

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 004/07-09-2009-ECCC/OCIJ**Party Filing:** The Defence for YIM Tith**Filed to:** Office of the Co-Investigating Judges**Original language:** ENGLISH**Date of document:** 26 November 2018**CLASSIFICATION****Classification of the document
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**YIM TITH'S COMBINED RESPONSE TO THE NATIONAL AND INTERNATIONAL
CO-PROSECUTORS' FINAL SUBMISSIONS**

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INTRODUCTION

1. Mr YIM Tith, through his Co-Lawyers ('the Defence'), hereby submits *Yim Tith's Combined Response to the National and International Co-Prosecutors' Final Submissions*. The Defence submits that Case 004 is riddled with legal, procedural and factual errors that render it necessary for the Co-Investigating Judges ('CIJs') to dismiss the case against Mr YIM Tith.
2. Agreeing with the National Co-Prosecutor's ('NCP') consistent stance, the Defence submits that Mr YIM Tith does not fall and has never fallen within the jurisdiction of the ECCC, meaning that the legal proceedings against him must be dismissed immediately. Both the *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea* ('UN-RGC Agreement') and the *Law on the Establishment of Extraordinary Chamber in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* ('Establishment Law') very clearly state that the ECCC holds jurisdiction over 'senior leaders of Democratic Kampuchea' and 'those who were most responsible for [crimes within the jurisdiction of the ECCC].' For the reasons expounded herein, these terms constitute justiciable jurisdictional criteria. Since Mr YIM Tith was neither a 'senior leader of Democratic Kampuchea' nor one of 'those who were most responsible for crimes,' the ECCC does not, and has never had, jurisdiction to indict him. The International Co-Prosecutor ('ICP') has no 'discretion' in this regard, and the CIJs are legally obliged to dismiss Case 004.
3. The ICP acted unilaterally in conducting his preliminary investigation and in filing the *Co-Prosecutors' [sic] Third Introductory Submission* ('ICP's Third Introductory Submission'). In so doing, he violated the object and purpose, the terms, and the spirit of the UN-RGC Agreement, Establishment Law, and the Internal Rules ('Rules'). His actions permanently precluded the cooperative approach to prosecutions mandated by ECCC law and rendered the ICP's Third Introductory Submission void. Case 004 is thus illegally founded and must be terminated.
4. Case 004 has suffered irremediable procedural damage such that it is now impossible to hold a fair trial and the continuation of the proceedings would constitute abuse of process:

- i. The integrity of Case 004 has been irremediably contaminated by the illegal publication of confidential material, including the ICP's Third Introductory Submission in 2011, before the judicial investigation had properly commenced and while external parties were conducting their own investigations. This has demonstrably impacted witness testimony, and thus constitutes effective interference with the administration of justice.
- ii. The inevitable consequences of acute and persistent financial constraints have prevented the CIJs from completing their mandate 'in a timely and efficient manner.' The CIJs have not been provided with 'sufficiently specific and reliable information that the funding situation will improve drastically.' The current situation and 'the outlook going forward' remain incompatible with the basic principles of a fair trial. As they have both held previously, the CIJs must not issue an indictment in circumstances in which full and fair trial and appellate proceedings cannot be guaranteed.
- iii. Case 004 has been beset by woeful and legally unjustifiable delays attributable to dilatory conduct on the part of the authorities as well as and including the pernicious effects of sustained funding crises. It is now impossible for the proceedings against Mr YIM Tith to be 'brought to a conclusion within a reasonable time.' Mr YIM Tith's fundamental right to be tried without undue delay has been irremediably violated.

Each of these violations of Mr YIM Tith's fair trial rights precludes the possibility of a fair trial. Accordingly, the CIJs must dismiss Case 004.

5. In the *International Co-Prosecutor's Rule 66 Final Submission against Yim Tith* ('ICP's Final Submission'), the ICP proceeds upon the basis of a number of grave legal errors. Chief among these are his audacious attempts to: expand the scope of the charges; apply, in contravention of the UN-RGC Agreement and Establishment Law, the doctrine of joint criminal enterprise ('JCE'); and to seek Mr YIM Tith's indictment for genocide of the Vietnamese national group.
6. As the ICP has been repeatedly reminded, and in accordance with basic criminal law, Mr YIM Tith cannot be indicted for crimes with which he has not been charged. The ICP nevertheless seeks Mr YIM Tith's indictment on the basis of facts beyond the scope of the investigation. This is all the more astonishing since it is the ICP who determined the

scope of the Case 004 investigation through the ICP's Third Introductory Submission and subsequent Supplementary Submissions. He has, further, sought Mr YIM Tith's indictment on the basis of facts for which he has not been charged, namely: as holding specific positions; for genocide of 'the Vietnamese national group in Cambodia (including Khmer Krom)'; and, contrary to the requirements of the law on JCE, even if it were applicable, an all-encompassing JCE.

7. The Defence submits that the doctrine of JCE is in any event inapplicable before the ECCC. The doctrine of JCE was developed by the ICTY in the 1990s and is, at best, *recognised* in – not dictated by – customary international law. There is neither a lacuna nor a lack of clarity in Article 29^{new} of the Establishment Law, and no chamber before the ECCC has sought its amendment to include JCE. Since the judges of the ECCC have no power to usurp the authority of the parties to the UN-RGC Agreement, the 'reading in' of JCE is *ultra vires*. Fundamentally, the application of the doctrine of JCE breaches the object and purpose of the UN-RGC Agreement. Accordingly, the Defence invites the CIJs to exercise their inherent power to depart from the faulty jurisprudence that has been iterated at the ECCC by restricting themselves to the terms of Article 29^{new}.
8. The ICP's request that Mr YIM Tith be indicted for 'the crime of genocide with intent to destroy the Vietnamese as a national group (particularly the Khmer Krom) in Cambodia' demonstrates a fundamental misunderstanding of the law on genocide as well as the history and demography of the Khmer Krom. Notwithstanding that Mr YIM Tith cannot be indicted for crimes for which he has not been charged, the ICP erred in suggesting 'that for the purposes of the definition of protected groups in the Genocide Convention and jurisprudence defining these terms, the Khmer Krom were part of the Vietnamese national group in Cambodia.' The suggestion that the Khmer Krom were subsumed by the Vietnamese national group has no basis in law or in fact. The ICP may not seek to rewrite law or fact simply because he is unable to demonstrate that Mr YIM Tith held the requisite specific intent to destroy the Khmer Krom.
9. The ICP has sought to mislead the CIJs radically as regards the nature and state of the evidence on Case File 004. The ICP's primary factual claim is that Mr YIM Tith played 'a critical role' in the implementation of the CPK's criminal policies across 'vast territories of the country' throughout the entire jurisdictional period of the ECCC from 17 April 1975 to 6 January 1979. According to the ICP's sweeping narrative, Mr YIM

Tith 'rose from the position of deputy secretary of Kirivong District to eventually attain the post of deputy secretary of the Northwest Zone.'

10. The ICP's claim is so detached from any evidentiary basis in Case File 004 as to render it hollow. In short, the ICP does not present sufficient direct evidence, documentary evidence, or witness testimony collected under judicial supervision, to substantiate his arguments that Mr YIM Tith held the alleged positions in the hierarchy of the Democratic Kampuchea ('DK') regime, nor that his acts and conduct amounted to participation in the alleged common criminal plan.
11. As the Defence sets out in the detailed analysis that follows, the ICP's case is based on a rumour mill of uncorroborated hearsay that has been irreparably contaminated by more than 30 years of public discussion, itself irremediably contaminated by the illegal leaking of the ICP's Third Introductory Submission in 2011 that named Mr YIM Tith as a suspect, associated him with Ta Mok, and connected him with many of the factual allegations on which witnesses subsequently gave evidence. From this mass of uncorroborated hearsay, the ICP has been highly selective in cherry-picking evidence that fits his case theory. The ICP disregards the hundreds of witnesses interviewed by the OCIJ who lived and worked in the Southwest and Northwest Zones at relevant times but had never heard of Mr YIM Tith. Furthermore, there is no evidence on Case File 004 that describes the content of any interaction between Mr YIM Tith and any other Khmer Rouge cadre, neither superior nor subordinate to him. There is not a single piece of contemporaneous documentary evidence bearing the name of Mr YIM Tith.
12. The acute lack of evidence against Mr YIM Tith has forced the ICP to overstate the evidentiary basis on the Case File. The ICP asserts that the authority, power, status, influence and prominence that Mr YIM Tith 'wielded' across the Southwest Zone are indicated by the '30 to 40 pigs,' 'bananas' and 'papayas' that a witness may have seen at a Kirivong District office and which the ICP describes as 'an abundant food supply' over which Mr YIM Tith had access and control. The ICP alleges that Mr YIM Tith was omnipresent in the Northwest Zone and Southwest Zone, exercising authority and contributing to the common criminal plan 'simultaneously' in both zones based on evidence that he had 'access to a Jeep.' Such submissions trivialise the gravity of the ECCC proceedings and, while the Defence does not wish to follow this approach to serious criminal proceedings, the Co-Lawyers are professionally obliged to respond to

the ICP's allegations no matter how absurd they are. Accordingly, the Defence analyses in detail each of the ICP's claims in an effort to assist the CIJs' consideration of Case 004.

13. Ultimately, the Defence submits that the ICP's Final Submission lacks legal merit as well as credibility and should therefore be disregarded *in toto*.

PROCEDURAL HISTORY

Preliminary Investigation

14. On 10 July 2006, the Co-Prosecutors commenced a preliminary investigation to determine whether evidence indicated that crimes within the jurisdiction of the ECCC had been committed and to identify potential suspects and witnesses.¹
15. On 18 November 2008, the Co-Prosecutors discussed their views regarding opening judicial investigations against persons additional to those subject to the judicial investigations in Cases 001 and 002.² They did not agree.
16. On 20 November 2008, the ICP registered his disagreement with the NCP before the Pre-Trial Chamber ('PTC') regarding the prosecution of potential new suspects through his Written Statement of Facts and Reasons.³
17. On 3 December 2008, the Office of Administration sent a copy of the Written Statement of Facts and Reasons for Disagreement to the NCP pursuant to Rule 71(2).⁴

¹ Case 004/01, *International Co-Prosecutor's Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7. The Defence relies upon the information disclosed by the ICP in his Final Submission in Case 004/01 as he did not provide such information to the Defence in the *International Co-Prosecutor's Rule 66 Final Submission against Yim Tith* (D378/2), which contains no procedural history.

² *National Co-Prosecutor's Observations Relating to CIJs' Exercise of Discretion over the Case of IM Chaem Regarding D251*, 21 September 2015, D251/6, para. 2; *Final Submission Concerning Yim Tith Pursuant to Internal Rule 66* ('NCP's Final Submission'), 31 May 2018, D378/1, para. 2. The Defence is reliant upon the information provided by the NCP by reference as it does not enjoy access to the relevant documents.

³ *National Co-Prosecutor's Observations Relating to CIJs' Exercise of Discretion over the Case of IM Chaem Regarding D251*, 21 September 2015, D251/6, para. 3; *NCP's Final Submission*, D378/1, para. 3.

⁴ *NCP's Final Submission*, D378/1, para. 3.

18. On 8 December 2008, the Co-Prosecutors issued a public statement in which they described the reasons for their disagreement over the ICP's Third Introductory Submission.⁵
19. On 29 December 2008, the NCP submitted a response to the ICP's Written Statement of Facts and Reasons to the PTC, setting out the details of her disagreement with the ICP's Third Introductory Submission.⁶
20. On 5 January 2009, the Co-Prosecutors issued another public statement in which they described the reasons for their disagreement over the ICP's Third Introductory Submission.⁷
21. On 6 February 2009, the PTC invited the Co-Prosecutors to file further submissions, if any, in respect of these disagreement proceedings.⁸
22. On 19 February 2009, the ICP stated that he '[did] not have any further observations beyond those described in the present submissions filed on 1 December 2008.'⁹ Meanwhile, '[t]he NCP submitted a set of documents that are related to the debates in the National Assembly of the Kingdom of Cambodia and the United Nations about the establishment of the ECCC.'¹⁰
23. On 24 April 2009, the PTC requested further information regarding the Co-Prosecutors' disagreement.¹¹
24. On 24 April 2009, the ICP issued a Press Statement in which he outlined the procedural history of the disagreement, and stated his intention to seek a public hearing on the

⁵ *Statement of the Co-Prosecutors*, 8 December 2008. See also: *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission* (7 September 2009, D1/1), *Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, Decision of the Pre-Trial Chamber, para. 47.

⁶ *National Co-Prosecutor's Observations Relating to CIJs' Exercise of Discretion over the Case of IM Chaem Regarding D251*, 21 September 2015, D251/6, para. 4; *NCP's Final Submission*, D378/1, para. 4, citing *National Co-Prosecutor's Response to International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2)*, 29 December 2008.

⁷ *Statement of the Co-Prosecutors*, 5 January 2009. See also: *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission* (7 September 2009, D1/1), *Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, Decision of the Pre-Trial Chamber, para. 47.

⁸ *NCP's Final Submission*, D378/1, para. 5.

⁹ *NCP's Final Submission*, D378/1, para. 6.

¹⁰ *NCP's Final Submission*, D378/1, para. 6.

¹¹ *NCP's Final Submission*, D378/1, para. 7.

matter.¹² This prompted the PTC to issue a reminder of the obligation of confidentiality to both Co-Prosecutors.¹³

25. On 22 May 2009, the NCP submitted the *National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, Dated 24 April 2009, and National Co-Prosecutor's Additional Observations*.¹⁴ The Defence does not have access to certain passages of the NCP's submissions, including those in which she answers queries regarding decisions to conduct preliminary investigations or pursue prosecutions, including the preceding part of an answer ending 'General Assembly and that crucially reminds us to take account of national reconciliation, stability, peace and security before deciding on prosecution.'¹⁵ Within that to which the Defence has access, the NCP clearly explicated her conviction that the ECCC Agreement and ECCC Law limit the personal jurisdiction of the ECCC. Accordingly, the NCP has never been able to agree to the *Draft of Guiding Principle and Policy for Prosecutions*, proposed by the ICP, which she considers contradict and exceed the limits of the court's personal jurisdiction as set by the Agreement and ECCC Law.¹⁶ The NCP also observed that, though the prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors acting jointly, the initiation of the investigation in Case 004 was conducted unilaterally by the ICP and his staff 'without a request from or discussion with' the NCP, and without delegation of the requisite power to act alone through a joint written decision.¹⁷ Impliedly acknowledging the unacceptable unilateral action, the International Deputy Co-Prosecutor apologised to the NCP, who had not been informed of the ICP's investigation.¹⁸ The NCP made it abundantly clear that she considers that Mr YIM Tith

¹² *Press Statement of the International Co-Prosecutor*, 24 April 2009.

¹³ *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission* (7 September 2009, D1/1), *Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, para. 48.

¹⁴ Case 001, *National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, Dated 24 April 2009, and National Co-Prosecutor's Additional Observations*, 22 May 2009, D17. This document has never been provided to the Defence, though it has been referred to in other cases before the ECCC. Previously referred to by the Defence for AO An, and accessible at: Case 004/02, D351/6.1.2. By letter dated 5 June 2018, the Defence asked the NCP to disclose this document as well as *National Co-Prosecutor's Response to International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2)*, both of which were referred to in the NCP's *Final Submission*. The Defence has received no response.

¹⁵ *Ibid.*, missing paras 32 to 36, 49 to 54, and the end of 65 onwards.

¹⁶ *Ibid.*, paras 10 to 13.

¹⁷ *Ibid.*, paras 18 to 20.

¹⁸ *Ibid.*, paras 22, 26, 28, 30, 42, 44, 46, 56.

does not fall within the jurisdiction of the ECCC because he was neither a ‘senior leader’ nor ‘most responsible.’¹⁹

26. On 18 August 2009, the PTC issued the *Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, in which it stated that it was seised of a disagreement between the Co-Prosecutors regarding the creation of Cases 003 and 004.²⁰ The PTC was unable to assemble the required number of votes to allow it to reach an affirmative decision regarding the Co-Prosecutors’ disagreement.²¹ It is critical to note, however, that Judges Prak Kimsan, Ney Thol and Huot Vuthy held that the ICP’s preliminary investigations were illegal.²² They observed, ‘the consequences of such violation [of the ECCC Law, Agreement and Rules] may exist in the proceedings that follow and shall not be taken into consideration in relation to the disagreement.’²³
27. On 8 December 2008 and again on 5 January 2009, the Office of the Co-Prosecutors issued public statements regarding their Disagreement. This was unanimously and strongly denounced by the PTC, which observed that ‘the Co-Prosecutors have drawn the attention of the media and the public to the fact that new suspects might be prosecuted, generating a great deal of interest and giving an indirect notice to the potential suspects that there might be further prosecutions.’²⁴

¹⁹ *Ibid.*, paras 39 and 40. See also: NCP’s Final Submission, D378/1, para. 8.

²⁰ Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: *Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3.

²¹ Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: *Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3. NCP’s Final Submission, D378/1, para. 9.

²² Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: *Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, ‘Opinion of Judges: Prak Kimsan, Ney Thol and Huot Vuthy,’ paras 1 to 19.

²³ Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: *Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, ‘Opinion of Judges: Prak Kimsan, Ney Thol and Huot Vuthy,’ para. 19.

²⁴ Acting international Co-Prosecutor’s Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: *Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, Decision of the Pre-Trial Chamber, para. 47.

28. On 24 April 2009, the ICP issued a third public statement, which prompted the PTC to issue the Co-Prosecutors with reminders of the obligation of confidentiality.²⁵

Judicial Investigation

29. On 7 September 2009, the Acting ICP submitted the ICP's Third Introductory Submission to the CIJs to open a judicial investigation against, *inter alios*, Mr YIM Tith.²⁶ The ICP's Third Introductory Submission was signed by the Acting ICP only. The ICP later filed four Supplementary Submissions.²⁷ None of these was signed or otherwise formally sanctioned by the NCP.
30. On 16 October 2009, the ICP forwarded 105 complaints (of 1,971 reviewed) allegedly relating to Case 004 to the CIJs, arguing that 'their inclusion in the Case File will be conducive to ascertaining the truth, will assist the Co-Investigating Judges in conducting their investigation and will assist the Co-Prosecutors in proving the guilt of the Charged Persons at trial.'²⁸
31. In October 2010, Prime Minister Samdech Hun Sen expressed the RGC's unequivocal opposition to Cases 003 and 004, stating that the pursuit of Cases 003 and 004 threatened to drag Cambodia back into civil war.²⁹ Other government officials made similar statements.³⁰ The UN did not express any view or react in any way to such comments.

²⁵ *Acting international Co-Prosecutor's Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, Decision of the Pre-Trial Chamber, para. 48.*

²⁶ *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1; Co-Prosecutors' [sic] Third Introductory Submission ('ICP's Third Introductory Submission'), 20 November 2008, D1.*

²⁷ *Co-Prosecutors' [sic] Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65; Co-Prosecutors' [sic] Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191; Response to Forwarding Order and Supplementary Submission Regarding Wat Ta Meak, 04 August 2015, D254/1; Response to Forwarding Order dated 5 November 2015 and Supplementary Submission Regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015, D272/1.*

²⁸ *Notice of Forwarding of Complaints to Co-Investigating Judges Pursuant to Internal Rule 49(4), 16 October 2009, D2, para. 7.*

²⁹ Zsombor Peter and Phorn Bopha, 'No More Khmer Rouge Trials, Premier Tells Ban,' Cambodia Daily, 28 October 2010, A157/2/1/1.1.6.

³⁰ 'Foreign Minister Hor Namhong told reporters following the meeting that Prime Minister Samdech Hun Sen considered pending investigations in Cases 003 and 004 a threat to the Kingdom's "stability". Samdech [Hun Sen] clearly affirmed that Case 003 will not be allowed,' he said. 'We have to think about peace in Cambodia or the court will fail.' 'The court will try the four senior leaders successfully and then finish with Case 002.' Cheang Sokha and O'Toole, J., 'Hun Sen shoots from the lip,' Phnom Penh Post, 28 October 2010, A157/2/1/1.1.2. 'The 2003 agreement between the government and the UN that established the tribunal empowers the court to prosecute

32. On 1 December 2010, a new International Co-Investigating Judge ('ICIJ'), Judge Blunk, was appointed.³¹ The CIJs later issued a statement in which they explained that no field investigations were taking place in Cases 003 and 004 and that work was instead focused on reviewing documents on the Case Files.³² By this point, the Documentation-Center Cambodia ('DC-Cam') had commenced its own targeted investigations.³³ Shortly thereafter, in March 2011, the Supreme Court Chamber ('SCC') queried, *proprio motu*, whether the term 'senior leaders of Democratic Kampuchea and those who were most responsible' 'constitutes a jurisdictional requirement that is subject to judicial review, or is a guide to the discretion of the Co-Prosecutors and Co-Investigating Judges that is not subject to judicial review.'³⁴
33. On 10 May 2011, the Cambodian Minister of Information publicly stated his dissatisfaction with the opening of investigations in Cases 003 and 004.³⁵ The UN did not express any view or react in any way to his comments.
34. By 26 May 2011, the ICP's Third Introductory Submission and documents relating to the NCP's disagreement had been illegally leaked to the media and Mr YIM Tith publicly named as one of its three suspects.³⁶
35. On 9 June 2011, the CIJs issued a Public Statement in which they reported that they had 'credible information that the content of the Second Introductory Submission[,] which is classified as confidential, has been divulged by a disloyal staff member of the ECCC' and

'senior leaders' and those 'most responsible' for crimes committed under Democratic Kampuchea. By pursuing possible prosecutions in Cases 003 and 004, court officials were violating this, Minister of Information Khieu Kanharith said yesterday.' Cheang Sokha and O'Toole, J., '*Hun Sen shoots from the lip*,' Phnom Penh Post, 28 October 2010, A157/2/1/1.1.2. Minister of Information, Khieu Kanharith, is quoted as stating, 'If we continue the third case, we should be wrong track from the original agreement between the UN and Cambodian government, which enshrined about trial for the senior and most responsible leaders only. It also affected the 'stability and national reconciliation' for the country. If the members of Khmer Rouge flee to struggle in jungle, and who will be responsible for that issue, and moreover, the other cases should hand over to local courts for dealing these cases'; Chhorng Long Heng, '*UN Secretary General talks on regional and bilateral issues*,' Southeast Asia, 31 October 2010, A157/2/1/1.1.5.

³¹ *Press Release by the International Co-Investigating Judge*, 10 October 2011.

³² *Statement from the Co-Investigating Judges*, 2 February 2011.

³³ D65.1.2, DC-Cam, Project to promote accountability: A visit to District 109, Southwestern Zone, 18 July 2010.

³⁴ Case 001, *KAING Guek Eav alias Duch, Order Scheduling Appeal Hearing*, 4 March 2011, F20, p. 3. Considered in detail below.

³⁵ *Press Release by the International Co-Investigating Judge*, 10 October 2011.

³⁶ D72/1.1.11, Written Record of Investigative Action ('WRIA'), 2 September 2011, reporting that Ms Yuko Maeda, an ECCC Press Officer, 'stated that from her memory she can recall that back to 26 May 2011 M. Jared Ferrie, a freelance journalist had first publish [*sic*] in a Jurist Newspaper about a confidential document from the Court and then a second time on 15 June 2011 in the Christian Science Monitor.'

Ferrie, J., 'More Leaked Documents Highlight KR Tribunal Under Fire in Cambodia,' *The Christian Science Monitor*, 15 June 2011. On Case File 004: D72/1.1.3.

warning that anyone publishing information therefrom would be liable to prosecution for interference with the administration of justice.³⁷ The CIJs reiterated this warning in the wake of Voice of America Khmer quoting verbatim and displaying a confidential ECCC document.³⁸ No such warning was issued in respect of the illegal publication of the ICP's Third Introductory Submission. Mr YIM Tith was repeatedly named in subsequent media articles and video footage,³⁹ and later linked to specific alleged crime sites and stated to be 'in charge of Khmer Rouge zones where hundreds of thousands of people are thought to have died through overwork, starvation or execution.'⁴⁰

36. In June 2011, legal advisors, consultants and investigators resigned from the Office of the Co-Investigating Judges ('OCIJ'), citing failures to investigate and the 'toxic atmosphere of mutual mistrust generated by [the ICIJ's] management of what is now a professionally dysfunctional office.'⁴¹
37. On 8 August 2011, the CIJs issued a press release in which they stated, *inter alia*, that 'there are serious doubts whether the [Case 004] suspects are "most responsible" according to the jurisdictional requirement of Article 2 ECCC Law.'⁴² The CIJs concomitantly noted that this would mean that the ECCC 'had no jurisdiction.'⁴³
38. On 5 October 2011, the Cambodia Daily reported that the Cambodian Foreign Minister had stated '[o]n the issue of the arrest of more Khmer Rouge leaders, this is a Cambodian issue... This issue must be decided by Cambodia.'⁴⁴ The UN did not express any view or react in any way to his comments.

³⁷ *Public Statement by the Co-Investigating Judges*, 9 June 2011.

³⁸ *Press Release by the Co-Investigating Judges*, 31 August 2011.

³⁹ Manning, S. and Thompson, A., 'Leaked Documents Suggest UN Backing Off Khmer Rouge Trials,' *Scoop Independent News*, 27 June 2011. Accessible, along with functioning hyperlinks to, *inter alia*, the ICP's Third Introductory Submission, at: <http://www.scoop.co.nz/stories/print.html?path=HL1106/S00165/leaked-documents-suggest-un-backing-off-khmer-rouge-trials.htm>. Also on Case File 004: D72/1.1.5.

Sok Khemara, 'Ex-KR Cadre Not Fearful of Tribunal and Guardian of Hell,' *VOA Khmer*, 10 August 2011, on Case File 004: D72/1.1.2; D72/1.1.13, WRIA, 6 September 2011.

⁴⁰ Sok Khemara, 'Crime Sites, Victim Information Released in Pending Tribunal Case,' *VOA Khmer*, 20 December 2012. Accessible at: <https://www.voacambodia.com/a/crime-sites-victim-information-released-in-pending-tribunal-case/1568123.html>.

⁴¹ Gillison, D., 'UN Legal Team Walk Out on Stymied KR Cases,' *Cambodia Daily*, 13 June 2011. Quoting from a resignation letter from Khmer Rouge historian Stephen Heder to Judge Siegfried Blunk. O'Toole, J., 'Disorder in the Court: KRT Investigators Resign Over 003,' *Phnom Penh Post*, 13 June 2011. Gillison, D., '6th UN Official Resigns from KR Judges' Office,' *Cambodia Daily*, 22 June 2011.

⁴² *Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)*, 08 August 2011, p. 1.

⁴³ *Ibid.*

⁴⁴ *Press Release by the International Co-Investigating Judge*, 10 October 2011.

39. On 7 October 2011, the Officer-in-Charge of the Defence Support Section filed the *Defence Support Section Request for a Stay in Case 004 Proceedings before the Co-Investigating Judges and for Measures Pertaining to the Effective Representation of Suspects in Case 004*, in which she argued, *inter alia*, that '[t]he suspects' fundamental right to equality of arms has been, and continues to be, undermined by the exclusion of the Defence from participating in the two year-long judicial investigation, as well as the right to request further investigative action, respond to party submissions, or appeal against judicial decisions made during the investigation.'⁴⁵
40. On 9 October 2011, former ICIJ Blunk submitted his resignation.'⁴⁶
41. On 14 November 2011, the Open Society Justice Initiative issued a report in which, in calling for an independent inquiry into the conduct of the CIJs in relation to Cases 003 and 004, it recognised the 'late stage' of the Case 004 investigation.⁴⁷ The report also noted the impact of the exclusion of the Defence from the investigation, stating, in relation to the closure of Case 003, that the failures to ensure effective representation of suspects' interests during the investigation rendered it 'almost inconceivable that they could be indicted' since that 'would constitute an egregious violation of their fair trial rights.'⁴⁸
42. On 15 November 2011, in their minority opinion to the PTC's *Consideration of the Pre-Trial Chamber regarding the International Co-Prosecutor's Appeal against the Decision on Re-Filing of Three Investigative Requests*, Judges Lahuis and Downing held:
- The failure to conduct a complete and impartial investigation would inevitably be detrimental to the rights of the suspects, the victims and the co-prosecutors, especially in the context where they have not thus far been afforded the opportunity to effectively participate in the said investigation.⁴⁹
43. PTC Judges Prak Kimsan, Ney Thol and Huot Vuthy held, in 2011, that the CIJs' refusal to grant the ICP's three investigative requests filed during the first Rule 66 period in Case

⁴⁵ *Defence Support Section Request for a Stay in Case 004 Proceedings before the Co-Investigating Judges and for Measures Pertaining to the Effective Representation of Suspects in Case 004*, 7 October 2011, D103, para. 44(b).

⁴⁶ *Press Release by the International Co-Investigating Judge*, 10 October 2011.

⁴⁷ Open Society Justice Initiative, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia,' 14 November 2011, p. 7.

⁴⁸ Open Society Justice Initiative, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia,' 14 November 2011, p. 18.

⁴⁹ Case 003, *Consideration of the Pre-Trial Chamber regarding the International Co-Prosecutor's Appeal against the Decision on Re-Filing of Three Investigative Requests*, 15 November 2011, D26/1/3, Opinion of Judges Lahuis and Downing, para. 16.

003 was ‘righteous’ since to grant the requests would engender an unreasonable time extension and the ICP had failed to exercise his rights under Rule 55.⁵⁰

44. On 19 November 2011, an article published in the Cambodia Daily made it clear that suspects in Case 004 were the subject of media attention, though the names of the suspects were officially confidential and they had not been provided with the necessary legal representation to which they were entitled:

Im Chaem, who was accused by prosecutors in 2009 of coordinating purges and executions in Democratic Kampuchea’s Northwest Zone, said she has still not been informed of the charges against her, despite the fact that investigators have now conducted multiple field interviews with witnesses to her alleged crimes. She also has no lawyer.

“Up until now, nobody [from the tribunal] has come to talk with me,” she said. “I did nothing wrong, so it means that they violate my rights, because I did not commit anything wrong but they accuse me.”⁵¹

45. On 1 December 2011, Reserve International Co-Investigating Judge (‘RICIJ’) Kasper-Ansermet took office. While he had taken an oath as reserve judge before the Plenary Session of the ECCC on 21 February 2011, his appointment was rejected by the Supreme Council of the Magistracy. In a press release dated 9 February 2012, the RICIJ stated that ‘[s]ince joining the ECCC on 1 December 2011 he has taken steps to ensure the effective functioning of the international side of the Office, including *reiterating* a request to the UN for the additional staff necessary to enable effective investigations into cases No. 003 and 004.’⁵²
46. On 15 December 2011, the RICIJ submitted a Record of Disagreement concerning the conduct of Cases 003 and 004 to the PTC.⁵³ The disagreement arose from the National Co-Investigating Judge’s (‘NCIJ’) opposition to proposed investigative acts on the basis that, because he had not been appointed by the Supreme Council of the Magistracy, the RICIJ lacked competence.⁵⁴

⁵⁰ Case 003, *Consideration of the Pre-Trial Chamber regarding the International Co-Prosecutor’s Appeal against the Decision on Re-Filing of Three Investigative Requests*, 15 November 2011, D26/1/3, Opinion of Judges Prak, Ney and Huot, paras 3 and 6.

⁵¹ Wallace, J., ‘Uncertainty Cast Over Suspects’ Rights at Khmer Rouge Tribunal,’ Cambodia Daily, 19 November 2011 (bracketed parenthesis in original).

⁵² *Press Release by the International Reserve Co-Investigating Judge*, 9 February 2012, emphasis added.

⁵³ *Press Release by the International Reserve Co-Investigating Judge*, 9 February 2012.

⁵⁴ *Press Release by the International Reserve Co-Investigating Judge*, 9 February 2012.

