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Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Pre-Trial Chamber
Chambre Préliminaire

APPEAL HEARINGS
CLOSED SESSION
Case File N° 004/1/07-09-2009-ECCC/OCIJ (PTC50)

12 December 2017

Before the Judges: PRAK Kimsan, Presiding
Olivier BEAUVALLET
NEY Thol
Kang Jin BAIK
HUOT Vuthy

The Accused: IM Chaem

Lawyers for the Accused:
BIT Seanglim
Wayne JORDASH

Pre-Trial Chamber Greffiers/Legal Officers:
Elsa LEVAVASSEUR
ROS Bophana

Lawyers for the Former Civil Parties:
SAM Sokong
Lyma NGUYEN

For the Office of the Co-Prosecutors:
Nicholas KOUMJIAN
SENG Bunkheang
Cóman KENNY

For Court Management Section:
SOUR Sotheavy

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
The President	Khmer
Dr. Bit Seanglim	Khmer
Me Wayne Jordash	English
Mr. Koumjian	English

P R O C E E D I N G S

(Court opens at 1000H)

THE PRESIDENT:

Please be seated.

We now resume our session and it is as previously scheduled.

And I would like to invite the national and international lawyers for the charged person to make their submission.

You have the floor.

DR. BIT SEANGLIM:

Good morning, Mr. President. Good morning, Your Honours, and good morning to everyone in the courtroom. My name is Bit Seanglim. I am the national co-counsel for Ms. Im Chaem. I am a member of the Bar Association of the Kingdom of Cambodia since 1997, and I have been representing Ms. Im Chaem since December 2013.

[10.02.50]

Next to me is my international co-counsel, Mr. Wayne Jordash. Mr. Jordash was called to the bar of England and Wales in 1995 and has been a Queen's Counsel since 2013. He is representing Ms. Im Chaem since July 2016.

Before I start, let me inform Your Honours and the parties in the courtroom that Ms. Im Chaem has elected not to appear at this hearing, nor did she prepare a statement for us to read on her behalf. She means no disrespect to the Court. However, in the light of the press attention and the potential impact upon her security that attending the ECCC in person may involve, she

prefers to rely upon her lawyers to advance her interest and to continue to insist upon her innocence in relation to all the charges.

Accordingly, today I will respond to the lawyers for the former civil party applicants concerning their arguments on the position of the ECCC within the Cambodian legal system. I will need approximately one hour to do so.

My co-counsel will then use the remaining three hours to respond to the International Co-Prosecutor's appeal against the Closing Order.

Let me now turn to the arguments raised by the lawyers for the former civil party applicants concerning the position of the ECCC within the Cambodian legal system. To sum up, in both their written submissions before the Pre-Trial Chamber -- and here, I am referring to document number D308/3/1/9 and their oral submission on the matter yesterday.

[10.06.40]

The lawyers for the former civil party applicants argue two main points.

First, that the Co-Investigating Judges should not have made observations concerning the position of the ECCC within the Cambodian legal system in their Closing Order, and second, that the Co-Investigating Judges' observations according to which Cambodian domestic Courts lack jurisdiction over any Khmer Rouge perpetrator are erroneous.

On the basis of these two points, the lawyers for the former civil party applicants conclude at paragraph 32 of their written submission, and I quote:

"The extent to which ordinary Cambodian Courts have the legal and institutional capacity to adjudicated Khmer Rouge era crimes is an issue entrusted to those Courts on determination." End quote [10.08.32]

This conclusion begs (sic) a very simple and preliminary question. If the position of the lawyers for the former civil party applicant is, indeed, that Cambodian domestic Courts alone should determine to the extent of their own competence over Khmer Rouge era crimes, why are they requesting the Pre-Trial Chamber to provide relief in this respect? Should it not be for ordinary Cambodian Courts to decide for themselves?

Our position that I will elaborate on is as follows.

The Pre-Trial Chamber is not the appropriate body to make a stand-alone determination on whether or not ordinary Cambodian Courts are competent to hear criminal cases committed during the Khmer Rouge era. As such, the lawyers for the former civil party applicants misinterpreted the purpose of the Co-Investigating Judges in analyzing the jurisdiction of ordinary Cambodian Courts over Khmer Rouge era crimes.

[10.10.55]

The Co-Investigating Judges' purpose was not to bind the Cambodian Courts, but to understand and reasonably delineate

their own discretion. This, and only this, should be the subject of any appeal or remedy. And in any event, any remedy, if required, should take due commissions of the Cambodian institutions' clearly stated intention to elect to try the Khmer Rouge era crimes at the ECCC only.

The Pre-Trial Chamber is not the appropriate body to provide the relief requested by the lawyers for the former civil party applicants.

And let me turn to my first point. The lawyers for the former civil party applicants seek to request the Pre-Trial Chamber to effectively force the Co-Investigating Judges' view concerning the jurisdiction of ordinary Cambodian Courts over Khmer Rouge era crimes. Despite the object and purpose of the views expressed, the lawyers for the former civil party applicants take the view that the Pre-Trial Chamber should bind the ECCC and declare that, at least for the Cambodian Courts alone, to not only determine the extent of their jurisdiction over Khmer Rouge era crimes, but also to express any view on jurisdiction.

[10.14.11]

In sum, at paragraph 31 of document number D308/3/1/9, the lawyers for the former civil party applicants claimed that the Co-Investigating Judges' observations prevent, and I quote: "...Cambodian Courts from ever addressing for themselves whether they can exercise jurisdiction over that period." End quote.

However, it is clear that the relief requested is

(unintelligible). The Pre-Trial Chamber's role is not to determine whether or not ordinary Cambodian Courts are competent over Khmer Rouge era crimes. Any attempt to circumscribe the jurisdiction of the Cambodian Courts in the manner proposed by the lawyers for the former civil parties applicants is not only superfluous, but also encroaches upon the sovereign right of the Cambodian state to determine its own criminal law jurisdiction, including the right of the Cambodian domestic Courts to determine whether they are themselves competent or not over Khmer Rouge era crimes.

[10.16.25]

The Co-Investigating Judges did not attempt to strip ordinary Cambodian Courts from any residual jurisdiction they may have. First, it is wholly erroneous to claim that the Co-Investigating Judges attempted to strip Cambodian Courts of any residual jurisdiction they may have over Khmer Rouge era crimes. On any reasonable view, the Co-Investigating Judges' observations in the Closing Order concerning the position of the ECCC within the Cambodian legal system were not of a declaratory or dispositive nature. They were part of an assessment of their own jurisdiction.

[10.18.01]

There is nothing in those remarks or the express reasoning to indicate that they intended to bind ordinary Cambodian Courts and prevent them from exercising their prerogative to determine or

circumscribe their own jurisdiction over Khmer Rouge era crimes. As argued at paragraphs 7 and 8 of our written submission -- and here I am referring to document number D308/3/1/18 -- the Co-Investigating Judges' analysis of the position of the ECCC within the Cambodian legal system is not expressed as applicable to any issue other than the scope of the personal jurisdiction of the ECCC. There is nothing in the reasoning or any other part of the Closing Order that allows for the conclusion that they were intended to apply outside the -- that narrow issue.

That is not to argue that the views expressed might not be relevant to other issues, including those relevant to the jurisdiction of the ordinary Courts of Cambodia. However, these future theoretical or hypothetical prospects cannot, in and of itself, give rise to an issue that should be reviewed or addressed by the Pre-Trial Chamber, let alone lead to the conclusion that this was the intent of the Co-Investigating Judges.

[10.21.30]

The Co-Investigating Judges do not prevent ordinary Cambodian Courts from addressing the question of their residual jurisdiction.

Second, it is also erroneous to claim that the Co-Investigating Judges' observations, in fact, prevent ordinary Cambodian Courts from adjudicating upon the question of their residual jurisdiction. As is plain, should ordinary Cambodian Courts

decide that they are competent to prosecute Khmer Rouge era crimes that fall outside the ECCC's jurisdiction, they would neither be bound by the Co-Investigating Judges' analysis in the Closing Order, nor, for that matter, by any subsequent ruling or restraining declaration by the Pre-Trial Chamber on this issue. [10.23.17]

Over time, various Chambers of the ECCC have taken the opportunity to rule on the interactions between the ECCC and ordinary Cambodian Courts. As noted at paragraph 6 of our written submission -- here I am referring to document number D308/3/1/18 in Case 001 --

both the Pre-Trial Chamber and the Trial Chamber have held that there is no line of authority between the two jurisdictions. In particular, the Pre-Trial Chamber held in Case 001 -- I am referring to document number C5/45 at paragraph 17 -- that, and I quote, "There is no provision for interaction between the ECCC and any other judicial bodies within the Cambodian Court structure." End quote.

Similarly, no legal provision contained in the Cambodian Criminal Code or the Cambodian Criminal Procedural Code provides that Cambodian Courts are bound by ECCC decisions. It is worth noting that this express admonition has been accepted by the lawyers for the former civil party applicants, who have relied upon, at paragraph 4 of their written submission, document number D308/3/1/9.

It is not known why they now seek to go behind it and cast it aside for the purposes of seeking the Pre-Trial Chambers' intervention. Therefore, in line with our arguments at paragraph 5 of our written submission, document number D308/3/1/18, the lawyers for the former civil party applicants advanced on a contradiction.

[10.27.28]

On the one hand, they argued that the Co-Investigating Judges' observations concerning their own jurisdiction "has" a binding effect on ordinary Cambodian Courts in a manner that would prevent them from addressing the question of their own residual jurisdiction and, on the other, they cited to consistent case law demonstrating with specificity and certainty that the ECCC and ordinary Cambodian Courts are distinct entities that are not bound by each other's decisions. Such a request is circular, contradictory and cannot be allowed to prevail.

The Pre-Trial Chamber is not obliged to entertain the hypothetical scenario presented by the lawyers for the former civil party applicants.

[10.28.42]

Third, as argued at paragraph 9 of our written submission, document number D308/3/1/18, the Pre-Trial Chamber has long held that it is not required to entertain or provide ad hoc advisory opinions premised upon hypothetical scenarios. It is, indeed, not the function of the Pre-Trial Chamber to reason through the

hypothetical scenarios presented by the lawyers for the former civil party applicants in which Cambodia may decide to exercise jurisdiction over Khmer Rouge era crimes in the future.

The lawyers for the former civil party applicants seek a remedy that the Pre-Trial Chamber declare that the question of the residual jurisdiction of ordinary Cambodian Courts is a matter left for them on the basis of a purely hypothetical and speculative scenario. They, indeed, claimed at paragraph 31 of their written submission that, and I quote:

"Cambodian Courts may decide that the 1993 Constitution of Cambodia allows for or even requires the direct application of offences recognized under customary international criminal law for Khmer Rouge era crimes." End quote.

[10.32.51]

That they "may rule to permit prosecutions for crimes on the basis of provisions that were enacted after the commission of the crimes". And that, and I quote again, "Cambodia may even enact additional laws that provide its national Courts more express jurisdiction over Khmer Rouge era crimes."

As I explained, the lawyers for the former civil party applications failed, throughout their written and oral submissions, to demonstrate that the scenario is a clear and present danger to any of the Cambodia's sovereign rights or any of those that reside with the former civil party applicants. Many things may happen in the future.

[10.35.18]
Is the Pre-Trial Chamber to speculate on them all and craft protective remedies on the distant fear that some time in the future they may come to pass?
The lawyers for the former civil party applicants misinterpreted the purpose of the Co-Investigating Judges' analysis of the position of the ECCC within the Cambodian legal system. Whilst our position is that the Pre-Trial Chamber is not the appropriate body to provide the requested relief, I would like to return -- to turn to my second point, namely, that the lawyers for the former civil party applicants misinterpreted the purpose of the Co-Investigating Judges' observations on the position of the ECCC within the Cambodian legal system.
They claim that the Co-Investigating Judges' observations were unwarranted and that they effectively attempted to strip ordinary Cambodian Courts of their jurisdiction to adjudicate any Khmer Rouge era crimes. This is simply not the case.
In sum, if the lawyers for the former civil party applicants accept that the Co-Investigating Judges had a duty to ensure that the charged person fell within the personal jurisdiction of the ECCC, then they must accept that the issue of the jurisdiction of the ordinary Cambodian Courts was a relevant issue that had to be assessed in order to understand their own discretion.
[10.38.38]
Of course, it cannot be denied that the Co-Investigating Judges

had a duty to ensure that Ms. Im Chaem fell within the personal jurisdiction of the ECCC, that is, that Ms. Im Chaem was someone who they could send to trial.

Article 5(3) of the ECCC Agreement provides that the scope of the investigations is limited to senior leaders and those who were most responsible for crimes committed during the Khmer Rouge era. Similarly, Article 6(3) of the ECCC Agreement provides that the scope of prosecutions is limited to the same categories of persons. If the Co-Investigating Judges are of the view that a charged person does not fall into either of the two categories, all charges must be dismissed.

