Kaing Guek
5 Eav is within the jurisdiction of the ECCC. Influenced by all of
6 these elements, the Trial Chamber therefore tried Kaing Guek Eav
7 on the incorrect premise that he came under its jurisdiction,
8 moreover it dismissed the defence objections simply on the
9 grounds that they were belated.

10 [15.40.58]

11 Defence counsel were apparently not afforded the opportunity,
12 from the outset, to respond to the Co-Prosecutors' charges, and
13 the Co-Prosecutors maintained those charges when they forwarded
14 the case containing the charges against Kaing Guek Eav. They
15 claim that the Chamber failed to fulfill the obligation of
16 verifying before accepting to be seized of the case file 001, and
17 whether it had requisite jurisdictional requirements to enable it
18 to exercise personal jurisdiction over Kaing Guek Eav in
19 accordance with the provisions of Article 1 of the agreement,
20 Articles 1 and 2(new) of the ECCC Law.

21 Moreover, the dissenting opinion of the international judge,
22 reflecting his belief that the Trial Chamber did not have
23 jurisdiction to try Kaing Guek Eav amounts to proof that all the
24 trial Judges, both national and international, knew and
25 recognised that the ECCC lacked the personal jurisdiction to be

1 seized of case 001. In conclusion, the Trial Chamber did not
2 have jurisdiction over Kaing Guek Eav. He held a junior and not
3 senior position both within the ranks of the government of
4 Democratic Kampuchea and within the Communist Party of Kampuchea.
5 [15.42.20]

6 The proceedings in case file 1 conducted before the Trial Chamber
7 from 30 March 2009 to 27 November 2009 must be considered as the
8 result of an error by the Chamber in the exercise of its personal
9 jurisdiction. I believe that I have summarised the position that
10 has been put forward by the defence with respect to the erroneous
11 characterisation. I shall take the care to recall the Bench a few
12 provisions as set out in the resolution of the UN General
13 Assembly. I also want to cite, verbatim, the first Article,
14 whose French version leaves absolutely no ambiguity with respect
15 to the definition of senior leaders and most responsible for
16 those crimes.

17 Indeed, Article 1 reads as follows, and I quote: "The purpose of
18 the present agreement is to regulate the cooperation between the
19 United Nations and the Royal Government of Cambodia in bringing
20 to trial senior leaders of Democratic Kampuchea and those who
21 were most responsible for the crimes and serious violations of
22 Cambodian penal law and international humanitarian law and
23 custom, and international conventions recognised by Cambodia that
24 were committed during the period from 17 April 1975 to 6 January
25 1979."

100

1 [15.43.55]

2 This allows the Court to try either senior leaders in a
3 conjunctive manner. The French version of this text does not
4 allow for any doubt to hover. In fact, I regret that my learned
5 colleague from the defence has interpreted the text in his way,
6 and has neglected the interpretation of the French text, and I
7 would ask that he revisit his observations maybe for the Bench
8 and refer to the French version of this Article.

9 The second Article of the agreement refers to the jurisdiction of
10 the ECCC as it clearly specifies that the Extraordinary Chambers
11 have personal jurisdiction over senior leaders of Democratic
12 Kampuchea and those who were most responsible for the crimes
13 referred to in Article 1 of the agreement. That very specific
14 Article cannot be read differently.

15 [15.45.15]

16 It is precisely in this context that the law of 27 November 2004,
17 the Law on the Establishment of the Extraordinary Chambers in the
18 Courts of Cambodia duplicates this text. It reads that "senior
19 leaders and those who were most responsible for the crimes
20 committed in Democratic Kampuchea herein after designated as
21 suspects". Once again, in the French version of this agreement,
22 there is no other interpretation that is possible, given its
23 wording.