47. On 2 February 2012, the RICIJ submitted another Record of Disagreement concerning the conduct of Cases 003 and 004 to the PTC, citing the same issue regarding the RICIJ's competence.⁵⁵
48. On 3 February 2012, the President of the PTC issued a memorandum returning the Records of Disagreement 'without giving notification of the Pre-Trial Chamber having taken a reasoned decision' and stating that the PTC judges 'had met on 27 January 2012 and that they had not "reached their consent to take into their consideration of the substance of those documents," based on the fact that "[the RICIJ] does not have enough qualification to undertake his duty according to legal procedure in force."⁵⁶
49. On the same day, the Supreme Court Chamber issued its *Appeal Judgement* in Case 001, in which it averred that the terms 'senior leader' and 'those who were most responsible' are non-jurisdictional criteria.⁵⁷ In so doing, it intervened in the jurisdictional debate in Cases 003 and 004.
50. On 9 February 2012, responding to the PTC, the RICIJ argued that the disputed investigative orders should be executed pursuant to Article 23 new of the ECCC Law and Rule 72(4)(d).⁵⁸
51. On 24 February 2012, the RICIJ issued the *Notification of Suspect's Rights [Rule 21(1)(D)]*, informing Mr YIM Tith that he was named as a suspect in the ongoing judicial investigation initiated by the ICP's Third Introductory Submission dated 20 November 2008 and Supplementary Submission dated 18 July 2011.⁵⁹ The Notification noted:

That in accordance with the Internal Rules of the ECCC [Rule 21(1)(d)], procedural rights and guarantees attached to the status of Suspect notably include the right to be defended by a lawyer of his/her choice, to have access to the case file (application, by analogy, of Rules 55(6), 55(1) and 58, except for the provisions of Rule 58(6) of the ECCC) and to remain silent at every stage of the proceedings.⁶⁰
52. On 19 March 2012, the RICIJ tendered his resignation with effect from 4 May 2012. Noting the NCIJ's consistent opposition to investigations into Cases 003 and 004, the

⁵⁵ *Press Release by the International Reserve Co-Investigating Judge*, 9 February 2012.

⁵⁶ *Press Release by the International Reserve Co-Investigating Judge*, 9 February 2012.

⁵⁷ Case 001, *Appeal Judgement*, F28, 3 February 2012.

⁵⁸ *Press Release by the International Reserve Co-Investigating Judge*, 9 February 2012.

⁵⁹ *Notification of Suspect's Rights [Rule 21(1)(D)]*, 24 February 2012, D109.

⁶⁰ *Notification of Suspect's Rights [Rule 21(1)(D)]*, 24 February 2012, D109, para. 4.

RICIJ explained that he '[would] not order any further investigations into cases 003 and 004 once those currently under way [were] concluded.'⁶¹ The RICIJ cited the need for investigations to be conducted in a proper manner and stated that he felt unable to perform his duties properly and freely.⁶²

53. On 4 May 2012, the RICIJ issued a press release in which he claimed that 'the suspects were granted access to the case file.'⁶³ As noted below, and despite the exhaustive efforts of the Defence, Mr YIM Tith was not granted access to Case File 004 until 4 December 2015.⁶⁴ The RICIJ noted, further, that his work had been 'severely impeded' for 'reasons which are manifestly more political and financial than strictly judicial.'⁶⁵
54. On 20 June 2012, the Supreme Council of the Magistracy of the Kingdom of Cambodia appointed Judge Mark Harmon as ICIJ.⁶⁶
55. On 30 July 2012, the United Nations announced that it was 'in the process of making the necessary arrangements for Mr Harmon's deployment to Phnom Penh.'⁶⁷
56. On 26 October 2012, Judge Harmon was sworn in as ICIJ.⁶⁸
57. On 7 July 2015, Judge Harmon announced his resignation as ICIJ 'with effect as of the date upon which my successor has been sworn into office.'⁶⁹
58. On 24 August 2015, the Supreme Council of the Magistracy of the Kingdom of Cambodia appointed Judge Michael Bohlander as ICIJ.⁷⁰

Defence Involvement in Case 004

59. On 29 July 2010, the Defence Support Section ('DSS') requested that the CIJs grant defence access to Case Files 003 and 004, along with other basic procedural rights, 'in

⁶¹ *Press Release by the International Reserve Co-Investigating Judge*, 19 March 2012.

⁶² *Press Release by the International Reserve Co-Investigating Judge*, 19 March 2012.

⁶³ *Press Release by the International Reserve Co-Investigating Judge*, 4 May 2012.

⁶⁴ *Written Record of Initial Appearance*, 9 December 2015, D281.

⁶⁵ *Press Release by the Reserve International Co-Investigating Judge*, 4 May 2012.

⁶⁶ *Deployment of New International Co-Investigating Judge*, 30 July 2012.

⁶⁷ *Deployment of New International Co-Investigating Judge*, 30 July 2012.

⁶⁸ See ECCC website: <https://www.eccc.gov.kh/en/articles/mark-harmon-sworn-international-co-investigating-judge> (last accessed by the Defence for Yim Tith on 19 November 2018).

⁶⁹ *Judge Harmon Announces his Resignation*, 7 July 2015.

⁷⁰ *Michael Bohlander Appointed as New Co-Investigating Judge*, 24 August 2015.

order to protect the rights of the suspects.’⁷¹ The former Chief of the DSS noted that the then five suspects in Cases 003 and 004 were ‘left without any form of legal representation or means of protecting their fair trial rights, despite being substantially affected by the investigation’ and expressed concern over the lack of defence involvement in the ongoing investigations.⁷²

60. On 20 September 2010, the DSS sent a letter to the CIJs noting that it had received no response to its letter of 29 July 2010 and reiterating its request and concerns.⁷³
61. On 23 September 2010, the CIJs issued a letter of clarification in which they opined that they considered the rights of those persons not ‘officially charged’ to be limited.⁷⁴
62. In early October 2010, in an effort to ensure that their interests were respected, the DSS assigned a Cambodian lawyer, Kong Sam Onn, to represent the then five Suspects in Cases 003 and 004.⁷⁵
63. On 2 February 2011, the CIJs issued a statement in which they explained that no field investigations were taking place in Cases 003 and 004, stating that ‘[t]he work at present is focused on examining and analysing the documents available on the Case Files, particularly the existing documents in the previous Case Files 001 and 002.’⁷⁶
64. On 14 February 2011, counsel representing the interests of Unnamed Suspects in Cases 003 and 004 filed the *Request for Access to Case Files 003 and 004*.⁷⁷
65. By late April 2011, Kong Sam Onn’s contract expired despite the ECCC’s Defence Support Section’s repeated attempts to have it renewed.⁷⁸ Kong Sam Onn was reported as saying that ‘the investigating judges did not accept me and they closed the case.’⁷⁹

⁷¹ Letter from DSS Chief, Richard Rogers, to Judges You Bunleng and Marcel Lemonde, titled ‘RE: Defence rights in Case File 003 and 004,’ 29 July 2010, A1.

⁷² *Ibid.*

⁷³ Letter from DSS Chief, Richard Rogers, to Judges You Bunleng and Marcel Lemonde, titled ‘RE: Follow-up to DSS letter on Defence rights in Case File 003 and 004,’ 20 September 2010, A1/1.

⁷⁴ Letter from Judges You Bunleng and Marcel Lemonde to DSS Chief, Richard Rogers, titled ‘Defence rights in Case File 003 and 004,’ 23 September 2010, A1/2.

⁷⁵ Wallace, J., ‘Uncertainty Cast Over Suspects’ Rights at Khmer Rouge Tribunal,’ Cambodia Daily, 19 November 2011.

⁷⁶ Statement from the Co-Investigating Judges, 2 February 2011.

⁷⁷ *Request for Access to Case Files 003 and 004*, 14 February 2011, D4.

⁷⁸ Wallace, J., ‘Uncertainty Cast Over Suspects’ Rights at Khmer Rouge Tribunal,’ Cambodia Daily, 19 November 2011.

⁷⁹ *Ibid.*

66. On 7 October 2011, the Officer-in-Charge of the DSS filed the *Defence Support Section Request for a Stay in Case 004 Proceedings before the Co-Investigating Judges and for Measures Pertaining to the Effective Representation of Suspects in Case 004*, in which she argued, *inter alia*, that '[t]he suspects' fundamental right to equality of arms has been, and continues to be, undermined by the exclusion of the Defence from participating in the two year-long judicial investigation, as well as the right to request further investigative action, respond to party submissions, or appeal against judicial decisions made during the investigation.'⁸⁰
67. On 20 December 2013, the Chief of the DSS informed the CIJs that he had assigned national counsel, Mr SO Mosseny, to represent Mr YIM Tith.⁸¹
68. On 20 February 2014, he informed the CIJs that he had assigned international counsel, Ms Suzana TOMANOVIĆ, to represent Mr YIM Tith.⁸²
69. Between 6 March 2014 and 17 November 2014, the Defence made nine applications to be granted access to Case File 004.⁸³ These were denied.⁸⁴

⁸⁰ *Defence Support Section Request for a Stay in Case 004 Proceedings before the Co-Investigating Judges and for Measures Pertaining to the Effective Representation of Suspects in Case 004*, 7 October 2011, D103, para. 44(b).

⁸¹ Letter from DSS Chief, Isaac Endeley, to Judges You Bunleng and Mark Harmon, 'RE: Assignment of Cambodian Co-Lawyers to Represent Ms IM Chhaem and Mr YIM Tith (a.k.a Ta Tith), Suspects in Case 004,' 20 December 2013, D122/9.

⁸² Letter from DSS Chief, Isaac Endeley, to Judges You Bunleng and Mark Harmon, 'RE: Assignment of Foreign Co-Lawyer to Represent Mr YIM Tith (a.k.a Ta Tith), a Suspect in Case 004,' 20 February 2014, D122/9/3.

⁸³ *YIM Tith's Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation*, 6 March 2014, D186; *YIM Tith's Application to the Co-Investigating Judges Requesting them to Seize the Pre-Trial Chamber with View to Annul the Judicial Investigation*, 20 May 2014, A157; *YIM Tith's Urgent Request for Relief Based on New Information*, 24 April 2014, D192; *YIM Tith's Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence Filings on the Case File*, 24 June 2014, D202; *YIM Tith's Request for Clarification that He Can Conduct His Own Investigation*, 3 June 2014, D203; *YIM Tith's Request to the Co-Investigating Judges to Provide their Understanding of the Law Should there Be Disagreement Between the Co-Investigating Judges When Issuing the Closing Order*, 19 June 2014, D205; *YIM Tith's Request for Clarification Regarding the Validity of Summons Issued by One Co-Investigating Judge for the Purposes of Charging Him*, 21 August 2014, D212; *YIM Tith's Urgent Request for the Five Documents Referred to in the 'International Co-Prosecutor's Disclosure of Statements from Case File 004'*, 24 October 2014, D226; *YIM Tith's Request for the International Co-Investigating Judge to Reconsider this Disclosure of Case 004 Witness Statements in Case 002/02*, 17 November 2014, D229.

⁸⁴ *Decision on YIM Tith's Request for the Provision of Four Documents Cited in D186/3*, 1 August 2014, D186/3/3; *Considerations of the Pre-Trial Chamber on YIM Tith's Appeals Against the International Co-Investigating Judge's Decisions Denying His Requests to Access the Case File and to Take Part in the Investigation*, 31 October 2014, D192/1/1/2; *Decision on YIM Tith's Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence's Filings on the Case File*, 4 August 2014, D202/2; *Considerations of the Pre-Trial Chamber on YIM Tith's Appeal Against the Decision Regarding His Request for Clarification that He Can Conduct His Own Investigation*, 19 January 2015, D203/1/1/2; *Decision on YIM Tith's Appeal Against the Decision Denying His Request for Clarification*, 13 November 2014, D205/1/1/2; *Decision on YIM Tith's Appeal Against the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-*

70. The Defence was eventually granted access to Case File 004 by order of the ICIJ on 4 December 2015, almost a decade after the Co-Prosecutors had opened their preliminary investigation on 10 July 2006.⁸⁵
71. Mr YIM Tith voluntarily attended his initial appearance in person at the ECCC premises in Phnom Penh on 9 December 2015.⁸⁶
72. On 4 March 2016, the ICIJ issued his *Request for Comments Regarding Alleged Facts Not to be Investigated Further*.⁸⁷ Therein, the ICIJ explained his intention to exclude 13 ‘Facts’ from the investigation, noting that:
- As a question of law, the above-mentioned facts would *prima facie* appear to be subject to a partial dismissal with the exception of Fact 13, which is a potential case for the application of Internal Rule 66 *bis*; however, the applicability of Internal Rule 66 *bis* to situations where, all other criteria of that Rule being fulfilled, there is insufficient evidence to support a charge, is unclear.⁸⁸
73. The Defence and ICP responded on 8 April 2016 and 11 April 2016 respectively.⁸⁹
74. On 25 August 2016, the ICIJ issued his *Notice of Provisional Discontinuance Regarding Individual Allegations*, in which he: provisionally discontinued the investigation into those facts that would appear to be subject to Rule 66*bis*, namely Facts 6, 13 and 14; discontinued the investigation into those facts that would appear to be subject to dismissal pursuant to Rule 67, namely Facts 1 to 5, 7 to 10 and 12; and continue to investigate Facts 11 and 15 to 17.⁹⁰ The facts subject to provisional discontinuance were thus:
- Fact 1: All allegations relating to Wat So Ben security centre.
- Fact 2: All allegations relating to Saom village.

Investigating Judge, 4 December 2014, D212/1/2/2; *Decision on Suspect’s Request for Clarification*, 19 December 2014, D226/1/1/1; *Decision on YIM Tith’s Notice of Withdrawal of Appeal Against the International Co-Investigating Judge’s Decision on Urgent Requests to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02*, 2 June 2016, D229/3/1/4.

⁸⁵ *Order Granting Yim Tith Access to the Case File Prior to his Scheduled Initial Appearance*, 4 December 2015, D280; *Written Record of Initial Appearance*, 9 December 2015, D281. Case 004/01, *International Co-Prosecutor’s Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7.

⁸⁶ *Written Record of Initial Appearance*, 9 December 2015, D281.

⁸⁷ *Request for Comments Regarding Alleged Facts Not to be Investigated Further*, 4 March 2016, D302.

⁸⁸ *Request for Comments Regarding Alleged Facts Not to be Investigated Further*, 4 March 2016, D302, para. 5.

⁸⁹ *Yim Tith’s Submissions on Alleged Facts Not to be Investigated Further*, 8 April 2016, D302/1; *International Co-Prosecutor’s Response to the International Co-Investigating Judge’s Request for Comments Regarding Alleged Facts Not to be Investigated Further*, 11 April 2016, D302/2. The Defence requested that the ICIJ dismiss all 13 ‘Facts’ pursuant to Rule 67(3), while the ICP argued that it would be ‘premature to determine conclusively the final application of either Internal Rule 66*bis* or 67 to the Facts’; supported the cessation of investigations into Facts 8, 10 and 12; and requested the continuation of investigation into Facts 1-7, 9, 11 and 13.

⁹⁰ *Notice of Provisional Discontinuance Regarding Individual Allegations*, 25 August 2016, D302/3.

- Fact 3: Allegations of targeting, arrest and execution of Khmer Krom and Vietnamese within Thipakdei cooperative.
- Fact 4: All allegations relating to Wat Banteay Treng security centre.
- Fact 5: Allegations of mass executions at Phnom Tra Cheak Chet.
- Fact 6: All allegations relating to Damnak Reang execution site.
- Fact 7: All allegations relating to Trach Kraol security centre also known as Boeng Bat Kandal prison.
- Fact 8: All allegations relating to the La-Ang Phnom Kuoy Yum caves.
- Fact 9: Allegations relating to the targeting, arrest and execution of Vietnamese within Reang Kerei commune.
- Fact 10: Allegations relating to the rape and murder of two women of Vietnamese descent in Preah Net Preah district.
- Fact 12: All alleged crimes relating to Tuol Purchey execution site.
- Fact 13: Allegations of forced marriage near Kang Hat Dam.
- Fact 14: All allegations in relation to sites in Case 004/01 against Im Chaem in Sector 5, Northwest Zone, i.e. Phnom Trayoung security centre and worksite, Spean Spreng and Prey Roneam Dam worksites, Wat Preah Net Preah and related detention and execution sites, Phum Chakrey security centre and execution site, Prey Taruth execution site, Wat Chamkar Khnol execution site and Trapeang Thma Dam worksite.

75. On 20 January 2017, the ICIJ issued his *Notice of Intention to Add Modes of Liability by way of Judicial Order and of Provisional Discontinuance*.⁹¹ Therein, the ICIJ notified the Defence of the amendment of the charges through additional modes of liability for specified crime sites, some of which were also subject to discontinuance.⁹² The ICIJ identified additional facts which would appear to be subject to Rule 66bis,⁹³ namely:

- Crime Site 8: Anlong Vil Breng and related execution site.
- Crime Site 14: Phnom Tra Chek Chet worksite.
- Crime Site 15: Banteay O Ta Krey execution site.
- Crime Site 23: Wat Kandal security centre.
- Crime Site 24: Wat Banteay Neang security centre.
- Crime Site 25: Wat Thoamayutt security centre.

⁹¹ *Notice of Intention to Add Modes of Liability by way of Judicial Order and of Provisional Discontinuance*, 20 January 2017, D342.

⁹² *Notice of Intention to Add Modes of Liability by way of Judicial Order and of Provisional Discontinuance*, 20 January 2017, D342, paras 2 to 5. The ICIJ amended the potential modes of liability with respect to Crime Sites 2, 3, 4, 5, 6, 8, 13, 15, 17, 18, 19, 20, 21, 28, 36 and 37.

⁹³ *Notice of Intention to Add Modes of Liability by way of Judicial Order and of Provisional Discontinuance*, 20 January 2017, D342, paras 7 to 44.

76. On 1 February 2017, the ICP stated his agreement with the ICIJ's approach, and submitted that 'Rule 66bis should be used to discontinue the investigation into proving the existence of an armed conflict between the Democratic Kampuchea and the Socialist Republic of Vietnam for the purpose of Grave Breaches of the Geneva Conventions of 1949.'⁹⁴
77. On 4 May 2017, the ICIJ issued his *Notification Pursuant to Internal Rule 66 bis (2)*, in which he notified the parties of his intention to exclude Facts 6, 13, and 14, and facts relating to Crime Sites 8, 14, 15, 23, 24, and 25 pursuant to Rule 66bis.⁹⁵
78. On 13 June 2017, the CIJs issued the *Notice of Conclusion of Judicial Investigation against Yim Tith* ('Rule 66 Notice'), providing the parties with 15 days from the issuance of the Rule 66 Notice to request further investigative action.⁹⁶ On the same day, the ICIJ issued his *Decision to Reduce the Scope of Judicial Investigation pursuant to Internal Rule 66 bis*, excluding Facts 6, 13 and 14, and facts relating to Crime Sites 8, 14, 15, 23, 24 and 25 from the investigation.⁹⁷
79. On 16 June 2017, the Defence filed *Yim Tith's Request for Adequate Preparation Time*, in which it sought an extension of the Rule 66(1) period of at least six calendar months on the basis that, having been granted access to Case File 004 only on 4 December 2015 (over nine years since the Co-Prosecutors commenced their preliminary investigation on 10 July 2006, and over six years since the ICP's Third Introductory Submission was filed on 7 September 2009), it had not been afforded sufficient time to review the material on Case File 004 before being required to make any final requests for investigative action.⁹⁸
80. On 23 June 2017, the ICP filed the *International Co-Prosecutor's Response to Yim Tith's Request for Additional Time [sic]*, in which he argued that Mr YIM Tith had been afforded adequate time to prepare his case.⁹⁹ The ICP requested an extension of the Rule 66(1)

⁹⁴ *International Co-Prosecutor's Response to the International Co-Investigating Judge's Notice of Intention to Add Modes of Liability by Way of Judicial Order and of Provisional Discontinuance*, 1 February 2017, D342/1, para. 4.

⁹⁵ *Notification Pursuant to Internal Rule 66 bis (2)*, 4 May 2017, D354.

⁹⁶ *Notice of Conclusion of Judicial Investigation against Yim Tith*, 13 June 2017, D358.

⁹⁷ *Decision to Reduce the Scope of Judicial Investigation pursuant to Internal Rule 66 bis*, 13 June 2017, D359.

⁹⁸ *Yim Tith's Request for Adequate Time*, 16 June 2017, D361. See also: Case 004/01, *International Co-Prosecutor's Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7 and *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission*, 7 September 2009, D1/1. *ICP's Third Introductory Submission*, D1.

⁹⁹ *International Co-Prosecutor's Response to Yim Tith's Request for Additional Time*, 23 June 2017, D361/2, para. 7.

period until 28 July 2017, though he provided neither explanation nor argument in support of this.¹⁰⁰ The NCP did not respond.

81. On 27 June 2017, the OCIJ informed the parties by email that the 15-day period stipulated in the Rule 66 Notice would be extended and that the deadline of 28 June 2017 was suspended.¹⁰¹
82. On 28 June 2017, the Defence filed *Yim Tith's Reply to the International Co-Prosecutor's Response to Yim Tith's Request for Adequate Preparation Time*.¹⁰²
83. On 5 July 2017, the CIJs issued their *Decision on Yim Tith's Request for Adequate Preparation Time*, in which they held that Mr YIM Tith had been afforded adequate time to prepare, seemingly ignored the substantive submissions of the ICP, denied the request for extension as articulated by the Defence, and ordered the extension of the Rule 66(1) period until 28 July 2017.¹⁰³
84. On 5 July 2017, the Defence filed *Yim Tith's Notice of Appeal against the Decision on Yim Tith's Request for Adequate Preparation Time*.¹⁰⁴
85. On 10 July 2017, the Defence filed *Yim Tith's Request for Suspension of D361/4 Deadline Pending Resolution of Appeal Proceedings*.¹⁰⁵
86. On 14 July 2017, the ICP filed *International Co-Prosecutor's Appeal of Decision on Request for Investigative Action*, in which he appealed the ICIJ's decision denying the ICP's request 'to obtain and place on Case File 004 analytical reports prepared by Mr Vuthy regarding Kraing Ta Chan and Wat Pratheath crime sites and any available

¹⁰⁰ *International Co-Prosecutor's Response to Yim Tith's Request for Additional Time*, 23 June 2017, D361/2, paras 1 and 8.

¹⁰¹ *Email from Anna Katulu to Nicholas Koumjian et al.*, 27 June 2017, D361/4.1.

¹⁰² *Yim Tith's Reply to the International Co-Prosecutor's Response to Yim Tith's Request for Adequate Preparation Time*, 28 June 2017, D361/3.

¹⁰³ *Decision on Yim Tith's Request for Adequate Time*, 5 July 2017, D361/4.

¹⁰⁴ *Yim Tith's Notice of Appeal against the Decision on Yim Tith's Request for Adequate Preparation Time*, 5 June 2017, D361/4/1.

¹⁰⁵ *Yim Tith's Request for Suspension of D361/4 Deadline Pending Resolution of Appeal Proceedings*, 10 July 2017, D361/4/1/1.

summaries, transcripts and/or recordings of any interviews relied upon in preparation of these studies.’¹⁰⁶

87. On 18 July 2017, the ICIJ issued a memorandum in which he explained that the Case 002/02 transcripts placed on Case File 004 over the course of the judicial investigation are to be assumed to have been subject to revision and that, accordingly, these are to be replaced by ‘their new versions.’¹⁰⁷ The ICIJ stated:

I also inform the parties that any amendments will not be reflected in any extracts or partial transcripts of Case 002/2 testimony that are on Case File 004. The parties are advised to instead refer to the full day’s testimonies for the particular extracts, which should already be on Case File 004, to ensure they are referring to the revised transcripts.¹⁰⁸

88. On 19 July 2017, the PTC issued its *Decision on Yim Tith’s Request for Suspension of Deadline Pending Resolution of Appeal Proceedings*, denying the Defence’s request.¹⁰⁹
89. On 19 July 2017, the ICP filed *International Co-Prosecutor’s Request to Place Annexes to Kraing Ta Chan Site Identification Report on Case File 004*.¹¹⁰
90. On 25 July 2017, the ICP filed *International Co-Prosecutor’s Request to Place onto the Case File the Full Case 002 Hearing of those Witnesses and Civil Parties whose Partial Testimony is already on the Case File*.¹¹¹
91. On 26 July 2017, the Defence filed *Yim Tith’s Appeal Against the Decision on Yim Tith’s Request for Adequate Preparation Time*, as well as a request to file in English only due to the backlog faced by the ITU.¹¹² While the latter was notified immediately, the

¹⁰⁶ *International Co-Prosecutor’s Appeal of Decision on Request for Investigative Action*, 14 July 2017, D338/1/1, para. 3. It is noted that the Khmer version of the appealed decision was notified on 5 June 2017, while the English version of the decision was notified on 1 May 2017.

¹⁰⁷ Confidential Memorandum from the ICIJ to the parties in Case 004, ‘Revisions of Case 002/02 transcripts,’ 18 July 2017, D362, paras 1 and 2.

¹⁰⁸ *Ibid.*, para. 3.

¹⁰⁹ *Decision on Yim Tith’s Request for Suspension of Deadline Pending Resolution of Appeal Proceedings*, 23 July 2017, D361/4/1/3.

¹¹⁰ *International Co-Prosecutor’s Request to Place Annexes to Kraing Ta Chan Site Identification Report on Case File 004*, 19 July 2017, D363.

¹¹¹ *International Co-Prosecutor’s Request to Place onto the Case File the Full Case 002 Hearing of those Witnesses and Civil Parties whose Partial Testimony is already on the Case File*, 25 July 2017, D364.

¹¹² *Yim Tith’s Appeal against the Decision on Yim Tith’s Request for Adequate Preparation Time*, 26 July 2017, D361/4/1/5. *Request to File Yim Tith’s Appeal against the Decision on Yim Tith’s Request for Adequate Preparation Time in One Language*, 26 July 2017, D361/4/1/4.

substantive appeal was notified to the parties only on 7 August 2017. The Khmer translation was notified to the parties on 15 September 2017.

92. On 28 July 2017, in the very final hours available to him, the ICP filed *International Co-Prosecutor's Request for Investigative Action Regarding Prison No. 8 in Kandieng District and Sexual Violence in Bakan District, Pursat Province* and *International Co-Prosecutor's Request for Investigative Action in Case 004 with Annex A*.¹¹³
93. On 3 August 2017, the ICIJ issued a decision denying the part of the *International Co-Prosecutor's Request for Investigative Action in Case 004 with Annex A* that concerned the placement of the Revised S-21 List and its underlying documents onto Case File 004.¹¹⁴
94. On 7 August 2017, the Defence filed *Yim Tith's Response to the International Co-Prosecutor's Request for Investigative Action Regarding Prison No. 8 in Kandieng District and Sexual Violence Regarding Pursat Province*, noting, *inter alia*, its impermissible scope, lack of specificity and tardiness.¹¹⁵
95. On 10 August 2017, the Defence filed *Yim Tith's Response to the International Co-Prosecutor's Request for Investigative Action in Case 004 with Annex A*, again, *inter alia*, noting the tardiness of the ICP's request.¹¹⁶
96. On 4 September 2017, the ICIJ issued his *Decision on the International Co-Prosecutor's Request for Investigative Action Regarding Prison No. 8 in Kandieng District and Sexual Violence in Bakan District*, largely dismissing the ICP's request for investigative action on the grounds that it exceeded the boundaries of the charges Mr YIM Tith faced, lacked specificity and was submitted very late in the investigative phase.¹¹⁷ On the same date, the ICIJ issued his *Decision on the International Co-Prosecutor's International Co-*

¹¹³ *International Co-Prosecutor's Request for Investigative Action Regarding Prison No. 8 in Kandieng District and Sexual Violence in Bakan District, Pursat Province*, 28 July 2017, D365; *International Co-Prosecutor's Request for Investigative Action in Case 004 with Annex A*, 28 July 2017, D366.

¹¹⁴ *First Decision in Relation to the International Co-Prosecutor's Request for Investigative Action in Case 004 with Annex A*, 3 August 2017, D366/1.

¹¹⁵ *Yim Tith's Response to the International Co-Prosecutor's Request for Investigative Action Regarding Prison No. 8 in Kandieng District and Sexual Violence Regarding Pursat Province*, 7 August 2017, D365/1.

¹¹⁶ *Yim Tith's Response to the International Co-Prosecutor's Request for Investigative Action in Case 004 with Annex A*, 10 August 2017, D366/2.

¹¹⁷ *International Co-Prosecutor's Request for Investigative Action Regarding Prison No. 8 in Kandieng District and Sexual Violence in Bakan District, Pursat Province*, 4 September 2017, D365/3, para. 31.

Prosecutor's Request for Investigative Action in Case 004 with Annex A, largely denying the ICP's request.¹¹⁸

97. On 5 September 2017, the CIJs issued the *Second Notice of Conclusion of Judicial Investigation against Yim Tith*, stating that they 'consider[ed] the investigation against Yim Tith to have been concluded' and informing the parties that 'no period for further investigative action is required under the Internal Rules and hence none is granted.'¹¹⁹
98. On 25 September 2017, the ICP submitted *International Co-Prosecutor's Response to Yim Tith's Appeal against the Decision on Additional Time*.¹²⁰ The following day, he requested that he be permitted to file his response in one language.¹²¹ The response, in both English and Khmer, was notified to the parties on 10 October 2017.
99. On 16 October 2017, the Defence filed *Yim Tith's Reply to the International Co-Prosecutor's Response to Yim Tith's Appeal against the Decision on Additional Time*.¹²² This was not notified to the parties until 7 November 2017. The Khmer translation was filed and notified on 10 November 2017.
100. On 13 November 2017, the PTC issued its *Decision on Yim Tith's Appeal against the Decision on Yim Tith's Request for Adequate Preparation Time*, holding the Appeal to be inadmissible.¹²³

Closing Order Proceedings

101. On 1 March 2018, the CIJs issued their *Forwarding Order Pursuant to Internal Rule 66(4)*.¹²⁴

¹¹⁸ *Decision on International Co-Prosecutor's Request for Investigative Action in Case 004*, 4 September 2017, D366/4.

¹¹⁹ *Second Notice of Conclusion of Judicial Investigation against Yim Tith*, 5 September 2017, D368, Disposition (paras 27 and 28).

¹²⁰ *International Co-Prosecutor's Response to Yim Tith's Appeal against the Decision on Additional Time*, 25 September 2017, D361/4/1/7.

¹²¹ *International Co-Prosecutor's Request to File his Response to Yim Tith's Appeal against the Decision on Additional Time in One Language*, 25 September 2017, D361/4/1/6.

¹²² *Yim Tith's Reply to International Co-Prosecutor's Response to Yim Tith's Appeal against the Decision on Additional Time*, 25 September 2017, D361/4/1/9.

¹²³ *Decision on Yim Tith's Appeal against the Decision on Yim Tith's Request for Adequate Preparation Time*, 13 November 2017, D361/4/1/10.

¹²⁴ *Forwarding Order Pursuant to Internal Rule 66(4)*, 1 March 2018, D378.

102. On 31 May 2018, the NCP filed her *Final Submission Concerning Yim Tith Pursuant to Internal Rule 66* ('NCP's Final Submission').¹²⁵ Therein, the NCP maintained her consistent position that 'YIM Tith who has been named in this case was neither a "senior leader of Democratic Kampuchea" nor the one "who was most responsible" for the crimes falling under the ECCC jurisdiction' and requested that the CIJs dismiss all allegations against YIM Tith.¹²⁶
103. On 5 June 2018, the ICP's Final Submission was notified.¹²⁷ The ICP seeks Mr YIM Tith's indictment as both a senior leader and as 'among those individuals most responsible' for a number of charges of genocide and crimes against humanity.¹²⁸
104. On 20 June 2018, the CIJs issued their *Decision on Time Granted to the Defence to Respond to the Final Submissions by the Co-Prosecutors*, granting the Defence three months from the date of notification of the full translation the ICP's Final Submission into Khmer to respond, in English only with the Khmer translation to follow as soon as possible, to the NCP's and ICP's Final Submissions.¹²⁹
105. On 22 August 2018, the Defence received notification of the full Khmer translation of the ICP's Final Submission.

I. PRELIMINARY OBJECTIONS

A. THE ECCC LACKS PERSONAL JURISDICTION OVER MR YIM TITH

106. The ICP erroneously submits that the ECCC's personal jurisdiction extends to Mr YIM Tith, alleging that he was both a 'senior leader' and a 'person most responsible.'¹³⁰ The ICP's submission is founded on the *obiter dicta* SCC opinion that the terms 'senior leader' and 'those who were most responsible' are non-jurisdictional criteria ('SCC opinion').¹³¹
107. The NCIJ has rightly found that in its interpretation of the terms 'senior leaders' and 'those who were most responsible,' the SCC has ignored the intention of the parties to the

¹²⁵ NCP's Final Submission, D378/1.

¹²⁶ NCP's Final Submission, D378/1, paras 24 to 36.

¹²⁷ ICP's Final Submission, D378/2.

¹²⁸ ICP's Final Submission, D378/2, paras 1127 to 1151, 1157 to 1184.

¹²⁹ *Decision on Time Granted to the Defence to Respond to the Final Submissions by the Co-Prosecutors*, 20 June 2018, D378/3, paras 2, 6 and 9.

¹³⁰ ICP's Final Submission, D378/2, paras 1126 to 1155.

¹³¹ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 64.