[10.40.49]

In the context of Case 004/01, the International Co-Prosecutor claimed in his final submission that Ms. Im Chaem was one of those most responsible for the crimes committed during the Khmer Rouge regime. It follows that the Co-Investigating Judges were required to determine the contours of the term "most responsible" to assess whether or not Ms. Im Chaem fell within the ECCC's personal jurisdiction prior to making any other determination on the substance of her case and, in particular, before deciding on whether or not to proceed to trial.

Now, it is understood by all at the ECCC that the assessment of the term "most responsible" is a discretionary matter for the Co-Investigating Judges to decide prior to making any other determination.

In Case 001, the Supreme Court Chamber held in the appeal judgment -- that is, document number F28, paragraph 62 -- that, and I quote:

"Neither a suspect nor the ECCC can verify whether a suspect is most responsible pursuant to sharp contoured abstract and autonomous criteria."

In other words, the very nature of the most responsible category requires a large amount of discretion.

[10.44.15]

In Case 001, the Supreme Court Chamber also recalled at paragraph 80 of the appeals judgment -- that is, document number F28 -- that the exercise of the Co-Investigating Judges' investigatorial discretion in assessing the term "most responsible" must be made in good faith based on sound professional judgment. This is precisely what the Co-Investigating Judges did.

This view was never challenged by any party in Case 004/01, including the International Co-Prosecutor and the lawyers for the former civil party applicants.

In the very first paragraphs of the Closing Order, the Co-Investigating Judges set out the applicable law on personal jurisdiction at the ECCC and addressed a number of factors relevant to determining the contours of the term "most responsible".

[10.46.15]

In this respect, they thoroughly analysed the ECCC law and its

interpretation by the Supreme Court Chamber in Case 001, the principle of in dubio pro reo, the decision-making in the Democratic Kampuchea structures and the position of the ECCC within the Cambodian legal system.

The lawyers for the former civil party applicants cannot reasonably claim that the latter consideration, the position of the ECCC within the Cambodian legal system was not a relevant or pertinent consideration that was properly examined and dismissed as impacting their own jurisdiction.

The claim that it was unwarranted and thought to deprive ordinary Cambodian Courts of any residual jurisdiction over Khmer Rouge era crimes is a leap too far. It appears to take the plain words, and object, and purpose of the Co-Investigating Judges' approach and turned it on its head.

As we have detailed at paragraphs 7 and 8 of our written submission, the Co-Investigating Judges' observations on the position of the ECCC within the Cambodian legal system were nothing more than a manifestation of a serious and careful approach to the question of jurisdiction.

It enabled the Co-Investigating Judges to consider the ECCC's jurisdiction within the relevant and prevailing context and to then decide that it had no impact upon their jurisdiction. It was a relevant consideration to consider and dismiss.

[10.50.08]

The Co-Investigating Judges made it clear that -- made it clear

in their Closing Order that the analysis of the jurisdiction of ordinary Cambodian Courts over Khmer Rouge era crimes was solely made for the purpose of assessing the ECCC's personal jurisdiction and drawing the contours of the most responsible category. At paragraph 25 of their Closing Order, they expressly stated that the question was whether or not the actions of residual jurisdiction of ordinary Cambodian Courts over Khmer Rouge era crimes should, and I quote, "impact on our exercise of discretion regarding personal jurisdiction."

[10.51.38]

Their discretion over the ordinary Cambodian Courts' lack of residual jurisdiction was, indeed, a necessary demonstration that the rationale of their decision, that is, that Ms. Im Chaem falls outside the personal jurisdiction of the ECCC was established notwithstanding the fact that, as noted at paragraph 25 of their Closing Order, it may well result in, and I quote, "a massive impunity gap".

It was a principled decision that cannot now be faulted merely because the lawyers for the former civil party applicants prefer a different view. This is law, not an a la carte menu.

In fact, had the Co-Investigating Judges not assessed whether or not ordinary Cambodian Courts had residual jurisdiction over Khmer Rouge era crimes and what role the presence or the absence of such a residual jurisdiction played in the assessment of personal jurisdiction at the ECCC, it would have been open for

the parties to argue that the Co-Investigating Judges did not take the resulting impunity gap into consideration in reaching their decision.

In other words, it would have been open to the parties to claim that the decision to dismiss the charges against Ms. Im Chaem for lack of personal jurisdiction was undermined by a failure to take into consideration relevant issues and, thereafter, to provide a written reasoned judgment.

Having advanced with such diligence and care, it is not now open to any party to express their own preference in the guise of an appeal ground.

[10.55.58]

Whatever the preference, it is plain that the Co-Investigating Judges' purpose was to merely assess and ultimately circumscribe the nature of their discretion. It did not purport to do anything else, let alone strip the ordinary Cambodian Courts of their prerogative.

Even if the Co-Investigating Judges had erred in concluding that ordinary Cambodian Courts lacked jurisdiction, the (unintelligible) of their findings is that whether the ordinary Cambodian Courts have jurisdiction or not has no impact upon their exercise of discretion regarding personal jurisdiction.

The lawyers for the former civil party applicants do not appear to challenge this finding or otherwise suggest that the finding concerning the Cambodian state's exercise of its own sovereign

rights led the Co-Investigating Judges into error in reaching their decision to dismiss the charges against Ms. Im Chaem. [10.58.22]

Cambodian institutions have already determined that there is no residual jurisdiction for Khmer Rouge era crimes.

Now, I would like to move to my third and last point.

The lawyers for the former civil party applicants claimed throughout their written submission that the Co-Investigating Judges effectively sought to replace the ordinary Cambodian Courts' view of their jurisdiction with that of the Co-Investigating Judges.

As argued at paragraphs 14 to 35 of our written submission, this is not borne out by the available evidence. An analysis of past and current practice demonstrates that, in fact, Cambodian institutions have long considered that there is no such residual jurisdiction.

As is plain, Cambodian institutions have approached the exercise of its sovereign right to prosecute former Khmer Rouge by taking into account factors such as national reconciliation, political stability or the interests of justice. This was the view at the time of the ECCC negotiations, and it is still their view today. [11.02.12]

The Khmer Rouge era occurred more than 40 years ago. Cambodian institutions have long showed their reluctance to the idea of further prosecutions aside from those before the ECCC. They

placed substantial weight on the need for national reconciliation as in the post-conflict state, that is, Cambodia.

In 2010, the Cambodian government declared to the then Secretary-General of the United Nations that no further prosecutions of former Khmer Rouge should take place. Contrary to the position of the lawyers for the former civil party applicants, at paragraph 17 to 25 of their written submission, this position had already been taken place, taken rather by all parties to the ECCC negotiations as it is described in our written responses to the lawyers for the former civil party applicants, document D308/3/1/18, at paragraph 16 to 22.

[11.04.22]

The group of experts appointed by the United Nations to assess the feasibility of bringing the Khmer Rouge to trial concluded that the prosecution of most Khmer Rouge perpetrators was logistically and financially impossible, that it would impede national reconciliation and that the responsibility of low-level perpetrators was a complex legal issue. The group added that, and I quote: "Domestic trials organised under Cambodian law are not feasible." End quote.

The parties to the ECCC negotiations, that is the Cambodian government and the United Nations, omitted to establish a referral mechanism to ordinary Cambodian Courts, despite their knowledge of such mechanisms existing at both the International Criminal Tribunal for the Former Yugoslavia and the International

Criminal Tribunal for Rwanda.

[11.06.31]

The question (unintelligible) is as to what evidence the lawyers for the former civil party applicants relied upon to suggest that there is any indication or even ambiguity in the current practice adopted by the Cambodian state. At paragraphs 26 to 28 of their written submission, they argued that, and I quote: "The Cambodian government and the United Nations have continued to highlight combatting impunity as critical to addressing the legacy of the Khmer Rouge." End quote.

As a proof that prosecutions are possible at the domestic level, and that: "The empirical fact that, to date, there has been no investigations or prosecutions does not mean that they are impossible as -- these are impossible as a legal matter." They further added, at paragraph 29 to 31 of their written submissions, that the Co-Investigation Judges' observations are contrary to Cambodian law because Cambodian Courts may decide in the future to allow the prosecution of Khmer Rouge era crimes.

These arguments are opaque and ultimately unconvincing. As we argued in our written submission at paragraph 23 to 35, subsequent to the drafting of the agreements that led to the ECCC, our relevant state practice is equally if not more unambiguous.

[11.09.43]

In particular, the Cambodian state legislative in

(unintelligible) regard to its ordinary courts to allow the prosecution of Khmer Rouge era crimes domestically is instructive. For example, whilst there is a time limit for the prosecution of domestic crimes -- has been extended by 30 years through an agreement between the United Nations and the Royal government of Cambodia for the purpose of prosecuting former Khmer Rouge officials before the ECCC, no such agreement has been reached with regard to practical (unintelligible) of the Cambodian Criminal Procedure Code. In other words, Cambodian ordinary domestic courts remain anchored through a (Inaudible) statute of limitation period for the prosecution of crimes. [11.11.23]

This provides clear and consistent evidence that Cambodia does not intend to provide its ordinary courts with the jurisdiction required to prosecute Khmer Rouge era crimes. Alongside this inaction, the absence of residual jurisdiction is further confirmed by Cambodian's courts practice over the past 30 years before which no prosecution of former Khmer Rouge for crimes committed during the relevant period have ever taken place. Out of the 255 publicly available cases heard by the Cambodian Supreme Court, none relate to Khmer Rouge era crimes.

In other arguments yesterday, the lawyers for the former civil party applicants sought to emphasise that the Co-Investigating Judges position is erroneous due to the fact that the United Nations vote never sanctioned or give extend of approval to

amnesty for serious crimes.

The stress of this argument is that any such defector amnesty would be contrary to Cambodian obligation under international law. This presence and over-simplified representation -- the international community response to post-conflict scenarios in the form of a binary equation. Prosecutions are mandated, amnesties are legally unjustifiable. The reality, however, is not black and white. As argued in our response at paragraphs 14 and 15, state practice reflects that amnesties are in certain cases a legitimate path of the rehabilitative process in post-conflict scenarios.

[11.15.51]

Indeed, this issue has received relevant judicial considerations in the 1998 decision of the House of Lords of England and Wales, in Pinochet, document D308/3/1/18.1.4, English ERN 01540854 to 55, stated by the Defence at paragraph 15 of our response, Lord Lloyd noted the " widespread adoption of amnesties for those who have committed crimes against humanity." His Lordship went on to explicitly that " Some of these have had the blessings of the United Nations as a means of restoring peace and democratic government." Critically, Lord Lloyd observed that it was not argued that these amnesties are as such, contrary to international law, by reason of the failure to prosecute the individual perpetrators and that state practice does not, at present, support an obligation to prosecute in all cases."

[11.18.08]
Plainly, the contention of the lawyers for the former civil party applicants regarding amnesties does not find support in state practice or international law. However, the lawyers for the former civil party applicants must bear in mind that the absence of residual jurisdiction, as shown by both the statements and the practices of Cambodian institutions over the year, does not mean that the victims of the Khmer Rouge regime are forgotten; criminal prosecution forms only one part of the process of national reconciliation.
Cambodian institutions have indeed been active at employing various non-prosecutorial and non-legal approaches and methods to achieve justice for the victims.
[11.20.12]
For example, programs providing education and victims support as means of achieving rehabilitation in relation to the events that occurred during the Khmer Rouge era have taken place. Amongst others, the Ministry of Tourism has partnered with the Documentation Centre of Cambodia to open the Anlong Veng Peace Centre dedicated to memory, reconciliation, and peace building in one of the last strongholds of the Khmer Rouge and hometown to Ta Mok. The initiatives include reforms in the school curriculum. Since 2008, the Ministry of Education, Youth and Sport and the Documentation Centre of Cambodia have undertaken a major national -- nationwide project to reform school curricula at the cost --

at secondary school and university levels on Khmer Rouge history, and trained teachers and lecturers.

More recently, a memorandum of understanding was signed between the Ministry of Education, Youth, and Sport and the Documentation Centre of Cambodia for 2018 to 2022 to provide "Advanced and effective methodology for teaching and learning the history of Democratic Kampuchea" to teachers and lecturers around the country. The aim of the project is to " ensure that students, all over the country, gain knowledge and understanding about the history of Democratic Kampuchea much more fairly as well as to educate them the tolerating, understanding, forgiving and reconciling attitude."

[11.23.40]

In sum, the Khmer Rouge victims are not being forgotten. Whilst reasonable and fair-minded people might disagree concerning the efficacy of this focus and approach, it cannot be argued that Cambodian has no right to make those - these decisions. More importantly, for the present purposes, it cannot be reasonably argued that the Co-Investigating Judges' interpretation of Cambodian exercise of its sovereignty is wrong, let alone, one, invalidates the Closing Order or otherwise perverse.