24 The two subjects, the two categories of those who may be tried
25 are those over whom the Court has jurisdiction. Very quickly,

101

1 Article 3 refers to the 1956 Cambodian criminal code, Article 4
2 to the genocide convention, Article 5 to the crimes against
3 humanity, Article 6 to grave breaches, Article 7 to The Hague
4 convention for the protection of cultural property, and I would
5 also call to your attention Article 29, that defence counsel was
6 completely silent on, and yet Article 29 is absolutely primordial
7 and would convince anyone that Duch fits into the category of
8 most responsible.

9 It reads as follows: "Article 29. Any suspect who planned,
10 instigated, ordered, aided and abetted or committed the crimes
11 referred to in Article 3(new), 4, 5, 6, 7 and 8 of this law shall
12 be individually responsible for the crime. The position or rank
13 of any suspect shall not relieve such person of criminal
14 responsibility or mitigate punishment. The fact that any of the
15 acts referred to Articles 3(new), 4, 5, 6, 7 and 8 of this law
16 were committed by subordinates does not relieve the superior of
17 personal criminal responsibility if the superior had effective
18 command and control, or authority and control over the
19 subordinates, and the superior knew, or had reason to know, that
20 the subordinate was about to commit such acts or had done so, and
21 the superior failed to take the necessary and reasonable measures
22 to prevent such acts or to punish the perpetrators. The fact
23 that a suspect acted pursuant to an order of the government of
24 Democratic Kampuchea or other superior shall not relieve the
25 suspect of individual criminal responsibility."

1 [15.47.55]

2 It is within this very specific legal context that the
3 Co-Prosecutors were compelled to research and identify those who
4 fall within the personal jurisdiction of the ECCC. Review of
5 the facts and evidence collected led the Co-Prosecutors to retain
6 the basis of the charges, in accordance with the aforementioned
7 text, against Kaing Guek Eav alias Duch, for his role and
8 functions as Chairman of the S-21 prison centre. It emerged from
9 all of the elements brought together that the accused, contrary
10 to his allegations, was not merely an executor without or bereft
11 of the possibility to express his opinion.

12 Duch was Deputy Chairman, and then Chairman, of S-21. He was
13 appointed by one of the member of the Standing Central Committee
14 during the period in question, on account of his experience in
15 managing the detention centre M-13, where he confirmed his place
16 in the regime and confirmed his status and qualifications as the
17 best interrogator. His appointment as Chairman of S-21 cannot
18 relieve him from individual criminal liability for the crimes
19 committed at S-21.

20 [15.49.15]

21 The accused was actively involved in directing S-21. He was a
22 supervisor, he participated in interrogations, he made
23 annotations on confessions by which he gave the Party leads and
24 clues on new and potential traitors to search for, he managed the
25 staff members who were entirely under his orders, and he taught

1 them interrogation and torture techniques.
2 Kaing Guek Eav had full control over the actions of his
3 subordinates, and over everything that happened at S-21. He
4 knowingly orchestrated and participated, directly or indirectly,
5 to the elimination of 12,273 people. He supported that policy and
6 the terror methods used. The acts of extreme gravity
7 perpetrated at S-21 under his orders constitute crimes against
8 humanity and grave breaches of the Geneva Conventions.
9 The Co-Investigating Judges confirmed this characterisation upon
10 conclusion of the investigation of the case. The accused and his
11 counsel are therefore wrong to argue that the Chamber erred by
12 finding that he was one of the principle perpetrators of the
13 serious crimes committed at S-21 from 17 April 1975 to 6 January
14 1979.
15 [15.50.30]
16 It cannot be claimed that this characterisation is not firmly
17 grounded in law for the reason that the Co-Prosecutors'
18 introductory submission characterises Kaing Guek Eav as one of
19 the senior leaders of the government of Kampuchea. The
20 Co-Investigating Judges were bound by the facts and crimes set
21 out in the introductory submission, but they had the discretion
22 to characterise those differently. The argument, therefore, made
23 by the accused, does not stand.
24 The assessment of the characterisation of the suspect, that is to
25 say over whom the Chamber may exercise personal jurisdiction as

1 defined in the founding legal texts of the ECCC must be subject
2 to a review by the Co-Prosecutors and an additional review by the
3 Co-Investigating Judges at the end of their investigative action.
4 It is in this context that the Trial Chamber was seized of the
5 crimes alleged during the period of 17 April 1975 to 6 January
6 1979 by a person who specifically falls under the personal
7 jurisdiction of the Chamber as provided for in the founding texts
8 of the ECCC and that person is Duch.