UN-RGC Agreement by implicitly finding that there is no merit in any of the negotiations around the establishment of the ECCC which led to a joint and binding understanding that only a certain finite number of named individuals were to be under the ECCC's jurisdiction.¹³²

108. The CIJs have declared their disagreement with the SCC's opinion:

While we have declared here and the International CIJ separately elsewhere that we disagree with the SCC's classification of "personal jurisdiction" as a non-jurisdictional criterion we feel bound by reason of practical judicial deference to the Court's supreme appellate body to follow the substance of the SCC case law unless there are exceptional reasons for a disagreement and for taking an openly dissenting stance.¹³³

109. Even though, as set out by the CIJs, 'the only direct appellate panel for the decisions of the OCIJ is the PTC and that in a civil law system such as that of Cambodia there is no doctrine of *stare decisis*,'¹³⁴ the CIJs 'feel bound by reason of practical judicial deference... from the point of view of clarity and uniformity of the law in a legal environment as closed as that of the ECCC for judges lower in the court hierarchy to disregard the SCC case law unless there were exceptional reasons.'¹³⁵ Through this stance, the CIJs did not analyse the SCC's reasoning. Such an analysis would have led to the conclusion that the SCC erred in reaching its opinion and, as set out below, there are 'exceptional reasons' for the CIJs to depart from it.

110. The SCC's interpretation of personal jurisdiction was expressed *obiter dicta*, the issue of justiciability having not been raised by the parties in their appeal briefs. Rule 110(1) states: 'The scope of the appeal shall be limited to the issues raised in the notice or in the immediate appeal.' The SSC overstepped their mandate as this issue was not raised by the appellants in their notices or immediate appeals and went beyond the limits fixed by the appeal set by Rule 110(1).¹³⁶

¹³² Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 461.

¹³³ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 10. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 432.

¹³⁴ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 10. See also Case 003, in which the International CIJ found that: 'In civil law systems, judges are bound only by the law; the common law principle of *stare decisis* does not apply.' Case 003, *Decision on MEAS Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict*, 5 April 2016, D87/2/1.7/1, para. 13.

¹³⁵ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 10. See also Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 432.

¹³⁶ Case 001, *Co-Lawyers for KAING Guek Eav alias Duch, Appeal Brief against the Trial Chamber Judgement of 26 July 2010*, 18 November 2010, F14; Co-Prosecutors Response to the Appeal Brief by the Co-Lawyers for KAING Guek Eav alias Duch against the Trial Chamber Judgement of 26 July 2010, 20 December 2010, F14/4.

111. Further, there are serious errors in the SCC's reasoning. Through the SCC opinion, the SCC: (1) ignores the position of the parties to the UN-RGC Agreement ('Agreement'); (2) contradicts the plain reading of the terms of personal jurisdiction; (3) applies inapposite reasoning; (4) selectively applies international jurisprudence, primarily through inappropriate analogies to ICTY case law; (5) erred in concluding that the terms are 'mere prosecutorial and judicial guidance;' and (6) violates the principle of legal certainty.
112. The ICIJ has stated during the investigations in Cases 003 and 004 that findings on personal jurisdiction are to be made upon completion of the investigation.¹³⁷ Responding to the ICP's Final Submissions is the first opportunity for Mr YIM Tith to make submissions on personal jurisdiction. The SCC gave its opinion on the jurisdictional nature of the terms 'senior leaders' and a 'persons most responsible' without hearing from Mr YIM Tith. Since this is a fundamentally important issue of the ECCC's applicable law, the CIJs cannot immediately defer to the SCC without violating Mr YIM Tith's right to be heard.

i. Background

(a) The Negotiation History of the UN-RGC Agreement

113. The following chronology is based upon material received by the OCIJ following requests made between May and August 2016 by the ICIJ to the United Nations' Archives to provide records of the negotiations.¹³⁸ The Defence appreciates the resolute efforts of the ICIJ, but regrets that disclosure of the majority of important requested documents was denied by the UN Archives on grounds of confidentiality.¹³⁹

¹³⁷ *Decision on Ta An's Motion for Annulment of Investigative Action Pursuant to Internal Rule 76*, 22 April 2014, D185/1; *Consolidated Decision on Ao An's Internal Rule 76(2) Applications*, 30 July 2015, D257; *Consolidated Decision on Meas Muth's Requests on Personal Jurisdiction*, 1 February 2016, D298.1, para. 27.

¹³⁸ *Letter from the ICIJ to UN Records and Archive Management Section, 'RE Request to be Provided with Identified Materials from United Nations Archives,'* 12 May 2016, D324.1; *Email from Filippo De Minicis to Amanda Leinberger, 'Re Request from International Co Investigating Judge Michael Bohlander,'* 20 May 2016, D324.3; *Letter from the ICIJ to Bridget Sisk, 'Judicial Request to be Provided with Folder Details and Identified Documents from United Nations Archives,'* 14 June 2016, D324.5; *Email correspondence between OCIJ and UN Records and Archive Management Section*, from 1 July 2016 to 16 August 2016, D324.6.

¹³⁹ *Case 004/01, Closing Order (Reasons)*, 10 July 2017, D308/3, para. 19, citing *Case 003, Notice of Placement on the Case File of Available Records Relating to the Establishment of the ECCC*, 8 September 2016, D181/2, para. 19.

114. On 21 June 1997, the First and Second Prime Ministers of Cambodia sent a letter to the Secretary-General of the United Nations asking ‘for the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979.’¹⁴⁰
115. On 12 December 1997, the General Assembly of the United Nations responded to the Letter, stating in Resolution 52/135 that it:
15. *Endorses* the comments of the Special Representative that the most serious human rights violations in Cambodia in recent history have been committed by the Khmer Rouge and that their crimes, including the taking and killing of hostages, have continued to the present, and notes with concern that no Khmer Rouge leader has been brought to account for his crimes;
 16. *Requests* the Secretary-General to examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law, including the possibility of the appointment, by the Secretary-General, of a group of experts to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability.¹⁴¹
116. On 31 July 1998, further to the Joint Letter and General Assembly Resolution 52/135, the UN Secretary-General reported the creation of the Group of Experts for Cambodia with the following mandate:
- (a) To evaluate the existing evidence with a view to determining the nature of the crimes committed by Khmer Rouge leaders in the years from 1975 to 1979;
 - (b) To assess, after consultation with the Governments concerned, the feasibility of bringing Khmer Rouge leaders to justice and their apprehension, detention and extradition or surrender to the criminal jurisdiction established;
 - (c) To explore options for bringing to justice Khmer Rouge leaders before an international or national jurisdiction.¹⁴²

¹⁴⁰ Kofi A. Annan, *Identical Letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council*, 51st Sess., Agenda Item 110, U.N. Doc. A/51/930 and S/1997/488 (24 June 1997), Annex, p. 2.

¹⁴¹ *Situation of human rights in Cambodia*, G.A. Res 52/135, U.N. G.A.O.R., 52nd Sess., 70th Plenary Mtg., Agenda Item 112(b), U.N. Doc. A/Res/52/135 (27 February 1998).

¹⁴² *Letter from Secretary General Annan to President of the Security Council*, 31 July 1998, D324.8; *Letter from Secretary General Annan to President of the General Assembly*, 31 July 1998, D324.9.

117. From 14 to 24 November 1998, the Group of Experts visited Cambodia and Thailand.¹⁴³

The majority of the Group's work took place between 7 September 1998 and 24 November 1998, with the Report of the Group of Experts for Cambodia, dated 18 February 1999, ('Report of the Group of Experts') stating as follows:

The bulk of the consultations and meetings took place during two missions of the Group: to United Nations Headquarters from 7 to 11 September 1998; and to Phnom Penh and Bangkok from 14 to 24 November 1998. In addition, individual members of the Group held meetings with persons whose views were considered important to the work of the Group and the Group met at the Office of the United Nations High Commissioner for Human Rights in Geneva from 27 to 29 January to finalize its recommendations.¹⁴⁴

118. After the Group of Experts finished the majority of its work but prior to publishing its Report, significant development occurred in accomplishing peace and stability in Cambodia. Prime Minister Samdech Hun Sen presented the significant development to the UN Secretary-General and the President of the Security Council in an *Aide-mémoire*, dated 21 January 1999:

An analysis on seeking a formula for bringing top Khmer Rouge leaders to trial

Over the past weeks, after the return to the fold of the nation as simple citizens of Khiev Samphan and Nuon Chea on December 25, 1998, there emerged public opinions and positions that deserved to take into consideration. First of all, everyone welcomes this event and considers that:

This event confirmed that the Khmer Rouge organization had come to an end. The national reconciliation in Cambodia, which was the source of peace and stability, had been fulfilled once and for all, and this peace and stability, in turn, would bring new national development to Cambodia. [...]

At the same time, there existed opinions that demand for an urgent trial. Some even called for the arrest of the Khmer Rouge leaders, treating them as prisoners of war, upon their return to the fold of the nation. There existed also counter-opinions. Both opinions and counter-opinions have prompted an inquiring atmosphere that whether ten thousands of former Khmer Rouge soldiers and their families who thus far defected have any concern for their fates in the future.

At present, there is an assessment that the last stage of the national reconciliation is very significant. It may lead Cambodia to a long-lasting peace and development, or it may plunge Cambodia into instability and insecurity. Those with this assessment are in the position that a trial is

¹⁴³ Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, 16 March 1999, D324.15, p.1.

¹⁴⁴ Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, 16 March 1999, D324.15, para. 7.

inevitable, and that there must be a full guarantee for social issue and economic development within stable and peaceful environment of Cambodia.

[...]

Prosecution, Instability, National Reconciliation, and Peace [...]

National reconciliation and peace are indispensable requirement of the Cambodian nation and people, and the trials of offenders to find justice for Cambodian are the goal and obligation to be fulfilled. [...] There must be due consideration before taking any action, avoiding any action that would jeopardize national reconciliation in Cambodia. **We need both peace and justice.**¹⁴⁵

119. The Report of the Group of Experts, dated 18 February 1999, which ignored the significant development set out in Prime Minister Samdech Hun Sen's *Aide-mémoire* of 21 January 1999, was submitted to the Secretary-General on 22 February 1999.¹⁴⁶ The Secretary-General transferred the Report to the General Assembly and the Security Council, stating:

The Group notes that its mandate calls for recommendations regarding bringing 'Khmer Rouge leaders' to justice. Our sense of this term is guided by General Assembly resolution 52/135, which calls for our group to 'propose further measures as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability', without limiting the issue to that of 'leaders', and by the letter of the Cambodian Government of 21 June 1997, which refers simply to 'those persons responsible' for the crimes of Democratic Kampuchea.¹⁴⁷

120. The Group of Experts came to five conclusions with respect to the targets of investigation for a future tribunal:

First, we do not believe that prosecutions should attempt to bring to justice all or even most people who committed violations of international or Cambodian law during the relevant period [...]

Second, the Group has carefully considered the concerns noted above regarding the possible effects of prosecuting persons who have surrendered to the Government or returned to civilian life, but does not believe, based on our assessment, that they warrant precluding such prosecutions [...]

Third, the Group does not believe that the term 'leaders' should be equated with all persons at the senior levels of Government of Democratic Kampuchea or even of the Communist Party of Kampuchea. The list of top governmental and party officials may not correspond with the list of persons

¹⁴⁵ Identical letters dated 21 January 1999 from the Permanent Representative of Cambodia to the United Nations addressed to the Secretary General and the President of the Security Council, Annex II, 22 January 1999, D324.11, pp 3-6. [Emphasis in original].

¹⁴⁶ Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, 16 March 1999, D324.15, p.1.

¹⁴⁷ Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, 16 March 1999, D324.15, para. 105.

most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making; and others not in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true with respect to certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng [...]

[F]ourth, the Group recommends that any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at the lower levels who are directly implicated in the most serious atrocities. [...]

Fifth, and finally, the Group believes that the above sense of the scope of investigations should be no more than a guide for prosecutors and not form an element of the jurisdiction of any tribunal.¹⁴⁸

The Report of the Group of Experts was outdated even before it was published as it failed to comply with the RGC's clear position to date that any tribunal would only cover Khmer Rouge leaders, as set out in Prime Minister Samdech Hun Sen's *Aide-mémoire* dated 21 January 1999.¹⁴⁹

121. Following the Report of the Group of Experts, Prime Minister Samdech Hun Sen wrote to the UN on several occasions. On each occasion, he clearly disagreed with the Group of Experts' recommendation for a tribunal of 'those at the lower level.' First, in a letter to the Secretary-General dated 3 March 1999, Prime Minister Samdech Hun Sen acknowledged receipt of the Report of the Group of Experts, referring to a tribunal for 'Khmer Rouge leaders' whilst ignoring the Group of Experts' recommendation of 'those at the lower level':

Once again, I wish to draw your attention to my letter and aide-mémoire on an analysis on seeking a formula for bringing top Khmer Rouge leaders to trial, dated 21 January 1999. In it, I called for comprehensive justice for Cambodia and its people and for a full investigation into the crimes committed during the whole period of civil wars in Cambodia from 1970 to 1998.

As you are aware, thanks to the Royal Government of Cambodia's persistent policy and practice of national reconciliation, the Khmer Rouge leaders and its rank and file have totally surrendered, thus a general peace prevails in the country as a whole.

¹⁴⁸ Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, 16 March 1999, D324.15, paras 109 to 111.

¹⁴⁹ Identical letters dated 21 January 1999 from the Permanent Representative of Cambodia to the United Nations addressed to the Secretary General and the President of the Security Council, Annex II, 22 January 1999, D324.11. See *supra*, para. 118.

It is quite obvious that peace and national reconciliation are sine qua non conditions for the rehabilitation, socio-economic development and alleviation of poverty of the Cambodian people. As national reconciliation and peace have been achieved throughout the country, the Government is now able to focus its full attention and resources on economic development and improving the living conditions of the Cambodian people.

We have never rejected the accountability of the Khmer Rouge leaders for the crimes of genocide in Cambodia. We just want, however, to caution that any decision to bring the Khmer Rouge leaders to justice must also take into full account Cambodia's need for peace, national reconciliation, rehabilitation and economic development for poverty reduction. Therefore, if improperly and heedlessly conducted, the trials of Khmer Rouge leaders would panic other former Khmer Rouge officers and rank and file, who have already surrendered, into turning back to the jungle and renewing the guerrilla war in Cambodia.

It is needless to say that without peace and security, no development projects can be contemplated or carried out. The decades of war and destruction during the Khmer Rouge rule were more than enough for Cambodia and the Cambodian people. From our most bitter experience in the past, whenever a war breaks out, we are not only unable to find justice for the people, but also unable to protect the people from death.¹⁵⁰

122. On a second occasion, on 19 March 1999, Prime Minister Samdech Hun Sen issued a declaration on 'the issue of the trial of Ta Mok'. He 'welcomed [international assistance] to be able to assist the court of Cambodia in order to try the Khmer Rouge leaders in accordance with the international standard for the sake of justice for all the victims'.¹⁵¹ Again, Prime Minister Samdech Hun Sen ignored the Group of Experts' recommendation of 'those at the lower level'.
123. On a third occasion, Prime Minister Samdech Hun Sen again wrote to the Secretary-General on 24 March 1999 emphasising a tribunal for 'Khmer Rouge leaders' whilst ignoring the Group of Experts' recommendation of 'those at the lower level':

As explained in the aide-memoire [...] and my declaration [...], an existing national tribunal of Cambodia should take up the case to charge and convict Ta Mok and other Khmer Rouge leaders if found guilty of crimes of genocide committed in Cambodia, whose victims are the Cambodian population' [...]

The issue of whether to try Ta Mok alone or any other Khmer Rouge leaders depends entirely on the competence of the tribunal.¹⁵²

¹⁵⁰ Identical letters dated 3 March 1999 from the Permanent Representative of Cambodia to the United Nations addressed to the Secretary General and the President of the Security Council, 3 March 1999, D324.12.

¹⁵¹ Letter dated 19 March 1999 from the Permanent Representative of Cambodia to the United Nations addressed to the President of the Security Council, 19 March 1999, D324.21.

¹⁵² Identical letters dated 24 March 1999 from the Permanent Representative of Cambodia to the United Nations addressed to the Secretary General and the President of the Security Council, 24 March 1999, D324.22.

124. On a fourth occasion, on 19 April 1999, the Permanent Representative of Cambodia forwarded a statement issued by the Cabinet of the Prime Minister on 18 April 1999 concerning ‘the Government’s position on the issue of the trial of Khmer Rouge leaders’. The statement of the RGC again focused any trial upon Khmer Rouge leaders whilst ignoring the Group of Experts’ recommendation of ‘those at the lower level’:

To meet international standards the trial of Ta Mok, the Khmer Rouge leader, would be conducted by the existing national court with the assistance from foreign countries, in which foreign judges and prosecutors would be allowed to take part. Cambodia would enact additional pieces of legislation in order to allow foreign judges and prosecutors to participate in the domestic trial.

The indictment and prosecution of other Khmer Rouge leaders are the sole competence of the court. The Royal Government is not entitled to give orders to the judicial branch to do this or that.¹⁵³

125. On 10 May 1999, KAING Guek Eav alias Duch was arrested and detained by the Cambodian Military Court on various charges pursuant to Cambodian law.¹⁵⁴ Following Duch’s arrest and detention, as set out below, the RGC changed its position so that any tribunal would focus upon the Khmer Rouge leaders and Duch.¹⁵⁵ The words ‘those responsible,’ ‘other persons responsible’ or ‘those most responsible’ solely referred to Duch.¹⁵⁶

126. On 12 January 2000, following Duch’s arrest and detention, in an email to the Secretary-General of the UN concerning the draft law creating the ECCC, then President of the Council of Ministers, the late SOK An, made mention of the RGC’s position that the personal jurisdiction of the ECCC would cover ‘other persons responsible for the most serious violations’ as well as ‘senior leaders’:

These extraordinary chambers have jurisdiction over ‘senior leaders of Democratic Kampuchea and other persons responsible for the most serious violations of Cambodian criminal laws, international laws and customs, and international conventions recognized by Cambodia, committed between 17 April 1975 and 6 January 1979.’¹⁵⁷

¹⁵³ Letter dated 19 April 1999 from the Permanent Representative of Cambodia to the United Nations addressed to the President of the Security Council, 19 April 1999, D324.23.

¹⁵⁴ Case 001, KAING Guek Eav alias Duch, Trial Judgement, 26 July 2010, E188 (‘Case 001 Trial Chamber Judgement’), para. 15, para. 623. Case 004/2, Order Dismissing the Case against Ao An, 16 August 2018, D359, para. 479.

¹⁵⁵ Case 004/2, Order Dismissing the Case against Ao An, 16 August 2018, D359, para. 473.

¹⁵⁶ Case 004/2, Order Dismissing the Case against Ao An, 16 August 2018, D359, para. 473.

¹⁵⁷ Email from Sok An, President of the Group of Experts, to Kofi Annan, concerning the draft law creating the ECCC, 12 January 2000, D324.26, para. 1, unofficial translation.

127. On 18 January 2000, the Permanent Representative of Cambodia to the United Nations, Ouch Borith, notified the draft law establishing the ECCC to the Secretary-General. In line with the RGC's position that the personal jurisdiction of the tribunal would cover Duch as well as senior DK leaders, Chapter II of the draft law included 'those who were responsible':

The Extraordinary Chambers shall be established in the existing court structure, namely the trial court, the appeals court, and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were responsible for serious violations of Cambodian criminal law, international law and custom, and international conventions recognized by Cambodia, and which were committed during the period from April 17, 1975 to January 6, 1979.¹⁵⁸

128. On 21 March 2000, in a draft letter from the Secretary-General to Prime Minister Samdech Hun Sen, it appeared that the UN agreed with the position that the personal jurisdiction of the tribunal covered senior leaders of DK and Duch. The draft letter was prepared by the Head of the UN Delegation, Hans Corell, in the context of the negotiations between the UN and the RGC for an agreement on the prosecution of the crimes committed during the DK period. The draft letter followed the language used by the RGC to reference Duch, namely 'those responsible':

The personal jurisdiction of the court shall be limited to senior leaders of Democratic Kampuchea and those responsible for crimes and serious violations of Cambodian penal law, international law and custom, and international conventions recognized by Cambodia and which were committed during the period from 17 April 1975 to 6 January 1979.¹⁵⁹

129. On 19 January 2001, Prime Minister Samdech Hun Sen, affirming the position of the RGC and UN that the personal jurisdiction of the tribunal covered senior leaders of DK and Duch, said in a speech in Anlong Veng: 'We will not bring 12 million Cambodians to court, or even 1,000 or even 100. Just top leaders.'¹⁶⁰

¹⁵⁸ *Letter from Ouch Borith, Permanent Representative of Cambodia to the United Nations, notifying that a draft law establishing the ECCC has been finalized*, 18 January 2000, D324.27, p. 2.

¹⁵⁹ *Draft letter from the Secretary-General of the UN to Samdech Hun Sen*, 21 March 2000, D324.29.

¹⁶⁰ David Scheffer, 'The Negotiating History of the ECCC's Personal Jurisdiction', *Cambodia Tribunal Monitor*, 22 May 2011, p. 10, citing Deutsche Presse-Agentur. Scheffer was the U.S. Ambassador-at-Large for War Crimes Issues from 1997 to 2001; he represented the United States in this capacity during the negotiations leading to the ECCC's establishment. In 2012, U.N. Secretary-General Ban-Ki Moon appointed Scheffer as the U.N. Special Expert on the United Nations Assistance to the Khmer Rouge Trials.

130. On 18 December 2002, in its resolution 57/228 about Khmer Rouge trials, the General Assembly affirmed the position of the RGC and UN that the personal jurisdiction of the tribunal covered senior leaders of DK and Duch, by recommending that:

[T]he Extraordinary Chambers should have personal jurisdiction over the senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in paragraph 2 above [...].¹⁶¹

131. On 6 January 2003, during an exploratory meeting between the UN and Cambodian delegations, a 'non-paper' summarising the structure and functioning of the ECCC prepared by the UN delegations to facilitate the negotiations on the UN-RGC Agreement reiterated that the personal jurisdiction of the tribunal covered senior leaders of DK and Duch, using the language 'those who were most responsible' to reference Duch:

In so far as concerns the jurisdiction of the Extraordinary Chambers, the agreement would provide that:

- they would have subject-matter jurisdiction in respect of the crime of genocide, crimes against humanity, war crimes as defined in relevant International instruments and other crimes under Cambodian law as defined in Chapter II of Cambodia's national Law;
- they would have personal jurisdiction in respect of senior leaders of Democratic Kampuchea and those who were most responsible for the crimes concerned.¹⁶²

132. On 17 March 2003, in a public statement upon leaving Phnom Penh, Under-Secretary-General Hans Corell, describing the main features of the draft text for an agreement between the UN and the RGC, declared:

[I]t is clear from the text of the agreement that the Extraordinary Chambers would have jurisdiction only over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia.¹⁶³

133. On 22 May 2003, UN General Assembly resolution 57/288 approved Article 1 of the UN-RGC Agreement, which reads as follows in order to have jurisdiction over senior leaders of DK and Duch:

The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to

¹⁶¹ *Resolution 57/228 adopted by the General Assembly about Khmer Rouge trials*, 18 December 2002, D324.34, p. 2.

¹⁶² *Non-paper summarizing the structure and functioning of the ECCC*, 6 January 2003, D324.35, p. 2. See also *Report of the Secretary-General on Khmer Rouge Trials*, 21 March 2003, D324.38, para. 16(e).

¹⁶³ *Statement by the United Nations Under-Secretary-General Hans Corell*, 17 March 2003, D324.36, p. 2.

trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979 [...].¹⁶⁴

134. On 4 October 2004, the Cambodian National Assembly debated and approved numerous aspects of the UN-RGC Agreement and Establishment Law. The following was approved:

- a. 'We have come to a decision that the draft on the Agreement and Amendments have been drafted correctly in accordance with Article 21 of the Internal Regulations of the National Assembly.'¹⁶⁵
- b. '[The UN-RGC Agreement], in general, is parallel to the opinion stated in the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea promulgated by Royal Decree number 080112 N.S.R.T.M dated August 10, 2001.'¹⁶⁶
- c. '[The UN-RGC Agreement] will have equal status to the domestic law of Cambodia after its ratification.'¹⁶⁷
- d. 'H.E. Sok An: the law states that it is the authority of the EC judges, who shall have the power to decide the targets and consider who shall be indicted or prosecuted. But, the EC, which has the competence and right make such decisions, must perform its functions in accordance with the law: the Agreement and law we are discussing.'¹⁶⁸

135. On 19 October 2004, the UN-RGC Agreement was ratified by Cambodia.¹⁶⁹

¹⁶⁴ Resolution 57/288 adopted by General Assembly about Khmer Rouge trials, 22 May 2003, D324.41, Annex 'Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea'.

¹⁶⁵ The First Session of the Third Term of the Cambodian National Assembly, Debate and Approval of the Agreement between the United Nations and the Royal Government of Cambodia and Debate and Approval of Amendments to the Law on Trying Khmer Rouge Leaders, 4-5 October 2004 ('2004 National Assembly Approval'), pp. 1-2.

¹⁶⁶ 2004 National Assembly Approval, p. 2.

¹⁶⁷ 2004 National Assembly Approval, p. 2.

¹⁶⁸ 2004 National Assembly Approval, p. 25.

¹⁶⁹ Instrument of Ratification on the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 19 October 2004.

136. On 27 October 2004, the Establishment Law was promulgated.¹⁷⁰

(b) History of the Post-Agreement Views of the RGC and UN

137. Since the ECCC's creation, the RGC has repeatedly and consistently re-stated its interpretation of the ECCC's jurisdictional limits:

- a. In October 2010 – two years after the Co-Prosecutors issued public statements on 8 December 2008¹⁷¹ and 5 January 2009¹⁷² which described the reasons of the disagreement over filing the Third Introductory Submission (the disagreement taking place on 18 November 2008)¹⁷³ – Prime Minister Samdech Hun Sen expressed the RGC's unequivocal opposition to Cases 003 and 004, stating that should the ECCC pursue Cases 003 and 004, Cambodia would be brought back to civil war.¹⁷⁴ Other government officials have made similar statements.¹⁷⁵
- b. In February 2015, Prime Minister Samdech Hun Sen stated in a speech at a UN-sponsored conference:

¹⁷⁰ ECCC website, Amendments to the ECCC Law promulgated, 27 October 2004, available at: <https://www.eccc.gov.kh/en/chronology/amendments-eccc-law-promulgated>.

¹⁷¹ ECCC, Statement of the Co-Prosecutors, 8 December 2008. See also: *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission* (7 September 2009, D1/1), Annex I: *Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, para. 47.

¹⁷² ECCC, Statement of the Co-Prosecutors, 5 January 2009. See also: *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission* (7 September 2009, D1/1), Annex I: *Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, para. 47.

¹⁷³ Case 004/01, *Final Submission Concerning Im Chaem Pursuant to Internal Rule 66*, 27 October 2016, D304/1, para. 2; Case 004/02, *Final Submission Concerning Ao An Pursuant to Internal Rule 66*, 18 August 2017, D351/4, para. 2.

¹⁷⁴ Zsombor Peter and Phorn Bopha, 'No More Khmer Rouge Trials, Premier Tells Ban,' CAMBODIA DAILY, 28 October 2010, A157/2/1/1.1.20.

¹⁷⁵ Cheang Sokha and O'Toole, J., 'Hun Sen shoots from the lip,' Phnom Penh Post, 28 October 2010, A157/2/1/1.1.2: 'Foreign Minister Hor Namhong told reporters following the meeting that Prime Minister Samdech Hun Sen considered pending investigations in Cases 003 and 004 a threat to the Kingdom's "stability". Samdech [Hun Sen] clearly affirmed that Case 003 will not be allowed,' he said. 'We have to think about peace in Cambodia or the court will fail.' 'The court will try the four senior leaders successfully and then finish with Case 002.' 'The 2003 agreement between the government and the UN that established the tribunal empowers the court to prosecute 'senior leaders' and those 'most responsible' for crimes committed under Democratic Kampuchea. By pursuing possible prosecutions in Cases 003 and 004, court officials were violating this, Minister of Information Khieu Kanharith said yesterday.'

Chhorng Long Heng, 'UN Secretary General talks on regional and bilateral issues,' Southeast Asia, 31 October 2010, A157/2/1/1.1.5: Minister of Information, Khieu Kanharith, is quoted as stating, 'If we continue the third case, we should be wrong track from the original agreement between the UN and Cambodian government, which enshrined about trial for the senior and most responsible leaders only. It also affected the 'stability and national reconciliation' for the country. If the members of Khmer Rouge flee to struggle in jungle, and who will be responsible for that issue, and moreover, the other cases should hand over to local courts for dealing these cases'.

Some want to go too far with the Khmer Rouge tribunal, expanding the scope, almost causing some poor folks to run back into the jungle. The scope – it just keeps expanding. So we have to think about the values of peace, the values of life, if war starts again. How many people will die?¹⁷⁶

138. Since the UN-RGC Agreement coming into force, the UN has made no statements on interpreting the UN-RGC Agreement or providing any interpretative guidance alternative to that provided by the RGC.

(c) ECCC Case Law on Personal Jurisdiction

139. In order to assist the CIJs, the ECCC case law to date on personal jurisdiction is set out below. In Case 001, the SCC opinion that the terms ‘senior leader’ and ‘those who were most responsible’ are non-jurisdictional criterion is *obiter dicta*.¹⁷⁷ In Case 002, all parties’ arguments in relation to personal jurisdiction were made prior to the SCC opinion in Case 001. The issue of justiciability was not considered in Case 002. Finally, Cases 003 and 004 have not reached the SCC in order for the SCC opinion to be challenged. The Defence sets out below the proceedings in Case 001 which changed personal jurisdiction from being treated as justiciable to not.

Case 001

Closing Order

140. In Case 001, the CIJs issued the Closing Order on 8 August 2008, finding the Charged Person KAING Guek Eav alias Duch to fall within the terms of personal jurisdiction as amongst those ‘most responsible.’¹⁷⁸ The CIJs did not raise any issue regarding justiciability of personal jurisdiction. The CIJs concluded:

While DUCH was not a senior leader of Democratic Kampuchea, he may be considered in the category of most responsible for crimes and serious violations committed between 17 April 1975 and 6 January 1979, due both to his formal and effective hierarchical authority and his personal participation as Deputy Secretary then Secretary of S21, a security centre which was directly controlled by the Central Committee.¹⁷⁹

Initial Hearing

¹⁷⁶ ‘PM Blasts Former Australian Foreign Minister,’ *Khmer Times*, 26 February 2015.

¹⁷⁷ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 64.

¹⁷⁸ Case 001, *Closing Order*, 8 August 2008, D99, para. 129.

¹⁷⁹ Case 001, *Closing Order*, 8 August 2008, D99, para. 129.

141. On 17 February 2009, at the Initial Hearing in Case 001, the Trial Chamber invited the parties to raise any objection to the jurisdiction of the Chamber, and expressly drew their attention to Internal Rule 89(1), which states that ‘a preliminary objection concerning the jurisdiction of the Chamber shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible.’¹⁸⁰
142. The Defence for Kaing Guek Eav raised no preliminary objection regarding the Trial Chamber’s jurisdiction.

Trial

143. On 31 March 2009, opening statements were made by the Co-Prosecutors, followed by the Accused and his Co-Lawyers. The National Co-Lawyer for Duch submitted that the Accused was neither a ‘senior leader’ nor a person ‘most responsible.’¹⁸¹

I do not demand that the 196 chiefs of prisons, or the 64 chiefs of prisons need to be brought to trial, but it is – I don't just want Duch to be just a scapegoat.¹⁸²

If you prosecute them, prosecute them all. Otherwise do not prosecute them at all. They are the same, they are chiefs of prisons, and people were killed too. And if 195 chiefs are not prosecuted, and only Duch is prosecuted, there is no justice. So the Co-Prosecutors need to justify this to the Trial Chamber.¹⁸³

144. The National Co-Lawyer concluded:

So finally, based on the spirit of article 2 of the ECCC law, the Trial Chamber has the jurisdiction to trial and prosecute the senior leaders of Democratic Kampuchea and those most responsible for the crimes and the grave breaches of both national and international laws, and ‘Kaing Guek Eav alias Duch is not a senior leader of Democratic Kampuchea, nor the person most responsible for the crimes, and the grave breaches of those law, he is just a chief of prisons as others, 195 chiefs of prisons who are not being prosecuted.’¹⁸⁴

¹⁸⁰ Case 001, T. (EN), 17 February 2009, E1/3.1, pp. 5 to 6.

¹⁸¹ Case 001, T. (EN), 31 March 2009, E1/6.1, pp. 74 to 81, 83.