Conclusions: To conclude, the Co-Investigating Judges were neither unreasonable nor made their observations concerning the position of the ECCC within the Cambodian legal system in bad faith.

They simply stated the facts as a necessary requisite to the definition of personal jurisdiction of the ECCC and (Inaudible) to a reasoned decision to dismiss the charges against Ms. Im Cheam for lack personal jurisdiction.

[11.25.58]

It is not for the Pre-Trial Chamber to provide the remedy requested by the lawyers for the former civil party applicants; that is to be clear that ordinary Cambodian courts may address the question of their residual jurisdiction over Khmer Rouge era crimes. This would be to misinterpret both the role of the Pre-Trial Chamber and the nature of the Co-Investigating Judges' the decision. The Co-Investigating Judges' observations cause no prejudice to the former civil party applicants and none that could (Inaudible) the Pre-Trial Chamber's intervention.

[11.27.37]

Thank you for your attention.

I am now handing over to my Co-Counsel for our response to the International Co-Prosecutor's appeals against the Closing Order.

THE PRESIDENT:

Thank you, Counsel.

And the International Co-Counsel for the charged person, you may have the floor.

MR. JORDASH:

Thank you. Good morning, Mr. President, good morning, Your Honors, and good morning to everyone in the Courtroom.

In the remaining time, I will present our response to the appeal. Ordinarily, I will move straight to the grounds themselves, but ultimately, the merits of this appeal stand or fall not on the substantive grounds --

[11.28.47]

THE PRESIDENT:

Counsel, please, wait for a few minute since DVD has to be replaced.

(Short Pause)

THE PRESIDENT:

Counsel, you may resume.

MR. JORDASH:

Thank you, Your Honours.

Ultimately, the merits of this appeal stand or fall not on the substantive grounds, but on the International Co-Prosecutor's failure to adhere to and respect the standards of review.

Instead of applying the standard of review, the International Co-Prosecutor seeks to re-litigate the case and merely requests the Pre-Trial Chamber to replace the Co-Investigating Judges' assessment with that of its own, and that approach undermines the six appeal grounds.

Accordingly, I will begin with a brief discussion on the standard of review before moving to grounds 1 to 6.

The principal submissions on the standard of review are contained in paragraph 10 of the appeal. The paragraph reads, "The

Pre-Trial Chamber has found it to be established international jurisprudence that, on appeal, alleged errors of law are reviewed de novo to determine whether the legal decisions are correct and alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the findings of fact at issue."

In the reply, the International Co-Prosecutor shifts the position and advances an even lower threshold. At paragraph 4 of the reply, the International Co-Prosecutor claims that,

"While appellate Chambers should grant lower Courts Judges latitude in exercising their own judgment in discretionary decisions, a discretionary decision that is based on a mistaken interpretation of the law or which ignores relevant facts cannot stand."

This is plainly unhelpful and obviously wrong. It is unhelpful because it does not say anything about the type of error of law or fact that might impact a discretionary decision.

It is obviously wrong because it seeks to hold the Closing Order specifically and discretionary decisions generally to an impossible standard.

[11.31.51]

The International Co-Prosecutor suggests that any error of law or fact, big or small, serious or inconsequential, is capable of overturning a discretionary decision. And in this instance, the decision that determined -- I think -- shall I slow down? Is

that the -- yes.

Apologies.

And in this instance, the decision that Ms. In Chaem is not amongst those who are most responsible.

According to the International Co-Prosecutor, all that is required is the identification of any error of law or fact, and the Pre-Trial Chamber must intervene and, as claimed in paragraph 3 of the appeal, correct these legal and factual errors and send the case file back to the Co-Investigating Judges or, in the alternative, for the Pre-Trial Chamber to itself re-evaluate the case.

In our submission, this is not a serious approach to the law or the appellate standard.

As we argued throughout our response, the failure to identify the errors of law and fact and explain how they are said to be fundamentally determinative of the overall decision is a material defect that cannot be ignored. No international or internationalized tribunal or appeal process works in this way, nor should it.

As we set out in the response at paragraph 101, arguments on -- at the appellate level may be dismissed when they are irrelevant, do not elaborate on how the alleged error impacts the challenged findings or merely assert that relevant evidence was not properly assessed, nor given sufficient weight, or not interpreted in a particular manner.

[11.34.30]
As the Pre-Trial Chamber has itself previously found, arguments that, "do not have the potential to cause the impugned decision to be reversed or revised may be dismissed immediately and need not be considered on the merits."
The correct threshold, we deal with this in our response. At paragraph 10, we recall the Co-Investigating Judges' Closing Order, paragraph 9, holding that the assessment of the most responsible criterion of personal jurisdiction at the ECCC is largely discretionary and that such an assessment "entails a wide but not entirely non-judicial margin of appreciation".
The Supreme Court Chamber has endorsed this approach.
On this basis, the Defence argues the Pre-Trial Chamber's review of discretionary decisions is limited to determining the proper exercise of that discretion.
The Defence notes that the Pre-Trial Chamber in Case No. 2, the decision on the appeal from the Order on the request to seek exculpatory material in the shared materials drive, D164/3/6, paragraph 26, held in its role in reviewing discretionary decisions that it is not "to replace its own view with that taken by the Co-Investigating Judges".
[11.36.30]
As a starting point, it is worthwhile examining what the Supreme Court Chamber said about that discretion and the narrowness of any challenge by the accused at trial. In Case 001, the appeal

judgment, document number F28, paragraph 70, quote, "As at the ICTY and ICTR, an accused before the ECCC cannot object to the Trial Chamber's jurisdiction on the basis that the Co-Investigating Judges did not limit the indictment to senior leaders or the most responsible absent a showing that the Co-Investigating Judges abused their discretion."

As further noted at paragraph 80 of the same decision, "In Prosecutor v. Brima, the Appeals Chamber of the SCSL -- the Special Court of Sierra Leone -- observed that in selecting cases, the Prosecutor must exercise his discretion in good faith based on sound professional judgment."

The Supreme Court Chamber agrees with that approach or, to put it another way, as we argue in our response at paragraph 14 and as decided in Case 002, the decision on the Thirith defence appeal against order on requests for investigative action by the defence for Ieng Thirith, D353/2/3, paragraph 8, the error must have been fundamentally determinative of the exercise of the Co-Investigating Judges' discretion.

[11.38.25]

The Defence submissions at paragraph 11 of our response also cite jurisprudence from the Pre-Trial Chamber, holding that, in appellate reviews of discretionary decisions, the appellant bears the onus to demonstrate one of three types of error.

One, an error of law that invalidates the decision, an error of fact which occasions a miscarriage of justice or that the

decision is so unreasonable as to force the conclusion that the Co-Investigating Judges failed to exercise their discretion judiciously.

It cannot be anything less.

The International Co-Prosecutor must establish that any error of law or fact was fundamentally determinative. It must have been of such a gravity that it invalidates the decision or occasions a miscarriage of justice or is so unreasonable. In other words, the errors alone or combined must have led to a decision that was undermined by unsound professional judgment or bad faith. It has to be shown to lead to an abuse of discretion.

[11.40.00]

This is not the same as arguing, as the International Co-Prosecutor does, that this, "erroneously introduces a double requirement". It is an appellate standard which allows the Pre-Trial Chamber to intervene in limited circumstances.

Moreover, the International Co-Prosecutor mischaracterizes the Defence position as "effectively arguing that the Judges have discretion to get the law and the facts wrong". They argue that, following the Defence logic, no matter how unsound the legal basis of a decision, there would be no possibility for a party to appeal or the Pre-Trial Chamber to review unless it was shown that the decision was an abuse of discretion.

They argue that it would require -- that standard would require speculation on the part of the appellate Chamber.

This is a straw man which need not detain the Pre-Trial Chamber. Requiring an error to be fundamentally determinative does not require speculation or guesswork. It requires the moving party to grasp the mettle and establish that the decision was overall flawed by a particular error.

Let us reverse the International Co-Prosecutor's logic. Following the Prosecutor's logic, no matter how sound the legal basis of a decision, there would be no possibility for a party to resist an appeal or the Pre-Trial Chamber to resist a review unless it was shown that there was not a single error of law or fact in the decision. That cannot be sensible judicial policy.

[11.42.15]

The International Co-Prosecutor suggests that Defence position disregards relevant jurisprudence of the ECCC. The International Co-Prosecutor claims that paragraph 9 of the reply of the Defence position does not comport with international practice.

As a consequence, the International Co-Prosecutor argues that in -- firstly, that any error of law entitles the appellate Chamber to substitute the exercise of its own discretion if it considers it "appropriate to do so". And in the alternative, the International Co-Prosecutor submits that the Pre-Trial Chamber possesses the inherent power to remit the Closing Order back to the Co-Investigating Judges to make an assessment based on the correct law and facts.

They argue in the alternative that if a decision is materially

affected by an error of law, it can be remitted to the original decision-maker. If it -- In summary, it can occur in the event of an incorrect interpretation of the governing law, a patently incorrect conclusion of fact or an abuse of discretion.

We agree, almost, with this latter submission. What is clear is that international standards demand something more than a subjective decision to intervene.

Intervention cannot occur merely because the Pre-Trial Chamber considers subjectively that it is appropriate to do so.

[11.44.28]

The overwhelming weight of international authority leaves the matter in no doubt. International jurisprudence establishes that errors of law must invalidate a decision, errors of fact must occasion a miscarriage of justice or the other errors otherwise be an abuse of discretion.

As such and as we saw yesterday, the appeal rests upon a fundamental misapprehension and any legal or factual error is capable of leading to a reversal of the decision and a re-evaluation.

Listening yesterday, the International Co-Prosecutor studiously avoided the crocks of the appellate standards. Throughout the appeal, the International Co-Prosecutor has disregarded the obligation to identify how any of the errors -- alleged errors encompassed by grounds 1 to 6, if established, led to an abuse of discretion.

Just a pause for a moment.

According to the Co-Investigating -- According to the International Co-Prosecutor, if the Co-Investigating Judges made an error of law with regard to the definition of extermination or enforced disappearances, as they alleged in grounds 3 and 4, but it had no overall impact on the decision, then we should begin again.

Not only that the law should be corrected, but that we should do the whole exercise of assessing personal jurisdiction again.

[11.46.28]

According to the International Co-Prosecutor, if there was a finding of fact establishing that there were a 1, 000 victims of a particular crime and not a 1, 001 then the Closing Order should be ripped up and we should do the whole thing again. And the consequence of that is that a woman who is nearly 80 years old, facing a hostile press, should be obliged to be subjected to further criminal proceedings on the basis of the errors which do not fundamentally change the final determination of personal jurisdiction.

And so, it is more than noteworthy that, in ground 1, the International Co-Prosecutor does not explicitly refer to the appellant standard review. In relation to ground 2, the International Co-Prosecutor fails to identify how the alleged failure "to address numerous allegations set out in the final submission impacted the overall decision".

The International Co-Prosecutor concluded, ground 2, not by making any reference to the applicable standard but by stating that, "the Co-Investigating Judges' conclusions on Ms. Im Chaem responsibility is erroneous in light of the numerous allegations contained in the final submissions which were not considered." [11.48.20]

Grounds 3 and 4 purely concern whether the Co-Investigating Judges erred in law for there is no attempt to quantify or assess the effects of that -- of those alleged errors. And the same with regard to grounds 5 and 6.

First, the appeal is fundamentally defective. Any appeal which simply selects alleged errors and treats them as a dispositive of the appeal is nearly the manifestation of a belief that the decision is wrong or it is an act of legal frustration or, as I said at the beginning, it is an attempt to re-argue the case. The fundamental pillars under my underpinning, the Co-Investigating Judges' decision in this case, as set out at paragraphs 38 and 39 of the Closing Order, they looked at whether -- the person's individual contribution to the atrocities, the relative gravity of the person's own actions and their effects, the effective person's former position within the Khmer Rouge hierarchy, and the degree to which the offender was able to contribute to or even determine policies and all their implementation.

[11.50.08]

This is the starting point for any assessment of whether errors were fundamentally determinative of the final decision. The Co-Investigating Judges reached their determination based on four essential planks: (1) That the activities with which Ms. Im Chaem was charged were limited to one district. (2) That she ultimately only attended the position of a district secretary on sector level committee member. (3) That there would have been over a hundred other district secretaries in the country. And (4) that the number of victims of the crimes allegedly committed when considered in the overall context of Democratic Kampuchea was insufficient to meet the threshold of personal jurisdiction. Any attempt to displace the Co-Investigating Judges exercise of discretion must demonstrate something fundamentally wrong or abusive in these assessments.

In our submission, the appeal does not even argue along those lines let alone establish those requirements.