9 [15.51.43]

10 However, the Chamber, seized of the charges made against a
11 suspect such as Duch, cannot content itself solely on the terms
12 of its seizing. It is within its jurisdiction to consider the
13 facts and evidence that are brought before it and verify if,
14 effectively, it may exercise its jurisdiction based on the same
15 facts and its jurisdiction over the suspect, in this case Duch,
16 effectively.

17 The answer that we submit to the question that you put before us
18 is as follows. Indeed, the definition of the terms senior
19 leaders of Democratic Kampuchea and those who were most
20 responsible for the crimes mentioned in the law on the ECCC
21 constitutes a jurisdictional requirement that is subject to prior
22 judicial review by the Co-Prosecutors and the Co-Investigating
23 Judges. But yes, the Chamber does hold the discretion to proceed
24 with re-characterisation.

25 In fact, the Chamber was entirely aware of this imperative, and

1 proceeded with a minute and detailed examination of the facts,
2 charges and evidence regarding the accused for the purpose of
3 delineating the contours of its personal jurisdiction. The
4 Chamber has, moreover, addressed this observation. Indeed, the
5 Chamber examined each of the crimes that the accused is charged
6 with and explicitly recalls, under section 2.5.2.5 that the
7 evidence satisfies the Chamber that S-21 was an integral part of
8 the CPK political and military structure and was considered vital
9 to achieving the Party's political objectives. It implemented
10 CPK policy such as the smashing of CPK enemies.

11 [15.53.35]

12 The accused's role as Chairman of S-21, reporting directly to
13 members of the Standing Committee gave him a unique vantage point
14 from which to implement this policy. The Chamber infers that he
15 was aware of the points from which to implement this policy, and
16 that S-21 was an important component in implementing it.

17 The Chamber recalled that the Co-Investigating Judges did not
18 allege that the accused was a senior leaders of Democratic
19 Kampuchea, but instead charged him as being one of those who were
20 most responsible for offences committed during the temporal
21 jurisdiction of the Extraordinary Chambers. The Chamber recalled
22 the dispositions of the Closing Order, according to which it was
23 said that Duch was not a senior leaders of Democratic Kampuchea,
24 he may be considered in the category of most responsible for
25 crimes committed during the period in question, due both to his

1 formal and effective hierarchical authority and his personal
2 participation as Deputy Secretary then Secretary of S-21, a
3 security centre which was directly controlled by the Central
4 Committee.

5 [15.54.45]

6 Neither the agreements concerning the ECCC nor the law on the
7 establishment of the ECCC expressly defines 'senior leaders of
8 Democratic Kampuchea', or those who were most responsible for the
9 crimes committed. However, the group of experts on Cambodia,
10 struck in 1998, by way of a UN General Assembly resolution,
11 accordingly recommended that any tribunal focused on those who
12 were most responsible for the most serious violations of human
13 rights during the reign of Democratic Kampuchea.

14 This would include senior leaders with responsibility over the
15 abuses as well as those at lower levels who were directly
16 implicated in the most serious atrocities. The jurisprudence of
17 other international tribunals, which have also examined the
18 notion of most senior leaders suspected of being most
19 responsible, have considered both the gravity of the crimes
20 charged and the level of responsibility of the accused.