¹⁸² Case 001, T. (EN), 31 March 2009, E1/6.1, p. 80.

¹⁸³ Case 001, T. (EN), 31 March 2009, E1/6.1, p. 81.

¹⁸⁴ Case 001, T. (EN), 31 March 2009, E1/6.1, p. 83.

145. The ICP requested that the Trial Chamber clarified with the Defence whether it was making a personal jurisdictional challenge.¹⁸⁵ The National Co-Lawyer responded but failed to indicate clearly whether a personal jurisdictional challenge was being made.¹⁸⁶
146. On 1 April 2009, the Trial Chamber asked the National Co-Lawyer whether his response to the statement made by the Co-Prosecutors regarding the legality of the charges against his client was ‘a request to the Chamber to resolve that particular issue before the proceedings.’¹⁸⁷ The National Co-Lawyer responded:

When the Co-Prosecutors asked whether I challenge the jurisdiction, I am not intending to challenge it because I am quite aware already and I could have raised it in the initial hearing already if I wished to do so.

So what I raised was not to challenge the jurisdiction. I only wanted the Court to follow the Rule 98(7) regarding the jurisdiction of the Court over my client because if he is not the most senior person or most responsible person to be prosecuted then he should not be prosecuted. I just want to confirm that position and I think they are just my comments for the Court consideration.

[...]

But, finally, I do not intend to challenge the jurisdiction.¹⁸⁸

Co-Prosecutors’ Closing Statements

147. On 24 November 2009, in their Closing Statement, the Co-Prosecutors ‘invite[d] the Trial Chamber to apply the guidance given at the ICTY and to determine that the ECCC has personal jurisdiction over this accused, as both a senior leader and as one who was most responsible.’¹⁸⁹ The Co-Prosecutors noted that the ICTY has a similar concept of ‘most senior leaders suspected of being most responsible,’ and the criteria the ICTY used to apply this standard are as follows:

[The] concept was defined by the tribunal as requiring an examination of the gravity of the crimes charged and the level of responsibility of the accused. When analyzing the gravity of the crimes, the ICTY highlighted factors such as the temporal scope, geographical scope, number of victims affected, the number of separate incidents an accused is charged with, and the manner in which the criminal conduct was committed. As for the level of responsibility, the tribunal considered that the term ‘most senior leader’ was not limited solely to policy leaders. Rather, a court must examine a number of factors such as the [permanence of his position], temporal scope, number of

¹⁸⁵ Case 001, T. (EN), 31 March 2009, E1/6.1, p. 92, 102-105.

¹⁸⁶ Case 001, T. (EN), 31 March 2009, E1/6.1, p. 107.

¹⁸⁷ Case 001, T. (EN), 31 March 2009, E1/7.1, p. 17.

¹⁸⁸ Case 001, T. (EN), 31 March 2009, E1/7.1, pp. 18-19.

¹⁸⁹ Case 001, T. (EN), 24 November 2009, E1/79.1, p. 10.

subordinates, rank of the accused within the hierarchical structure, and the actual criminal role of the accused.¹⁹⁰

Defence Closing Statements

148. On 25 November 2009, the Defence asserted in its Closing Statement that the ECCC lacked jurisdiction over the Accused because he was neither one of the ‘senior leaders’ nor one of those ‘most responsible’ for the crimes committed during the temporal jurisdiction of the ECCC.¹⁹¹ The Defence alleged that senior leaders of DK comprised only the members of the Standing Committee, that the Accused merely executed orders, and that more people were killed in other prisons than in S-21.¹⁹² Therefore, equality before the law would require that if the Accused is to be tried, all other prison chiefs should also be tried by the ECCC.¹⁹³

Trial Chamber Judgement

149. On 26 July 2010, in its Case 001 Judgement, the Trial Chamber stated that the defence arguments that the ECCC lacks jurisdiction over the accused presented in the Closing Statement were belated and therefore rejected them.¹⁹⁴ In doing so, the Trial Chamber implied that it would have heard the defence jurisdiction arguments were they made in time.
150. Notably, the Trial Chamber did not reject the defence arguments on the basis that the terms ‘senior leader’ and ‘those who were most responsible’ are non-jurisdictional criterion. The Trial Chamber went on to evaluate the matter as a jurisdictional issue on its own motion, and in doing so accepted the arguments advanced by parties – in this case the Co-Prosecutors in their Closing Statement. The Trial Chamber found that:

Personal jurisdiction is confined either to ‘senior leaders of DK’ or ‘those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia.’¹⁹⁵

¹⁹⁰ Case 001, T. (EN), 24 November 2009, E1/79.1, pp. 9-10.

¹⁹¹ Case 001, T. (EN), 25 November 2009, E1/80.1, pp. 84-115.

¹⁹² Case 001, T. (EN), 25 November 2009, E1/80.1, pp. 84-115.

¹⁹³ Case 001, T. (EN), 25 November 2009, E1/80.1, p. 105.

¹⁹⁴ Case 001, *Judgement*, 26 July 2010, E188, para. 15.

¹⁹⁵ Case 001, *Judgement*, 26 July 2010, E188, para. 17.

151. The Trial Chamber noted that neither ‘senior leaders of DK’ nor ‘those who were most responsible’ are defined anywhere in the UN-RGC Agreement or in the Establishment Law.¹⁹⁶ It referred to the Group of Experts’ conclusions, discussed above, before discussing the relevant jurisprudence of other international tribunals, noting that:

Other international tribunals which have also examined the notion of ‘most senior leaders suspected of being most responsible,’ have considered both the gravity of the crimes charged and the level of responsibility of the accused. When assessing the gravity of the crimes charged, the Referral Bench of the International Criminal Tribunal for Yugoslavia (‘ICTY’) has relied on factors such as the number of victims, the geographic and temporal scope and manner in which they were allegedly committed, as well as the number of separate incidents, whereas the level of responsibility of the accused has been evaluated on the basis of considerations such as the level of participation in the crimes, the hierarchical rank or position of the accused, including the number of subordinates and hierarchical echelons above him or her, and the permanence of his position. The Pre-Trial Chamber of the International Criminal Court (‘ICC’), in determining the admissibility of a case, has evaluated similar factors.¹⁹⁷

152. The Trial Chamber noted that ‘although hierarchical position is a relevant criterion, international tribunals have generally not undertaken rigid comparisons of seniority of persons previously tried before them when making referral decisions.’¹⁹⁸ The Trial Chamber recognised that the UN-RGC Agreement and Establishment Law impose no obligation to try all potential perpetrators of crimes falling within its jurisdiction, and the fact that other individuals within DK during the indictment period may have shared these attributes does therefore not preclude the Accused from also being considered as one of those most responsible.¹⁹⁹

153. Ultimately, the Trial Chamber concluded that the CIJs were correct in their assessment of the Accused’s position within the Khmer Rouge and, therefore, that the Accused ‘falls within the personal jurisdiction of the ECCC as one of those most responsible for crimes

¹⁹⁶ Case 001, *Judgement*, 26 July 2010, E188, para. 19.

¹⁹⁷ Case 001, *Judgement*, 26 July 2010, E188, para. 22, citing *Situation in the DRC, Prosecutor v. Ntaganda*, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, ICC Pre-Trial Chamber I (ICC-01/04-02/06-20-Anx2), 10 February 2006 (unsealed on 21 July 2008 pursuant to Decision ICC-01/04-520), paras 51 to 64, 68-71, 74, 78-89 (quashed on appeal on different grounds, in *Situation in the DRC*, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, ICC Appeals Chamber (ICC-01/04-169), 13 July 2006 (unsealed on 23 September 2008 pursuant to Decision ICC-01/04-538), paras 73 to 79.

¹⁹⁸ Case 001, *Judgement*, 26 July 2010, E188, para. 24, citing *Prosecutor v. Ademi et al.*, Decision on Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, ICTY Referral Bench (IT-04-78-PT), 14 September 2005, paras. 30-31 (finding that the Accused’s seniority did not *ipso facto* preclude referral to a national jurisdiction for trial).

¹⁹⁹ Case 001, *Judgement*, 26 July 2010, E188, para. 24.

committed during the period from 17 April 1975 to 6 January 1979.’²⁰⁰ As such, the Trial Chamber found no need also to examine the issue of whether the Accused was a senior leader of the DK.²⁰¹ The factors that the Trial Chamber took into account when determining Duch as ‘most responsible’ were:

- a. Duch’s position – Duch was Deputy of S-21 and then Chairman of S-21.
- b. Duch’s role – ‘Duch led the Interrogation Unit and participated in the planning of S-21 operations and training of staff on interrogation techniques;’ and ‘oversight of the entire S-21 operation including the annotation of confessions and the ordering of executions.’
- c. The role of Duch’s office (S-21) – ‘S-21 was a very important security centre of DK, considered as an organ of the Communist Party of Kampuchea (“CPK”), reporting to the very highest levels of the CPK leadership, carrying out nationwide operations and receiving high level cadres and prominent detainees.’
- d. The number of victims – ‘More than 12,000 individuals were detained at S-21, a number which is incomplete and must be read in light of the practice of not registering all detainees.’
- e. Origin of the victims – ‘Victims from every part of Cambodia were sent to S-21, with the result that the scope of its activities reached across the entire country.’
- f. Length of time – ‘S-21 was operational from October 1975 to early January 1979, thus covering a significant portion of the DK regime’s existence.’²⁰²

Defence Appeal of the Trial Chamber Judgement

154. On 18 November 2010, the Defence Appeal of the Trial Chamber Judgement asserted that it could not be inferred from either the UN-RGC Agreement or Establishment Law that Duch was one of those most responsible.²⁰³
155. The Defence Appeal stated that by concurring ‘with the speculative conclusion of the Co-Investigating Judges that KAING Guek Eav fits in the category of those most responsible for the crimes within the jurisdiction of the ECCC,’ the Trial Chamber ‘violated Rule 87(1) of the ECCC Internal Rules and Article 38 of the Constitution of the Kingdom of

²⁰⁰ Case 001, *Judgement*, 26 July 2010, E188, para. 25.

²⁰¹ Case 001, *Judgement*, 26 July 2010, E188, para. 25.

²⁰² Case 001, *Judgement*, 26 July 2010, E188, para. 23.

²⁰³ Duch SCC Appeal Brief, para. 13.

Cambodia, which states that “any case of doubt shall be resolved in favour of the accused.”²⁰⁴

156. The Defence Appeal went on to discuss the jurisprudence of other international criminal tribunals, concluding that based on the relevant criteria used by the ICTY in determining the class of senior leaders considered most responsible, the Accused cannot be considered as forming part of those most responsible.²⁰⁵ The relevant criteria cited by the Defence are the gravity of the crimes charged and the degree of responsibility of the accused.²⁰⁶

The factors used in assessing the relevant criteria are as follows:

The Referral Bench of the ICTY has relied on factors such as the number of victims, the geographic and temporal scope of the crimes and manner in which they were allegedly committed, as well as the number of separate incidents of the crime, whereas the level of responsibility of the accused has been evaluated on the basis of considerations such as the level of participation in the crimes, the hierarchical rank or position of the accused, including the number of subordinates and hierarchical echelons above him or her, and the permanence of his position.²⁰⁷

157. This jurisprudence is taken from the Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, which states:

Rule 11 *bis* of the Rules is currently silent as to the level of responsibility required for the accused to be prosecuted in a national court. Granted, this level is not easy to determine precisely and in the abstract, particularly in the context of a conflict which involved both leaders of States or autonomous entities and civilian and paramilitary groups capable of conducting a widespread policy of terror. However, for reasons of transparency *vis-à-vis* the international community and, more particularly, the States of the former Yugoslavia, in addition to the ability of the national courts to conform to international standards, the Tribunal should take into consideration the position of the accused and the gravity of the crime with which he is charged. It will be for the Tribunal to assess and set out *in concreto* the main points of those criteria.²⁰⁸

²⁰⁴ Duch SCC Appeal Brief, paras. 16 and 17. [Emphasis in original.]

²⁰⁵ Duch SCC Appeal Brief, paras. 19 and 20.

²⁰⁶ Duch SCC Appeal Brief, para. 19.

²⁰⁷ Duch SCC Appeal Brief, para. 19.

²⁰⁸ UN Doc. S2002/678, Enclosure (‘Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts (June 2002)), para. 42.

Co-Prosecutors' Response to the Defence Appeal

158. On 20 December 2010, the Co-Prosecutors' Response to the Defence Appeal noted that the Appellant's position was both 'inconsistent with the position he took at the beginning and throughout most of the Case 001 proceedings' and 'unsustainable as a matter of law.'²⁰⁹ The Co-Prosecutors' Response asserted that the Defence Appeal does not reflect the minimum standard of pleading to sustain many if not all of the arguments contained therein, specifically noting:

The Appellant (1) Fails to support his arguments with specific reference to the record, transcript, evidence or judgement; (2) makes obscure, contradictory, vague or otherwise insufficient arguments; (3) criticizes the Trial Chamber's reasoning without providing substantiation or argument as to the alleged error committed; and (4) misstates and mischaracterizes facts and law to support his arguments.²¹⁰

159. The Co-Prosecutors' Response further asserted that while the Trial Chamber was correct in its determination that the Appellant's personal jurisdiction objection was 'untimely and therefore inadmissible,' it was also correct in its determination that 'the ECCC has personal jurisdiction over the Appellant as "one of those most responsible for crimes committed" during the relevant period.'²¹¹

160. The Co-Prosecutors noted:

Articles 1 and 2 of the ECCC Law and Agreement establish personal jurisdiction over 'senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.'²¹²

161. The Co-Prosecutors therefore agreed with the Trial Chamber and the Appellant as to the personal jurisdiction of the ECCC, but disagreed with the Appellant as to whether he was within this jurisdiction. The Co-Prosecutors noted:

[T]he Appellant assumes that the same standard of proof for determining the guilt of an accused—'beyond reasonable doubt'—also applies to the Trial

²⁰⁹ OCP Case 001 Appeal Brief, para. 4.

²¹⁰ OCP Case 001 Appeal Brief, paras 7 and 8.

²¹¹ OCP Case 001 Appeal Brief, paras 20 and 21.

²¹² OCP Case 001 Appeal Brief, para. 25.

Chamber's assessment of personal jurisdiction. The Appellant provides no support for this position, which is far from self-evident.²¹³

162. The Co-Prosecutors asserted that rather than 'beyond reasonable doubt,' either a *prima facie* or balance of probabilities standard would be more appropriate in assessing personal jurisdiction.²¹⁴
163. As set out above, it is clear that throughout the proceedings in Case 001 prior to the involvement of the SCC, the Co-Prosecutors treated personal jurisdiction as a justiciable matter.

Appeal Hearings

164. On 4 March 2011, approximately one month before the appeal hearing, in its scheduling order for the hearing of appeals, the SCC invited the Appellants to make oral submissions on the question of whether the term 'senior leaders of Democratic Kampuchea and those who were most responsible' 'constitutes a jurisdictional requirement that is subject to judicial review, or is a guide to the discretion of the Co-Prosecutors and Co-Investigating Judges that is not subject to judicial review.'²¹⁵ As set out above, this issue had never been raised by any party in their Appeal notices, briefs or Responses.
165. As acknowledged by the Supreme Court Chamber, the Defence made no submissions 'directly addressing this particular question of law.'²¹⁶ In a departure from their previous written submissions, the Co-Prosecutors submitted in oral argument that the term does not amount to a jurisdictional requirement reviewable by the Trial Chamber, stating 'the issue is not related to jurisdiction, rather it is related to the competence and the prosecutorial discretion [sic]'.²¹⁷
166. The Civil Parties argued in oral submissions only that 'the definition of the terms senior leaders of Democratic Kampuchea and those who were most responsible for the crimes

²¹³ OCP Case 001 Appeal Brief, para. 30.

²¹⁴ OCP Case 001 Appeal Brief, para. 31, citing *Prosecutor v. Brima*, SCSL-2004-16-A, 'Judgment', Appeals Chamber, 22 February 2008.

²¹⁵ Case 001, KAING Guek Eav alias Duch, Order Scheduling Appeal Hearing, 4 March 2011, F20, p. 3.

²¹⁶ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 26. SCC Judgement, para. 26.

²¹⁷ Case 001, T. (EN), 28 March 2011, F1/2.1, p. 104 (lines 17-24) (Civil Parties Group 3). *But see* T. (EN), 28 March 2011, F1/2.1, p. 91.

mentioned in the law on the ECCC constitutes a jurisdictional requirement that is subject to prior judicial review by the Co-Prosecutors and the Co-Investigating Judges.²¹⁸

Supreme Court Chamber – Appeal Judgement

167. On 3 February 2012, the SCC's Case 001 Appeal Judgement assessed the Defence's jurisdictional appeal. The SCC first discussed their interpretation of Rule 89(1), noting two overriding principles:

First, Rule 89(1)(a) cannot reverse the burden of proof in criminal proceedings before the ECCC. The Co-Prosecutors bear the burden of proving the guilt of an accused, and accused persons enjoy the right to be presumed innocent until proven guilty. Thus, Internal Rule 89(1)(a) cannot be interpreted so as to force an accused to assist the Co-Prosecutors' case against him/her by providing early notice of jurisdictional deficiencies that could nullify the trial. Second, the accused's right to remain silent includes the right to decide at which time s/he will raise an objection to the jurisdiction of the Trial Chamber that could nullify the trial. While an accused will likely have legal interest in raising such an objection as a preliminary matter in order to avoid the trial, he cannot be penalized for deciding to withhold the raising of the objection until a time that s/he sees fit. If, for example, near the close of trial proceedings, an accused raises an objection to a want of jurisdiction that could nullify the trial, the law applicable before the ECCC precludes the Trial Chamber from not entertaining the objection solely because the deadline in Internal Rule 89(1) has elapsed.²¹⁹

168. The SCC went on to note the inherent duty of the Trial Chamber to satisfy itself at all times that it has jurisdiction to try an accused.²²⁰ The SCC stated that:

If, at any stage of the proceedings, the Trial Chamber becomes aware that it may be acting in excess of its jurisdiction, then it must examine the issue and satisfy itself that it has jurisdiction to proceed. A competent court is a prerequisite to a fair trial.²²¹

169. Given the above interpretation of Rule 89(1), the SCC concluded that the Trial Chamber erred in interpreting the rule so as to render the Accused's jurisdictional objection inadmissible.²²² They went on to note that:

While the Trial Chamber's decision to confirm its jurisdiction *ex proprio motu* does not eliminate the legal error made by the Trial Chamber, it cures its effect in that it enabled the filing of an informed appeal by the Accused.²²³

²¹⁸ Case 001, T. (EN), 28 March 2011, F1/2.1, p. 104, lines 17-23.

²¹⁹ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 33.

²²⁰ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 34.

²²¹ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 34.

²²² Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 36.

²²³ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 36.

170. The SCC then analysed whether the term ‘senior leaders of Democratic Kampuchea and those who were most responsible’ referred to two separate categories of persons. The Chamber concluded that based on the history of the creation of the ECCC, the term refers to two categories of Khmer Rouge officials that are not dichotomous:

One category is the senior leaders of the Khmer Rouge who are among the most responsible, because a senior leader is not a suspect on the sole basis of his/her leadership position. The other category is non-senior leaders of the Khmer Rouge who are also among the most responsible. Both categories of persons must be Khmer Rouge officials and among the most responsible, and, pursuant to Article 2 new of the UN-RGC Agreement, both are ‘suspects’ subject to criminal prosecution before the ECCC.²²⁴

171. After it determined that the term ‘senior leaders of Democratic Kampuchea and those who were most responsible’ referred to two distinct categories of persons, the SCC went on to evaluate whether all or part of this term constitutes a jurisdictional requirement of the ECCC that must be satisfied in order for the Trial Chamber to try an accused. Up to this point, all parties were operating under the understanding that this term was a jurisdictional requirement. The SCC initially concluded that, based solely on the textual context of Article 2(1) of the UN-RGC Agreement discussed above, the term operates exclusively as a legal requirement of the Trial Chamber’s jurisdiction over an accused.²²⁵
172. The SCC evaluated whether interpreting the term ‘senior leaders of Democratic Kampuchea and those who were most responsible’ as a jurisdictional requirement of the ECCC is consistent with the object and purpose of the UN-RGC Agreement and whether such an interpretation would lead to a ‘manifestly absurd or unreasonable’ result. The SCC did not follow the rules of interpretation in accordance with Article 31 of the Vienna Convention on the Law of Treaties 1969 (‘VCLT’)²²⁶ – the SCC erred in law by failing to refer to the ‘ordinary meaning’ of the terms within the context of the object and purpose of the UN-RGC Agreement. In doing so, it analysed three terms (‘Khmer Rouge official’; ‘most responsible’; and ‘senior leaders’) separately.
173. The SCC stated that determining whether someone was a ‘Khmer Rouge official’ is justiciable before the Trial Chamber because it ‘involves a question of historical fact that

²²⁴ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 57.

²²⁵ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 60.

²²⁶ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (‘VCLT’), Article 18.

is intelligible, precise, and leaves little or no room for the discretion of the Trial Chamber.²²⁷

174. It concluded that the other two terms, however, should not be interpreted as jurisdictional requirements. In its discussion of the term ‘most responsible,’ the SCC stated:

First, there is no objective method for the Trial Chamber to decide on, compare, and then rank the criminal responsibility of all Khmer Rouge officials. Second, the notion of comparative criminal responsibility is inconsistent with Article 29 of the ECCC Law, which states, ‘[t]he position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.’ This provision also expressly confirms the principle that superior orders do not constitute a defence to the crimes set out in Chapter II of the ECCC Law. The Accused, in effect, submits that the Trial Chamber is required to embark upon a relative assessment of his criminal responsibility within the DK. This would amount to indirectly permitting a defence of superior orders and would frustrate the express provisions of the ECCC Law, including Article 29. The third indication that ‘most responsible’ cannot reasonably be interpreted as a jurisdictional requirement of the ECCC is that the determination of whether an accused is ‘most responsible’ requires a large amount of discretion.²²⁸

175. The SCC went on to describe why ‘most responsible’ should be treated not as a jurisdictional requirement but instead as investigatorial and prosecutorial policy. The main reason the SCC cited for this conclusion was the competence afforded to the CIJs and Co-Prosecutors under ECCC Law:

The Co-Investigating Judges are responsible for the conduct of investigations and are required to be independent in the performance of their functions. Article 5(3) of the UN-RGC Agreement provides that it is ‘understood’ that ‘the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes [...] that were committed during the period from 17 April 1975 to 6 January 1979.’ Thus, the Co-Investigating Judges are vested with authority to determine whether a particular investigation falls within the scope of the term ‘most responsible.’ The Co-Prosecutors are responsible for the conduct of prosecutions. They, too, are required to be independent in the performance of their functions, and are subject to an identically worded ‘understanding’ in Article 6(3) of the UN-RGC Agreement to the effect that ‘the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible.’ It follows that the Co-Prosecutors are also vested with authority to determine whether a particular prosecution falls within the scope of the term ‘most responsible.’²²⁹

²²⁷ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 61.

²²⁸ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 62.

²²⁹ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 64.

176. The SCC then wrongly discussed the referral system at the ICTY, whereby a case can be referred to national authorities at any time after the indictment and prior to the commencement of trial, noting that ‘the criteria for such allocation, “the gravity of the crimes charged and the level of responsibility of the accused,” operate not as jurisdictional bars but as prosecution policy.’²³⁰ As discussed below, the ICTY referral system is inapplicable at the ECCC.²³¹

177. The SCC went on to cite *Prosecutor v. Brima*, in which the Appeals Chamber of the Special Court of Sierra Leone held that:

The only workable interpretation of the term ‘greatest responsibility’ is that ‘it guides the Prosecutor in the exercise of his prosecutorial discretion’ and that it would be ‘unreasonable and unworkable to suggest that the discretion is one that should be exercised by the Trial Chamber or the Appeals Chamber at the end of the trial.’²³²

The focus of both the Appeals Chamber at the SCSL and the SCC at the ECCC is dealing with personal jurisdiction at the end of a trial. This is not the question before the CIJs in Case 004.

178. For these reasons, the SCC concluded that the term ‘most responsible’ constitutes investigatorial and prosecutorial policy which guides the CIJs and Co-Prosecutors in exercising their independent discretion in investigating and prosecuting the most serious offenders falling within the ECCC’s jurisdiction, and does not constitute a jurisdictional requirement itself.²³³

179. For similar reasons, the SCC concluded that the term ‘senior leaders’ is also not a jurisdictional requirement. It noted that the term is ‘sufficiently flexible that it may not necessarily be limited to former members of the CPK Central and/or Standing Committees’ and that ‘such flexibility inherent in the definition of ‘senior leaders’ indicates that the term does not operate as a jurisdictional requirement of the ECCC.’²³⁴

²³⁰ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 71, citing ICTY Rules of Procedure and Evidence, Rule 11bis (C). See also: ICTR Rules of Procedure and Evidence, Rule 11bis (C).

²³¹ See *infra*, paras 227 to 228.

²³² Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 73, citing: SCSL, *Prosecutor v. Brima* (SCSL-2004-16-A), Judgment, 22 February 2008.

²³³ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 74.

²³⁴ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 76.

180. In Case 002, all parties' arguments in relation to personal jurisdiction were made prior to the SCC finding in Case 001 and the issue of justiciability was not considered in Case 002.²³⁵ Finally, Cases 003 and 004 have not reached the SCC such that the SCC opinion may there be challenged.

ii. Submissions

181. As set out above, the Defence submits that there are exceptional reasons for the CIJs to depart from the SCC's opinion that the terms 'senior leader' and 'those who were most responsible' are non-jurisdictional criterion: a. the CIJs are not required to follow the SCC's views; b. the CIJs cannot immediately defer to the SCC opinion without violating Mr YIM Tith's right to be heard; and c. there are serious errors in the SCC's reasoning. Taken together, there are clear exceptional reasons for the CIJs to depart from the SCC's opinion and deem that the terms 'senior leader' and 'those who were most responsible' are justiciable. Consequently, when the terms 'senior leader' and 'those who were most responsible' are analysed, the only possible conclusion is that Mr YIM Tith does not fall under the Personal Jurisdiction of the ECCC.

(a) The CIJs are Not Required to Follow the SCC's Opinion

182. The CIJs are not required to follow the SCC's opinion regarding the terms 'senior leaders' and 'those who were most responsible.' Despite disagreeing with the SCC's position on this issue,²³⁶ the CIJs stated in Case 004/1 that they 'fe[lt] bound by reason of practical judicial deference to the Court's supreme appellate body to follow the substance of the SCC case law.'²³⁷

183. It must be emphasised that the ECCC is not subject to a formal doctrine of *stare decisis* and there is no principled reason for the CIJs to adopt a posture of practical judicial deference to the SCC. Indeed, the ICIJ has stated that '[i]n civil law systems, judges are

²³⁵ Case 002, *Co-Prosecutors Rule 66 Final Submission (Public Redacted Version)*, 16 August 2010, D390, paras 1294 to 1296; *Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations*, 1 September 2010, D390/1/2/1.3, paras 106 to 108; *[Khieu Samphan's] Preliminary Objections Concerning Jurisdiction*, 14 February 2011, E46, paras 12 to 15; *Directions to Parties concerning Preliminary Objections and Related Issues*, 5 April 2011, E51/7; as noted by the Trial Chamber in the Case 002/01 Judgement, 7 August 2014, E313, para. 13.

²³⁶ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 10 and 34. Case 004, *Consolidated Decision on Meas Muth's Requests on Personal Jurisdiction*, 1 February 2016, D298.1, para. 30.

²³⁷ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 10.

bound only by the law; the common law principle of *stare decisis* does not apply.²³⁸ The CIJs have nonetheless said that they would not feel bound by the SCC's interpretation in a case where 'exceptional reasons for a disagreement and for taking an openly dissenting stance' exist.²³⁹ Even this threshold is excessively high. The jurisprudence cited by the Trial Chamber for dissenting from earlier jurisprudence is that of the ICTY Appeals Chamber, which adopted a lower threshold, requiring only 'cogent reasons' for the Chamber to express its own view.²⁴⁰ Nonetheless, the Defence will set out reasons for the CIJs to depart from the SCC's opinion that the terms 'senior leader' and 'those who were most responsible' are non-jurisdictional criterion on an 'exceptional reasons' basis.

184. The CIJs should be especially reluctant to exercise judicial deference in a situation where the judicial organs of the court fundamentally disagree over the bounds of the ECCC's personal jurisdiction. While the Trial Chamber acknowledges that there is no clear definition of either 'senior leaders' or 'those who were most responsible,' it does not conclude that this ambiguity precludes either term from being interpreted as a jurisdictional requirement.²⁴¹

(1) The CIJs cannot immediately defer to the SCC opinion without violating Mr YIM Tith's right to be heard

185. An exceptional reason that justifies departing from the SCC's view is that to do otherwise would violate Mr YIM Tith's right to be heard. Although the Defence is aware of the ICIJ's view that interpretation of the terms 'senior leader' and 'most responsible' has been litigated previously at the ECCC,²⁴² the Defence for Mr YIM Tith was not heard by the SCC before it made its findings and, as stated above, no party raised the issue before the SCC.²⁴³

²³⁸ Case 003, *Decision on MEAS Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict*, D87/2/1.7/1, 5 April 2016, para. 13.

²³⁹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 10.

²⁴⁰ Case 001, *Judgement*, 26 July 2010, E188, fn 979, citing: ICTY, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-A), *Judgement*, 17 December 2004, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions, paras 1 and 13, in which they considered that 'no cogent reasons existed to depart from' the earlier jurisprudence; Case 002, *Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 69; Case 002, *Decision on the Applicability of Joint Criminal Enterprise*, 12 September 2011, E100/6, para. 22; Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 91.

²⁴¹ Case 001, *Judgement*, 26 July 2010, E188, para. 19.

²⁴² Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 48.

²⁴³ *Supra*, para. 180.

186. The right to be heard is enshrined in Article 14(1) of the ICCPR, which provides that in the determination of any criminal charge, a person shall be entitled to a fair hearing,²⁴⁴ and under Article 14(3) shall be entitled as a minimum guarantee, in full equality, to be tried in his or her presence.²⁴⁵ The UN Human Rights Committee has recognised that the principle of natural justice encapsulated in the *audi alteram partem* rule is protected by Article 14(1) of the ICCPR,²⁴⁶ meaning literally that justice ‘requires the other side to be heard’.²⁴⁷ The maxim of *audi alteram partem* is also protected in Article 6(1) of the ECHR, as illustrated in the ECtHR case of *Quadrelli v. Italy*, wherein the Grand Chamber found an infringement of Article 6 had occurred when the Italian Supreme Court had failed to consider a memorandum of the defence.²⁴⁸
187. In this regard, the Appeals Chamber of the Special Tribunal for Lebanon – another court based on the civil law system – has expounded on the risks of determining issues of fundamental importance to the proceedings without hearing from the Defence, in the context of a special procedure that was introduced in Rules 68(G) and Rule 176bis(C) of the Rules of Procedure and Evidence of the Tribunal. In proceedings *in absentia*, the Pre-Trial Judge was permitted to submit to the Appeals Chamber certain preliminary questions on interpretation of the Agreement, Statute and Rules pursuant to Rules 68(G)²⁴⁹ and 176bis(C) in order for him to ‘examine and rule’ on an indictment at a stage when there is no accused.²⁵⁰ In considering whether to introduce Rule 176bis(C), the Appeals Chamber warned of the dangers of allowing rulings to be made without first

²⁴⁴ ICCPR, Article 14(1).

²⁴⁵ ICCPR, Article 14(3)(d).

²⁴⁶ UN HRC, *Hermosa v. Peru*, Communication 203/1986, CCPR/C/34/D/203/1986 (1988), individual opinion of Committee members Joseph Cooray, Vojin Dimitrijevic and Rajsoomer Lallah, para. 3: ‘The principles of a fair hearing, known in some systems as the rules of natural justice, and guaranteed under article 14, paragraph 1 of the Covenant, include the concept of *audi alteram partem*.’

²⁴⁷ Black’s Law Dictionary, 9th Edition, 2009, p. 1819: ‘Hear the other side. No one should be condemned unheard.’

²⁴⁸ ECtHR, *Quadrelli v. Italy*, no. 28168/95, 11 January 2000, para 34. The ECtHR cited a previous Italian case, stating: ‘The right to submit observations guaranteed to the parties by Article 6(1) of the Convention can only be regarded as effective if these observations are really “heard”, that is to say, duly examined by the court seised’, citing ECtHR, *Artico v. Italy*, judgment of 13 May 1980, Series A no 37, page 16, para. 33.

²⁴⁹ Rule 68(G) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon provides that: ‘The Pre-Trial Judge may submit to the Appeals Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that he deems necessary in order to examine and rule on the indictment.’