Let me turn to ground 1. The International Co-Prosecutor argues -- and it is important to articulate with these grounds, to look at the precise claims made by the appeal in paragraphs 12 and 13 of the appeal. In paragraph 12 of the appeal, it is asserted that, " The Co-Investigating Judges failed to consider all of the factual allegations of which they were seized, all the arguments of the International Co-Prosecutors advanced in the final submissions as to how the evidence supports Ms. Im Chaem criminal responsibility for several very serious crimes.

[11.52.53]

It is alleged that the Co-Investigating Judges asserted that they had no need to give a reasoned decision as to whether the evidence established Im Chaem responsibility for these crimes, since the Co-Investigating Judges themselves had not charged Im Chaem with those offenses or mode of liability.

In order to examine the correctness of the International Co-Prosecutors submissions, it is necessary to take a step back and actually examine paragraphs 244 to 246 of the Closing Order and actually view what the Judges did or what they did not do rather than what the International Co-Prosecutor claims that they did or did not do. The paragraphs 244 to 246, the Co-Investigating Judges made clear (1) first, that they had concluded that it was impermissible to indict Im Chaem for a much wider set of crimes committed by a (Inaudible) mode of liability than those she was charged with. However, the Co-Investigating Judges, in paragraph 246 (sic), made it quite clear that they were not ignoring those allegations as they stated, "Even if Ms. Im Chaem had been charged for the full array of allegations levied against by the International Co-Prosecutor, she would still fall outside the jurisdiction of the ECCC. It is for these reasons that we will provide a brief overview of the evidence related to crime sites in section 5 (sic) for which Im Chaem has not been charged."

[11.54.59]

And then, turning to paragraph 247 of the Closing Order, the Co-Investigating Judges made it crystal clear what their analysis entailed. In short, having concluded in paragraph 245 that, as a matter of law, Ms. Im Chaem could not be indicted for crimes not charged, they then went on to consider the broader question. If she had been charged with those crimes, would it have made a difference to their assessment of whether Ms. Chaem fell within the jurisdiction of the ECCC?

Paragraph 247 provides their answer, and it could not be clearer. The Co-Investigating Judges expressly determined that had Ms. Chaem being charged with allegations that arose from the facts not charged, they wouldn't have made a difference to their final determination.

[11.56.16]

In relation to (1) two crimes sites in Koh Andet District, Sector 13, Wat Ang Srei Muny and Prey Sokhon Execution Site and to all of the allegations in Sector 13, Southwest Zone, given that Ms. Im Chaem was found to have no executive authority in that district, the crimes are irrelevant. And (2) in relation to two crimes sites in the Northwest Zone, Wat Chamkar Khnol and Trapeang Thma Dam located in the Sisophon and Phnom Srok District of Sector 5, the evidence of Ms. Cheam involvement was inconclusive. This also applies to the other allegations in Sector 5.

The Co-Investigating Judges discussed this at length at

paragraphs 247 to 280.

In sum, the International Co-Prosecutors claimed, paragraph 12 of their appeals, that the Co-Investigating Judges failed to consider all of the factual allegations is wholly inaccurate. As a fair reading of the Closing Order indicates, they expressly considered and (Inaudible) those factual allegations that are having any determinative impact upon their assessment of personal jurisdiction.

The Co-Investigating Judges, in summary, examined the allegations and the evidence underpinning them, found that there was insufficient link between them and Ms. Im Chaem, and consequently, in light of that lack of linkage, they set forth to provide only a brief overview of the evidence relating to those crimes sites. That "is" the crimes sites in Sector 13 of the Southwest Zone, in Sector 5 in the Northwest Zone for which Im Chaem had not been charged.

[11.58.41]

So, in summary, the Co-Investigating Judges went much further than they actually had to. Naturally, since they concluded a lack of linkage, there was no need to examine the crimes in detail. Accordingly, the International Co-Prosecutor not only misreads the Closing Order but fails to show any error of law or abusive discretion. This misreading of the Closing Order impacts upon each of the International Co-Prosecutor's three sub-grounds to ground 1.

The allegations, in fact, were considered and found not to be relevant. The principal points advanced as straw man, nothing more and nothing less.

Nonetheless, for the sake of completeness, let us examine briefly the International Co-Prosecutor's principal submission at paragraphs 11 to 22 of the appeal, namely that the Co-Investigating Judges erred by finding that allegations in the introductory submissions must be charged in order to be part of the Closing Order.

[12.00.23]

Your Honours, I was about to move to another section, but I noticed the time. I don't know if this is a convenient time to pause.

MR. PRESIDENT:

You have a lot (Inaudible) to speak before the Pre-Trial Chamber in terms of your submissions?

MR. JORDASH:

Yes.

[12.01.06]

MR. PRESIDENT:

So, the Court is now in recess, and we will resume at 1:30 in the afternoon.

(Court recesses from 1201H to 0130H)

[13.33.18]

MR. PRESIDENT:

Please be seated. Co-Lawyer for the charged person, please make -- continue your submission.

MR. JORDASH:

Mr. President, Your Honours, thank you.

Just to complete the submissions in relation to ground 1 and the International Co-Prosecutor's assertion that the Co-Investigating Judges erred by finding that allegations in the introductory submissions must be charged in order to be part of a Closing Order, we have advanced detailed submissions in our response and I won't seek to reiterate them. However, it is right to note that the International Co-Prosecutor's logic begs the question: What is the object, purpose, and effect of the notification of charges?

If the International Co-Prosecutor's assertions are correct, on the basis of the International Co-Prosecutor's logic, the notification of charges has no procedural value. It's nothing more than an unnecessary formality.

[13.35.26]

Yesterday, the International Co-Prosecutor submitted that the notification of charges is not a reasoned decision and that charging, in this document, is limited to a certain procedural significance. However, the ECCC has ruled on this submission in Case 002. As noted in Case 002, the order refusing the request for further charging, D298/2, paragraph 13, the notification of charges is "not a mere procedural formality, but rather a

judicial decision made by the Co-Investigating Judges once they have found clear and consistent evidence of criminal responsibility against any person".

As determined by the Pre-Trial Chamber in Case 002 in the decision on the appeal from the order on the request to seek exculpatory material in the shared material drive, D164/4/13, at paragraph 36, the judicial investigation is concluded when they, the Co-Investigating Judges, "have accomplished all the acts they deem necessary to ascertaining the truth in relation to the facts set out in the introductory and supplementary submissions before assessing whether the charges are sufficient to send the charged person to trial or whether they shall dismiss the case".

[13.37.21]

In Case 002, Closing Order D427, paragraph 1323, the Co-Investigating Judges defined the threshold for indictment as being satisfied when the evidence is "sufficiently serious and corroborative to reach a certain level of probative force".

According to Internal Rule 79(1), the Trial Chamber shall be seized by an indictment from the Co-Investigating Judges or the Pre-Trial Chamber. In other words, as stated in the decision, an appeal against the Case 001 Closing Order, D99/3/42, paragraphs 104 to 107, the Closing Order settles the charges unless the Pre-Trial Chamber on appeal adds additional legal characterizations to the existing charges based on the material facts from the Closing Order. Therefore, by the time the judicial

investigation was included in Im Chaem's case, the Co-Investigating Judges had undertaken all the acts they deemed necessary to ascertaining the truth in regard to the facts set out in the Co-Prosecutors' introductory submission and first and second supplementary submissions.

The fact that Ms. Im Chaem was not charged with alleged crimes other than those in relation to PTSC and SSWS indicates that the Co-Investigating Judges were not satisfied that there was clear and consistent evidence indicating that she could be charged or that she could be criminally responsible for any allegations that were not included in the notification of charges. In our submission, this is obvious and trite law.

At paragraph 14 of the reply, the International Co-Prosecutor claims that, "though dealing with re-characterization, the Pre-Trial Chamber has previously found that crimes not formally charged and not included in the Closing Order could be added to the Closing Order on appeal because the underlying factual allegations were included in the Co-Prosecutor's introductory submission".

[13.40.03]

The International Co-Prosecutor relies on the appeal decision on the indictment against Duch and yesterday, the International Co-Prosecutor stated that, "this was the best example that a suspect can be indicted for crimes not charged". However, the reliance upon this case is misplaced.

In Case 001, the Pre-Trial Chamber added domestic offences of torture and murder to Duch's indictment. However, all that was being added, in that instance, were legal offences. This was not a situation where facts had been previously considered and offences dismissed due to a lack of clear and consistent evidence, as in this case, or otherwise, a request from the Prosecutor to the Pre-Trial Chamber to engage in de novo investigations. This would require a substantial and detailed assessment of the evidence or, should I say, a detailed reassessment of the evidence; a task that was not required to be undertaken by the Pre-Trial Chamber in Case 001 when it re-characterized existing charges.

Moving on to ground 2, the International Co-Prosecutor asserts that the Co-Investigating Judges erred in law in approach to the facts of which they were seized but not charged. As observed at the outset of our submissions, a fair reading of the Closing Order shows that they didn't -- Co-Investigating Judges disregarded those charges in their assessment of personal jurisdiction. They considered them and found them not to alter their decision.

In light of that clear legal position -- the legal position that you couldn't be charged for those facts -- there can be no legitimate complaint that the Co-Investigating Judges elected to provide only a brief overview of the evidence of those crimes. Moreover, in light of the lack of sufficiency of the evidence

establishing Ms. Chaem's involvement or authority over the crimes, a brief overview of the evidence relating to crime sites in Sector 5 for which Im Chaem had not been charged was more than ample to satisfy due process and to provide the International Co-Prosecutor with the information they required to exercise their rights, including their rights to appeal.

[13.43.17]

In sum, ground 2 is entirely misplaced. The Co-Investigating Judges expressly stated that they had considered the facts not charged and, in reality, the International Co-Prosecutor's complaint in these circumstances can only be a complaint that the Co-Investigating Judges failed to provide adequate reasons. As must be plain from such a limited complaint, the International Co-Prosecutor faces an uphill battle to show that the Co-Investigating Judges failed to provide adequate reasons and that the specific failure to provide reasons was fundamentally determinative of the exercise of discretion. Although the Co-Investigating Judges are required to "state the reasons for the decision", as dictated by Internal Rule 67.4, the rule provides that, when issuing a Closing Order, the Co-Investigating Judges are not bound by the Co-Prosecutor's submissions. In other words, the Co-Investigating Judges were not obliged to align the Closing Order to the issues raised in the Co-Prosecutor's final submission.

As confirmed by the Supreme Court Chamber of the ECCC and

consistent with the standards of decisions in the context of regional and international human rights law such as those emerging from the European Court of Human Rights, the requirement to give reasons does not equate to an obligation to "mechanically work through each and every argument that a party has raised". That quote came from the Case 002, Appeal Judgment F36, paragraph 207, and we rely upon it.

Moreover, ground 2, once again, like all the other grounds is formally defective. In each alleged instance wherein it is claimed the Co-Investigating Judges failed to consider relevant facts or provide adequate reasons, the International Co-Prosecutor declines to identify how the alleged errors were fundamentally determinative of the exercise of discretion. This is fatal to ground 2. It is not the role of the Pre-Trial Chamber to do what the International Co-Prosecutor has failed to do.

[13.46.21]

To consider, briefly, the categories of facts the Co-Investigating Judges allegedly failed to consider, the International Co-Prosecutor identifies five categories: (1) The purge of the Northwest Zone; (2) Forced marriages in Sector 13 and Sector 5; (3) Persecution of the Vietnamese in Sector 5; (4) Crimes against the Khmer -- Khmer Krom in Sector 13; and (5) Several other crimes of which the Co-Investigating Judges were seized.

First, to deal with the allegations from the Southwest Zone, at paragraphs 143 to 150, the Co-Investigating Judges first assessed the evidence related to Ms. Im Chaem's role and authority in the Southwest Zone. The Co-Investigating Judges assessed and provided a detailed analysis of the International Co-Prosecutor's allegations and concluded that Ms. Im Chaem's role in the Southwest Zone was limited to heading the Sector 13 woman's association. In this position, "she was responsible for the political education of women in the various districts of Sector 13".

In light of this finding, the Co-Investigating Judges correctly and reasonably concluded, as will be argued in detail under grounds 5 and 6 shortly, that Ms. Im Chaem was not involved in the decision making affecting Koh Andet District and Sector 13. They further concluded reasonably, we submit, that there was no evidence of Ms. Chaem's -- Im Chaem's involvement with Wat Ang Srei Muny and Prey Sokhon, the two crime sites located in the Southwest Zone.

In light of these findings, the findings that Ms. Im Chaem was not involved in the Southwest Zone's decision-making, the Co-Investigating Judges were not required to assess, in detail, the evidence related to the crimes allegedly committed in the Southwest Zone and in relation to which Ms. Im Chaem had not been charged.