21 [15.55.50]

22 It was drawn throughout the hearing that the accused had
23 participated in the training of the interrogation methods, as
24 well as took part in the planning of the centre's activities. As
25 Chairman of S-21 he supervised the overall functioning of the

107

1 centre by specifically making annotations on the confessions of
2 the detainees and ordered execution. S-21 was an important
3 security centre in Democratic Kampuchea. It was considered the
4 organ of the Communist Party of Kampuchea.
5 Its leadership reported to the highest echelons of the Party. It
6 conducted activities on a country-wide scale and high ranking
7 officials and notable prisoners were incarcerated there. More
8 than 12,000 people were detained at S-21, a figure we are told
9 that remains incomplete because the practice at the prison was
10 not to register all prisoners. Victims from all over Cambodia
11 were sent to S-21. This is what enabled the prison to spread its
12 scope of activity throughout the entire country.
13 S-21 operated from October 1975 to the start of 1979, throughout
14 the entire time Democratic Kampuchea existed. As such, the
15 Chamber agreed with the conclusions drawn by the Co-Investigating
16 Judges and believed that in its capacity as one of the senior
17 leaders of crimes and serious violations of Cambodian and
18 international law committed during the period from 17 April 1975
19 to 6 January 1979 the accused is within the personal jurisdiction
20 of the ECCC.
21 [15.57.20]
22 It is therefore necessary for the Chamber to determine if the
23 accused was one of the senior leaders. As such, upon review of
24 the aforementioned documents, it may be concluded that the
25 Co-Prosecutors, during the initial stages of the proceedings, had

108

1 focused on the issue as to whether Kaing Guek Eav could be
2 defined as one of the senior leaders or most responsible,
3 secondly that the Co-Investigating Judges had asked themselves
4 the same questions and partially amended the preliminary
5 conclusions of the Co-Prosecutors, and thirdly that the Trial
6 Chamber had specifically asked the same question and answered in
7 the affirmative.

8 I now wish to make a few remarks with respect to procedure. We
9 wish to remind that pursuant to the agreement, the Extraordinary
10 Chambers exercise, and once created, the ECCC issued their
11 Internal Rules. The Internal Rules have the object of
12 consolidating Cambodian procedure that is applicable before this
13 Court. The law on the ECCC provides that reference may be made
14 to extra rules. When the rules in effect do not deal with a
15 specific question, or in case of uncertainty regarding their
16 interpretation, or if the question is raised regarding their
17 compatibility with international standards.

18 [15.58.40]

19 But the Internal Rules is very clear on this point. Cambodian
20 law, before the Trial Chamber and international rules of
21 procedure, may also be used as a reference in case of need. In
22 the context of the difficulty presented by the issue, the
23 preliminary objection raised by the accused, there is nothing to
24 challenge, because Rule 89 is perfectly clear.

25 All questions regarding the Chamber's jurisdiction are

1 considered, and all these preliminary objections had to be, under
2 the penalty of inadmissibility, be presented, at the latest,
3 within 30 days following the date when the Closing Order became
4 definite. The accused and his counsel did not use this
5 possibility, thus we say in French, it was too late.

6 [15.59.55]

7 When the initial hearing took place, the accused made a few
8 observations, and these observations never focused on the
9 Chamber's jurisdiction, and it is only when the trial began,
10 which lasted nine months, that the defence suddenly raised this
11 issue and argued on this problem in order to try to demonstrate
12 that from the beginning the Chamber did not have the jurisdiction
13 to try the accused because he was not a senior leaders, and
14 challenged that he was one of those most responsible for the
15 crimes committed.

16 The Chamber considered that this late submission could not
17 constitute a regular preliminary objection. In the same way, the
18 defence's arguments, according to which, pursuant to appendix 5
19 of the 1991 Paris agreement, and of the law outlawing the members
20 of Democratic Kampuchea from 1994, that the accused could not be
21 prosecuted for the crimes charged. And these arguments were also
22 presented in a belated fashion, and thus were also rejected.