²⁵⁰ STL Rules of Procedure and Evidence, Rule 176bis(c): ‘The Appeals Chamber shall issue an interlocutory decision on any question raised by the Pre-Trial Judge under Rule 68(G), *without prejudging the rights of any accused*.’ [Emphasis added].

hearing from the accused, the Appeals Chamber emphasising the ‘exceptional nature’ of the procedure.²⁵¹

[T]here are significant reasons for the normal practice of refraining from giving judgment, even on interpretation of a statute, in the absence of a specific factual context. The experience of the law is that general observations frequently require modification in the light of particular facts, which can provide a sharper focus and trigger a more nuanced response.²⁵²

188. Moreover, the application of Rules 68(G) and 176bis(C) was originally premised on the absence of counsel representing the Accused person. The Appeals Chamber considered that it would be inappropriate to use the special procedure under Rules 68(G) and 176bis(C) after counsel for the Accused had been appointed, as this ‘would raise serious questions about the fairness of the proceedings.’²⁵³ The Appeals Chamber considered that the Accused ‘need to be heard before the Appeals Chamber can make *fundamental decisions concerning the applicable law of the Tribunal that directly affect their case*. To deny them that right would make the proceedings unfair.’²⁵⁴
189. Furthermore, the detrimental effect on fairness to Mr YIM Tith of not being heard is amplified by the fact that the issue in question is one of fundamental importance concerning the ECCC’s applicable law that directly affects Mr YIM Tith’s case. Prior ECCC practice has given Charged Persons the right to be heard on matters of law which directly affect them. In Cases 003 and 004, the ICIJ invited the parties to submit observations on whether, under customary international law applicable between 1975 and 1979, an attack by a state or organisation against members of *its own* armed forces may amount to an attack directed against a civilian population for the purpose of Article 5 of the [Establishment] Law.²⁵⁵
190. Whether the Co-Prosecutors are able to choose to indict any former member of the Khmer Rouge without judicial oversight is obviously central to Case 004. The CIJs cannot defer

²⁵¹ STL, Appeals Chamber, *Decision on the Pre-Trial Judge’s Request Pursuant to Rule 68(G)*, 29 March 2012, STL-11-01/PT/AC/F0171/20120329/R119415-R119430/EN/pvk, para. 27.

²⁵² STL, Appeals Chamber, *Decision on the Pre-Trial Judge’s Request Pursuant to Rule 68(G)*, 29 March 2012, STL-11-01/PT/AC/F0171/20120329/R119415-R119430/EN/pvk, para. 28.

²⁵³ STL, *Decision on the Pre-Trial Judge’s Request Pursuant to Rule 68(G)*, 29 March 2012, STL-11-01/PT/AC/F0171/20120329/R119415-R119430/EN/pvk, para. 34.

²⁵⁴ STL, *Decision on the Pre-Trial Judge’s Request Pursuant to Rule 68(G)*, 29 March 2012, STL-11-01/PT/AC/F0171/20120329/R119415-R119430/EN/pvk, para. 35. [Emphasis added]. Citing the Accused’s right to a fair hearing under Article 16(2) of the Statute.

²⁵⁵ *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs*, 19 April 2016, D306 (emphasis in original).

their own view on this issue to that of the SCC without violating Mr YIM Tith's right to be heard.

(b) There are Serious Errors in the SCC's reasoning

191. There are serious errors in the SCC's reasoning which provide exceptional reasons to depart from the SCC opinion: (1) it ignores the position of the parties to the UN-RGC Agreement, the overriding instrument upon which the ECCC is based; (2) the SCC's view contradicts the plain reading of the terms of personal jurisdiction; (3) the SCC's opinion is inapposite (4) it selectively applies international jurisprudence, primarily through inappropriate analogies to ICTY case law; (5) the SCC erred in concluding that the terms are 'mere prosecutorial and judicial guidance'; and (6) it violates the principle of legal certainty. Each of these exceptional reasons will be taken in turn.

(1) The SCC's Opinion Ignores the Position of the Parties to the UN-RGC Agreement

The negotiations between the UN and RGC are the primary interpretive guidance

192. The primary interpretative guidance in considering an individual to be a 'senior leader' or a 'person most responsible' in the context of the ECCC jurisdiction is and must be the negotiating history of the bi-lateral agreement establishing the ECCC and the subsequent relevant comments of the parties to that agreement. The terms on which the RGC and the UN agreed to establish the ECCC expressly limit the tribunal's personal jurisdiction to 'senior leaders' and 'those who were most responsible' and the Defence submits that the negotiation history demonstrates that these terms are genuine requirements of personal jurisdiction, justiciable and not reducible to mere guidelines.
193. The UN-RGC Agreement is a bilateral treaty between the Royal Government of Cambodia and the United Nations, as confirmed by Article 2(2) of the UN-RGC Agreement, which states, 'the Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.'²⁵⁶ As such, the UN-RGC Agreement must be interpreted according to the VCLT.

²⁵⁶ UN-RGC Agreement, Article 2(2).

194. Article 31(1) of the VCLT states that ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’²⁵⁷ As such, an interpretation of the ‘ordinary meaning’ of the terms ‘senior leaders’ and ‘most responsible’ requires a contextual approach with reference to the object and purpose of the UN-RGC Agreement.
195. Further interpretative context can be gleaned from an examination of the negotiations leading up to the establishment of the ECCC. Where the ordinary meaning of treaty terms is unclear, Article 31 and Article 32 of the VCLT outline the additional guidance that must be utilized in order to better discern the intended meaning of the terms. The UN-RGC Agreement is a bilateral treaty to which the ECCC itself is not party; rather, the ECCC was established by the Agreement.²⁵⁸ As such, the existing jurisprudence of the ECCC is of limited interpretative value, while the intentions of both the UN and the RGC must be given considerable weight. Per Article 32 of the VCLT, a special meaning shall be given to a term if it is established that the parties so intended.²⁵⁹ Together with the context of the treaty, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account.²⁶⁰

The VCLT is directly applicable to the interpretation of the terms ‘senior leader’ and ‘those who were most responsible’

196. The Defence is cognisant of the ICIJ’s view that:

[W]hile the Terms are defined identically in both Article 1 of the ECCC Law and Article 1 of the UN-RGC Agreement, it is the ECCC Law which regulates proceedings before the ECCC. As a national law, the first version of which actually pre-dated the Agreement, the ECCC Law is not directly subject to the rules of interpretation set forth in Articles 31 and 32 of the VCLT. However, the Terms as defined in the ECCC Law are based on Article 1 of the UN-RGC Agreement, which is a bilateral treaty and according to its Article 2(2) subject to the interpretation rules set forth in the VCLT. In that sense, the interpretation of the *Agreement* informs the interpretation of the ECCC Law but, again, it would in my view be incorrect to subject the ECCC Law as such *directly* to any scrutiny under the VCLT. The impact of the VCLT is thus indirect at best and

²⁵⁷ VCLT, Article 31(1).

²⁵⁸ UN-RGC Agreement, Articles 1 and 2.

²⁵⁹ VCLT, Article 32.

²⁶⁰ VCLT, Article 32.

it cannot, for example, supersede any clearly opposing Cambodian law not in line with the VCLT or the Agreement.²⁶¹

197. As set out above, the Cambodian National Assembly approved the UN-RGC Agreement which 'is parallel to the opinion stated in the [Establishment] Law.'²⁶² Further, the Cambodian National Assembly approved that the '[The UN-RGC Agreement] will have equal status to the domestic law of Cambodia after its ratification.'²⁶³ Although it is not in dispute that there was an Establishment Law promulgated in 2001, this was amended in 2004. It is the 2004 Establishment Law which is used at the ECCC and was approved by the Cambodian National Assembly as equal status with the UN-RGC Agreement.
198. Since the UN-RGC Agreement has equal status to the domestic law of Cambodia and is parallel to the opinion stated in the Establishment Law, then Article 2(2) of the Agreement has equal status in Cambodian domestic law, namely that 'The Vienna Convention on the Law of Treaties...applies to the Agreement.' Accordingly, contrary to the ICIJ's view, the Defence submits that the VCLT directly applies to the interpretation of the terms 'senior leader' and 'those who were most responsible.'²⁶⁴

Statements and practice of the parties to the UN-RGC Agreement – both preceding and subsequent to the Agreement – are relevant sources of interpretation of the Agreement

199. The negotiation process between the RGC and the UN created an Agreement to ensure that national reconciliation and justice was sought; in particular, the issue of jurisdiction was to reflect the sovereignty of Cambodia.²⁶⁵ During the negotiation process, both the RGC and the UN firmly and willingly emphasised the value of preserving peace and reconciliation by expressing the concerns about the insecurity that may arise from any charges brought by the ECCC proceedings that may jeopardise the national reconciliation, which had been very hard to recover.²⁶⁶

²⁶¹ *Consolidated Decision on Meas Muth's Requests on Personal Jurisdiction*, 1 February 2016, D298.1, para. 31.

²⁶² 2004 National Assembly Approval, p. 2.

²⁶³ 2004 National Assembly Approval, p. 2.

²⁶⁴ Cambodia signed the VCLT on 23 May 1969. Accessible at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

²⁶⁵ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 471.

²⁶⁶ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 480.

200. The RGC has been consistent in its position that the ECCC must not risk national reconciliation, stability, peace and security. This RGC position has been clear since January 1999 when the Cambodian civil war came to an end:

National reconciliation and peace are indispensable requirement of the Cambodian nation and people, and the trials of offenders to find justice for Cambodian are the goal and obligation to be fulfilled. [...] There must be due consideration before taking any action, avoiding any action that would jeopardize national reconciliation in Cambodia. **We need both peace and justice.**²⁶⁷

201. The UN recognised and shared the concerns of the RGC that the process of seeking justice can impact stability, reconciliation and peace. As a result, the two purposes of the ECCC Agreement include 'justice' and 'reconciliation' which are prominent in the preamble to the Agreement.²⁶⁸

WHEREAS in the same resolution the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security.²⁶⁹

202. During the first stage of negotiations between the RGC and the UN, the word is put 'Senior' was put in front of 'Leader' in order to limit the ECCC's personal jurisdiction to only a few leaders.²⁷⁰ These Leaders refers only to the members of the Party Central Committee and the members of the Standing Committee of the Party such as: Pol Pot, Nuon Chea, Khieu Samphan, Son Sen, Ieng Sary, Ke Pauk, Ieng Thirith, Van Rith, Ta Mok.²⁷¹
203. During the RGC/UN negotiations, Kaing Guek Eav alias Duch, a former chief of the security office S-21, was found alive and later detained in a military custody court.²⁷² Following the arrest and detention of Duch, both the RGC and the UN were of the view

²⁶⁷ Identical letters dated 21 January 1999 from the Permanent Representative of Cambodia to the United Nations addressed to the Secretary General and the President of the Security Council, Annex II, 22 January 1999, D324.11, pp 3-6. [Emphasis in original]. Further, in 1999, Prime Minister Samdech Hun Sen articulated: 'We have never rejected the accountability of the Khmer Rouge leaders for the crimes of genocide in Cambodia. We just want, however, to caution that any decision to bring the Khmer Rouge leaders to justice must also take into full account Cambodia's need for peace, national reconciliation, rehabilitation and economic development for poverty reduction. Therefore, if improperly and heedlessly conducted, the trials of Khmer Rouge leaders would panic other former Khmer Rouge officers and rank and file, who have already surrendered, into turning back to the jungle and renewing the guerrilla war in Cambodia.' Thomas Hammarberg, 'Efforts to Bring the Khmer Rouge Leaders to Justice: Discussions Between the Cambodian Government and the UN, 1999.

²⁶⁸ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 481.

²⁶⁹ UN-RGC Agreement, preamble.

²⁷⁰ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 472.

²⁷¹ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 472.

²⁷² Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 473.

that along with the senior leaders, Duch should also be tried at the ECCC.²⁷³ Duch was considered to be the most responsible in the sense that he played a key role in committing the crimes with *de facto* authority.²⁷⁴ Consequently, the phrase ‘most responsible person’ was included only for Duch.²⁷⁵ If Duch had not been found, it is clear that the phrase ‘most responsible person’ will not have appeared in the Agreement.²⁷⁶ The intention of the RGC and the UN is unambiguous. Individuals who fall within the personal jurisdiction of the ECCC are only the highest-ranking senior leaders and Duch.

204. The narrow personal jurisdiction issue was raised by representatives of the RGC in the National Assembly session to discuss and approve the Draft Law on the Establishment of the ECCC, which clearly states that ‘the targeted persons must be a small number, not broad, targeting only senior leaders.’²⁷⁷ This position has repeated by the RGC.
205. Subsequent statements and practice of the parties to a treaty are also relevant sources of interpretation of the treaty pursuant to Articles 31 and 32 of the VCLT. Article 31(3) of the VCLT provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. Furthermore, under Article 32, recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation.
206. In relation to Cases 003 and 004 – after the Co-Prosecutors issued public statements on 8 December 2008²⁷⁸ and 5 January 2009²⁷⁹ which described the reasons of the disagreement over filing the Third Introductory Submission (the disagreement taking place on 18

²⁷³ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, paras 473 and 542.

²⁷⁴ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 474.

²⁷⁵ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, paras 473 and 542.

²⁷⁶ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 473.

²⁷⁷ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 475.

²⁷⁸ ECCC, Statement of the Co-Prosecutors, 8 December 2008. *See also: Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission* (7 September 2009, D1/1), *Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, para. 47.

²⁷⁹ ECCC, Statement of the Co-Prosecutors, 5 January 2009. *See also: Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission* (7 September 2009, D1/1), *Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, para. 47.

November 2008)²⁸⁰ – Prime Minister Samdech Hun Sen expressed the RGC’s unequivocal opposition to Cases 003 and 004 on the grounds that should the ECCC pursue Cases 003 and 004, Cambodia would be brought back to civil war.²⁸¹ Prime Minister Samdech Hun Sen’s opposition came nearly two years after the Co-Prosecutors’ disagreement over filing the Third Introductory Submission was publicly announced. As set out above, it is clear that the NCP was acting pursuant to the personal jurisdiction as negotiated to create the Agreement and the Establishment Law. Further, it is clear that Prime Minister Samdech Hun Sen was reaffirming what was agreed upon during the negotiations to create the Agreement and the Establishment Law.

207. Other government officials have made similar statements:

- a. ‘Foreign Minister Hor Namhong told reporters following the meeting that Prime Minister Samdech Hun Sen considered pending investigations in Cases 003 and 004 a threat to the Kingdom’s “stability”. Samdech [Hun Sen] clearly affirmed that Case 003 will not be allowed,’ he said. ‘We have to think about peace in Cambodia or the court will fail.’ ‘The court will try the four senior leaders successfully and then finish with Case 002.’²⁸²
- b. ‘The 2003 agreement between the government and the UN that established the tribunal empowers the court to prosecute “senior leaders” and those “most responsible” for crimes committed under Democratic Kampuchea. By pursuing possible prosecutions in Cases 003 and 004, court officials were violating this, Minister of Information Khieu Kanharith said yesterday.’²⁸³
- c. Minister of Information, Khieu Kanharith, is quoted: ‘If we continue the third case, we should be wrong track from the original agreement between the UN and Cambodian government, which enshrined about trial for the senior and most responsible leaders only. It also affected the “stability and national

²⁸⁰ Case 004/01, *Final Submission Concerning Im Chaem Pursuant to Internal Rule 66*, 27 October 2016, D304/1, para. 2; Case 004/02, *Final Submission Concerning Ao An Pursuant to Internal Rule 66*, 18 August 2017, D351/4, para. 2.

²⁸¹ Zsombor Peter and Phorn Bopha, ‘No More Khmer Rouge Trials, Premier Tells Ban,’ Cambodia Daily, 28 October 2010, A157/2/1/1.1.6.

²⁸² Cheang Sokha & James O’Toole, ‘Hun Sen shoots from the lip,’ Phnom Penh Post, 28 October 2010, A157/2/1/1.1.2.

²⁸³ Cheang Sokha & James O’Toole, ‘Hun Sen shoots from the lip,’ Phnom Penh Post, 28 October 2010, A157/2/1/1.1.2.

reconciliation” for the country. If the members of Khmer Rouge flee to struggle in jungle, and who will be responsible for that issue.’²⁸⁴

Any risk that the ECCC will bring Cambodia back to civil war would be a breach of the Agreement. The RGC is responsible for the security of Cambodia and as such is the most prominent voice to determine the security of Cambodia.

208. The UN has remained silent on the RGC’s subsequent practice.

209. The International Court of Justice has held, in the *Preah Vihear* case,²⁸⁵ that where the circumstances call for a reaction, and where a party has been able to speak on an issue but has remained silent within a reasonable period of time, the silent party is taken to have acquiesced.²⁸⁶

It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgment of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*²⁸⁷

210. In the present instance, the RGC has set forth its position on the personal jurisdiction of the ECCC. As this issue determines who can be prosecuted at the ECCC, should the UN disagree with the RGC, a reaction is required. The UN has been able to speak on this issue but has remained silent. The UN’s silence amounts to an acquiescence of the RGC’s interpretation of ‘senior leaders of Democratic Kampuchea and those who were most responsible.’

211. The practice of the international component of the ECCC cannot be taken into account as subsequent practice of the Agreement as the international component of the ECCC is not

²⁸⁴ Chhorng Long Heng, ‘UN Secretary General talks on regional and bilateral issues,’ Southeast Asia, 31 October 2010, A157/2/1/1.1.5.

²⁸⁵ ICJ, *Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand).

²⁸⁶ ICJ, *Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Judgement, 15 June 1962, p. 23.

²⁸⁷ An English translation reads: ‘He who is silent is taken to have agreed if he should have been able to speak.’

a party to the Agreement, but was rather created by the Agreement, and has a mandate to implement the Agreement.²⁸⁸

212. The ICP asserts that he ‘considers there to be no reason to believe that indicting Yim Tith would compromise justice, national reconciliation, stability, peace, or security in Cambodia.’²⁸⁹
213. It appears that the ICP, in calling for Mr YIM Tith to be indicted, is inviting Cambodia to risk its stability, peace and security. In doing so, the ICP is working against the aims of the ECCC, as set out in the preamble of the Agreement, and as such acting *ultra vires*.
214. Similarly, the international judges of the PTC are inviting Cambodia to risk its stability, peace and security, and acting *ultra vires*, by calling for Cambodian courts to try Charged Persons who were under investigation:

The inability to reach a consensus in this Chamber on the ECCC's personal jurisdiction [...] must not prevent the serious allegations [...] from being addressed before a national court, since Cambodia has inherent jurisdiction over all Khmer Rouge-era cases of which the ECCC is not or cannot be seised.²⁹⁰

The Report of the Group of Experts must not be given undue weight in interpreting the UN-RGC Agreement

215. The Report of the Group of Experts dated 18 February 1999 should not be taken as *prima facie* representative of the intentions of the RGC in entering into the UN-RGC Agreement. Its persuasive value is limited since its conclusions are not reflective of the final position of the parties to the Agreement.²⁹¹
216. The mandate of the Group of Experts was formed on 12 December 1997, prior to the end of the Cambodian civil war.²⁹² Part of the purpose in establishing a tribunal was to help

²⁸⁸ UN-RGC Agreement, Articles 1 and 2.

²⁸⁹ ICP's Final Submission, D387/2, para. 1153.

²⁹⁰ Case 004/01, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, para. 340: ‘The inability to reach a consensus in this Chamber on the ECCC's personal jurisdiction over IM Chaem must not prevent the serious allegations against her from being addressed before a national court, since Cambodia has inherent jurisdiction over all Khmer Rouge-era cases of which the ECCC is not or cannot be seised.’

²⁹¹ The Report of the Group of Experts is cited by the Trial Chamber in the Case 001 Judgement at paragraphs 19-21; the SCC cites the Report of the Group of Experts in the Case 001 Appeal Judgement at paras. 48-50.

²⁹² *Situation of human rights in Cambodia*, G.A. Res 52/135, U.N. G.A.O.R., 52nd Sess., 70th Plenary Mtg., Agenda Item 112(b), U.N. Doc. A/Res/52/135 (27 February 1998).

end the civil war and bring peace and reconciliation to Cambodia.²⁹³ The Group of Experts left Cambodia, at the latest, by 24 November 1998.²⁹⁴ By the time the Report of the Group of Experts was published on 18 February 1999, the Cambodian civil war had ended (on 25 December 1998),²⁹⁵ and the aims of the RGC were refocused in order to maintain peace and build reconciliation within Cambodia. Any tribunal would have to align with these new aims, as is evident from the RGC's aide-memoire dated 21 January 1999 onwards.²⁹⁶ Accordingly, by the time the Report of the Group of Experts was published, its recommendations were outdated.²⁹⁷

217. The Group of Experts had a broad mandate, yet its fifth and final conclusion reached with respect to targets of investigation for a future tribunal is that the scope the Experts discuss 'should be no more than a guide for prosecutors and not form an element of the jurisdiction of any tribunal.'²⁹⁸ This directly contradicts the eventual terms of Article 2 of the UN-RGC Agreement, explicitly stating 'the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.'²⁹⁹ Further, the conclusion reached by the Group of Experts contradicts the position of the RGC which sees personal jurisdiction of the ECCC as a justiciable matter.³⁰⁰ The fact that Article 2 of the Agreement, which is in line with the position of the RGC (which was not opposed by the UN), directly contravenes the Experts' conclusion suggests that the Report of the Group of Experts must be treated with caution as a source for treaty interpretation.

²⁹³ 'Both this resolution and resolution 1997/49 of the Commission on Human Rights requested me in collaboration with the Office of the High Commissioner for Human Rights to examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law including the possibility of appointing a group of experts to evaluate the existing evidence and propose further measures as a means of bringing about national reconciliation strengthening democracy and addressing the issue of individual accountability.' *Letter from Secretary General Annan to President of the Security Council*, 31 July 1998, D324.8; *Letter from Secretary General Annan to President of the General Assembly*, 31 July 1998, D324.9.

²⁹⁴ *Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, 16 March 1999, D324.15, para. 7.

²⁹⁵ *See supra*, para. 118.

²⁹⁶ *See supra*, para. 118.

²⁹⁷ *Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, 16 March 1999, D324.15, para. 105.

²⁹⁸ Report of the Group of Experts, para. 111.

²⁹⁹ UN-RGC Agreement, Article 2(1).

³⁰⁰ On 4 and 5 October 2004, the Cambodian National Assembly debated and approved numerous aspects of the Agreement and Establishment Law, which included: 'H.E. Sok An: the law states that it is the authority of the EC judges, who shall have the power to decide the targets and consider who shall be indicted or prosecuted.' 2004 National Assembly Approval, p. 25.

218. The Report of the Group of Experts may provide indications as to the type of tribunal that was conceived in 1997, but this is factually distinct from the agreement the RGC and UN ultimately reached in October 2004.³⁰¹ The five conclusions reached by the Group of Experts ultimately cannot be taken as a reflection of the intentions of the UN or RGC in entering into the Agreement.³⁰²

(2) The SCC's Interpretation of the Terms 'Senior Leaders' and 'Those who were Most Responsible' Contradicts the Plain Meaning of Both the UN-RGC Agreement and the Establishment Law

219. The SCC's interpretation of the terms 'senior leaders' and 'those who were most responsible' contradicts the plain meaning of both the UN-RGC Agreement and the Establishment Law pursuant to Article 31 of the VCLT. A textual interpretation of Article 2(1) of the ECCC Law explicitly includes the terms 'senior leader' and 'most responsible' in its description of the ECCC's personal jurisdiction. This interpretation is in line with Article 31 of the Vienna Convention, stating that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'³⁰³ The primary way to examine the intention of the parties is to look at the ordinary meaning of the terms.

220. According to Article 2(1) of the UN-RGC Agreement, 'the Extraordinary Chambers have jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement'.³⁰⁴ The plain and ordinary meaning of this provision is that the two terms – 'senior leaders' and 'most responsible' – are genuine jurisdictional requirements of the ECCC assented to by the UN and the RGC.

221. The SCC failed to give sufficient weight to an ordinary reading of the terms of personal jurisdiction, in its interpretation of the language in the UN-RGC Agreement and the Establishment Law to create the category of 'Khmer Rouge official' which it concluded was the extent of the ECCC's personal jurisdiction. The SCC's creative interpretation of

³⁰¹ On 19 October 2004, Cambodia ratified the Agreement. Instrument of Ratification on the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 19 October 2004.

³⁰² Report of the Group of Experts, paras 106 to 111. *See supra*, para. 120.

³⁰³ VCLT, Article 31.

³⁰⁴ UN-RGC Agreement, Article 2(1). [Emphasis added.]

the terms suggests a teleological approach, the SCC interpreting the law to fit a certain interpretation of personal jurisdiction.

222. Further, the CIJs have held that the unique contours of the ECCC make it ‘a prime example for the need for interpretational judicial restraint.’³⁰⁵ Interpretational judicial restraint would favour an ordinary reading of the terms of personal jurisdiction rather than the SCC’s teleological approach of interpreting the law to fit a certain interpretation of personal jurisdiction.

(3) The SCC’s Opinion is Inapposite

223. The SCC’s opinion was expressed in the circumstances of Case 001 and does not establish a precedent that must be followed by the CIJs in Case 004. The SCC’s finding was made after the end of a trial, the Defence not having raised the issue of personal jurisdiction before the CIJs at the pre-trial stage.³⁰⁶ The SCC held that ‘[w]hether an accused is a senior leader or one of those most responsible is exclusively a policy decision for which the Co-Investigating Judges and Co-Prosecutors, and not the Trial Chamber, are accountable.’ The SCC’s finding therefore was not addressing the scenario of whether a decision by the CIJs to indict a Charged Person, is justiciable by the Trial Chamber prior to the start of the trial, after it has been reviewed by the PTC.
224. The SCC found that personal jurisdiction is a matter for prosecutorial and judicial discretion on the basis that ‘there is no objective method for the Trial Chamber to decide on, compare, and then rank the criminal responsibility of all Khmer Rouge officials.’ This reasoning is solely applicable to the Trial Chamber which has to work to within the contours of the Case File. The OCIJ can create an objective method upon which to decide on who is most responsible – and have done so in Case 004/01.³⁰⁷
225. The Defence submits that the CIJs must depart from the SCC’s view also because the SCC ignored the provisions of Rule 98(7). This rule states that ‘[w]here the Chamber

³⁰⁵ ‘The case of a special court with a narrowly tailored personal temporal and subject matter jurisdiction based on contentious negotiations between a national government and the international community in a post conflict transitional scenario which began operations almost 30 years after the events in question is a prime example for the need for interpretational judicial restraint.’ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 26 to 27.

³⁰⁶ Case 001, *Appeal Judgement*, 3 February 2012, F28, paras 21 to 22. Further, during the appeal hearing, the *Duch* defence did not address the issue of whether the terms ‘senior leaders’ and ‘those who were most responsible’ are requirements of personal jurisdiction (para. 26).

³⁰⁷ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 37 to 39.

considers that the crimes set out in the Indictment do not fall within the jurisdiction of the ECCC, it shall decide that it does not have jurisdiction in the case'.³⁰⁸ The provisions of Rule 98(7) are unambiguous, and would make little sense if the parameters of 'senior leaders' and 'most responsible' were not justiciable by the Trial Chamber in some form. The SCC's failure to account for the relevance of Rule 98(7) further suggests that the SCC acted in accordance with a teleological imperative.

226. The SCC further asserts that interpreting 'most responsible' as a jurisdictional requirement would 'indirectly permit a defence of superior orders and would frustrate the express provisions of [...] Article 29'.³⁰⁹ The SCC's view is inapposite and misconceived. Making 'most responsible' a jurisdictional requirement would not grant a defence of superior orders.³¹⁰ It prevents the prosecution of individuals outside the expressly agreed jurisdiction of the ECCC. Where there is a potential defence of superior orders, the ECCC should consider whether this has a material impact on the assessment of 'most responsible.'

(4) The SCC Selectively Applies International Jurisprudence

227. The SCC erred in relying primarily on case law from the ICTY in finding that 'most responsible' is an element of prosecutorial discretion rather than personal jurisdiction. The SCC selectively applies international jurisprudence in a way that neatly fits with its conclusion, ignoring the fundamental differences in the nature and competence of the ECCC and other international tribunals. While recourse to international jurisprudence as a means of supplemental interpretation is in accordance with the VCLT, the intention of the parties, as described above, is the primary source of interpretation and must not be ignored. While the ICTY and ICTR are *ad hoc* tribunals, often faced with similar legal questions as those faced by the ECCC, both were established through UN Security Council Resolutions;³¹¹ their creation was the result of a unilateral decision by the UN Security Council acting pursuant to Chapter VII of the UN Charter. The ECCC, however, was set up through a bilateral agreement and not through a UN mandate. Because the issue of a tribunal's personal jurisdiction is directly related to the structure and mandate

³⁰⁸ Rule 98(7).

³⁰⁹ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 62.

³¹⁰ The CIJs recognised this in Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, fn 7.

³¹¹ UN Security Council Resolution 827, S/RES/827 (1993); UN Security Council Resolution 955, S/RES/955 (1994).

of the tribunal, relying on tribunals with entirely different mandates results in inapplicable comparisons.

228. The guidance drawn by the SCC from the ICTY relates largely to the latter's referral system through which cases can be referred to national courts. This system is the result of the UN's Completion Strategy for the Tribunal;³¹² the ECCC has nothing equivalent to this. While the criteria used by the ICTY to determine whether or not to refer a case to a lower court may seem applicable to the ECCC on its face, such a comparison ignores this fundamental structural difference. Furthermore, the existence of a referral mechanism at the ICTY undermines the SCC's contention that the ICTY and ICTR Chambers were afforded a large discretion in determining which suspects to prosecute.³¹³

(5) The SCC Erred in Concluding that the Terms are 'Mere Prosecutorial and Judicial Guidance'

229. When the Establishment Law was approved in the National Assembly, H.E., the late, Sok An set out that it is the ECCC judges 'who shall have the power to decide the targets and consider who shall be indicted or prosecuted' and that the ECCC 'must perform its functions in accordance with the law: the Agreement and [Establishment Law]'.³¹⁴ This undermines the SCC's finding on justiciability as no mention is made of the terms 'senior leaders' and 'those most responsible' being unfettered prosecutorial and judicial guidance.
230. The SCC's interpretation of the terms of personal jurisdiction as mere prosecutorial and judicial guidance would leave an important feature of the ECCC's operation to subjective assessment and would be meaningless in the absence of oversight to avoid abuse of discretion. If the terms 'senior leader' and 'those who were most responsible' were to be applied as merely a guide to prosecutorial discretion, as the SCC asserts, the terms 'senior leader' and 'most responsible' must nonetheless be recognised as external limits to this discretion. A self-enforced limit is effectively no limit; ignoring the provisions above by asserting that the terms are solely elements of prosecutorial discretion would be a manifestly absurd result. The NCIJ acknowledges the need to strictly interpret the law

³¹² Security Council Resolution 1503, UN Doc. No. S/Res/1503, 28 August 2003; Security Council Resolution 1534, UN Doc. No. S/Res/1534, 26 March 2004.

³¹³ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 69.

³¹⁴ 2004 National Assembly Approval, p. 25.

when fettering discretion,³¹⁵ and in the Case 004/02 Closing Order invoked Article 5 of the Cambodian Criminal Code,³¹⁶ Article 38 of the Cambodian Constitution³¹⁷ and Rule 21.³¹⁸

231. The SCC states that the terms should be viewed as elements of prosecutorial discretion because ‘there is no objective method for the Trial Chamber to decide on, compare, and then rank the criminal responsibility of all Khmer Rouge officials.’³¹⁹ It does not, however, explain whether there is an objective method for the Co-Prosecutors or CIJs to undertake this comparison, or even whether such criteria must exist with respect to prosecutorial and investigatorial discretion.
232. It is notable that Reserve CIJ Kasper-Ansermet formulated objective criteria to guide his investigative policy in Case 003.³²⁰ In a press release issued by CIJs Bunleng and Blunk in 2011, they state that ‘unlike in Case 002, there are serious doubts whether the suspects are ‘most responsible’ according to the jurisdictional requirement of Article 2 of ECCC Law.’³²¹ Further, in Case 004/01, the CIJs found IM Chaem did not fall under the category of ‘most responsible’.³²² While the Case 003 statement and Case 004/01 Closing Order do not lay out objective criteria, they implies that the CIJs had at least successfully formulated and attempted to apply such criteria.
233. The SCC apparently ignored the use of objective criteria by the OCIJ or the OCP, and instead merely concluded that because the OCP and OCIJ are independent according to the UN-RGC Agreement, and because the agreement states that ‘it is understood, however, that the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible,’ ‘it follows that [the Co-Prosecutors and the Co-Investigating Judges] are [...] vested with the authority to determine whether

³¹⁵ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, paras 429, 450, and 451.