[13.49.02]

Secondly, just to deal in summary with allegations in the Northwest Zone, the International Co-Prosecutor contends that the Co-Investigating Judges erred in law by failing to consider allegations and arguments concerning: (1) The purge of the Northwest Zone, (2) Forced marriages in Sector 5, (3) Persecution of the Vietnamese in Sector 5, and (4) Several other crimes in the Northwest Zone, again, of which the Co-Investigating Judges were, in fact, not seized.

As was a reasonable approach to determining the relevant and probative value of the evidence in regards to determining personal jurisdiction, the Co-Investigating Judges first assessed the evidence relating to Ms. Im Chaem's role and authority in the Northwest Zone and found it failed to show "the contours of her authority over sector-related matters".

At Wat Chamkar Khnol, Trapeang Thma Dam, or in relation to deaths and arrests at Wat Preah Net Preah, our written response provides a detailed response to each assertion made by the International Co-Prosecutor. For the moment, we will respond in relation to the submissions made yesterday by the International Co-Prosecutor in relation to the purge of the Northwest Zone and in relation to forced marriages.

In relation to the purge of the Northwest Zone, the International Co-Prosecutor argues that, in the Closing Order, the Co-Investigating Judges made a series of findings regarding the purge, but only as a narrative for the transfer and did not, in

the final analysis, consider the gravity of the crimes committed. First, a review of the Closing Order demonstrates that the Co-Investigating Judges examined the evidence related to Ms. Im Chaem's alleged involvement in the purges at the Northwest Zone in some detail. They assessed all relevant considerations including her relationship with Ta Mok and her role as much as the evidence allowed it to be discerned. Contrary to the International Co-Prosecutor's claim at paragraph 24 of the appeal, the Co-Investigating Judges did not conclude that Ms. Im Chaem "led and participated in what the Co-Investigating Judges described as the major coordinating -- coordination task; that was purging the Northwest Zone". At its highest, the Co-Investigating Judges found that she led the transfer of Southwest -- Southwest Zone cadres to the Northwest Zone. [13.52.20]

In any event, having assessed at paragraph 158 to 160 of the Closing Order, Ms. Im Chaem occupied a much lesser role than that alleged by the International Co-Prosecutor; namely, that of secretary of Preah Net Preah District during the majority of the relevant period and not any leading position in the Northwest Zone. The evidence did not establish, logically, any contribution to those crimes.

In light of the limited role found, no reasonable trier of fact would have attributed the entirety of the crimes in the sector to Ms. Im Chaem for the purposes of assessing personal jurisdiction.

Accordingly, the International Co-Prosecutor's claim that the Co-Investigating Judges failed to consider the crimes is not only premised on an erroneous reading of the Closing Order, but is not a reasonable submission let alone a viable appeal ground.

Turning to forced marriages, first, in Sector 13, Southwest Zone. It is worthwhile examining the International Co-Prosecutor's assertion that the Co-Investigating Judges failed to consider evidence of Ms. Chaem's responsibility for forced marriages in Sector 13 of the Southwest Zone in a reasonable manner. In reality, the entirety of the Prosecution's case concerning Ms. Im Chaem's alleged direct involvement in forced marriages in the Southwest Zone rested on a single unsupported allegation according to which she "forced young women in Sector 13 to marry disabled soldiers". The remainder of the evidence established that, on some occasions, forced marriages occurred, but did not speak in any meaningful way to Ms. Im Chaem's relationship to them.

As concerns the single unsupported allegation, first, it did not relate to events that occurred in Sector 13 of the Southwest Zone, but to Svay in the Northwest Zone.

Second, even if it was relevant, which it plainly wasn't, the evidence is incapable of possessing any meaningful probative value. It is uncorroborated and unsourced hearsay.

[13.55.16]

The proposition advanced in paragraph 28 of the appeal that the

Co-Investigating Judges should have taken this evidence as sufficient linkage of Ms. Im Chaem to a campaign of forced marriages in Sector 13 and that this should have been -- this should have weighed into the evaluation of whether Ms. Im Chaem fell within the personal jurisdiction of the Court is not a reasonable submission.

Finally, contrary to yesterday's claim that Sok Rum was relied upon on two other occasions in the Closing Order regarding other issues, this does not undermine the Co-Investigating Judges' approach. As is plain and consistent with international standards, the Co-Investigating Judges are -- are not obliged to accept or reject statements in their entirety. They are -- are entitled to rely upon parts of statements and reject other parts.

In relation to forced marriages in Sector 5, Northwest Zone, the International Co-Prosecutor asserts that the Co-Investigating Judges failed to consider evidence of Ms. Im Chaem's responsibility for forced marriages at crime sites under Ms. Im Chaem's alleged authority including at Spean Sreng Canal Worksite and Trapeang Thma Dam in the Northwest Zone, and these should have been considered as part of the overall assessment.

The International Co-Prosecutor plays fast and loose with the evidence and with the Co-Investing Judges' approach. While it is correct, as observed by the International Co-Prosecutor at paragraph 35 of his reply, that the Co-Investigating Judges did not make any explicit findings on forced marriages, in the

circumstances, this was a reasonable omission and certainly not one that can impact upon the final determination.

[13.57.41]

First, the Co-Investigating Judges examined the evidence related to Ms. Im Chaem's alleged involvement in the Southwest Zone and in the Northwest Zone and they did so at length. This was, in the circumstances, the critical issue.

Second, even putting aside that critical issue, the evidence linking Ms. Im Chaem to forced marriages in the Northwest Zone was paper-thin. First, with regard to Spean Sreng Canal Worksite, the International Co-Prosecutor, in paragraph 269 of his final submission, cites a single civil party applicant, Sen Sophon, in support of the claim that forced marriages took place at that crime site. As argued at paragraph 58 of the response, the witness did not implicate Ms. Im Chaem in forced marriage ceremonies. The witness, in fact, did not provide any meaningful probative evidence. "He did not know much about her. "

Again, the claim yesterday that Sen Sophon was relied upon, on four occasions, in the Closing Order regarding unrelated issues does not undermine the Co-Investigating Judges' approach. The Co-Investigating Judges are entitled to accept or reject aspects of statements provided they do so in a reasonable manner.

[13.59.32]

Second, with regard to Trapeang Thma Dam, any evidence of forced marriage ceremonies was irrelevant to the Co-Investigating

Judges' assessment of personal jurisdiction. The Co-Investigating Judges found that whilst Ms. Im Chaem visited the site "the full extent of her involvement and authority over that project was somewhat unclear". This was a finding not challenged by the International Co-Prosecutor.

The only evidence of any relevant or meaningful probative value relevant to the establishment of Ms. Im Chaem's alleged involvement in a course of conduct entailing forced marriages was the evidence provided by Thang Thoeuy, who contended that Ms. Im Chaem presided over a forced marriage ceremony in the Northwest Zone and then ordered subordinates to spy on couples in order to ensure that marriages were consummated.

By definition, we submit, a reasonable trier of fact may conclude that one witness, alone, cannot provide sufficiently serious, consistent, or corroborative evidence to provide more than nominal probative support for such a significant alleged course of conduct; a course of conduct alleged to have been pursued for the entire period of the regime in nearly every zone and involving mass ceremonies ranging from two couples to a hundred couples each time.

[14.01.38]

It was well within the reasonable exercise of discretion to decline to rely upon or even comment upon this single thread of evidence. The International Co-Prosecutor fails to show any error or abuse of discretion. Accordingly, we submit, ground 2 is

entirely misplaced. It -- It rests upon nothing more than a presumption that the Co-Investigating Judges had to mechanically reasoned through every piece of evidence and submission irrespective of the findings concerning authority or lack thereof or, otherwise, the relevant or probative value of the evidence. In circumstances where the Co-Investigating Judges assessed Ms. Im Chaem's authority and found it wanting, they were not under an obligation to then consider the detail of the crimes. The scope or gravity of the crimes, however horrific and however large, became irrelevant to their determination. Similarly, in circumstances where the evidence of Miss Im Chaem's criminal conduct was so tenuous or unconvincing, the Co-Investigating Judges were under no obligation to provide reasons for its dismissal.

[14.03.21]

Conversely, the International Co-Prosecutor is under an obligation to do more than merely assert pieces of evidence have been disregarded. He must demonstrate how no reasonable trier of fact would have taken that approach and how that approach led to or was illustrative of an abuse of discretion to the overall determination. Ground 2 should be dismissed as defective and lacking in merit.

In relation to ground 3, the International Co-Prosecutor submits, in paragraphs 38 to 46 of the appeal, that the Co-Investigating Judges made two errors: (1) An error of law whereby the

Co-Investigating Judges found that the intent for the crime of extermination must be formed ex-ante and an error of fact by failing to find that Ms. Im Chaem had the requisite mens rea for extermination.

The Defence submissions in relation to ground 3 are contained in paragraphs 74 to 90 of their response -- of our response. First, the Defence submits that ground 3 is inadmissible. Second, the Defence submits that the Co-Investigating Judges did not err in defining the required mens rea. Thirdly, the Defence maintains -- and this is perhaps the most important part of the submission - that, even if an error of law is established, the International Co-Prosecutor fails to argue or establish that it led to an abuse of discretion in relation to the overall decision.

[14.05.34]

As I will outline, the Defence submits that, in the circumstances, had the crime of extermination been defined in the way that the -- let me go back a bit. The Defence submits that even if there has been an error in the definition of extermination, it would not have impacted the Closing Order for several cogent reasons.

So, I will focus, today, on the second and the third issues: the definition of the mens rea and whether any error was fundamentally determinative of the overall decision.

First, in our submission, the Co-Investigating Judges did not err in defining the required mens rea of the crime of extermination.

In our submission, the International Co-Prosecutor's argument rests on a fragmented view of the Closing Order. As we note in paragraph 79 of our response, when defining the crime of extermination, the Co-Investigating Judges adopted the finding of the Supreme Court Chamber of the ECCC, that the mens rea of extermination is "the intent to kill persons on a massive scale or to inflict serious bodily injury or create living conditions calculated to bring about the destruction of a numerically significant part of the population".

[14.07.30]

On a close and holistic reading of the Closing Order, there was little to suggest the Co-Investigating Judges intended or did depart from this definition when assessing Ms. Im Chaem's responsibility for the events at PTSC.

It is important to analyze this issue with an appreciation of the Supreme Court Chamber's ruling, cited with approval by the Co-Investigating Judges in the Closing Order, that what is required is "a showing that the killing of members of the group is what was desired by the perpetrator, irrespective of whether he or she was certain that this would actually happen", and that "mere knowledge that deaths may occur would be insufficient". That's to be found at paragraph 68 of the Closing Order.

Despite the International Co-Prosecutor's suggestions to the contrary, at paragraph 45 of the appeal, the mens rea of extermination may not be merely a question of the establishment

of "knowledge that killings are taking place and continued participation in related killings". As noted in the International Co-Prosecutor's footnote to paragraph 45, the jurisprudence, in fact, states that the intent in a general sense "may thus be inferred from the Accused participation", but that an Accused "must have clear awareness that this participation will lead to the commission of crimes."

[14.09.35]

As observed by the ICTR Appeals Chamber in Kayishema and Ruzindana relied upon by the International Co-Prosecutor in paragraph 45 of their appeal, the question of whether that intent can be inferred is a decision that is within the discretion of the court of first instance, in that case, the Trial Chamber. How to exercise that discretion with regard to the available evidence and in further awareness -- requisite awareness in circumstances such as those revealed by the evidence relevant to PTSC, in this case, is the (unintelligible) of the problem faced by the Co-Investigating Judges and, we submit, ignored by the International Co-Prosecutor in his appeal.

The Defence submits that this problem may be summarized as follows: In circumstances where a discrete number of killings -- killing events occur in and are clearly desired by the alleged perpetrator, the inference required may not be a difficult one to assess. Conversely, where massiveness and intent is to be inferred from individual events that are small, incremental, or

otherwise separated in time and space, the question of what the charged person knew and desired may be concealed or obscured. [14.11.31]

Demanding an ex-ante intent, as the Co-Investigating Judges did, may assist in ensuring that any assessment of desire and, ultimately, intent is concretely and objectively based. This is what the Co-Investigating Judges were grappling with. How in the face of these facts could they be satisfied to the requisite standard that any individual intended to kill persons on a massive scale or to inflict serious bodily injury or create living conditions calculated to bring about the destruction of a numerically significant part of the population.

It's our submission that the Co-Investigating Judges deployed the ex-ante intent requirement in order to address this problem. The killings in this location were carried out during a longer period of time and possibly by different physical perpetrators, as found in the Closing Order at paragraph 288. Notwithstanding, findings establishing Ms. Im Chaem's formal authority at that location, this gave rise to evidential conundrums. It, in our submission, created doubt concerning the nature of the killings, the identity of the perpetrators and, ultimately, the relationship of Ms. Im Chaem to the various killing events and her overall desire and what it was focused upon. [14.13.27]

Accordingly, as argued in paragraph 8 of the response, the

Co-Investigating Judges' conclusion concerning an ex-ante intent was not intended to introduce a new legal element. It was, instead, a reasonable approach to the evidence in the factual circumstances found established at this specific location. Consistent with the principle of culpability, the Co-Investigating Judges' approach was a reasonable acknowledgment that, at that location only, an ex-ante intent was required to be sure of the requisite intent.