23 And we would like to remind as well that during the first
24 substantive hearing of 30 March 2009, a full reading was given,
25 by the Co-Prosecutors, of the indictment, and Duch, who was

110

1 present during this hearing with his counsel, point by point
2 accepted the vast majority of the charges, despite their gravity.
3 And only challenged a few details that seems maybe secondary, or
4 let's say very limited in relation to all of the charges.

5 [16.01.40]

6 But pursuant to Rule 87 of the Internal Rules, subparagraph 6, it
7 is expressly provided that when the Co-Prosecutors and the
8 accused agree that there is nothing to challenge in the
9 indictment, then the Chamber can consider that these facts are
10 proven. That is to say that following this first day of
11 hearings, following this full reading of the indictment,
12 following this acknowledgement to more than eighty per cent of
13 the facts in this indictment, well, the Chamber established the
14 evidence that proved the facts in a proper manner.

15 So in this context, the accused and his counsel never challenged
16 that the ECCC had jurisdiction vis-à-vis him. Nor that he was
17 part of those most responsible for the crimes that were committed
18 under Democratic Kampuchea due to the facts that are charged.
19 Thus, the lack of jurisdiction of the Chamber was neither raised
20 formally nor in a regular manner by the accused in regard to the
21 Internal Rules, or -- and this is thus pursuant to Cambodian
22 rule, and pursuant to international humanitarian custom law, to
23 which Cambodia abides, that the Chamber deemed that it was seized
24 on a regular basis and considered that the facts held against
25 Duch proved the personal jurisdiction of the Court and thus

111

1 allowed the Court to sentence him.

2 Thus, and in the interests of the civil parties, we are kindly
3 requesting you to confirm the Judgment that was handed down by
4 the Trial Chamber on 26 July 2010 in the fact that it re-examines
5 the terms of its personal jurisdiction and retain Duch as being
6 part of the category of the suspects and whose Judgment falls
7 under the agreement as well as the ECCC Law, and it is in this
8 context that we will confirm that Duch indeed falls under the
9 personal jurisdiction of the Court. Thank you.

10 [16.04.23]

11 MR. PRESIDENT:

12 Defence counsel may reply, should they wish to do so. I mean
13 they reply both to the Co-Prosecutor and the civil party lawyers.

14 MR. KAR SAVUTH:

15 Thank you, Mr. President. I would like to reply to the response
16 made by the Co-Prosecutor. First, the prosecutors indicated that
17 Duch acknowledged the crimes committed at S-21, and that such
18 acknowledgement proves that Duch falls under the personal
19 jurisdiction of the ECCC. Allow me to emphasise that. Duch
20 acknowledged the crimes committed at S-21 even when he was before
21 the Military Court, he did not contest it. But the question here
22 is who is the main author of the crimes?

23 It was those people that had the right to make decisions and
24 orders, and that Duch did not enjoy such rights. He received
25 orders from Son Sen and Nuon Chea. Point number two. The

112

1 prosecutors indicated that defence counsel raised the matter of
2 preliminary objection, which is contradictory to the facts and
3 the law at issue. Allow me to respond that Judgment paragraphs
4 15 and 14 indicated clearly that the matter raised then was not
5 the issue of preliminary objection in short.
6 Third, the Co-Prosecutors say that Duch falls under the personal
7 jurisdiction of the ECCC while the defence counsel challenged. I
8 would like to draw your attention to penal code Article 24, which
9 indicates that each individual shall be liable for his own crime,
10 and these crimes were not committed by the accused himself. In
11 the final submission of the Co-Prosecutors, paragraphs 15 and 11
12 and 10 of the indictment or Closing Order indicated further that
13 the Communist Party of Kampuchea issued the orders, not Duch
14 himself. So those who issued orders must, or shall be accountable
15 for the crimes, while Duch only received order, he should not be
16 liable for the crimes.
17 [16.07.40]
18 Number four, the prosecutors indicated that the defence counsel
19 failed to request that the Co-Investigating Judges summon Nuon
20 Chea for questioning. I would like to show this piece of
21 evidence that Marcel Lemonde, the Co-Investigating Judge, and
22 Mrs. Anna Austin advised, or ordered the judicial police, Mr.
23 Bastin, to only investigate inculpatory evidence, and not
24 exculpatory evidence. Of course, this take must be vested with
25 the Co-Investigating Judges to do so, but they failed to do it.