³¹⁶ Article 5 of the Cambodian Criminal Code sets out: ‘In criminal matters, the law shall be strictly construed. A judge may neither extend its scope of application nor interpret it by analogy.’

³¹⁷ Article 38 of the Cambodian Constitution sets out that: ‘any case of doubt shall be resolved in favour of the accused.’

³¹⁸ Rule 21 sets out in pertinent part: ‘The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, [...] to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC. [...]’

³¹⁹ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 62.

³²⁰ *Consolidated Decision on Meas Muth’s Requests on Personal Jurisdiction*, 1 February 2016, D298.1, paras. 15, 16, and 24.

³²¹ *Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004, Office of the Co-Investigating Judges*, 8 August 2011.

³²² Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 325.

a particular prosecution falls within the scope of the term “most responsible.”³²³ This conclusion does not necessarily follow. The SCC clearly recognises the need for objective criteria, and the CIJ’s existing practice shows that it is possible to produce and apply objective criteria.

234. If the SCC’s characterisation were correct, the ECCC would hold inappropriately broad personal jurisdiction over ‘Khmer Rouge officials.’ Such a wide personal jurisdiction is incompatible with both the object and purpose and the capacity of the ECCC.³²⁴ Given the obvious unacceptable conflict with the reconciliatory purpose of the ECCC, it is difficult to see how the RGC or the UN could possibly have intended that the personal jurisdiction terms provide merely ‘guidance’ to Co-Prosecutors granted otherwise unfettered discretion.

(6) Following the SCC’s Opinion would Violate the Principle of Legal Certainty

235. An expansive or loose interpretation of the personal jurisdiction requirements would result in a violation of the principle of legal certainty, which is codified in Rule 21. For the purposes of legal certainty, there must exist clear, certain and known criteria with which to determine whether an individual falls under the ECCC’s jurisdiction.³²⁵ There must be sufficient legal certainty that former Khmer Rouge officers of the DK era are able to ascertain whether or not they meet the criteria of ECCC personal jurisdiction – such individuals should be in a position to predict whether they fall within the group of Khmer Rouge officers who may potentially be subject to investigation and prosecution. This holds irrespective of the question of whether the CIJs’ discretion to indict an individual is justiciable.
236. The principle of legal certainty also requires that any ambiguity in the interpretation of the terms of personal jurisdiction should be interpreted conservatively. Any doubt as to whether an individual falls within the ECCC’s personal jurisdiction must not be resolved in a manner that causes prejudice to the individual – this engages the principle of *in dubio*

³²³ Case 001, *Appeal Judgement*, 3 February 2012, F28, para. 64.

³²⁴ Stephen Heder, ‘A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia’, 1 August 2011, <<http://www.cambodiatribunal.org/blog>> pp 35 and 36, citing Hans Correll letter. See also Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 (entered into force 29 April 2005), preamble.

³²⁵ Erik Claes et al., *Facing the Limits of the Law*, 2009, A157/2/1/1.1.4. ‘In continental systems, legal certainty is defined in terms of a maximum predictability of officials’ behavior.’

pro reo.³²⁶ The CIJs should consider the interpretation of the terms ‘senior leaders’ and ‘most responsible’ is an unusual question of treaty interpretation in that a wrongful interpretation risks immediately prejudicing the indicted individual. If the CIJs are in doubt as to the intentions of the parties to the UN-RGC Agreement, they must resolve their doubt in favour of a narrow interpretation, in order to avoid unjustly prejudicing the defendant.

iii. Conclusion: The ECCC Does Not have Jurisdiction to Try Mr YIM Tith

237. The intention of the parties to the Agreement is that only Senior Leaders of DK and Duch³²⁷ fall under the personal jurisdiction of the ECCC.³²⁸ In accordance with the intentions of the parties to the Agreement, the only senior leaders to fall within the personal jurisdiction of the ECCC are members of the Party Central Committee and the members of the Standing Committee of the Party such as: Pol Pot, Nuon Chea, Khieu Samphan, Son Sen, Ieng Sary, Ke Pauk, Ieng Thirith, Van Rith, Ta Mok.³²⁹
238. Further, the ECCC needs to commit to the requirement in the preamble to UN-RGC Agreement that the ECCC must ‘recognize the pursuit of national reconciliation, stability, peace and security before making any prosecution.’³³⁰ The determination of what actions will lead to stability, peace, or security in a particular state are matters which are essentially within the domestic jurisdiction of that state. As such, the determination of what actions will lead to stability, peace, or security within Cambodia will fall within the jurisdiction of the Cambodian state, who is a party to the Agreement.
239. It is clear from the intentions of the parties to the UN-RGC Agreement that Mr YIM Tith does not fall under the personal jurisdiction of the ECCC. The case against Mr YIM Tith should never have been initiated and must be dismissed.

B. THE ICP’S THIRD INTRODUCTORY SUBMISSION IS VOID

240. The ICP’s unilateral conduct in initiating proceedings in Case 004 precluded the possibility of a cooperative prosecution as demanded by the UN-RGC Agreement and the

³²⁶ *Consolidated Decision on Meas Muth’s Requests on Personal Jurisdiction*, 1 February 2016, D298.1, para. 33.

³²⁷ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, paras 473 and 542.

³²⁸ *See supra*, paras 125 to 136.

³²⁹ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 472.

³³⁰ Case 004/01, *Final Submission Concerning Im Chaem Pursuant to Internal Rule 66*, 27 October 2016, D304/1, para. 35.

Establishment Law. The illegality of the ICP's Third Introductory Submission has not been remedied by the belated enactment of the disagreement procedure nor by the triggering of the default position of 'proceed' pursuant to Rule 74(1). The Defence submits that the CIJs are now obliged to consider the legal effects of the ICP's violation of the UN-RGC Agreement and Establishment Law.

i. Requirement to Determine Validity of the ICP's Third Introductory Submission

241. The Defence for AO An previously argued that the ICP's Third Introductory Submission is procedurally invalid since it was filed without the signature of the NCP.³³¹ Without going into its merits, the ICIJ held that this argument 'misses the reality of the manner in which Case 004 as a whole [...] has developed since the filing of the 3IS.'³³² The ICIJ proceeded to describe the developments of Case 004/1, noting that both CIJs dismissed the case 'on the merits of the question of personal jurisdiction' and 'did not argue that a dismissal was necessary because there was a serious procedural flaw in the 3IS voiding the entire investigation.'³³³
242. The Defence respectfully submits that, in terms of pure logic, dismissal on one ground neither invalidates nor remedies an additional or alternative ground for dismissal.
243. The ICIJ also observed, as a purported reason to consider that the PTC as a whole has tacitly determined that the ICP's Third Introductory Submission is valid, that 'the PTC [...] has consistently engaged with the appeals and motions by the parties on the grounds of either overall lack of personal jurisdiction or on the substance of the complaint in question.'³³⁴ Following this logic, quorate substantive decisions from the PTC would confirm personal jurisdiction and undermine both the stance of some PTC judges and the NCIJ as well as the basis for the CIJs' dismissal in Case 004/1. This cannot be correct since the determination of personal jurisdiction on the merits then remained at issue. Indeed, it is notable that the PTC did reach quorate decisions in Case 004/1 and the CIJs nevertheless dismissed Case 004/1 on the basis that the ECCC lacks the personal

³³¹ Case 004/02, *Ao An's Response to the Co-Prosecutors' Rule 66 Final Submissions*, 24 October 2017, D351/6, paras 25 to 31.

³³² Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 41.

³³³ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 42.

³³⁴ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 42.

jurisdiction to try IM Chaem.³³⁵ Joint actions of the CIJs or indeed the PTC do not constitute confirmation of jurisdiction.

244. The ICIJ's findings also disregard that the ICIJ previously rejected a supplementary submission filed unilaterally by the ICP on the basis that he had failed to comply with Rule 71:

In the current case, neither has consensus been achieved by the Co-Prosecutors, nor has any dispute settlement procedure before the Pre-Trial Chamber been completed, nor has the 30 day dispute settlement period ended, wherefore the ICP is not entitled to execute the Supplementary Submission by filing it.

Since the ICP [...] clearly violated Rule 71(3) by ignoring the dispute settlement period, the Supplementary Submission filed by him cannot be considered as valid.³³⁶

245. As previously held by the ICIJ, '[t]he fact that a filing shall be executed does not mean it is legal; it only means that proceedings shall continue for the time being until a ruling on its legality is made, as is spelt out clearly for example in Rule 76(1).'³³⁷ Notwithstanding the 'reality of the manner' in which Case 004 has proceeded, and as noted by the ICIJ, the validity of the ICP's Third Introductory Submission and therefore all consequent proceedings remains 'a matter which all judges would have to address *ex officio* and at any stage of the proceedings.'³³⁸ This coheres with the majority finding of the PTC that the 'consequences of such violation [of the ECCC Law, Agreement and the Internal Rules through the unilateral conduct of the preliminary investigation] may exist in the proceedings that follow.'³³⁹

³³⁵ See, for example: Case 004/01, *Decision on IM Chaem's Urgent Request to Stay the Execution of Her Summons to an Initial Appearance*, 8 August 2014, A122/6.1/2; *Decision on IM Chaem's Appeal against the International Co-Investigating Judge's Decision on her Motion to Reconsider and Vacate Her Summons Dated 29 July 2014*, 9 December 2015, D236/1/1/8; *Decision on Im Chaem's Request for Confirmation on the Scope of the Ao An's Annulment Application Regarding All Unrecorded Interviews*, 15 September 2016, D296/4; *Decision on IM Chaem's Request for Reclassification of Her Response to the International Co-Prosecutor's Final Submission*, 8 June 2018, D304/6/4; *Decision on IM Chaem's Urgent Request for an Extension of Time and Pages to Respond to the Appeal of the Closing Order*, 17 August 2017, D308/3/1/3; *Decision on the National Civil Party Co-Lawyer's Request Regarding the Filing of Response to the Appeal against the Closing Order and Invitation to File Submissions*, 29 August 2017, D308/3/1/8. Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 306 to 325.

³³⁶ *Decision on Co-Prosecutors' Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, 28 June 2011, D27/3, para. 5.

³³⁷ *Decision on International Co-Prosecutor's Request to Place Documents from Case File 002 and other Evidentiary Material onto Case File 004*, 7 July 2011, D7/4, para. 6.

³³⁸ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 41.

³³⁹ *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission* (7 September 2009, D1/1), *Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement*

246. The Defence respectfully submits that the ICIJ's comments in Case 004/02 do not establish that the CIJs are not currently obliged to make a determination on the merits on the question of the validity of the ICP's Third Introductory Submission. Perceived constructive acquiescence is not, the Defence submits, a sufficient basis upon which to violate the rights of the accused and the laws of the ECCC.
247. Accordingly, the Defence requests that the CIJs now consider the legal effects of this violation.

ii. The ICP's Third Introductory Submission is Invalid

248. The ICP's illegal unilateral actions leading to the submission of the ICP's Third Introductory Submission thwarted any possibility of a cooperative prosecution as demanded by the UN-RGC Agreement and the Establishment Law. The ICP's decision to exclude the NCP precluded cooperation between the Co-Prosecutors and circumvented the procedure for settling disagreements and thus the appropriate procedure to seek leave to proceed unilaterally. All blame lies with the ICP. Nonetheless, once the NCP learned of the ICP's preliminary investigation, the motions of the disagreement procedure were belatedly enacted.³⁴⁰ Since the PTC was not able to reach the supermajority required for a decision on the Co-Prosecutors' Disagreement, Rule 74(1) provided that the 'prosecution shall proceed.'³⁴¹ Regardless of the technical permission of the Rules, proceeding with the investigation without the signature of the NCP contravenes the object and purpose as well as the spirit of the UN-RGC Agreement.

249. The object and purpose of the UN-RGC Agreement are explicitly set out at Article 1:

The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed during the period from 17

Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, 'Opinion of Judges: Prak Kimsan, Ney Thol and Huot Vuthy,' para. 19.

³⁴⁰ *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission* (7 September 2009, D1/1), *Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, Decision of the Pre-Trial Chamber, paras 1 to 10, and 27.

³⁴¹ *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission* (7 September 2009, D1/1), *Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, Decision of the Pre-Trial Chamber, para. 45.

April 1975 to 6 January 1979. The Agreement provides, *inter alia*, the legal basis and the principles and modalities for such cooperation.

250. The collective responsibilities and collaborative relationship of the Co-Prosecutors are dictated by Article 6 of the UN-RGC Agreement. The scope of the prosecutions is strictly limited.³⁴² While the Co-Prosecutors are independent from external influence in their function, they are not independent of each other: their cooperation is mandatory.³⁴³ The UN-RGC Agreement envisages bicephalous, but not separated, proceedings. The National and International Co-Prosecutors are equal court officials and equivalent agents of respective parties to the UN-RGC Agreement, a bilateral treaty explicitly governed by the VCLT.³⁴⁴
251. The International Co-Prosecutor commenced his preliminary investigation unilaterally, apparently ignoring the existence of his direct and equal national counterpart, and thus precluded both cooperation and the proper procedure for the settlement of disagreements mandated by Article 7 of the UN-RGC Agreement.³⁴⁵ By this action, the ICP violated a provision essential to the accomplishment of the object and purpose of the UN-RGC Agreement, namely the regulated cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial those properly falling under the jurisdiction of the ECCC. This amounts to a material breach of the UN-RGC Agreement within the meaning of Article 60(3)(b) of the Vienna Convention.³⁴⁶
252. The Acting ICP's public apology demonstrates the international component's awareness of its breach of both the Rules and the fundamental spirit of the UN-RGC Agreement.³⁴⁷ It provides no legal remedy and cannot 'cure' the fundamentally illegal action.³⁴⁸

³⁴² UN-RGC Agreement, Article 6(3).

³⁴³ UN-RGC Agreement, Article 6(3) and (4).

³⁴⁴ UN-RGC Agreement, Articles 6(1),(4) and 2(1).

³⁴⁵ UN-RGC Agreement, Article 6(4). Since the UN-RGC Agreement takes precedence over the Internal Rules, and the provisions breached make specific reference to the joint cooperative behaviour of both Co-Prosecutors, Rule 1(2) cannot be cited in the ICP's defence to legitimise a unilateral reading of Rule 50.

³⁴⁶ VCLT: The Defence recognises that the ICP is not in and of himself a party to the UN-RGC Agreement. However, his office is one of the instruments essential to the implementation of the treaty, and his actions are thus governed by the VCLT.

³⁴⁷ Case 001, *National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, Dated 24 April 2009, and National Co-Prosecutor's Additional Observations*, 22 May 2009, D17. This document has never been provided to the Defence, though it has been referred to in other cases before the ECCC. Previously referred to by the Defence for AO An, and accessible at: Case 004/02, D351/6.1.2, para. 22.

³⁴⁸ Case 001, *National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, Dated 24 April 2009, and National Co-Prosecutor's Additional Observations*, 22 May 2009, D17, paras 22, 26, 28, 30, 42, 44, 46, 56. *Acting international Co-Prosecutor's Notice of Filing of the Third Introductory*

253. As observed by the PTC, it was not open to the ICP to seek to file an Introductory Submission unilaterally:

[Articles 6(1), 6(4) and 7 of the UN-RGC Agreement, Article 16 of the Establishment Law, Article 20 (new) of the ECCC Law, and Internal Rule 71] indicate that it was foreseen, from the time the Agreement was concluded, that disagreements might arise between the two Co-Prosecutors, however, there is a stated aim that they shall cooperate. Articles 6(1) and (4) of the Agreement, Articles 16 and 20 (new) of the ECCC Law and Internal Rule 71(3) clearly indicate that one Co-Prosecutor can act without the consent of the other Co-Prosecutor if neither one of them brings the disagreement before the Pre-Trial Chamber within a specific time limit. It is further observed that only in case of matters of concern specifically identified in the Internal Rules would a disagreement prevent one Co-Prosecutor from proceeding with a given action pending a decision by the Pre-Trial Chamber. *Amongst these matters of major concern is the filing of Introductory Submissions, which is currently at issue.*³⁴⁹

254. In their consideration of the Co-Prosecutors' Disagreement, the majority of the PTC, Judges Prak Kimsan, Ney Thol and Huot Vuthy, held that the ICP's unilateral initiation of the preliminary investigation and failure even to communicate his intentions or actions to the NCP was illegal:

We are of the view that on the basis of the arguments by the Co-Prosecutors, there was no discussion or provision of information relevant to the preliminary investigation of the both Co-Prosecutors before drafting the Second and Third Introductory Submissions. We, therefore, find that the preliminary investigation was conducted unilaterally by the International Co-Prosecutor. In the meantime, the apology by Deputy Prosecutor William SMITH, which was not denied by the International Co-Prosecutor, is a more vivid manifestation of the failure to notify the National Co-Prosecutor about the preliminary investigation.

Pursuant to Articles 16 of the ECCC Law and 6(1) of the Agreement, we are of the opinion that on the matter of the disagreement, the preliminary investigation is a significant starting point which validates the Introductory Submission. The International Co-Prosecutor's preliminary investigation without prior notification or discussion in terms of cooperation with the National Co-Prosecutor is a violation of the ECCC Law, Agreement and the Internal Rules. The consequences of such violation may exist in the

Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, Opinion of Judges Prak, Ney and Huot, paras 18 and 19.

³⁴⁹ *Acting international Co-Prosecutor's Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, Decision of the Pre-Trial Chamber, para. 16. [Emphasis added].* Additionally, the Defence notes that the specific demand that the Co-Prosecutors cooperate over the filing of introductory submissions precludes reliance upon Rule 1(2) to legitimise unilateral conduct prohibited by the UN-RGC Agreement and the Establishment Law, which in any event take precedence over the Rules.

proceedings that follow and shall not be taken into consideration in relation to the disagreement.³⁵⁰

255. The Defence agrees with the majority PTC opinion: the ICP's actions did indeed constitute a significant 'violation of the ECCC Law, Agreement and the Internal Rules,' the consequences of which remained to be determined 'in the proceedings that follow.'
256. As the product of an illegal preliminary investigation, the ICP's Third Introductory Submission is void. The consequence of this is that the legal basis for the investigation in Case 004 and the resulting competence of the ECCC to try Mr YIM Tith have been fatally undermined.³⁵¹ The ICIJ previously held that 'competence' is satisfied where a tribunal is 'a legally established body' operating 'in accordance with its applicable law and rules of procedure.'³⁵² Where an otherwise legitimate tribunal has not been properly seised of a matter, it does not have competence. In this instance, the CIJs have not been properly seised of the matter 'in accordance with [the ECCC's] applicable law and rules of procedure.' The ECCC therefore lacks competence to try Mr YIM Tith.
257. Finally, in accordance with the legal provisions cited above and the bicephalous nature of the ECCC, the Rules specifically demand that introductory submissions include the signatures of both Co-Prosecutors.³⁵³ The ICP's Third Introductory Submission is signed only by the Acting ICP, rendering it additionally procedurally void under Rule 53(3).
258. The NCP has continued to state her opposition to the judicial investigation in Case 004.³⁵⁴ There is no remedy for an illegally founded investigation. It ought never to have proceeded. Accordingly, the Defence submits that the case against Mr YIM Tith must now be dismissed.

³⁵⁰ *Acting international Co-Prosecutor's Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, Opinion of Judges Prak, Ney and Huot, paras 18 and 19.*

³⁵¹ UN-RGC Agreement, Articles 1, 6 and 7, Rule 53, and ICCPR, Article 14(1).

³⁵² ICCPR, Article 14(1); UN HRC General Comment 32; *Decision on Suspect's Motion Requesting Clarification regarding Disagreements between the Co-Investigating Judges*, 8 August 2014, D204/2, para. 11.

³⁵³ Rule 53(1)(e).

³⁵⁴ *NCP's Final Submission*, D378/1.

C. IMPOSSIBILITY OF FAIR TRIAL

259. As a court, the fundamental duty of the ECCC is to ensure a fair trial.³⁵⁵ It cannot.

260. The integrity of the investigation has been irremediably impacted as a result of breaches of the confidentiality of Case 004, the ECCC remains besieged by financial insecurity and its pernicious effects, and the proceedings against Mr YIM Tith have been persistently plagued by delays far beyond his control. As previously recognised by the CIJs,³⁵⁶ it would be morally wrong and legally impermissible to issue an indictment in circumstances in which the accused has not and cannot be guaranteed a fair and expeditious trial and indeed the proceedings might suddenly cease due to lack of funding.

261. The fairness and integrity of the proceedings against Mr YIM Tith have been vitiated by:

- i. Effective interference with the administration of justice;
- ii. Continued insecurity of funding; and
- iii. Undue delay.

These manifest violations have ruptured the legal process to the extent that it is now impossible to piece together the constituent elements of a fair trial and the case must be dismissed.

i. Effective Interference with the Administration of Justice

262. The integrity of the investigation is wholly reliant on its confidentiality. This is mandated by the Rules.³⁵⁷ The CIJs recently explicated their uncompromising views on the ‘endemic’ and tacitly permitted illegal publication of confidential information at the ECCC:

The fact that unlawful leaks of confidential information at the ECCC have in the past been endemic and have gone virtually unpunished is not a justification for continuing this disgraceful practice. As stated in international cases involving violations of judicial confidentiality, individuals, including journalists, may not – with impunity – publish information classified by judges as confidential on the basis of their own assessment of the public interest in that information. Such behaviour may endanger the integrity of the proceedings and reduce the public’s confidence in a court’s ability to preserve confidentiality. The cooperation of individuals, organisations, and states is

³⁵⁵ Cambodian Constitution, Article 33. ICCPR, Article 14. *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004 and 004/2*, 5 May 2017, D355, paras 4 and 35.

³⁵⁶ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 54.

³⁵⁷ Rules 54 and 56.

vital for the proper functioning of international criminal courts. Breaches of confidentiality which, in undermining confidence in a court's ability to preserve confidentiality, jeopardise such cooperation, must therefore be prosecuted.³⁵⁸

263. The Co-Prosecutors may provide to the public only 'an objective summary of the information contained in [their Introductory, Supplementary and Final Submissions]'³⁵⁹ and the CIJs are granted similarly strictly limited discretion to disclose 'such information regarding a case under judicial investigation as they deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information.'³⁶⁰
264. Notwithstanding this, the Co-Prosecutors issued public statements describing reasons for their disagreement over the filing of the ICP's Third Introductory Submission.³⁶¹ This prompted expressions of concern at the highest levels of the RGC, including over the destabilisation of Cambodia.³⁶² The UN did not express any view or react in any way.
265. On 26 May 2011, the ICP's Third Introductory Submission was illegally made public.³⁶³ Mr YIM Tith was thus publicly identified as a suspect accused of manifold serious

³⁵⁸ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 13.

³⁵⁹ Rule 54.

³⁶⁰ Rule 56(2).

³⁶¹ ECCC, Statement of the Co-Prosecutors, 5 January 2009. *See also: Acting international Co-Prosecutor's Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2008, D1/1.3, Decision of the Pre-Trial Chamber, para. 47; Case 004/01, *Final Submission Concerning Im Chaem Pursuant to Internal Rule 66*, 27 October 2016, D304/1, para. 2; Case 004/02, *Final Submission Concerning Ao An Pursuant To Internal Rule 66*, 18 August 2017, D351/4, para. 2.

³⁶² Zsombor Peter and Phorn Bopha, 'No More Khmer Rouge Trials, Premier Tells Ban,' *Cambodia Daily*, 28 October 2010, A157/2/1/1.1.6; 'Foreign Minister Hor Namhong told reporters following the meeting that Prime Minister Samdech Hun Sen considered pending investigations in Cases 003 and 004 a threat to the Kingdom's "stability". Samdech [Hun Sen] clearly affirmed that Case 003 will not be allowed,' he said. 'We have to think about peace in Cambodia or the court will fail.' 'The court will try the four senior leaders successfully and then finish with Case 002.' Cheang Sokha & James O'Toole, '*Hun Sen shoots from the lip*,' PHNOM PENH POST, 28 October 2010, A157/2/1/1.1.2. 'The 2003 agreement between the government and the UN that established the tribunal empowers the court to prosecute 'senior leaders' and those 'most responsible' for crimes committed under Democratic Kampuchea. By pursuing possible prosecutions in Cases 003 and 004, court officials were violating this, Minister of Information Khieu Kanharith said yesterday.' Cheang Sokha & James O'Toole, '*Hun Sen shoots from the lip*,' PHNOM PENH POST, 28 October 2010, A157/2/1/1.1.2. Minister of Information, Khieu Kanharith, is quoted as stating, 'If we continue the third case, we should be wrong track from the original agreement between the UN and Cambodian government, which enshrined about trial for the senior and most responsible leaders only. It also affected the 'stability and national reconciliation' for the country. If the members of Khmer Rouge flee to struggle in jungle, and who will be responsible for that issue, and moreover, the other cases should hand over to local courts for dealing these cases.' Chhorng Long Heng, '*UN Secretary General talks on regional and bilateral issues*,' SOUTHEAST ASIA, 31 October 2010, A157/2/1/1.1.5. *See also: Press Release by the International Co-Investigating Judge*, 10 October 2011.

³⁶³ Written Record of Investigative Action, 2 September 2011, D72/1.1.11, reporting that Ms Yuko Maeda, an ECCC Press Officer, 'stated that from her memory she can recall that back to 26 May 2011 M. Jared Ferrie, a

international crimes. The ICP's Third Introductory Submission could only have been leaked by personnel or an office of the ECCC. This would seem to have been confirmed by the CIJs, who also noted that publication of the information in the Second Introductory Submission would constitute interference with the administration of justice.³⁶⁴ Nevertheless, subsequent media reports quoted the accusing document verbatim and displayed confidential ECCC material.³⁶⁵

266. The publication of the ICP's Third Introductory Submission illegally and irremediably caused serious damage to Mr YIM Tith's reputation. Since 2011, the public has been told, in detail, how the ICP wants Mr YIM Tith to be held responsible for the most serious crimes known to mankind.³⁶⁶ The ICP's Third Introductory Submission serves merely to instigate a judicial investigation; nevertheless, it was boldly written as though the investigation had been concluded. Perhaps such a tone may be endured by professional lawyers in confidential proceedings, but it is certainly not acceptable for public consumption. As found by the European Court of Human Rights, public statements expressing the opinion that a suspect is guilty before he has been proven guilty according

freelance journalist had first publish [*sic*] in a Jurist Newspaper about a confidential document from the Court and then a second time on 15 June 2011 in the Christian Science Monitor.'

Ferrie, J., 'More Leaked Documents Highlight KR Tribunal Under Fire in Cambodia,' *The Christian Science Monitor*, 15 June 2011. On Case File 004: D72/1.1.3.

³⁶⁴ ECCC Press Release, 'Public Statement by the Co-Investigating Judges,' 9 June 2011. ECCC Press Release, 'Press Release by the Co-Investigating Judges,' 31 August 2011.

³⁶⁵ ECCC Press Release, 'Press Release by the Co-Investigating Judges,' 31 August 2011.

³⁶⁶ Manning, S. and Thompson, A., 'Leaked Documents Suggest UN Backing Off Khmer Rouge Trials,' *Scoop Independent News*, 27 June 2011. Accessible, along with functioning hyperlinks to, *inter alia*, the ICP's Third Introductory Submission, at: <http://www.scoop.co.nz/stories/print.html?path=HL1106/S00165/leaked-documents-suggest-un-backing-off-khmer-rouge-trials.htm>. Also on Case File 004: D72/1.1.5. Sok, K., 'Ex-KR Cadre Not Fearful of Tribunal and Guardian of Hell,' *VOA Khmer*, 10 August 2011, on Case File 004: D72/1.1.2. Written Record of Investigative Action, 6 September 2011, D72/1.1.13 Sok, K., 'Crime Sites, Victim Information Released in Pending Tribunal Case,' *VOA Khmer*, 20 December 2012. Accessible at: <https://www.voacambodia.com/a/crime-sites-victim-information-released-in-pending-tribunal-case/1568123.html>.

to law violate the presumption of innocence.³⁶⁷ The obligation extends to public as well as judicial authorities, thus including the ICP.³⁶⁸

267. The preliminary investigation upon which the ICP's Third Introductory Submission was based was neither judicially investigated nor subjected to the rigorous testing of criminal court proceedings. In circumscribing the boundaries of the CIJs' investigative jurisdiction, it may, further, be assumed that the ICP broadened his allegations. Indeed, directly contradicting the ICP's published claims and assumptions, the CIJs issued a statement expressing their 'serious doubts whether the [Case 004] suspects are "most responsible" according to the jurisdictional requirements of Article 2 ECCC Law,' noting that this would render the ECCC without jurisdiction and that it is inappropriate to 'raise expectations which might not be met later on.'³⁶⁹
268. Following the publication of the ICP's Third Introductory Submission, Mr YIM Tith was repeatedly named in media articles and video footage,³⁷⁰ linked to specific alleged crime sites and stated to be 'in charge of Khmer Rouge zones where hundreds of thousands of people are thought to have died through overwork, starvation or execution.'³⁷¹ Mr YIM

³⁶⁷ See, for example: ECtHR, *Minelli v. Switzerland*, Application Number 8660/79, Judgment, 25 March 1983, para. 18; ECtHR, *Allenet de Ribemont v. France*, Application Number 15175/89, Judgment, 10 February 1995, paras 36 to 41, including: 'In the instant case some of the highest-ranking officers in the French police referred to Mr Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder. This was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of facts by the competent judicial authority.' ECtHR, *Karakas and Yeşilirmak v. Turkey*, Application Number 43925/98, Judgment, 28 June 2005, para. 47: 'The presumption of innocence will be violated if a judicial decision or statement by a public official reflects the opinion that he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty.'

³⁶⁸ Article 35 new; Rule 21(d); ICCPR, Article 14(2); General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial, UN HRC, CCPR/C/GC/32, 23 August 2007, para. 20; ECtHR, *Daktaras v. Lithuania*, Application Number 42095/98, Judgment, 10 October 2000, para. 42; ECtHR, *Allenet de Ribemont v. France*, Application Number 15175/89, Judgment, 10 February 1995, paras 36 to 37, including: '[Article 6(2) rights] must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory [...] the Court considers that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities.'

³⁶⁹ Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ), 08 August 2011, p. 1.

³⁷⁰ Manning, S. and Thompson, A., 'Leaked Documents Suggest UN Backing Off Khmer Rouge Trials,' *Scoop Independent News*, 27 June 2011, accessible, along with functioning hyperlinks to, *inter alia*, the ICP's Third Introductory Submission, at: <http://www.scoop.co.nz/stories/print.html?path=HL1106/S00165/leaked-documents-suggest-un-backing-off-khmer-rouge-trials.htm>. Also on Case File 004: D72/1.1.5; Sok, K., 'Ex-KR Cadre Not Fearful of Tribunal and Guardian of Hell,' *VOA Khmer*, 10 August 2011, on Case File 004: D72/1.1.2; Written Record of Investigative Action, 6 September 2011, D72/1.1.13.

³⁷¹ Sok, K., 'Crime Sites, Victim Information Released in Pending Tribunal Case,' *VOA Khmer*, 20 December 2012, accessible at: <https://www.voacambodia.com/a/crime-sites-victim-information-released-in-pending-tribunal-case/1568123.html>.

Tith had been afforded no opportunity to refute the accusations and was granted access to Case File 004 only on 4 December 2015.³⁷²

269. The intense prejudice caused cannot be ameliorated.
270. Beyond the prejudice caused to Mr YIM Tith's reputation and the presumption of his innocence, the publication of the ICP's Third Introductory Submission undermined the integrity of the judicial investigation. Publicising a case theory before or during a judicial investigation is fatal since it potentially contaminates all subsequently taken witness testimony. It is inherently prejudicial to the rights of the suspects and the interests of civil parties. As such, the provision of the ICP's Third Introductory Submission to the media constitutes wilful interference with the administration of justice, as prohibited by Rule 35(1) and emphasised by the CIJs.³⁷³ This was and remains the responsibility of those offices in possession of the ICP's Third Introductory Submission.³⁷⁴
271. The possibility of contamination is sufficient to render the investigation unsound.³⁷⁵ Procedural rules pertaining to the gathering and examination of evidence exist independently of assessments of probative value. Where such procedural rules are transgressed and the integrity of evidence jeopardised, that intrinsically constitutes serious prejudice to the proceedings. No further question is necessary, and no answer possible. The Defence is not – and cannot be – expected to articulate how information gathered improperly would or might have differed from that gathered properly. That would be pure speculation and the iterative conjecture exponential. The point is that the inherent loss of integrity is final and irremediable: the truth will never be known.

³⁷² *Written Record of Initial Appearance*, 9 December 2015, D281. Case 004/01, *International Co-Prosecutor's Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7.