In their reply at paragraph 47, the International Co-Prosecutor argues that the Defence's characterization of the Co-Investigating Judges' deployment of the ex-ante intent as a reasonable evidential requirement is legally and factually wrong. In this respect, the International Co-Prosecutor submits that, contrary to Ms. Im Chaem's description of killings at PTSC, as fragmented and committed by disparate perpetrators, these were not random or unconnected incidents.

The International Co-Prosecutor claims that this is apparent from the Co-Investigating Judges' factual findings regarding PTSC; namely, Ms. Im Chaem's authority over the centre where they occurred, the number of victims, and the factual connections between the routine killings.

[14.15.35]

The International Co-Prosecutor submits that Ms. Im Chaem's involvement and intent is clearly proven by these facts; however, the thrust of the International Co-Prosecutor's arguments appears

to be limited to the observations that, because Ms. Im Chaem was in overall authority over PTSC and the killings were of a significant number and not random or unconnected, the question of her intent was obvious.

However, in our submission, more is required. While these findings are relevant to broad questions of criminal responsibility over events at PTSC, including questions of intent with regard to extermination, clearly, they are relevant to that too. The International Co-Prosecutor fails to grapple with the circumstances found by the Co-Investigating Judges which, in summary, amount to incremental killings over a long period of time by different perpetrators.

The international prosecutor has not directly addressed the length of time that the killings took place over, nor the plurality of the physical perpetrators themselves or, otherwise, why it could safely be inferred looking at the specific circumstances that Ms. Im Chaem's acts and conduct allow the required inference?

[14.17.19]

As noted in the Appeal Judgment in Case 002, F36, paragraph 521, extermination requires calculation, substantial preparation, and an intention of result. The International Co-Prosecutor fails to identify the specific evidence that establishes these elements or otherwise, in our submission, explain why the factual demonstration of an ex-ante intent was not a reasonable

evidential requirement in the circumstances.
The only findings of the Co-Investigating Judges that were direct related to findings that Ms. Im Chaem, on occasion, ordered the execution of prisoners at PTSC; however, the -- the Co-Investigating Judges did not find these orders to be routine. Conversely, both references in the Closing Order are to a single instance of an order to execute former prisoners.
As plainly found in our submission by the Co-Investigating Judges, there is little or nothing in the findings of the killings, more generally, spread out over nearly two years perpetrated by disparate or a multiplicity of perpetrators to suggest that she had imposed orders, more generally, that provided convincing evidence of the relevant intent.
[14.19.04]
Similarly, the non-random nature of the killings is relevant, but not in any way dispositive of the relevant and required intent. It does not, without more, establish intent, especially in the face of the circumstances I have just described.
The International Co-Prosecutor contends that the introduction of a new element to the crime of extermination is not justified by any risk of violation of the principle of culpability, nor is it consistent with international approaches to the crime. As a review of the international approaches to the crime, as outlined in paragraph 82 of the response shows, this submission is misconceived.

The Co-Investigating Judges, in this case, are not alone in international criminal law in confronting these evidential problems and crafting solutions to meet them. The problem of how to infer intent in circumstances where the scale of the killings gives rise to inferences, but then are undermined by questions of remoteness due to the length of time and the multiplicity of perpetrators is a common one. Indeed, this remoteness and whether and how, nonetheless, to infer intent from large-scale killings has bedevilled a series of cases at the ICTY and ICTR.

First, it has been recognized in a series of cases that include Luki? and Luki?, IT-98-32/1A, D308/3/111.1.16 at paragraph 538 and Popovi?, IT-05-88T, D3083/1/11.1.14 at paragraph 825 that relevant "relevant factors to establishing the crime of extermination include inter alia the time of the killings and that, more generally, the temporal proximity of the killings may be an issue critical to the assessment of intent".

Second of note -- And I should have said that those cases come from the ICTY. Second of note, in other cases, the separation of events, time, and differing perpetrators has, in fact, undermined the assessment of the relevant intent. In Karemera and Ngirumpatse, at the ICTR 98-44-A, D308/3/111.1.19, at paragraph 661, the Appeals Chamber held that the crime of extermination could not be established in that case "by a collective consideration of distinct events committed by different perpetrators and over an extended period of time".

[14.22.48]
Similarly, in Bagosora, again at the ICTR-98-41A, D308/3/1/11.1.18, at paragraph 396, the Appeals Chamber found that extermination could not be established "on a collective consideration of events committed by different perpetrators and over a period of two months".
Accordingly, we submit, the Co-Investigating Judges were not only entitled to be cognizance -- cognizant of such factors when assessing the alleged crime of extermination at PTSC, they were duty-bound to wrestle with these elements. In this case, the Co-Investigating Judges rather than abandoning the search for mens rea took a reasonable approach to the problem, the requirement of proof of an ex-ante intent.
As a history of these cases show, it is not accurate to characterize the Defence submission as the Co-Prosecutor did yesterday and at paragraph 48 of the reply, that this is the same as arguing for an additional element to be added to the definition of extermination. Instead, it was an eminently reasonable solution and consistent with the line of jurisprudence and that line of jurisprudence includes the case of Staki?, Br?anin, Blagojevi? and Joki? at the ICTY which, in our submission, supports the validity of the Co-Investigating Judges' approach. For example, in the ICTY case of Br?anin, IT-99-36T, the Trial Chamber in the judgment of the 1st of September 2004, paragraph 394, endorsed the approach taken by the Trial Chamber

in Vasiljevi? that employed proof of "a vast murderous enterprise" as evidence that went to prove extermination. [14.25.21]

As noted by the Trial Chamber, "The Trial Chamber makes it clear that Vasiljevic's knowledge that his action is part of a vast murderous enterprise in which a larger number of individuals are systematically marked for killing or to be killed, if proven, will be considered as evidence tending to prove the Accused knowledge that his act was part of a widespread or systematic attack against the civilian population and not beyond that." As subsequently observed by the Blagojevic and Jokic Trial Chamber in their judgment IT-02-60T, D308/3/111.1.5, at paragraph 576, endorsing the approach in Vasiljevic, "This Trial Chamber endorses this view and does not consider the existence of 'a vast murderous enterprise' as a separate element of the crime, nor as an additional layer of the mens rea required for the commission of the crime." In other words, those Trial Chambers took a similarly creative and demanding approach to the factual circumstances at hand and crafted a solution to ensure that the crime could be assessed in a way which was consistent with the principle of culpability. [14.27.20]

More importantly -- I'm moving on to the second part of ground 3 -- the Prosecution's appeal does not have the potential to affect the overall outcome of the final determination in the Closing

Order. Even if an error of law is established, the International Co-Prosecutor fails to argue or establish that it led to an abuse of discretion in relation to the impugned decision.

Of significance, as noted in the Defence response at paragraph 87, are the following: The killings at Phnom Trayoung Security Centre, said by the International Co-Prosecutor to amount to extermination, were taken into account by the Co-Investigating Judges in assessing the crime against humanity of murder. You will find that, Your Honours, at Closing Order, paragraph 285 to 288. The Co-Investigating Judges considered that all executions and deaths from overwork and starvation at the centre amounted to murder as a crime against humanity. In this regard, it is of critical importance to this ground that the International Co-Prosecutor does not take issue with the finding of the Co-Investigating Judges at paragraph 323 of the Closing Order, but in light of the potential for multiple crimes arising out of the same underlying facts, "multiple possible legal characterization of the same facts allow for multiple charging and possibly eventual conviction, but they do not significantly enhance the gravity of the actions of Im Chaem either."

[14.29.47]

In other words, the legal categorization of the crimes as extermination as a crime against humanity would have introduced new legal elements, but would not have introduced new victims and, therefore, could only have marginally -- very marginally

have aggravated the crimes.
The most pertinent factor taken into account by the Co-Investigating Judges in relation to the assessment of personal jurisdiction was the number of victims. The Co-Investigating Judges -- and it's worthwhile repeating -- took account of the estimated 2,000 deaths at the Phnom Chakrey Security Centre in arriving at their determination of personal jurisdiction.
In other words, any legal re-categorization, which is what the Prosecution requests that you, Your Honours, do, would not extend the geographical scope of the charges against Ms. Im Chaem, nor elevate her formal position in the Khmer Rouge hierarchy, nor, as I said, aggravate the crimes to any significant extent.
[14.31.26]
In sum, if there was a legal error, this could not have been fundamentally determinative of the final assessment.
Moving on to ground 4, in our submission, the Co-Investigating Judges did not err in law when defining the crime of enforced disappearances and applying it to their findings in the Closing Order. In our submission, the Co-Investigating Judges did not err in law when defining the crime and secondly, even if an error of law is established, the International Co-Prosecutor fails to argue or establish any abuse of discretion in relation to the overall determination.
Dealing with the first point, in our submission, the International Co-Prosecutor misinterprets the Co-Investigating

Judges' approach to the definition of the crime of enforced appearances -- disappearances. First, the International Co-Prosecutor misreads, in our submission, the approach taken to the definition. There is, we concede, some support for the International Co-Prosecutor's proposition that the Co-Investigating Judges departed from the definition of enforced disappearances; however, when considered in the round, this support is minimal and, ultimately, would not have changed the outcome.

[14.33.35]

First, at paragraph 74 of the Closing Order, the Co-Investigating Judges correctly stated the law and adopted the Supreme Court Chamber's definition of other inhumane acts under crimes against humanity and found that enforced disappearances may qualify as other inhumane acts.

In our submission, it cannot be argued that, when stating this law, the Co-Investigating Judges approach could be described as anachronistic and legally incorrect.

Secondly, it is submitted that, in the specific circumstances of this case, the Co-Investigating Judges cannot be criticized for taking into account whether there was evidence that the families of the disappeared made enquiries about the fate or whereabouts of the disappeared. As has been stated by the Supreme Court Chamber in Case 002, Appeal Judgment F36, the determination of whether specific conduct constitutes other inhumane acts "requires a

case-specific analysis of, in particular, the impact of the conduct on the victims and whether the conduct itself is comparable to the enumerated crimes against humanity".

Accordingly, it cannot reasonably be argued that the question of whether there was evidence that the families of the disappeared made enquiries about the fate or whereabouts of the disappeared is irrelevant or not potentially probative of the question of whether the facts established the physical and mental elements of other inhumane acts. As with ground 3, the road towards assessing the actus reus and mens rea of the crime at hand was a long and difficult task.

[14.36.06]

In our submission, the International Co-Prosecutor should not be permitted to bind the legal hand of the Co-Investigating Judges or otherwise dictate the precise approach that should be taken to the evidence in these discretionary assessments.

It is undoubtedly the case, however, that the Co-Investigating Judges could have expressed themselves more clearly on these issues. We concede, as we must that, at paragraph 294 of the Closing Order, the Co-Investigating Judges noted that, "the denial of requests to disclose information about the whereabouts and fate of the victims was a key element of the crime".

However, as I have submitted, a proper review of the totality of the approach taken demonstrates that it, in fact, did not apply the modern definition of enforced disappearances. Instead of

requiring an additional element, namely, that persons should have sought information about the whereabouts of any detained individual, the Co-Investigating Judges regarded this evidence in the circumstances pertaining at the crime sites to be essential to a demonstration of the fulfilment of the elements of other inhumane acts. And moreover, they regarded it essential to enable them to distinguish enforced disappearances from other crimes against humanity, namely, imprisonment and murder.

As argued by the Defence in our response at paragraph 98, despite the less clearly defined contours of the crime of the older definition of enforced disappearances, it still was not open to the Co-Investigating Judges to merely assume, as the Co-Prosecutor suggests, that arrests and disappearances automatically satisfied the elements of the crime. The Co-Investigating Judges had to be satisfied that any intentional acts or omissions that led to the disappearances caused serious mental or physical suffering or injury and that these violations of fundamental rights caused serious mental and physical suffering and injury of a similar gravity and nature as the other enumerated crimes against humanity.

[14.38.59]

In our submission, by applying an evidential approach, does that raise the question of whether persons had sought information about the whereabouts of a detained individual? The Co-Investigating Judges carefully and correctly adhered to the

principles inherent in due process.

Instead of addressing this issue, the International Co-Prosecutor misinterprets the Defence submission and the Co-Investigating Judges' approach. The Defence did not assert, as claimed at paragraph 52 of the reply, that, "It cannot be assumed that the disappearances caused serious mental or physical suffering." The International Co-Prosecutor urges a truncated approach to the Co-Investigating Judges' findings and expounds an oversimplification of the submissions that we make. What the Defence submitted, and submit today, is that a multi-layered analysis of the facts was required and engaged in by the Co-Investigating Judges. The assessment of the actus reas and mens rea elements of the crime of enforced disappearances involved more than merely finding that arrests and disappearances of workers were common occurrences at Spean Sreng Canal work site. It could not be assumed that arrests and disappearances automatically satisfy the elements of the crime.