113

1 Duch was not really the senior person. Even his superior was not
2 really holding the highest position. On top of him there were
3 more than seven people. When Son Sen went to the battlefield,
4 Nuon Chea was Son Sen's successor, and Nuon Chea was already
5 stated in Duch testimony that he was the Chairman or the superior
6 of Duch, and Nuon Chea himself was not summoned to the hearing.
7 So why should this be the role or the task of the defence counsel
8 to do so? Why not the task of the Judges?
9 Point number five. Everyone is quite familiar already that
10 Democratic Kampuchea is a lawless regime. Since the regime is
11 lawless, whatever any individual did was not against the law.
12 How could it be against the law if there was no such law?
13 Number six. The prosecutor indicated that the defence counsel
14 referred to the law on the outlawing of the Khmer Rouge group. I
15 would like to make it clear that we did not really make such
16 assertion, we only referred to the ECCC Law. The Co-Prosecutors
17 are those who really protect the law, not the defence counsel.
18 Defence counsel are those who enforce the law, or implement the
19 law.
20 [16.10.30]
21 The Article 129 of the law state that the trial proceedings must
22 be in accordance with the existing law, and the law outlawing the
23 Khmer Rouge is still in force, and we would like to appeal to the
24 Co-Prosecutor not to violate Constitution Article 129.
25 Seven, the prosecutor indicated that S-21 security centre was the

114

1 central security centre, while Chom Chroy security centre was
2 very small, at the district level. But I would like to draw the
3 Supreme Court Chamber's attention regarding how many people
4 killed at Chom Chrouy security centre. You called it a small
5 security centre where more than a lot of people were killed.
6 More people even were killed at Chom Chroy than at S-21. Why
7 such security centre and the chief of that security centre did
8 not fall under the jurisdiction of the ECCC?
9 And the law really requires that individuals are liable for the
10 crimes they have committed, because there are mens rea and actus
11 rea, and that the institution was supreme. The law states that
12 only the senior leaders and those who fall under the personal
13 jurisdiction of the Court shall be prosecuted, and that chiefs of
14 security centre of Chom Chrouy and S-21 were not those who shall
15 be prosecuted under the personal jurisdiction of the ECCC.
16 [16.12.50]
17 Point number eight. The prosecutors indicated that the defence
18 counsel, during the trial proceeding, indicated that we did not
19 challenge the jurisdiction of the ECCC. Now I would like to make
20 it clear that we are not challenging the jurisdiction of the
21 ECCC. Again, loud and clear. Because the ECCC has jurisdiction
22 to bring to justice those senior leaders and those who were most
23 responsible for the crimes committed during that regime. But
24 what we are challenging is the methods employed by the
25 prosecutors before the Trial Chamber to presume that Duch was the

115

1 most person responsible for the crimes, for the purpose of these
2 trials.

3 Point number nine. The Co-Prosecutors indicated that they have
4 the right, according to Article 40 of the penal code, of course I
5 fully concur with them that this right should be well enjoyed by
6 the prosecutors, but here at this Tribunal, Article 5(3) and
7 Article 6(c) of the agreement of the ECCC set the scope of
8 investigation, and the prosecution to be manoeuvred by
9 Co-Investigating Judges and prosecutors, so this scope has been
10 well set.

11 It doesn't mean that Co-Prosecutors or investigating Judges can
12 do whatever they wish, otherwise it cannot be accepted. They
13 have to really exercise their power within the confines and
14 limits, the set rules.