³⁷³ *Written Record of Investigative Action*, 2 September 2011, D72/1.1.11, reporting that Ms Yuko Maeda, an ECCC Press Officer, 'stated that from her memory she can recall that back to 26 May 2011 M. Jared Ferrie, a freelance journalist had first publish [*sic*] in a Jurist Newspaper about a confidential document from the Court and then a second time on 15 June 2011 in the Christian Science Monitor.' Ferrie, J., 'More Leaked Documents Highlight KR Tribunal Under Fire in Cambodia,' *The Christian Science Monitor*, 15 June 2011. On Case File 004: D72/1.1.3. *ECCC Press Release*, 'Public Statement by the Co-Investigating Judges,' 9 June 2011. *ECCC Press Release*, 'Press Release by the Co-Investigating Judges,' 31 August 2011.

³⁷⁴ Rule 56(1).

³⁷⁵ ECtHR, *Jaloud v. The Netherlands*, Application Number 47708/08, *Judgment*, 20 November 2014, para. 228.

(a) Impact on Witness Testimony

272. Witness testimony is inherently weak. Memory is very fallible and assuredly given accounts can collapse rapidly under even cursory examination. Recognition of this led Nuremberg prosecutors to favour documentary evidence and to rely only sparingly on witnesses, in trials starting just months after the cessation of the German State under the ‘Nazi’ regime.³⁷⁶ Former ICP Andrew Cayley recently stated how, ‘very much like’ the *Nationalsozialistische Deutsche Arbeiterpartei*, ‘the Khmer Rouge were assiduous about documentation.’³⁷⁷ He explained to the media that this documentation allowed the Co-Prosecutors ‘to build strong cases against individuals like Nuon Chea.’³⁷⁸ His comments appear to contradict lamentations regarding the Khmer Rouge’s alleged destruction of documents as the Vietnamese invaded.³⁷⁹
273. Case File 004, however, consists overwhelmingly of material relating to interviews with potential witnesses. The ICP relies on no documentary material in his efforts to link Mr YIM Tith to the allegations he faces. Indeed, the Defence is not aware of a single contemporaneous document bearing Mr YIM Tith’s name on Case File 004.
274. This is deeply problematic. Witness testimony is fallible. Memory is a fickle beast, impaired by stress,³⁸⁰ and eroded by time.³⁸¹ In *Fofana*, Judge Thompson stated that ‘[t]he

³⁷⁶ Jackson, R., *The Nürnberg Case* viii, 1947; Taylor, T., *The Nuremberg Trials*, 55 Columbia Law Review 488, 1955, at 521. The German High Command submitted their surrender on 8 May 1945, terminating the 12-year rule of the *Nationalsozialistische Deutsche Arbeiterpartei*. The International Military Tribunal at Nuremberg’ Major War Criminals Trial was held from 20 November 1945 until 1 October 1946.

³⁷⁷ Baxter, H., ‘From Newcastle and New Zealand to the Killing Fields of Cambodia,’ *The Independent*, 29 September 2018, p. 26/32.

³⁷⁸ *Ibid*.

³⁷⁹ Etcheson, C., *After the Killing Fields Lessons from the Cambodian Genocide*, 2005, pp. 64 to 65, as cited by Combs, N. A., ‘Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions,’ *Washington and Lee Law Review* 75 (2018) 223-300, pp. 249 to 250.

³⁸⁰ Morgan, C. et al., ‘Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress,’ *International Journal of Law and Psychiatry* 27 (2004) 265-297, including at p. 274: ‘These data provide robust evidence that eyewitness memory for person encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error.’

³⁸¹ ICC, *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 103: ‘The Chamber has made appropriate allowance for any instances of imprecision, implausibility or inconsistency, bearing in mind the overall context of the case and the circumstances of the individual witnesses. For example, the charges relate to events that occurred in 2002 and 2003. Memories fade, and witnesses who were children at the time of the events, or who suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account. There are other potential reasons why a witness’s evidence may have been flawed and the Chamber, when assessing his or her testimony, has taken these considerations into account and they are reflected in its overall assessment of the account in question.’

ICC, *Prosecutor v. Ngudjolo*, Judgment pursuant to Article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-3-tENG, para. 49, regarding events occurring 10 years prior to the delivery of the judgment: ‘The passage of time explains why memories may sometimes have faded and witnesses – some of whom were still children at

Chamber duly advised itself that evidence about facts which took place 10 or more years prior to testifying may well involve inherent uncertainties due to the imperfections and vagaries of human perception and recollection.³⁸² As noted by Professor Nancy Amoury Combs, ‘recent research suggests that, even under the best of circumstances, eyewitness testimony frequently is inaccurate.’³⁸³ ‘Stranger eyewitness identifications’ – identification of persons unknown to the witness – are described as ‘the most questionable evidence of all.’³⁸⁴

275. Memory, and therefore witness testimony, is also extremely vulnerable to influence.³⁸⁵ Questioning, photographs, or other external influences such as media reports or political rhetoric, can affect memories, even to the point of complete fabrication.³⁸⁶ The Khmer Rouge regime has been the subject of 40 years of discussion, international and domestic rhetoric, and a decade of public ECCC proceedings. It is inconceivable that public understanding of the period has not been affected.
276. For all these reasons, the integrity of potential witness testimony must be strongly guarded from any additional, avoidable influence. It has not.

the time or were traumatised – might have had difficulty in providing a coherent, complete and logical account. There are other potential reasons for flaws in some witnesses’ evidence.’

ICTR, *Prosecutor v. Muhimana* (ICTR-95-1B-T), Judgment and Sentence, 28 April 2005, para. 65; *Prosecutor v. Gacumbitsi* (ICTR-01-64-T), Judgment, 17 June 2004, para. 83; ICTY, *Prosecutor v. Limaj* (IT-03-66-T), Judgement, 30 November 2005, para. 12.

See also: Combs, N. A., *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press, 2010, p. 14, citing: Shepherd, J., et al., ‘Identification Evidence: A Psychological Evaluation,’ 1982, pp. 80-86.

³⁸² SCSL, *Prosecutor v. Fofana et al.*, ‘Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute,’ 2 August 2007, SCSL-04-14-J, para. 44.

³⁸³ Combs, N. A., *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press, 2010, p. 14, noting that ‘numerous studies have shown the fallibility of eyewitness perception, and the advent of DNA testing has borne out these studies by showing that nearly 80 percent of wrongful convictions in the United States involved eyewitness error.’ See also: Combs, N. A., ‘Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions,’ *Washington and Lee Law Review* 75 (2018) 223-300, at p. 238, citing: Garrett, B., *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, 2011, p. 48; Loftus, E., Davis, D., ‘The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media,’ 46 *New England Law Review* (2012), 769, p. 770.

³⁸⁴ Combs, N. A., ‘Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions,’ *Washington and Lee Law Review* 75 (2018) 223-300, p. 258.

³⁸⁵ Morgan, C., Loftus, E., et al., ‘Misinformation Can Influence Memory for Recently Experienced Stressful Events,’ *International Journal of Law and Psychiatry* 36 (2013) 11-17. Frenda, S., Loftus, E., et al., ‘False Memories of Fabricated Political Events,’ *Journal of Experimental Social Psychology* 49 (2013) 280-286.

³⁸⁶ *Ibid.*

(b) Contamination of Investigation Through External Party Use of ICP's Third Introductory Submission

277. One tangible ramification of leaking the ICP's Third Introductory Submission to the public was that it became available to bodies conducting their own investigations outside the purview and beyond the accountability of the ECCC. One of these is the Documentation-Center Cambodia, often known as DC-Cam, which was heavily involved in the investigation of Case 004 even before the ICP's Third Introductory Submission was illegally leaked to the public. The OCIJ has relied heavily on its work.³⁸⁷
278. DC-Cam was created as a result of the United States of America's Cambodian Genocide Justice Act in 1994.³⁸⁸ The Cambodian Genocide Justice Act assumes crimes against humanity were committed and there was genocide.³⁸⁹ Under the 'Our Mission' section of the DC-Cam website, DC-Cam states that it has two main objectives: 'The first is to record and preserve the history of the Khmer Rouge regime for future generations. The second is to compile and organize information that can serve as potential evidence in a legal accounting for the Khmer Rouge.'³⁹⁰
279. According to DC-Cam's Mission Statement, its Accountability Project, which started in 2000, was: (i) focused primarily on 'fact-finding in an effort to promote justice'; (ii) 'directly relevant to the cases against senior surviving Khmer Rouge leaders at the Extraordinary Chambers in the Courts of Cambodia (ECCC)'; (iii) 'provides a way to illuminate chains of command, reporting practices and other institutional features of the DK regime that can help to hold leaders accountable for atrocities committed in the field'; and (iv) 'also serves on a crucial truth-telling function.'³⁹¹ It is obvious that this final goal is secondary to the first: DC-Cam's aim is first and foremost to 'help to hold leaders accountable' before the ECCC.
280. Therefore, DC-Cam's mandate – still part of its mission today – is to collect evidence with the mindset that there were crimes against humanity and there was genocide, and not

³⁸⁷ D3/8, Tun Soun, WRI, EN 00622285.

³⁸⁸ United States, Cambodian Genocide Justice Act, 22 U.S.C. 2656, Part D, §§ 571–74.

³⁸⁹ United States, Cambodian Genocide Justice Act, 22 U.S.C. 2656, Part D, § 572.

³⁹⁰ DC-Cam, 'Our Mission,' available at: <http://www.dccam.org/About/History/Histories.htm>.

³⁹¹ DC-Cam, 'Promoting Accountability: 2000-present,' accessible at http://www.dccam.org/Projects/Promoting/Promoting_Accountability.htm (last accessed by Defence for Yim Tith on 19 November 2018).

with the mindset to investigate the truth. Mr. Youk Chhang, the Director of DC-Cam, agreed that the objective of the DC-Cam interviews ‘is to gather historical information for the Court in order to find the culprits who committed crimes’ during the DK era.³⁹²

281. Indeed, DC-Cam has openly admitted to investigating Cases 003 and 004 – cases which should be solely under the investigation of the Co-Investigating Judges – by visiting crime sites and interviewing people.³⁹³ In Case 002, the CIJs warned the parties not to conduct their own investigation.³⁹⁴ Such a warning makes sense where those investigating – other than the CIJs – have an inherent interest in the outcome of the investigation. A parallel investigation by an entity with an inherent interest in the outcome of the investigation – such as DC-Cam – may unduly influence witnesses who could later be interviewed by the CIJs. The questionnaire used by DC-Cam interviewers is divided into a series of specific international crimes, seeking evidence relevant to establishing the elements of each.³⁹⁵ The OCP has stated that DC-Cam’s research could help secure convictions at the ECCC.³⁹⁶
282. DC-Cam’s Mission Statement also states that DC-Cam conducted over 10,000 interviews between 2000 and 2007, and after that intended to ‘undertake a more comprehensive analysis of the transcripts in our files.’³⁹⁷ DC-Cam explicitly noted the provision of materials and analysis to the ECCC, following Stephen Heder’s assessment of whether they ‘provide information relevant to the cases of the former Khmer Rouge officials most likely to stand trial.’³⁹⁸ It is notable that Stephen Heder is neither a lawyer nor an experienced criminal investigator; he is best described as an academic with an interest in

³⁹² Case 002, Transcript of Trial Proceedings, 24 January 2012, E1/32.1, p. 86, ln. 14-16.

³⁹³ Crothers, L., ‘Researchers Probe Alleged KR Island Massacre,’ The Cambodia Daily, 29 August 2014: *‘This information is very important, particularly for investigating the case of Meas Muth in Case 003. We will go to the island and search for the crime sites and meet people who have lived there since the early ‘80s,’ [a DC-Cam Investigator] said. The initial allegations compiled by prosecutors against Meas Muth do not mention a massacre on the island. The allegations were forwarded to investigating judges in 2009, and an investigation is ongoing.*

³⁹⁴ Case 002, Order issuing warning under Rule 38, 25 February 2010, D367, paras 8 to 9.

³⁹⁵ Case 002, DC-Cam Guide for Historical Interviews, 4 March 2001, E3/158.

³⁹⁶ Crothers, L., ‘Researchers Probe Alleged KR Island Massacre,’ The Cambodia Daily, 29 August 2014: *William Smith, the tribunal’s deputy co-prosecutor, said in an email that the allegations [raised by DC-Cam] could help prove there was armed conflict between Cambodia and Vietnam in 1975. This could help prosecutors demonstrate that Nuon Chea and Khieu Samphan are guilty of war crimes when proceedings in the second phase of their trial begin later this year. Mr. Smith said the investigation into what happened on Koh Tang would also help provide “relevant context to the acts of genocide alleged to have been committed by both Accused against the Vietnamese population from 1977 onwards.” These allegations of genocide will also be heard in the next trial phase.*

³⁹⁷ DC-Cam, ‘Promoting Accountability: 2000-present,’ accessible at http://www.dccam.org/Projects/Promoting/Promoting_Accountability.htm.

³⁹⁸ *Ibid.*

Cambodian history.³⁹⁹ Reliance on his ‘assessment’ is problematic, and further undermined by the stated teleological interest in ‘former Khmer Rouge officials *most likely to stand trial*,’⁴⁰⁰ whatever that means and however that was assessed, rather than in determining ‘those most responsible’ for relevant crimes.

283. In July 2007, the Co-Prosecutors filed their Introductory Submission containing allegations against Nuon Chea, Ieng Sary, Ieng Thirith, Khieu Samphan and Kaing Guek Eav alias Duch.⁴⁰¹ Once seised, the Co-Investigating Judges, and they alone, were responsible for the judicial investigation and the maintenance of its confidentiality.⁴⁰² Therefore, ‘[undertaking] a more comprehensive analysis of the transcripts on [its] files’ was the logical subsequent step for DC-Cam’s Accountability Project.⁴⁰³

284. The first information regarding facts within the scope of the Case 002 investigation was released to the public by the CIJs on 5 November 2010.⁴⁰⁴ In their press release, the CIJs stated:

In order to assist any members of public who wish to apply to become a Civil Party (prior to this deadline) and assist in the judicial investigation of Case File 002, the Co-Investigative Judges, pursuant to rule 56.2 a) of the Internal Rules hereby provide information outlining the facts falling within the scope of ongoing investigation.

They continued:

Takeo province, Tram Kok Cooperatives, which include the cooperatives in the following communes: Kus Samrong, Trapeang Thom Tboung, Trapeang Thom Cheung, Tram, Kok, Nheng Nhang, Sre Ronong and Ta Phen.

285. On 14 January 2010, the CIJs informed the parties that they considered that the judicial investigation had been concluded.⁴⁰⁵ By order dated 19 July 2010, the Case File was transferred to the OCP for the purpose of their final submission under Internal Rule 66(4).⁴⁰⁶ At this point in time, the public was aware, through OCP press releases regarding

³⁹⁹ See *infra*, para. 1240.

⁴⁰⁰ DC-Cam, ‘Promoting Accountability: 2000-present,’ accessible at http://www.dccam.org/Projects/Promoting/Promoting_Accountability.htm. [Emphasis added.]

⁴⁰¹ Case 002, *Closing Order*, 15 September 2010, D427, para. 3.

⁴⁰² Rules 55, 56 and 60(2).

⁴⁰³ DC-Cam, ‘Promoting Accountability: 2000-present,’ accessible at http://www.dccam.org/Projects/Promoting/Promoting_Accountability.htm.

⁴⁰⁴ *Statement from the Co-Investigating Judges, Judicial Investigation of Case 002/19-09-2007-ECCC-OCIJ and Civil Party Applications*, 5 November 2010.

⁴⁰⁵ Case 002, *Closing Order*, 15 September 2010, D427, para. 13, fn 15; *Notice of Conclusion of Judicial Investigation*, 14 January 2010, D317.

⁴⁰⁶ Case 002, *Forwarding Order*, 19 July 2010, D385; *Closing Order*, 15 September 2010, D427, para. 13, fn 17.

the disagreement between the ICP and NCP, of the initiation of a new investigation and potential new case(s).⁴⁰⁷ However, no details had then been released to the public regarding the scope of the latter investigation or alleged suspects.

286. Nevertheless, two years after concluding their work collecting interviews with witnesses, DC-Cam reactivated their field work and commenced investigations in Kirivong District, Takeo Province (DK's Sector 13).⁴⁰⁸ Kirivong District did not fall within the scope of Case 002. DC-Cam stated:

From 14 to 18 July 2010, DC-Cam's Project to Promote Accountability (PA) made a field trip to Kirivong district or District 109 of Southwestern Zone. The zone was infamous due to its leader, Ta Mok, also known as Pol Pot's butcher, who died in military prison in 2006 just before the ECCC began to function. The Project's purpose is to locate former members of the Khmer Rouge's organization and the Project believes these Khmer Rouge members possess monumental information as to the hierarchical commands and orders and the administrative structure of control.

Methodology

Using available data and existing contacts, the Project sought to locate, identify and interview former members of the Khmer Rouge organization from the most inferior to the most senior. To begin with, the team identified previous contacts in District 109 the Project had established since 2001 using biographical data. Stemming from these contacts, the Project continued to locate, identify and interview other former Khmer Rouge currently residing in the District. This has been tremendously effective in the sense that **informants** usually point to their former colleagues and this had resulted in ascertainment of facts confirmed by multiple sources. A set of questionnaire carefully designed and reviewed by lawyers were used for the purpose of this interview, **with an emphasis of avoiding self-incrimination by informants**.

During the period, PA team was able to locate and conduct interview with 19 individual members of the Khmer Rouge's members; although, the team would have been able to collect more interviews had informants not refused to be interviewed.⁴⁰⁹

287. The Defence observes that DC-Cam's concern to protect informants and conserve their rights against 'self-incrimination' renders its 'project' more closely akin to a targeted criminal investigation rather than a general effort to record full and truthful accounts for historical purposes. DC-Cam stated, further:

⁴⁰⁷ *Acting international Co-Prosecutor's Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, Decision of the Pre-Trial Chamber, para. 47.*

⁴⁰⁸ D65.1.2, DC-Cam, Project to promote accountability: A visit to District 109, Southwest Zone, 18 July 2010.

⁴⁰⁹ D65.1.2, DC-Cam, Project to promote accountability: A visit to District 109, Southwest Zone, 18 July 2010.

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District 109 was located within the administrative control of Southwestern zone, which was then headed by a secretary and Pol Pot's right-hand Ta Mok. Ta Mok died in a military prison of old age in 2006 just before the Khmer Rouge Tribunal, known officially as the Extraordinary Chambers in the Courts of Cambodia, was up and running. According to Ben Kiernan's interview and confirmed by informants from Kirivong, District 109 was controlled by a district secretary named Tith, who was Ta Mok's brother-in-law.

There has been conflicting information as to the whereabouts of Tith at the moment. According to informant Chhouk Khim, Tith is at the moment holding an important position in the government and living in Phnom Penh; whereas another informant told the Project that Tith lives a decent life in Saen Chao near Thai border, with big house and many cars. The team has not been able to locate the whereabouts of Saen Chao. Another informant said that both Tith and his wife, Ken, are still alive, but does not know where exactly.⁴¹⁰

288. DC-Cam stated that it had ceased its collection of interviews when the judicial investigation commenced in 2007.⁴¹¹ The Case 002 judicial investigation was confidential, and in any event did not cover Kirivong District.⁴¹² The name 'Tith' was, at that time, not mentioned in any press releases or public statements either in connection with the Case 002 judicial investigation or in the context of the ICP's Third Introductory Submission. The ICP's Third Introductory Submission was illegally leaked to the public by 26 May 2011, shortly after the CIJs had issued a statement in which they explained that no field investigations had commenced in Cases 003 and 004.⁴¹³
289. The targeted nature of DC-Cam's rekindled 'investigation' strongly suggests that DC-Cam was conducting investigations on the basis of confidential information contained in the ICP's Third Introductory Submission that could, before it was leaked, have been obtained only from personnel within the ECCC.
290. Since DC-Cam and its staff are neither ECCC personnel nor party to Case 004, they are not obliged to maintain the confidentiality of the judicial investigation.⁴¹⁴

⁴¹⁰ D65.1.2, DC-Cam, Project to promote accountability: A visit to District 109, Southwest Zone, 18 July 2010.

⁴¹¹ DC-Cam, 'Promoting Accountability: 2000-present,' accessible at http://www.dccam.org/Projects/Promoting/Promoting_Accountability.htm.

⁴¹² Case 002, *Closing Order*, 15 September 2010, D427.

⁴¹³ ECCC Press Release, 'Statement from the Co-Investigating Judges,' 2 February 2011.

⁴¹⁴ Rule 56(1).

291. From the closure of the Case 002 investigation on 14 January 2010 until Mr YIM Tith was publicly linked to Case 004 through the illegal publication of the ICP's Third Introductory Submission on 26 May 2011, 50 DC-Cam statements were placed on Case File 004.⁴¹⁵ Many of these were used as the basis for questioning conducted by judicial investigators,⁴¹⁶ and have been relied on directly or indirectly in the ICP's Final Submission.⁴¹⁷

⁴¹⁵ D123/2/1.18, UONG Phan, DC-Cam Interview, 14 July 2010; D123/2/1.20a, KEO Ouch, DC-Cam Interview, 15 July 2010; D123/2/1.19a, AM Kun, DC-Cam Interview, 16 July 2010; D123/2/1.21a, MAO Chhorm, DC-Cam Interview, 16 July 2010; D65.1.2, MAO Chhorm, DC-Cam Interview, 16 July 2010; D123/2/1.23a, KAM Nhom, DC-Cam Interview, 17 July 2010; D123/2/1.22a, TIM Phy, DC-Cam Interview, 17 July 2010; D123/1/2.37, LIM Hong aka MEAN Sambath alias AUN, DC-Cam Interview, 12 October 2010; D123/1/2.27, MUY Sot, DC-Cam Interview, 15 October 2010; D123/1/2.31, KRAUCH Tim, DC-Cam Interview, 18 October 2010; D123/1/2.29, NGET Chanthau, DC-Cam Interview, 18 October 2010; D123/1/2.28, SAO Heuy, DC-Cam Interview, 18 October 2010; D123/1/2.32a, MEAS Kun, DC-Cam Interview, 20 October 2010; D123/1/2.30, NGET Saroeun, DC-Cam Interview, 20 October 2010; D123/1/2.33, NGET Chhuong, DC-Cam Interview, 7 December 2010; D123/1/2.34, SOK Kea, DC-Cam Interview, 8 December 2010; D123/1/2.36, MEAS Voeun, DC-Cam Interview, 11 December 2010; D123/1/2.35, VAN Saveoun, DC-Cam Interview, 11 December 2010; D123/2/1.24a, NGIM Noeun, DC-Cam Interview, 20 January 2011; D123/2/1.25a, LENG Oeuk, DC-Cam Interview, 21 January 2011; D123/2/1.26a, NOP Mom, DC-Cam Interview, 21 January 2011; D123/2/1.27a, TIM Phuon, DC-Cam Interview, 22 January 2011; D123/2/1.24, CHOU Yan, DC-Cam Interview, 18 March 2011; D123/2/1.21, KAO Son, DC-Cam Interview, 19 March 2011; D123/2/1.23, MOK Sarin, DC-Cam Interview, 19 March 2011; D123/2/1.22, PRAK Run, DC-Cam Interview, 19 March 2011; D123/2/1.20, TEP Chov, DC-Cam Interview, 19 March 2011; D123/2/1.28a, SAO Port, DC-Cam Interview, 20 April 2011; D123/1/3.36a, UM Vanna, DC-Cam Interview, 13 May 2011; D123/1/3.37a, PEN Sarun, DC-Cam Interview, 14 May 2011; D123/1/2.60, LAT Suoy, DC-Cam Interview, 18 May 2011; D123/2/2.4a, NORN Phorn, DC-Cam Interview, 19 May 2011; D123/2/2.6a, PEN Han aka UN Han, DC-Cam Interview, 19 May 2011; D123/2/2.5a, SOEUN Rai, DC-Cam Interview, 20 May 2011; D123/2/2.8a, Y Chhon, DC-Cam Interview, 20 May 2011; D123/2/2.10a, CHHEANG Chuo, DC-Cam Interview, 21 May 2011; D123/2/2.12a, IT Ny, DC-Cam Interview, 21 May 2011; D123/2/2.9a, KEV San, DC-Cam Interview, 21 May 2011; D123/2/2.11a, PRAK Sokha, DC-Cam Interview, 21 May 2011; D123/2/2.14a, LEANG Bie, DC-Cam Interview, 22 May 2011; D123/2/2.17a, NOP Ngim, DC-Cam Interview, 22 May 2011; D219/62.1, PREAP Kap, DC-Cam Interview, 22 May 2011; D123/2/2.15a, SAY Roem, DC-Cam Interview, 22 May 2011; D123/2/2.16a, SIM Ny, DC-Cam Interview, 22 May 2011; D123/2/2.13a, SUON Sem, DC-Cam Interview, 22 May 2011; D123/2/2.1a, EK Sophal, DC-Cam Interview, 23 May 2011; D123/2/2.19a, KEO Roenun, DC-Cam Interview, 23 May 2011; D123/2/2.3a, NGET Sokhoeun, DC-Cam Interview, 23 May 2011; D123/2/2.18a, TOUCH Chhum, DC-Cam Interview, 23 May 2011.

⁴¹⁶ D118/33, AM Kun, WRI, 10 April 2013; D219/111, MAO Chhorm, WRI, 8 December 2014; D118/21, TIM Phy, WRI, 19 February 2013; D219/521, TIM Phy, WRI, 14 September 2015; D119/47, LIM Hong aka MEAN Sambath alias AUN, WRI, 13 June 2013; D219/626, MUY Sot, WRI, 9 December 2015; D119/69, KRAUCH Tim, WRI, 4 December 2013; D6.1.728, MEAS Voeun, WRI, 16 December 2009; D6.1.989, MEAS Voeun, WRI, 3 March 2010; D11, TIM Phuon, WRI, 6 May 2011; D118/20, TIM Phuon, WRI, 19 February 2013; D219/466, TIM Phuon, WRI, 17 August 2015; D119/15, SAO Port, WRI, 27 February 2013; D219/297, SAO Port, WRI, 7 May 2015; D119/144, LAT Suoy, WRI, 18 August 2014; D219/67, NORN Phorn, WRI, 15 November 2014; D219/775, PEN Han aka UN Han, WRI, 7 June 2016; D219/262, SOEUN Rai, WRI, 7 April 2015; D118/285, NOP Ngim, WRI, 12 August 2014; D219/298, NOP Ngim, WRI, 7 May 2015; D219/835, NOP Ngim, WRI, 20 September 2016; D219/62, PREAP Kap, WRI, 3 November 2014.

⁴¹⁷ ICP's Final Submission, fns 2, 3, 5, 6, 8, 9, 12, 19, 20, 21, 42, 68, 69, 76, 78, 80, 82, 83, 86, 95, 96, 97, 99, 100, 101, 102, 103, 104, 105, 106, 107, 183, 185, 186, 187, 188, 189, 191, 193, 195, 200, 209, 210, 212, 215, 250, 251, 252, 253, 254, 261, 338, 362, 363, 364, 408, 409, 414, 417, 419, 421, 422, 429, 430, 431, 432, 434, 458, 460, 462, 463, 464, 465, 473, 530, 600, 602, 613, 625, 635, 634, 638, 639, 750, 751, 753, 758, 794, 795, 797, 832, 833, 835, 1052, 1053, 1061, 1113, 1196, 1197, 1200, 1242, 1259, 1278, 1285, 1706, 2852, 2853, 2854, 2861, 2862, 2864, 2870, 2871, 2877, 2878, 2879, 2885, 2886, 2887, 2890, 2891, 2892, 2896, 2897, 3224, citing, variously: D123/2/1.18, UONG Phan, DC-Cam Interview, 14 July 2010; D123/2/1.19a, AM Kun, DC-Cam Interview, 16 July 2010; D118/33, AM Kun, WRI, 10 April 2013; D123/2/1.21a, MAO Chhorm, DC-Cam Interview, 16 July

292. The ICP cited ‘DC-Cam, Project to promote accountability: A visit to District 109, Southwest Zone’ in his *Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom*.⁴¹⁸ The ICP also attached a photograph labelled ‘Yim Tith (known as Ta Tith), Photo by Vanthan Peoudara, Deputy Director of the Documentation Center of Cambodia, January 22, 2011.’⁴¹⁹ This photograph is not contemporary to the DK period, and thus it is not clear what value it might have for the purposes of an investigation for ‘historical record.’ The Defence submits that it is fair to assume that DC-Cam obtained this photograph through its investigation into Mr YIM Tith’s involvement in the crimes falling within the scope of the ICP’s Third Introductory Submission and did so with the knowledge that he was named therein as a suspect.
293. Of course, after 26 May 2011, DC-Cam certainly had access to the ICP’s Third Introductory Submission. Since 26 May 2011, DC-Cam produced 85 statements that were subsequently placed on Case File 004.⁴²⁰ Many of these interviewees were also then

2010; D65.1.2, MAO Chhorm, DC-Cam Interview, 16 July 2010; D219/111, MAO Chhorm, WRI, 8 December 2014; D123/2/1.22a, TIM Phy, DC-Cam Interview, 17 July 2010; D118/21, TIM Phy, WRI, 19 February 2013; D219/521, TIM Phy, WRI, 14 September 2015; D6.1.989, MEAS Voeun, WRI, 3 March 2010; D123/2/1.27a, TIM Phuon, DC-Cam Interview, 22 January 2011; D219/900.1 (D123/2/1.24), CHOU Yan, DC-Cam Interview, 18 March 2011; D123/2/1.28a, SAO Port, DC-Cam Interview, 20 April 2011; D119/144, LAT Suoy, WRI, 18 August 2014; D219/262, SOEUN Rai, WRI, 7 April 2015; D123/2/2.17a, NOP Ngim, DC-Cam Interview, 22 May 2011; D118/285, NOP Ngim, WRI, 12 August 2014; D219/298, NOP Ngim, WRI, 7 May 2015; D219/835, NOP Ngim, WRI, 20 September 2016; D219/62.1, PREAP Kap, DC-Cam Interview, 22 May 2011; D219/62, PREAP Kap, WRI, 3 November 2014.

⁴¹⁸ *Supplementary Submission Regarding Sector 1 Crime Sites and persecution of Khmer Krom*, 18 July 2011, D65. Corrected version of this Supplementary Submission was filed on 25 November 2016.