[14.41.18]

The International Co-Prosecutor, in the reply at paragraph 52, merely asserts that such assumptions, that is the assumption that disappearances caused serious mental or physical suffering, is not necessary because "The Supreme Court Chamber in Case 002, when addressing the threshold of other inhumane acts, held that the evacuation of Phnom Penh 'violated the right to liberty, the right to security of persons and the right to freedom of movement

and residence. It infringed the freedom from cruel, inhuman or degrading treatment. As such, it caused serious mental and physical suffering and injury and constituted a serious attack against human dignity'."

That is to be found in the Appeal Judgement, F36, paragraph 656. The International Co-Prosecutor's approach to this comparison is alarmingly reductionist and one that no reasonable trier of fact could have adopted. The fact that the evacuation of Phnom Penh was found to have violated rights in the manner described is perhaps not surprising, but it cannot stand as dispositive evidence that all evacuations, all disappearances, all arrests and detentions were comparable and amounted to enforced disappearances.

[14.43.07]

The International Co-Prosecutor's assertion at paragraph 51 of the appeal, therefore, that, "The mental anguish and suffering for those at Spean Sreng was no different" than that found within the scope of Case 002 is plainly an insufficient basis upon which to demonstrate the commission of these crimes and, more importantly, an insufficient basis from which to criticize the Co-Investigating Judges in this case.

In seeking to advance this point, the International Co-Prosecutor neglects to even argue, let alone establish, that the facts pertaining to the arrests and disappearances at SSWS were comparable or of a similar gravity. It is not enough, in our

submission, to simply list those facts in one case, some facts in this case and argue that they are the same.

The Trial Chamber in Case 002 found that at least 2 million people were forcibly evicted from Phnom Penh in terrifying and violent circumstances without prior warning and at the peak of the hot season, general absence of water, food, shelter, hygiene, facilities and medical care. That is to be found in the Appeal Judgement, F36, paragraph 655.

[14.45.02]

Similarly, the International Co-Prosecutor, as he does at paragraphs 95 to 96 -- sorry, I beg your pardon -- as we deal with at paragraph 95 to 96 of the response, must do more than merely claim that the Co-Investigating Judges erred by requiring that it be established that families or friends had not made enquiries about the fate or whereabouts of the disappeared persons. He must also do more than simply assert that generally, within the prevailing circumstances of the Khmer Rouge regime, obliging an individual to seek information from Angkar is totally unrealistic. This is assumption built on assumption and one that -- an approach that the Co-Investigating Judges could not and should not have taken.

As explained by the Supreme Court Chamber in Case 002, the Appeal Judgement F36, and as I have referred to already, a determination of whether the specific conduct constitutes other inhumane acts requires a case-specific analysis, in particular looking at the

impact of the conduct on the victims and whether the conduct is comparable to the enumerated crimes against humanity.

Most importantly, moving on to the second part of our response to ground 4, as argued in our response at paragraph 99, even if an error of law is established as with ground 3, the International Co-Prosecutor fails to argue or establish that it led to an abuse of discretion in relation to the overall decision. Similarly to ground 3, multiple legal characterization of the same facts "Do not significantly enhance the gravity of the actions of Ms. Im Chaem."

That is to be found at paragraph 323 of the Closing Order, and has not been challenged and could not reasonably be challenged by the International Co-Prosecutor.

[14.47.48]

So even if the Co-Investigating Judges erred in requiring an additional element, the International Co-Prosecutor's failure to argue how, in light of the totality of the crimes under consideration, especially the totality of the crimes of humanity -- crimes against humanity of murder, imprisonment, that were correctly defined and weighed at paragraph 67 and 70 of the Closing Order, respectively, any re-categorization or any correction of the legal categorization of enforced disappearances could not have more than marginally impacted the overall assessment of personal jurisdiction.

This is not some theoretical concern. The definition of enforced

disappearances as another inhumane act, that is any intentional act or omission that caused serious mental or physical suffering or injury may readily encompass or overlap considerably with other crimes such as the killings and the imprisonment which were considered and found in the Closing Order.

[14.49.21]

Indeed, this appears to be the principal, or one of the principal reasons that focus the Co-Investigating Judges on whether there had been enquiries in relation to the disappeared. As noted by the Co-Investigating Judges at paragraph 302 of the Closing Order, "There is ample evidence that labourers were arrested, taken away or disappeared and that those who disappeared from the site may have been executed." In other words, the Co-Investigating Judges appeared to have dealt with these acts as murder and, in other instances, as imprisonment.

In these circumstances, the totality of the criminal conduct was weighed into the final assessment. Any error of law was an error of legal characterization that could not have materially impacted the decision, let alone to an extent that invalidates the judgement or the Closing Order.

Moving on to grounds 5 and 6. These grounds concern alleged factual errors committed by the Co-Investigating Judges concerning Ms. Im Chaem's position in the Southwest Zone. To sum up, both his written submissions before the Pre-Trial Chamber and oral submissions on the issues yesterday argue that, based upon a

proper review of the evidence, no reasonable tribunal --
To sum up, both his written submissions before the Pre-Trial Chamber and oral submission on the issues yesterday argue that based upon a proper review of the evidence, no reasonable tribunal could have found that Im Chaem occupied a limited role in the Southwest Zone, namely, the chief of the Sector 13 women's association.
[14.52.34]
The International Co-Prosecutor asserts that (1) no reasonable trier of fact could have failed that Im Chaem was not the Koh Andet district secretary and that the Co-Investigating Judges failed to properly assess the evidence and, in some instances, omitted to consider relevant evidence and (2) the International Co-Prosecutor asserts that no reasonable trier of fact could have failed to find that Im Chaem was a Sector 13 -- was a Sector 13 committee member and that the Co-Investigating Judges failed to properly assess the evidence reviewed in the Closing Order and failed to refer to relevant evidence.
In particular, the International Co-Prosecutor takes issue with two alleged factual errors. First, he alleges that Ms. Im Chaem's interviews with the Document Centre -- the Documentation Centre of Cambodia were not properly assessed. The International Co-Prosecutor claims that the evidence shows that Ms. Im Chaem unequivocally admitted to holding the positions of secretary of the Koh Andet District, a member of the Sector 13 committee.

Second, the International Co-Prosecutor claims that a number of corroborative witness accounts were either misrepresented or improperly disregarded by the Co-Investigating Judges. According to the International Co-Prosecutor, these accounts were sufficiently corroborative of Ms. Im Chaem's interviews that they established without a doubt that she was both secretary of the Koh Andet District, a member of the Sector 13 committee.

[14.54.35]

On the basis of these two factual errors, the International Co-Prosecutor requests at the same paragraph a "Fresh assessment of Im Chaem's responsibility under JCE, Joint Criminal Enterprise, for crimes in the Southwest Zone."

For the remainder of the time, I will elaborate on the following two points in relation to grounds 5 and 6 and demonstrate that the International Co-Prosecutor's assertions and subsequent request for a reassessment of Ms. Im Chaem's responsibility through JCE for crimes committed in the Southwest Zone are devoid of merit for the following two principal reasons.

First, the International Co-Prosecutor fails to argue the correct standard of appellate review in regard to alleged factual errors in grounds 5 and 6. This failure renders the argument incapable of impacting the Co-Investigating Judges' conclusion on personal jurisdiction.

[14.56.09]

And secondly, we submit the Co-Investigating Judges reasonably

adopted a cautious approach when relying upon Ms. Im Chaem's DC-Cam statement and assessed them quite reasonably in light of the totality of the evidence in the Case File when reaching conclusions concerning the International Co-Prosecutor's allegations. An assessment of both the DC-Cam statements and the witness accounts said to corroborate reveals an eminently reasonable approach to the evidence.

In sum, the International Co-Prosecutor's submissions are defective in form and deeply flawed in substance. Defective because the International Co-Prosecutor fails to plead how the Co-Investigating Judges' findings can ---

[14.57.25]

MR. PRESIDENT:

Counsel, please wait for one or two minutes so that we can change the DVD.

(Short pause)

[14.58.04]

MR. PRESIDENT:

Counsel, you may continue.

MR. JORDASH:

Thank you, Your Honours.

Let me turn directly to my first point, the International Co-Prosecutor's failure to argue the correct standard of review. In grounds 5 and 6, the International Co-Prosecutor submits that the Co-Investigating Judges erred in fact. He claims, and I quote

from paragraph 58 of the appeal, that, "No reasonable trier of fact could have found that Im Chaem was not the Koh Andet district secretary." And from paragraph 70 of the appeal: "No reasonable trier of fact could have failed to find that Im Chaem was the Sector 13 committee member." However, the International Co-Prosecutor fails to argue how the correct standard of appellate review should be applied to these errors, if found. [14.59.24]

In relation to these grounds, this condemns this aspect of the appeal to the legal dustbin. Having failed to explain how any error was fundamentally determinative of the overall decision, they are incapable of establishing any relevant error in the Co-Investigating Judges' final assessment.

It cannot be the function of the Pre-Trial Chamber to determine how the errors, if they were made, what they are and, more importantly, how they impacted the whole decision. It is for the International Co-Prosecutor to explain how they impact the overall decision or else the Pre-Trial Chamber is condemned to go and review the whole determination to understand the impact of these alleged errors. The fact that the International Co-Prosecutor does not descend into that appellate arena speaks volumes about the nature of any error made.

What it does in the end without any enumeration of the appellate standard is to create nothing more than a request to the Pre-Trial Chamber to re-litigate the facts and, in due course,

replace the Co-Investigating Judges' with your own view. [15.01.18]

We know, as stated by the Pre-Trial Chamber in Case 002, D164/3/6, that that is not the function of this Chamber.

Let me turn then to my second and last point, the Co-Investigating Judges' approach to the evidence.

The International Co-Prosecutor asserts that the Co-Investigating Judges' approach to the evidence was problematic and one that no reasonable trier of fact could take. However, as argued at paragraphs 107 to 109 of our response, the Co-Investigating Judges adopted an appropriately cautious approach when relying upon DC-Cam statements and reasonably assessed those statements and Ms. Im Chaem's interviews in light of all the other evidence in the Case File.

It is our submission that not only was the Co-Investigating Judges' approach reasonable, but the principle of in dubio pro reo required precisely that approach. Conversely, the International Co-Prosecutor's approach to the evidence, if adopted, would undermine fundamental fair trial principles. [15.03.10]

Firstly, we submit the Co-Investigating Judges' considerations concerning the evidentiary value of DC-Cam statements follow the ECCC case law. In paragraphs 103 to 108 of the Closing Order, the Co-Investigating Judges analysed the evidentiary value of statements other than Written Records of Interviews generated by

their office. Their considerations included Written Records of Interviews generated by their office, transcripts of trial proceedings, statements by DC-Cam, interviews conducted by the Co-Prosecutors and civil party applications.

In regard to DC-Cam statements specifically, the Co-Investigating Judges noted at paragraph 104 of the Closing Order that statements provided by DC-Cam "Enjoy a rebuttable presumption of prima facie relevance and reliability." However, they recognize that these "Statements were generated without the judicial guarantees and formality that characterize Written Records of Interviews."

Paragraph 108 of the Closing Order concludes on the whole analysis of the evidentiary value of these statements. The Co-Investigating Judges held that, "In conclusion and balancing these considerations, Written Records of Interviews generated by the OCIJ and Trial transcripts enjoy a higher reliability presumption and have been afforded a high probative value than statements prepared by other entities. With regard to the latter, a more cautious approach has been adopted in our assessments and the information contained therein has been relied on only when corroborated by other sources."

[15.05.40]

In our submission, nothing about that approach can be faulted. At paragraphs 107 and 120 of our response, we detail how the Co-Investigating Judges made clear that Written Records of

Interviews generated by the Office and transcripts of Trial proceedings reasonably enjoy a higher presumption of reliability, whereas other statements such as DC-Cam statements had to be approached with a greater degree of caution, including needing corroboration before any reliance was placed upon them.

However, at paragraph 59 of the reply, the International Co-Prosecutor sought to argue that the Defence misrepresented the Closing Order when we submitted that the Co-Investigating Judges held that DC-Cam statements may be relied upon only when corroborated by other sources. The claim is that "The Closing Order made no such unequivocal determination."

[15.07.12]

In the view of the International Co-Prosecutor, the Co-Investigating Judges did not specifically refer to statements collected by DC-Cam when they noted that statements prepared by entities other than their office may be relied upon only when corroborated by other sources. This is absurd.