15 In relation to the civil party who indicated that I indicated
16 that during that time there was no law, but I think they did not
17 really fully cite our submission. I did say further that at that
18 time there was only political line, only the policy by the Angkar
19 that no one could not contest. Who could contest such policy or
20 line? For example, Duch was at S-21 when Vorn Vet, who was his
21 former superior, was sent in. That person had to be smashed.
22 Duch himself could not intervene because the regime already said
23 so, that the person had to be smashed.

24 [16.15.45]

25 The line did direct everyone to really follow it. And I think

116

1 that is all from me. I would like to share the floor with my
2 co-counsel.

3 MR. KANG RITHEARY:

4 Thank you, Mr. President, for allowing me the floor to add
5 further on top of what my colleague has just indicated. The
6 Co-Prosecutors used a lot of terms in relation to the charges
7 brought against Kaing Guek Eav alias Duch, and that Duch falls
8 under the jurisdiction under this ECCC by its discretion.

9 [16.16.30]

10 The use of discretion without any reference to the facts or
11 evidence or standards constitutes to a violation to Article 13 of
12 the Geneva Convention of 12 August 1949 in relation to the civil
13 and political rights when it comes to due process. Article of
14 the criminal procedural code of Cambodia which prohibits strongly
15 the interpretation of the laws by means of analogy.

16 So any application of jurisprudence by international tribunals
17 are erroneous, and the defence counsel requests that such
18 assertion be rejected. Regarding the internal smash, the defence
19 support the idea that it is true, and because the function of
20 smashing the internal people, or people in the Party rank, means
21 that only people who were in the rank would be affected, not
22 other victims.

23 And S-21 was tasked with smashing the enemy of the state. Anyone
24 who would like to challenge the Party would be smashed. So other
25 than that there are only about 5 to 10 per cent of the people who

117

1 were innocent prisoners. Among the many prisons, I would like to
2 only raise nine prisons where more people were executed. For
3 example, like at one prison, ten times the number of prisoners
4 were executed. For example, at Chong Chroy more than 100,000
5 prisoners were killed. Prison Po Tonle in Kandal, 350,000. Wat
6 O Trakuon, Kampong Cham, more than 320,000. Wat Kampong Tralach,
7 Kampot, more than 210,000 people. Wat Takeo Bati and Wat Baray,
8 Kampong Thom, more than 100,000. Takeo Baray Chulsar, more than
9 150,000 to 200,000 people were killed.

10 But at S-21, or Tuol Sleng, in Phnom Penh, Dangkao, only 1,400 to
11 150 people were killed. And those who were killed at S-21 were
12 only soldiers who were perceived as enemies of the state. And
13 there were two main groups of people who were killed. The enemy
14 of the Angkar and the enemies of class. Civilians, I mean, who
15 were accused as enemy. They were former officials or capitalist
16 or feudalist, and in particular the 17 April people, as they
17 called.

18 [16.20.10]

19 S-21 had scope over the whole country, but individual scope was
20 limited. And the other prisons that I mentioned had bigger scope
21 of coverage than S-21 when it comes to the broad term.

22 The prosecutor indicated that they maintain their discretion to
23 interpret how to define people under the tradition, and however
24 they fail to refer to any law in relation to this particular
25 assertion.

118

1 Among the many senior leaders of the Khmer Rouge, some people
2 were not involved in the crimes, and this assertion can be found
3 in the preamble of the report presented to the General Assembly
4 of United Nations. And only those who were responsible for the
5 crimes were regarded as senior leaders. So the people who
6 committed the crimes, and I think the prosecutor made a mistake
7 in defining these terms, that's why it has given rise to the full
8 submission of documents before, or evidence before the Court.
9 The ECCC determination on the personal jurisdiction does not
10 heavily rely on just the evidence submitted by the
11 Co-Prosecutors. They at the same time need to look at the
12 personal jurisdiction and the jurisdiction over the offences,
13 because the Chamber is vested with the power to review these on
14 its own. For example, to which group of people shall be
15 prosecuted, and to which group shall not.

16 [16.22.35]

17 And the defence would like to challenge the assertion by the
18 prosecutor regarding this, and that when it comes to our
19 submission concerning the preliminary objection. Because we had
20 to really submit the submission rather late in the proceedings
21 because more evidence had been located, and that our assertion or
22 arguments have to refer to the evidence according to Rule 87 of
23 the Internal Rules, because the rule states that evidence can be
24 submitted by parties at any time during the proceeding, and that
25 reference to Rule 89 to reject Rule 87 is not proper.

119

1 I would like to admit that S-21 was the central prison, and Duch
2 never contests such assertion, because he believe -- he was
3 convinced that this prison was the prison of the centre and the
4 military prison. It used to be under the supervision of division
5 703, who was chaired by In Lorn, alias Nat, who ended up being
6 the victim of S-21. Because the prison was the central prison,
7 that's why central people were overseeing this.
8 For example, they have the people from the Party line and the
9 government line. People including Pang and Lin who oversaw
10 another prison at Wat Botum. At Wat Botum was the place where
11 people who challenged Pol Pot personally, directly, were kept and
12 smashed. And from the border, Party line, for example, there was
13 Pang and members from the Standing Committee. And from the
14 government there were committee of the central military, and I
15 think that the information has already been indicated in the case
16 file, and also the general staff of the army which was chaired by
17 Son Sen.
18 There were a lot of divisions, and division commanders, including
19 Meas Mut, Su Met, and other people. Son Sen really oversaw
20 directly this prison, and when Nuon Chea succeeded Son Sen, Nuon
21 Chea exercised the power to control S-21.
22 [16.25.15]
23 We agree that Co-Prosecutors are fifty per cent correct when they
24 indicated that S-21 was the central prison. Other prisons. We
25 agree with the Co-Prosecutors that those prisons at the zone were

120

1 independent, and that their function was lower, but I think we
2 challenge such assertion, because at S-21 the head of S-21 could
3 not really interfere in the affair of other prisons. When report
4 was made from zones prisons, they were sent directly to Pol Pot,
5 not to S-21. That's why Pol Pot ordered such arrest, and then
6 ordered Son Sen to arrest those people.

7 We noted that that's why some prisoners were brought in from the
8 zones. Duch indicated that he never received any prisoner from
9 the south west zone because Ta Mok was the Secretary of that
10 zone, and he was in control of the prison there. And you may
11 also be familiar with the south west zone who -- the chairman of
12 which was very cruel. And the prosecutors also submitted
13 evidence concerning the secret decision by the DK of 30 March
14 1976.

15 We are not suspicious in relation to who are bound by Articles 1
16 and 2 of the ECCC Law. I would like to end this submission
17 regarding the prosecutors' response. I would like now to proceed
18 to the reply to the civil party lawyers.

19 [16.27.36]

20 I completely reject the assertions by the civil parties counsel,
21 as it is contradictory to the ECCC Law in paragraph 3. Because
22 civil action and criminal actions are two separate actions. The
23 criminal action is to find the guilt of the accused and to punish
24 accordingly, and the civil action is to find the harms committed
25 upon the person of the victims, and to seek reparations

121

1 proportionate to the harm they suffered.

2 It means the civil party lawyers could only seek reparation for
3 the civil part of the Judgment, so whatever their assertions are
4 I completely reject it. Only the Co-Prosecutors can make
5 assertions on the criminal actions. So this is not the
6 obligation of the lawyers for the civil parties to assert on the
7 issue of personal jurisdiction of my client Duch.

8 MR. PRESIDENT:

9 It is now time appropriate for the adjournment for today, and the
10 Court will adjourn, and will resume tomorrow morning, the 29th,
11 at 9 am. Security guard, you are now instructed to bring the
12 accused back to the detention centre, and bring him back tomorrow
13 morning at 9 am.

14 The Court is now adjourned.

15 (Judges exit courtroom)

16 (Court adjourns at 1629)

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