Our position, as I have just laid out, is confirmed in the most unequivocal terms by the analysis of the two interviews given by Ms. Im Chaem to DC-Cam wherein the Co-Investigating Judges stated at paragraph 139 of the Closing Order, "Two statements given by Im Chaem to DC-Cam. One statement to Youth for Peace and one statement to Smiling Toad Productions have been considered in this Closing Order recent."

Consistent with the approach taken in Case 002 and with the

general rules of evaluation of evidence explained in this section, these statements have been given less weight than interviews conducted by the OCIJ. Their credibility and probative value have been assessed in light of all the other evidence in the Case File. The Co-Investigating Judges' approach correctly and reasonably followed the ECCC law.

[15.09.08]

Logically and factually this was, of course, the right approach. DC-Cam statements were not collected for the purpose of a criminal trial. Indeed, Ms. Im Chaem was told by DC-Cam staff in 2007 and 2008 -- I refer Your Honours to D123/1/5.1A, D123/1/5.1B -- that the purpose of her interview was "To study and compile the history of the Democratic Kampuchea between 1975 and 1979". And latterly, in 2012, D123/1/5.1C, that it was to "compile and develop a tourist guide book about Anlong Veaeng".

Instead of confronting this established case law and offering a cogent reason why DC-Cam statements ought in and of themselves to be afforded a higher evidentiary value, the question is avoided.

In sum, any reasonable tribunal, in light of the prevailing law and the facts, were duty-bound to adopt the approach adopted by the Co-Investigating Judges.

[15.11.09]

In our submission, the Co-Investigating Judges' assessment having made those evidentiary observations cannot reasonably be critiqued.

At paragraph 144 of the Closing Order, the Co-Investigating Judges held that the evidence in the Case File did not support the contention that Ms. Im Chaem was the secretary of Koh Andet District and a member of the Sector 13 committee. Relying on both Ms. Im Chaem's statements and witness accounts, they concluded, as I noted earlier, that her position in the Southwest Zone was the chief of the women's association in Sector 13.

In our submission, the Co-Investigating Judges' approach to the specifics in the evidence was not only reasonable but an impeccable example of how a tribunal should approach fragile, inconsistent and weak evidence. At best, the evidence in the Case File is ambiguous, at worst it is a wholly unsatisfactory body of evidence incapable of wresting any dispositive conclusion regarding Ms. Im Chaem's position in the Southwest Zone.

Firstly, Ms. Im Chaem's DC-Cam statements, rather than providing the clear and consistent evidence asserted yesterday and in the appeal provide, at best, ambiguous evidence.

In relation to Ms. Im Chaem's alleged position of Koh Andet district secretary, the Co-Investigating Judges noted that the International Co-Prosecutor based his allegation "On one of Im Chaem's statements and on the evidence of one witness." That is to be found at D308/3, paragraph 145.

After analysis of both, the Co-Investigating Judges concluded the evidence was insufficient to support the contention.

[15.13.57]

The International Co-Prosecutor claims that paragraph 59 of the appeal that the Co-Investigating Judges "Failed to properly assess Im Chaem's interviews evincing her position as secretary of Koh Andet" and submit her statement was "clear".

He cites the following from her interviews with DC-Cam in support of the claim that the Co-Investigating Judges erred. Firstly, as she was assigned by the "provincial authority to take charge of organizing people from Koh Andet", she "led the people to work on the rice paddy and farm at the places under her control; she helped them in general", and "helped people in Koh Andet in general." She was transferred to Koh Andet District, as she says, "because I could fulfil the plan", and she was involved in "setting up policies" in Koh Andet District.

A reasonable view of these statements leads only to the conclusion that they are general and support a variety of inferences concerning her role. No reasonable tribunal could have found that they establish Ms. Im Chaem's position of district secretary in the Koh Andet District.

[15.15.52]

While the International Co-Prosecutor at paragraph 60 of the appeal, cherry picked from one interview where Ms. Im Chaem made reference to being on a committee "in charge of Koh Andet" -- sorry, "in charge" of Koh Andet, he omits to address the fact that Ms. Im Chaem also explicitly stated in an earlier interview that she "was not the secretary of the district". Instead she

"was in charge of women".

At this point, I would like to show a portion of Ms. Im Chaem's interview with DC-Cam in 2009. This demonstrates the point, or one of the points.

(Document shown on screen)

As Your Honours can see, she is asked the question: "Was your role the secretary of the district when you were in charge of organizing people?" And Ms. Im Chaem responds: "No, I was not the secretary of the district. The committee composed of two men and one woman.

Q. Was it called the district committee?

A. Yes, and I was in charge of the women.

Q. Yes, were you in charge of the women?

A. Yes, I was in charge of the -- all women."

[15.17.52]

As is plain, Ms. Im Chaem explicitly refutes being the Koh Andet district secretary.

The same goes for the International Co-Prosecutor's submission that the Co-Investigating Judges erred in assessing Ms. Im Chaem's DC-Cam statement in regard to her alleged position as a member of the Sector 13 committee. Specifically, the International Co-Prosecutor claims, at paragraph 71 to 73, of the appeal that, despite Ms. Im Chaem admitting to being promoted to be a member of the Sector 13 committee for a year, the Co-Investigating Judges "inexplicably" disregarded this evidence

without further consideration.
At this point, I would like to show another portion of Ms. Im Chaem's interview with DC-Cam in 2012.
(Document shown on screen)
[15.19.15]
"Q. So, even you went to Takeo but you still worked for Koh Andet District, didn't you?
Ms. Im Chaem: Yes, I still worked for that district.
Q. Well, you did not work for the sector, did you?
A. No.
Q. Which sector was it at that time, Sector 13?
A. Sector 13."
So, as is plain, Ms. Im Chaem statements are much less clear that was suggested to you yesterday. The fact that the International Co-Prosecutor doesn't confront these variant accounts but cherry picks the bits that he likes speaks volumes about the lack of consistency in the evidence and about the correctness of the approach taken by the Co-Investigating Judges. Of course, the Co-Investigating Judges had to approach these interviews with caution.
Moreover, moving to the alleged corroborative accounts, under both grounds 5 and 6, the International Co-Prosecutor claims that the Co-Investigating Judges failed to properly assess the evidence which provided, in his view, corroboration for Ms. Im Chaem's interviews with DC-Cam.

[15.21.05]
However, as argued in our response at paragraphs 110 to 118 in relation to ground 5 and paragraphs 121 to 129 in relation to ground 6, the International Co-Prosecutor's piecemeal and selective approach to the evidence demonstrates the converse of their argument, demonstrates the reasonableness of the Co-Investigating Judges' approach in weighing the entirety of the evidence.
Yesterday, the International Co-Prosecutor read out a list of witnesses that, it is claimed, corroborates without a doubt the allegation that Ms. Im Chaem was Koh Andet district secretary and a member of the Sector 13 committee. Let me take two examples that demonstrate the lack of merit in this contention, the dangerousness of his approach and the reasonableness of the Co-Investigating Judges' decision.
The International Co-Prosecutor claimed that there was no indication as to why the Closing Order did not consider the "highly relevant evidence" of Sok Rum. According to the International Prosecutor, Sok Rum, in her interview with the Co-Investigating Judges, D119/108, at Answer 105, clearly stated that Ms. Im Chaem was the secretary of Koh Andet District.
However, let us put this answer into its correct context.
[15.23.01]
First Sok Rum stated, and I quote from the same answer as the one cited by the International Co-Prosecutor, that is answer 105 of

D119/108, "I learnt this, that Ms. Im Chaem was the secretary of Koh Andet District from those older sisters who were group chairwomen."

As is plain, Sok Rum's account is nothing more than unattributed hearsay evidence. If the International Co-Prosecutor wants to rely upon it, he ought to bring that to Your Honours' attention. It's especially relevant if that evidence is supposed to provide proper corroboration of the DC-Cam statements. That is uncorroborated hearsay on top of inconsistent statements from DC-Cam.

Second, the question put to Sok Rum in relation to Ms. Im Chaem's position needs to also be given further clarification. At answer 78 of her interview with the Co-Investigating Judges, Sok Rum stated, and I quote, "In that interview of mine with the Documentation Centre of Cambodia, there were few neighbours of mine joining me, and they sometimes answered on my behalf questions directed to me. So I did not know some of the answers provided in that interview."

[15.25.00]

The witness also stated in answer 12 of the same interview that, at the relevant period, she was "too young to remember the names of those on the Sector 13 committee".

In this context, the International Co-Prosecutor's claim that Sok Rum's account is highly relevant evidence raises a number of concerning questions.

Another illustrative example arises from the International Co-Prosecutor's allegation that the Co-Investigating Judges did not properly assess the account of Bun Thoeun. The International Co-Prosecutor cites to this account in D118/274, at answer 29, according to which it is claimed Ms. Im Chaem became a member of Sector 13. Again, the International Co-Prosecutor cherry picked portions of the witness's full answer. What the witness actually said at answer 29 was, "I do not recall well with reference to whether Ms. Im Chaem had another position as chief of the women's association because, during that time, everything was secret. I just heard that, after Ta Soam's removal, Ye Chaem perhaps became a member of Sector 14."

We accept, the witness made the mistake about the 14 and was referring to Sector 13. And the point remains, this witness didn't know. He was cautious in his approach, unlike the International Co-Prosecutor.

[15.27.02]

And so, to wrap up our response. There were many more examples of the prosecution's problematic approach to the evidence and to the Co-Investigating Judges' approach to that evidence. Unlike the International Co-Prosecutor, it was not within the gift of the Co-Investigating Judges to just take pieces of evidence which they liked. Their job was to look at the totality of the evidence, set out clear path for assessing it and follow that clear path. They weren't obliged in their reasons to refer to the

testimony of every witness and to every piece of evidence on the record, and a failure to do so does not establish an error.

In short, the International Co-Prosecutor's ground -- or grounds 5 and 6 are nothing more than an attempt to re-litigate and, as we have submitted, just by selecting a few of the prosecution's submissions, it is plain that they want to re-litigate not showing the Pre-Trial Chamber the entirety of the evidence but simply the bits that they like.

In sum, it is our submission that the International Co-Prosecutor falls short of showing any factual error in the Co-Investigating Judges' analysis of the evidence relating to Ms. Im Chaem's position in the Southwest Zone, let alone one capable of overturning the Closing Order at -- and the conclusion where she doesn't fall within the ECCC's personal jurisdiction.

[15.29.05]

And so, in conclusion, the International Co-Prosecutor's appeal must, in all respects, fail. They have failed to argue, let alone establish, valid appeal grounds from 1 to 6. It is not sufficient to allege errors and then just sit down. More is required in order to invoke the Pre-Trial Chamber's intervention and we respectfully submit that that more is missing.

Thank you for your attention, Your Honours.

[15.29.50]

MR. KOUMJIAN:

My learned friend wants to address very quickly, in a couple of

minutes, an issue of confidentiality.

[15.30.03]

MR. PRESIDENT:

Counsel?

DR. BIT SEANGLIM:

Mr. President, I would like to make a conclusion regarding confidentiality. Roughly, I note that the International Co-Prosecutor requested yesterday that the transcripts of the Hearings before Your Honours be made public.

MR. PRESIDENT:

Counsel, you are limited to your own submission and you cannot make a new submission.

DR. BIT SEANGLIM:

Then, I would like to hand the floor to my International Co-Counsel.

MR. JORDASH:

Whilst this is just a very brief response to the International Co-Prosecutor's request to make the transcripts of this hearing public, we respectfully oppose the request. Hearings before Your Honours are held in camera for a reason. They pertain to arguments at the pre-trial stage, a stage protected by confidentiality.

Obviously, the transcripts contain details of witnesses and their accounts. These are covered by the confidentiality of judicial investigations.

Moreover, the claims by the International Co-Prosecutor, especially those which we submitted, may be considered somewhat extravagant, have the potential to impact on the security of witnesses, they have the potential to mislead the public and they have the potential to undermine the security of our client in the administration of justice.

We respectfully submit that a balance should be made between insuring Ms. Im Chaem's personal security and the fair administration of justice and keeping the public informed of ongoing proceedings. That does not, in our submission, weigh in favour of making these transcripts and this hearing public.

In the alternative, should Your Honours decide in favour of the International Co-Prosecutor's request, we respectfully request that you apply the caution applied by the Co-Investigating Judges when the Closing Order was published and redact all portions with due caution to insure these important issues are -- and interests are maintained.

Thank you.

[15.33.29]

MR. KOUMJIAN:

Your Honour, I know there are no replies on the appeal, but this is a new matter that Counsel raised outside -- a new argument outside of the appeal arguments.

May I briefly reply?

MR. PRESIDENT:

Parties have been informed in our scheduling order dated the 14 that parties are not allowed to respond or to make new submissions besides the submissions that are limited in this hearing, and that is all.

And we now conclude our hearing on this matter as we scheduled for the two days, and I declare the closure of the hearing.

(Court adjourns at 15.33H)