⁴¹⁹ D65.1.54, Photo of Yim Tith (known as Ta Tith) by Vanthan Peoudara. EN 00704582

⁴²⁰ D123/2/3.15a, HANG Oeun, DC-Cam Interview, 7 June 2011; D123/2/3.17a, YEM Sam On, DC-Cam Interview, 7 June 2011; D123/2/3.16a, CHIV Choeun, DC-Cam Interview, 8 June 2011; D123/2/3.18a, IE Saon, DC-Cam Interview, 8 June 2011; D123/2/3.19a, NEAK Noeun, DC-Cam Interview, 8 June 2011; D123/1/2.47, CHHAY Phan, DC-Cam Interview, 15 June 2011; D123/1/2.42, HUON Chanrin, DC-Cam Interview, 15 June 2011; D123/1/2.40, KET Vat, DC-Cam Interview, 15 June 2011; D123/1/2.41, KROENG Rit, DC-Cam Interview, 15 June 2011; D123/1/2.43, LACH Cheu, DC-Cam Interview, 15 June 2011; D123/1/2.38, LACH Kea, DC-Cam Interview, 15 June 2011; D123/1/2.45, LIEM Sarem, DC-Cam Interview, 15 June 2011; D123/1/2.46, LORT Bandet, DC-Cam Interview, 15 June 2011; D123/1/2.39, THIM Nam, DC-Cam Interview, 15 June 2011; D123/1/2.53, BOU Mao, DC-Cam Interview, 16 June 2011; D123/1/2.48, CHAN Diel, DC-Cam Interview, 16 June 2011; D123/1/2.50, MAK Siloeut, DC-Cam Interview, 16 June 2011; D123/1/2.49, MOM Koeng, DC-Cam Interview, 16 June 2011; D123/1/2.51, NOU Chuong, DC-Cam Interview, 16 June 2011; D123/1/2.56, TOUCH Phean, DC-Cam Interview, 16 June 2011; D123/1/2.44, YEM Kimruos, DC-Cam Interview, 16 June 2011; D123/1/2.57, KHOR Mot, DC-Cam Interview, 17 June 2011; D123/1/2.59, NUON Chhandoeun, DC-Cam Interview, 17 June 2011; D123/1/2.52, PECH Ruos, DC-Cam Interview, 17 June 2011; D123/1/2.54, SAUR Lay, DC-Cam Interview, 17 June 2011; D123/1/2.55, SOEU Saut, DC-Cam Interview, 17 June 2011; D67.5, CHHUM Seng, DC-Cam Interview, 18 June 2011; D123/1/2.62, KAO Phan, DC-Cam Interview, 18 June 2011; D123/1/2.58, PAN Chhuong, DC-Cam Interview, 18 June 2011; D123/1/2.61, CHHIT Yoeuk, DC-Cam Interview, 19 June 2011; D123/1/2.64, IL Pheap, DC-Cam Interview, 10 September 2011; D123/1/2.63, YOUK Neam, DC-Cam Interview, 10 September 2011; D123/1/2.65, BIN Nann, DC-Cam Interview, 11 September 2011; D123/1/2.66, THIP Samphat, DC-Cam Interview, 11 September 2011; D123/1/2.67, SUM Sal, DC-Cam Interview, 24 September 2011; D123/1/2.68, CHHIM Phan, DC-Cam Interview, 11 October 2011; D123/1/2.25, TUM Soeun, DC-Cam Interview, 11 October 2011; D123/1/5.10, LUN Seng, DC-Cam Interview, 26 February

interviewed by judicial investigators,⁴²¹ and relied on directly or indirectly in the ICP's Final Submission.⁴²² It is thus impossible to be certain that DC-Cam's personnel, no

2012; D123/1/5.12, LONG Vun, DC-Cam Interview, 29 February 2012; D123/1/5.11, SOK Chhay, DC-Cam Interview, 29 February 2012; D123/1/5.14, MOUL Nen, DC-Cam Interview, 28 March 2012; D123/1/5.15, HEM Mean, DC-Cam Interview, 29 March 2012; D123/1/5.16, HEM Moeun, DC-Cam Interview, 29 March 2012; D123/1/5.17, LIM Koeun, DC-Cam Interview, 29 March 2012; D123/1/5.18, KEO Sokh, DC-Cam Interview, 2 April 2012; D123/1/5.19, PEN Vy, DC-Cam Interview, 3 April 2012; D123/1/5.20, THIEP Then, DC-Cam Interview, 4 April 2012; D123/1/5.21, UK Sokh, DC-Cam Interview, 8 April 2012; D123/1/5.22, SAOM Taing, DC-Cam Interview, 9 April 2012; D123/1/5.24, CHUM Chuong, DC-Cam Interview, 18 April 2012; D123/1/5.25, LONG Ly, DC-Cam Interview, 18 April 2012; D123/1/5.23, OU Saran, DC-Cam Interview, 18 April 2012; D123/1/5.27, HENG Viech, DC-Cam Interview, 19 April 2012; D123/1/5.26, KHIEU Neou, DC-Cam Interview, 19 April 2012; D123/1/5.28, NOP Socheat, DC-Cam Interview, 20 April 2012; D123/1/5.31, AO Savat, DC-Cam Interview, 21 April 2012; D123/1/5.32, CHAN Sang, DC-Cam Interview, 21 April 2012; D123/1/5.30, LENG Pheng, DC-Cam Interview, 21 April 2012; D123/1/5.29, SUOS Young, DC-Cam Interview, 21 April 2012; D123/1/5.33, TUY Thoeun, DC-Cam Interview, 21 April 2012; D123/1/5.35, TAENG Ang, DC-Cam Interview, 22 April 2012; D123/1/5.34, TUON Tim, DC-Cam Interview, 22 April 2012; D123/1/5.36, SENG Voeurn, DC-Cam Interview, 19 May 2012; D123/1/5.37, DUCH Sarit, DC-Cam Interview, 20 May 2012; D123/1/5.38, IN Buon alias IN Be, DC-Cam Interview, 21 May 2012; D123/1/5.39, MIECH Saravuth, DC-Cam Interview, 21 May 2012; D123/1/5.40, KOY Thuon, DC-Cam Interview, 23 May 2012; D123/1/5.44, DIEV Kann, DC-Cam Interview, 24 May 2012; D123/1/5.42, DUONG Sann, DC-Cam Interview, 24 May 2012; D123/1/5.41, LONG Sokhy aka LONG Rotha, DC-Cam Interview, 24 May 2012; D123/1/5.43, MEAS Van, DC-Cam Interview, 24 May 2012; D123/1/5.45, KUN Njet, DC-Cam Interview, 20 June 2012; D123/1/5.3, NHIM Soeun, DC-Cam Interview, 20 June 2012; D123/1/5.2, PRAKK Soeun, DC-Cam Interview, 20 June 2012; D123/1/5.47, NIV Saran, DC-Cam Interview, 22 June 2012; D123/1/5.48, SAN Aong, DC-Cam Interview, 22 June 2012; D123/1/5.46, TAUCH Oan, DC-Cam Interview, 22 June 2012; D123/1/5.49, NOU An, DC-Cam Interview, 23 June 2012; D123/1/5.50, SIM Than, DC-Cam Interview, 24 June 2012; D123/1/5.4, TEP Pauch, DC-Cam Interview, 24 June 2012; D123/1/5.51, AN Sopheap and CHHAOM Se, DC-Cam Interview, 25 June 2012; D123/1/5.52, CHUM Ratt, DC-Cam Interview, 26 June 2012; D123/1/5.53, CHUON Nakk, DC-Cam Interview, 27 June 2012; D267.1.138, TOEM Phal, DC-Cam Interview, undated.

⁴²¹ D119/40, CHHAY Phan, WRI, 19 May 2013; D219/474, HUON Chanrin, WRI, 18 August 2015; D119/77, LACH Cheu, WRI, 23 January 2014; D59, LACH Kea, WRI, 18 August 2011; D119/76, LIEM Sarem, WRI, 22 January 2014; D119/78, LORT Bandet, WRI, 24 January 2014; D219/209, THIM Nam, WRI, 3 March 2015; D119/94, BOU Mao, WRI, 21 February 2014; D119/39, CHAN Diel, WRI, 18 May 2013; D119/73, NOU Chuong, WRI, 20 January 2014; D51, TOUCH Phean, WRI, 18 August 2011; D119/41, TOUCH Phean, WRI, 20 May 2013; D57, YEM Kimruos, WRI, 18 August 2011; D53, KHOR Mot, WRI, 18 August 2011; D119/99, PECH Ruos, WRI, 12 March 2014; D119/89, CHHUM Seng, WRI, 18 February 2014; D119/88, KAO Phan, WRI, 17 February 2014; D61, PAN Chhuong, WRI, 19 August 2011; D119/29, PAN Chhuong, WRI, 14 March 2013; D119/136, PAN Chhuong, WRI, 22 July 2014; D119/33, CHHIT Yoeuk, WRI, 26 April 2013; D47, IL Pheap, WRI, 30 July 2011; D43, YOUK Neam, WRI, 29 July 2011; D219/140, YOUK Neam, WRI, 12 January 2015; D219/141, YOUK Neam, WRI, 13 January 2015; D49, BIN Nann, WRI, 30 July 2011; D119/49, THIP Samphat, WRI, 15 June 2013; D219/93, THIP Samphat, WRI, 1 December 2014; D106/7, SUM Sal, WRI, 31 March 2012; D219/103, SUM Sal, WRI, 2 December 2014; D119/32, CHHIM Phan, WRI, 13 April 2013; D219/347, CHHIM Phan, WRI, 2 June 2015; D106/5, TUM Soeun, WRI, 29 March 2012; D119/65, TUM Soeun, WRI, 16 October 2013; D219/102, TUM Soeun, WRI, 2 December 2014; D230, TUM Soeun, WRI, 3 December 2014; D118/153, LONG Vun, WRI, 26 November 2013; D119/123, HEM Mean, WRI, 6 May 2014; D118/150, HEM Moeun, WRI, 21 November 2013; D118/222, HEM Moeun, WRI, 3 April 2014; D6.1.389, KHIEU Neou, WRI, 23 July 2009; D118/151, KHIEU Neou, WRI, 23 November 2013; D118/171, KHIEU Neou, WRI, 23 January 2014; D219/179, CHAN Sang, WRI, 6 February 2015; D118/60, LONG Sokhy aka LONG Rotha, WRI, 22 May 2013; D179/1.1.1, AN Sopheap and CHHAOM Se, WRI, 8 May 2013; D118/78, AN Sopheap and CHHAOM Se, WRI, 25 June 2013; D118/23, TOEM Phal, WRI, 20 February 2013; D219/471, TOEM Phal, WRI, 21 August 2015.

⁴²² ICP's Final Submission, fns 2, 5, 8, 34, 35, 36, 37, 38, 39, 45, 46, 74, 75, 81, 82, 83, 84, 86, 90, 267, 268, 315, 316, 317, 389, 401, 404, 406, 408, 508, 509, 510, 513, 520, 621, 625, 626, 726, 762, 781, 782, 803, 807, 808, 809, 810, 811, 1052, 1056, 1059, 1060, 1061, 1076, 1087, 1089, 1095, 1104, 1106, 1107, 1108, 1109, 1113, 1121, 1243, 1244, 1245, 1275, 1276, 1277, 1279, 1283, 1285, 1286, 1287, 1289, 1291, 1293, 1698, 1699, 1706, 3009, 3010, 3011, 31763224, 3226, citing, variously: D219/474, HUON Chanrin, WRI, 18 August 2015; D119/76, LIEM Sarem, WRI, 22 January 2014; D123/1/2.46, LORT Bandet, DC-Cam Interview, 15 June 2011; D123/1/2.53, BOU

matter their motivations, did not tell witnesses, nor that they had not otherwise learned of, the allegations against Mr YIM Tith contained in the ICP's Third Introductory Submission. It is accordingly impossible to hold any confidence in the confidentiality of the judicial investigation, and therefore impossible to trust that the integrity of the investigation and YIM Tith's rights were safeguarded.

294. It is clear that judicial investigators frequently relied upon DC-Cam statements as a basis for their questioning of potential witnesses. Indeed, it appears that judicial investigators often became frustrated when witnesses deviated from the accounts they had provided to DC-Cam.

295. For instance, on 18 August 2013, DC-Cam conducted an interview with Ma Sivorn.⁴²³ Ma Sivorn was the wife of SOU Met, the former Secretary of Division 505, who was, at the time of the interview, one of the suspects in Case 003. Though the Case 003 investigation was meant to be confidential, the DC-Cam interviewer explicitly refers to the ECCC's interest in SOU Met:

Q: I hope this is my last series of questions since I asked you a lot.

A: Please.

Q: First it is about the Court. I heard the news that your husband was charged. What do you know about it?⁴²⁴

296. In this interview, MA Sivorn mentions a 'Ta Tith' who was, in 1990, deputy to SOU Met at checkpoint 404, located near to Pailin.⁴²⁵ She never provides his full name:

Q: He [Ta Tith] was commanding only checkpoint 404. Was your husband commander and Ta Tith the deputy?

A: He was the commander and Ta Tith the deputy.⁴²⁶

Mao, DC-Cam Interview, 16 June 2011; D119/94, BOU Mao, WRI, 21 February 2014; D119/73, NOU Chuong, WRI, 20 January 2014; D123/1/2.44, YEM Kimruos, DC-Cam Interview, 16 June 2011; D123/1/2.57, KHOR Mot, DC-Cam Interview, 17 June 2011; D123/1/2.52, PECH Ruos, DC-Cam Interview, 17 June 2011; D119/99, PECH Ruos, WRI, 12 March 2014; D119/89, CHHUM Seng, WRI, 18 February 2014; D119/29, PAN Chhuong, WRI, 14 March 2013; D119/33, CHHIT Yoeuk, WRI, 26 April 2013; D119/49, THIP Samphat, WRI, 15 June 2013; D106/5, TUM Soeun, WRI, 29 March 2012; D119/65, TUM Soeun, WRI, 16 October 2013; D219/102, TUM Soeun, WRI, 2 December 2014; D118/153, LONG Vun, WRI, 26 November 2013; D123/1/5.16, HEM Moeun, DC-Cam Interview, 29 March 2012; D118/150, HEM Moeun, WRI, 21 November 2013; D118/222, HEM Moeun, WRI, 3 April 2014; D118/151, KHIEU Neou, WRI, 23 November 2013; D123/1/5.41, LONG Sokhy aka LONG Rotha, DC-Cam Interview, 24 May 2012; D118/60, LONG Sokhy aka LONG Rotha, WRI, 22 May 2013; D118/23, TOEM Phal, WRI, 20 February 2013; D219/471, TOEM Phal, WRI, 21 August 2015.

⁴²³ D219/903.1, MA Sivorn, DC-CAM Interview, 18 August 2013.

⁴²⁴ D219/903.1, MA Sivorn, DC-CAM Interview, 18 August 2013, at EN 01527548.

⁴²⁵ D219/903.1, MA Sivorn, DC-CAM Interview, 18 August 2013, at EN 01527534 to 01527538.

⁴²⁶ D219/903.1, MA Sivorn, DC-CAM Interview, 18 August 2013, at EN 01527538.

297. On 30 September 2017, the ICIJ interviewed MA Sivorn.⁴²⁷ The judicial investigator opened the interview thus:

You have been summoned for an interview today because you previously were interviewed in 2005 by the Documentation Center of Cambodia when you interviewed by LONG Dany. The Case File Number was D219/903 1 document in English is ERN 01375544 0375644. Later I will ask you some questions related to that. First let me ask you some questions regarding your identity. What is your full name?⁴²⁸

298. The judicial investigator thus confirmed the ICIJ's awareness that DC-Cam both held and disclosed confidential material from what was, at the time of the DC-Cam interview, an ongoing investigation concerning SOU Met. While disclosure of such information certainly constitutes interference with the administration of justice contrary to Rule 35(1)(a), the judicial investigator seems unconcerned. Perhaps even more worryingly, the judicial investigator (operating on the assumption that MA Sivorn had been referring to Mr YIM Tith, though it is not known on what basis he can make this assessment) instead expresses frustration at what he perceives to be MA Sivorn's reticence in confirming the information he considers she gave to DC-Cam:

Q: I don't know if you are not happy to provide a response or you don't wish to tell us your answers. I don't understand why your answers provided to the Documentation Centre of Cambodia were in such detail. Your statement was about a 100 pages long. Do you know a cadre called YIM Tith?

A: I have heard of him, but I did not see him personally.

Q: Did you hear of him during the Democratic Kampuchea regime?

A: Yes, I did. I heard of him in that regime, but I did not meet him.

Q: Did you know about his official role and position?

A: No, I did not.

Q: Did you know MEAS Muth in that regime?

A: No, I did not.

Q: I would like you to look at page 52 of the Written Record of Witness Interview. It is confirmed in the investigator's notes that the name 'MEAS Muth' appears on almost every page of your Written Record. In regard to MEAS Muth, you mentioned on page 52 that he was holding a position at the General Staff level while YIM Tith was holding a much higher position.

A: I would like to confirm that I learned about this from other people. I did not know clearly about this myself.

Q: You heard people talking about Ta Tith; what did they say about him?

⁴²⁷ D219/910, MA Sivorn, WRI, 30 September 2017.

⁴²⁸ D219/910, MA Sivorn, WRI, 30 September 2017, Q/A:1, at EN 01476056.

A: I heard them saying that he worked at the Ministry of National Defence. That was all.

Q: In what year did you hear people saying that he worked at the Ministry of National Defence? Did that happen between 1975 and 1979?

A: No, it was later. Probably, it was in 1986 or 1987 when the country was reunited. No, I would like to make a correction. It was in 1996 or 1997. I didn't hear anything between 1975 and 1979.

Q: Did you meet or see YIM Tith after 7 January 1979?

A: No, I did not.

Q: Let's take a look at page 86 of the Documentation Centre of Cambodia document. On that page, you have confirmed that YIM Tith worked in Battambang Province and Samloth. This is your answer provided to the Documentation Centre of Cambodia and you knew that he worked in Battambang Province, Samloth district.

[...]

According to the interview and this written record, you have confirmed that YIM Tith worked in Battambang and that he was a chairperson of that place. Now you are saying that you don't know him. Why have you changed your answer?

A: Let me clarify. I heard his name and knew that he was in Samloth District. However, I did not meet him personally.⁴²⁹

299. MA Sivorn also states, 'we, the low level, did not know about persons in the high level. They kept secret very well; it was not known where they went to.'⁴³⁰ She explains that she knew 'Ta Mut very well' and that he 'went to Division 3 and after that to the Navy unity in Kampong Som.'⁴³¹ Upon being asked if she knew other members of the Southwest Zone committee at that time, MA Sivorn states: 'I knew only Ta Mok. I did not know any other persons.'⁴³² The witness later explains that Ta Mok tried to arrest her husband in 1996: 'The last arrest [attempt] was made in 1996 shortly before we reconciled with the government.'⁴³³

300. This DC-Cam interview was conducted while the investigation into Case 004 was highly confidential, but after the conclusion of DC-Cam's stated interview activities. An OCIJ legal officer filed a request for this interview to be added to Case File 004 on 25 January 2017, but there is nothing in the request to explain how she found it or was made aware of it.⁴³⁴

⁴²⁹ D219/910, MA Sivorn, WRI, 30 September 2017, at 01476060 to 01476062.

⁴³⁰ D219/903.1, MA Sivorn, DC-CAM Interview, 18 August 2013, at 01527472.

⁴³¹ D219/903.1, MA Sivorn, DC-CAM Interview, 18 August 2013, at 01527485.

⁴³² D219/903.1, MA Sivorn, DC-CAM Interview, 18 August 2013, at 01527485.

⁴³³ D219/903.1, MA Sivorn, DC-CAM Interview, 18 August 2013, at 01527506.

⁴³⁴ D219/903.

301. What is clear, however, is that the breach of the confidentiality of the judicial investigation in Case 004 contaminated DC-Cam's witness statements. These were then fed back into the Case 004 investigation, contaminating it as well.

(c) Procedural Impact of Late Admission of Mr YIM Tith to Case 004

302. Mr YIM Tith was granted access to Case 004 only at a very advanced stage of the long investigation, significantly after his co-accused and civil party applicants, and almost a decade since the ICP commenced his preliminary investigations.⁴³⁵ Prior to his admission to Case File 004, the Defence made repeated attempts to participate in the proceedings in order to seek to protect Mr YIM Tith's rights and interests.⁴³⁶ These attempts were often rebuffed on the basis that he had not yet been charged (the Defence notes that the NCIJ

⁴³⁵ ICP's Third Introductory Submission, D1; Decision to Charge Im Chaem In Absentia, 3 March 2015, D239; Written Record of Initial Appearance of Ao An, 27 March 2015, D242; Written Record of Initial Appearance, 9 December 2015, D281. See also: Case 004/01, International Co-Prosecutor's Rule 66 Final Submission against IM Chaem, 27 October 2016, D304/2, para. 7; Rule 23bis(2).

⁴³⁶ See, for example: Yim Tith's Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation, 6 March 2014, D186; Yim Tith's Submission on the Reconsideration of the Decision to Grant Yim Tith Access to the Case File, 7 May 2014, D186/2; Yim Tith's Appeal against the Decision on his Urgent Motion to Access the Case File and Take Part in the Judicial Investigation, 13 August 2014, D186/3/1/1; Yim Tith's Request for Documents Referenced in the Decision on the Yim Tith Defence Urgent Motion to Access the Case File and Take Part in the Judicial Investigation, 25 July 2014, D186/3/2; Yim Tith's Urgent Request for Relief Based on New Information, 24 April 2014, D192; Yim Tith's Appeal against the International Co-Investigating Judge's Denial of his Urgent Request for Relief Based on New Information, 9 May 2014, D192/1/1/1; Yim Tith's Notice that he Fully Intends to Remain Silent before the Co-Investigating Judges or Any Member of the Office of the Co-Investigating Judges, 26 May 2014, D195; Yim Tith's Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence's Filings on the Case File, 24 June 2014, D202; Yim Tith's Request for Clarification that he can Conduct his Own Investigation, 3 June 2014, D203; Yim Tith's Request to the Co-Investigating Judges to Provide Their Understanding of the Law Should There be a Disagreement Between the Co-Investigating Judges When Issuing the Closing Order, 19 June 2014, D205; Yim Tith's Request for Clarification Regarding the Validity of a Summons Issued by One Co-Investigating Judge for the Purposes of Charging Him, 21 August 2014, D212; Yim Tith's Urgent Request for Document A122/6.1/3 Referenced in the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, 3 September 2014, D212/1/1; Yim Tith's Appeal against the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, 15 September 2014, D212/1/2/1; Yim Tith's Urgent Request for the Five Documents Referred to in the "International Co-Prosecutor's Disclosure of Statements from Case File 004", 24 October 2014, D226; Yim Tith's Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02, 17 November 2014, D229; Yim Tith's Urgent Appeal against the OCIJ's Constructive Denial of his Urgent Request for the International Co-Investigating Judge to Reconsider the disclosure of Case 004 Witness Statements in Case 002/02, 14 January 2015, D229/1/1; Yim Tith's Second Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02, 23 February 2015, D229/2; Yim Tith's Formal Notice of Further Information Received and Acknowledgement of Extension of Time-Limit for Appeal of Former International Co-Investigating Judge Harmon's Decision on Yim Tith's Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02, 9 September 2015, D229/3/1/2.

holds that suspects ought to be considered ‘charged’ from the submission of the ICP’s Third Introductory Submission⁴³⁷).⁴³⁸

303. The importance of the Rules providing for the active participation in the judicial investigation was emphasised by PTC judges in their minority opinion in *Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill*.⁴³⁹ The Minority Judges noted that civil party applicants ‘may bring important information pertaining to the facts under investigation, including the role the Suspects may have played in the alleged crimes.’⁴⁴⁰ The Judges further noted that ‘[r]efusing them the possibility to participate in the investigation may deprive the Co-Investigating Judges of important information in their search for the truth, leading to an incomplete investigation and raising doubts about its impartiality.’⁴⁴¹
304. The long exclusion of Mr YIM Tith, while he and potential witnesses aged and evidence perhaps atrophied, but while the Co-Prosecutors and Civil Parties could actively participate in Case 004, certainly raises concerns regarding the fullness of the investigation and its impartiality.
305. As a result of his long exclusion from the active legal proceedings, Mr YIM Tith was able to challenge only belatedly contentious actions and practices established at the ECCC, often significantly after the event. Practices to which the Defence certainly would have – indeed *had* – strongly objected prior to their inception had become normalised, and their

⁴³⁷ Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 5: *The status of a charged person is considered from the time the Co-Prosecutors issued their Introductory Submission and charges are only a procedure whereby the charged person is entitled to legal representation to defend himself/herself against the facts alleged by the Co-Prosecutors and notified by the Co-Investigating Judges.*

⁴³⁸ *Decision on the Yim Tith Defence Urgent Motion to Access the Case File and Take Part in the Judicial Investigation*, 17 July 2014, D186/3; *Decision on Yim Tith’s Urgent Request for Relief Based on New Information*, 25 April 2014, D192/1; *Considerations of the Pre-Trial Chamber on Yim Tith’s Appeals against the International Co-Investigating Judge’s Decisions Denying his Requests to Access the Case File and to Take Part in the Investigation*, 31 October 2014, D192/1/1/2; *Decision on Suspect’s Request for Five Documents*, 3 November 2014, D226/1; *Decision on Yim Tith’s Appeal against the Co-Investigating Judges’ Constructive Denial of His Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02*, 27 February 2015, D229/1/2; *Decision on Yim Tith’s Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02*, 12 August 2015, D229/3.

⁴³⁹ Case 003, *Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill*, 24 October 2011, D11/2/4/4, Opinion of Judges Lahuis and Downing.

⁴⁴⁰ Case 003, *Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill*, 24 October 2011, D11/2/4/4, Opinion of Judges Lahuis and Downing, para. 5.

⁴⁴¹ Case 003, *Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill*, 24 October 2011, D11/2/4/4, Opinion of Judges Lahuis and Downing, para. 5.

entrenchment offered as grounds to dismiss the Defence's 'late in the day' objections.⁴⁴² The Defence also notes that, as a direct result of being excluded from Case 004 while such practices were established, its objections had to meet the threshold for reconsideration, a higher threshold than demanded of the ICP or other parties.⁴⁴³

306. Defence concerns regarding the CIJs' relinquishment of control over confidential investigative material in Case 002/02 proved to be well-founded and fully justified.⁴⁴⁴ The Defence submits that Mr YIM Tith's rights could not be adequately safeguarded simply by the presence of judges in the courtroom.⁴⁴⁵

ii. Continued Insecurity of Funding

307. The ECCC has long been beset by woeful financial constraints. Through their impact on staffing, these have caused significant delays to Case 004. These delays have vitiated the prospect of expeditious proceedings such that no fair trial is now possible and Case 004 must be terminated. In their *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, and while noting their 'remaining misgivings,' the CIJs stated that they would 'remain actively seised of the matter until the last closing order has been issued' and that they would take necessary measures '[s]hould a future lack of funds or financial uncertainty

⁴⁴² See, for example: *Yim Tith's Urgent Appeal against the OCIJ's Constructive Denial of his Urgent Request for the International Co-Investigating Judge to Reconsider the disclosure of Case 004 Witness Statements in Case 002/02*, 14 January 2015, D229/1/1; *Yim Tith's Second Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02*, 23 February 2015, D229/2; *Decision on Yim Tith's Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02*, 12 August 2015, D229/3; *Yim Tith's Urgent Request for Stay of Execution and Notification of Intention to Request Reconsideration*, 6 May 2016, D193/71; *Yim Tith's Urgent Request for Stay of Execution and Notification of Intention to Request Reconsideration*, 11 May 2016, D193/73; *Yim Tith's Request for Reconsideration of the Decision on International Co-Prosecutor's Request to Disclose One Case 004 Documents to Case 002 (D193/69)*, 19 May 2016, D193/76; *Yim Tith's Request for Partial Reconsideration of D193/15 and D193/24 and Response to International Co-Prosecutor's Disclosure Requests D193/72*, 23 May 2016, D193/77; *Yim Tith's Response to International Co-Prosecutor's Disclosure Request D193/75*, 26 May 2016, D193/79; *Consolidated Decision on Yim Tith's Requests for Reconsideration of Disclosure (D193/76 & D193/77) and the International Co-Prosecutor's Request for Disclosure (D193/72)*, 5 July 2016, D193/89, para. 80.

⁴⁴³ The PTC confirms that a Chamber may reconsider a decision where there is a legitimate basis to do so, such as a change of circumstances (including new facts or arguments) or where the previous decision was erroneous or has caused injustice. See Case 002, *Decision on Application of Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person*, 28 August 2008, D193/71.1.3, para. 25.

⁴⁴⁴ *Decision on International Co-Prosecutor's Request to Place Materials on Case File 004*, 30 May 2017, D347/2, paras 40 and 41.

⁴⁴⁵ *Ibid.*

threaten judicial independence, fairness, and the integrity of the proceedings.’⁴⁴⁶ The Defence respectfully submits that time has now come for the CIJs to reassess the status and certainty of future funding, and to make a determination.

(a) Background

308. On 5 May 2017, the CIJs issued their *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*.⁴⁴⁷ The funding circumstances of the ECCC – never secure – had become so critical that the CIJs were compelled to act. Therein, they expressed their:

[...] deep concerns over the funding arrangements currently in place for the ECCC, both on the national and international sides, and because of our considered opinion that the current situation and the outlook going forward have now become incompatible with the basic principles of fair trial, the rule of law and judicial independence.⁴⁴⁸

309. The CIJs provided insight into the funding circumstances of the ECCC:

The position the Court currently finds itself in is, simply put, the following. The Court’s budget proposal for 2017 was endorsed by all relevant actors. Endorsement of the budget means acceptance that the requested funds are necessary for the proper operation of the Court. However, funding was then not provided to the requested and endorsed level, neither by a UN subvention nor by voluntary contributions. The Court is now several millions of US-dollars short of its endorsed budget and all judges have recently been orally informed by the Office of Administration that it is highly unlikely that more funding will be available for 2017 to comply with the endorsed budget, or that funding levels will increase in the time after. [...]

We fully realise that the wider recent geopolitical events make heavy demands on the financial capacity of the UN, the RGC and the donor countries. Nonetheless, in the second and third recitals of the preamble to the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“UN-RGC Agreement”), the parties affirmed that the “*General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security*” and that “*the Cambodian authorities have requested assistance from the United Nations in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible*”. The conduct of the parties to the UN-

⁴⁴⁶ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, paras 65 and 69.

⁴⁴⁷ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355.

⁴⁴⁸ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 1.

RGC Agreement must continue to reflect the severity of this commitment. How the parties fulfil this commitment is, on the one hand, their prerogative but, on the other hand, also their responsibility.⁴⁴⁹

310. The CIJs observed:

The financial challenges and funding inadequacies that the court has faced throughout the past several years continue to be ever more present today, and pose significant and real barriers to the continued and future operation of the Court and its ability to meet international standards of judicial independence and thus, fair trial. The funding has progressed piecemeal on the basis of voluntary contributions, a fact which has placed the operation of both the national and international components in a persistently precarious state that how now reached crisis point. As the international and domestic standards outlined above demonstrate, this precariousness creates a level of uncertainty for the judiciary that could force certain outcomes of the proceedings which would be in violation of international standards of judicial independence and the effective administration of justice.

It is our task to prevent any course of events that would lead to an unacceptable state of affairs as described above. The time we have for such preventive action is determined by the end of the currently secure funding, i.e. at this stage by the end of June 2017.⁴⁵⁰

311. Therein, the CIJs set out the requisite threshold that would deter them from ordering a stay of proceedings:

We are therefore currently – and very reluctantly – considering the order of a stay of all proceedings with full prejudice in Cases 003, 004 and 004/2 commencing no later than by the end of June 2017, unless we are provided with sufficiently specific and reliable information that the funding situation will improve drastically, and with a sufficiently specific and reliable proactive planning outlook, which would provide us with the necessary assurance that:

- i. on the one hand we will be able to successfully complete our mandate in a timely and efficient manner until the issuance of a closing order in each case, and
- ii. on the other hand, that effective measures will be implemented to ensure sufficient funding for any appellate review of the closing orders and, should a trial ensue, for the trial and appeals process.⁴⁵¹

⁴⁴⁹ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, paras 2 and 3.

⁴⁵⁰ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, paras 75 and 76.

⁴⁵¹ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 79.

312. In *Observations of the United Nations Secretariat in Relation to the Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, the UN Secretariat encapsulated the fundamental issue:⁴⁵²

- i. As noted by the Request, the ECCC “has been fully funded through voluntary contributions from 2005 to 2013”. In recent years, however, financial challenges have arisen as voluntary contributions have not been sufficient to meet the expenditures of the ECCC. Should voluntary contributions not be enough to cover the United Nations’ financial obligations under the ECCC agreement, such expenses can only be incurred if authorised by the General Assembly. Since 2013, the Secretary-General has undertaken the necessary steps to seek additional financial resources from the General Assembly separate and apart from the mechanism of voluntary funding. Each year, the Member States have demonstrated their commitment to the ECCC by approving, as an exceptional measure, the use of a subvention from the programme budget to supplement the voluntary financial resources of the international component.
- ii. [R]ecommendations for subventions are made on the basis that appropriate measures for achieving operational savings and efficiencies in the ECCC are in place. Hence the Office of Administration, in consultation with the United Nations, had implemented cost-saving measures during the implementation period to the extent that it does not negatively impact on the judicial proceedings.
- iii. The Secretary-General initially proposed a subvention of \$16.7 million for 2017, to allow extension of staff contract pending the receipt of expected voluntary contributions throughout the budget period. [...] The General Assembly approved a subvention at a reduced amount. It is nevertheless expected to be sufficient to finance the anticipated funding gap, but falls short of allowing contract extensions for staff in one step until the end of 2017. Hence, staff contracts are extended in multiple steps depending on the timing of pledges and contributions from donors so as not to exceed the commitment authority granted by the General Assembly.
- iv. [A]fter four consecutive requests since 2013 for subventions to support the international component of the Extraordinary Chambers, the practice was in fact no longer exceptional in nature. Therefore, the Committee recommended that the General Assembly request the Secretary-General to provide fuller and more detailed justification, to better substantiate further subvention requests, if any.
- v. [A]ny future request for subvention to the ECCC from the programme budget will need to be submitted and presented in a results-based format.
- vi. [N]either the General Assembly resolutions nor the ECCC Agreement envisage that funding for the ECCC would be guaranteed at any point in time for a specific period of time. Further, there are no provisions in the

⁴⁵² Case 004/02, *Office of Administration’s Submission on the Budgetary Situation and its Impact on Cases 003, 004, and 004/2* (5 June 2017, D349/3), *Annex 1: Observations of the United Nations Secretariat in Relation to the Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, undated, D349/3.1.1, paras 7, 9 to 13.

relevant General Assembly resolutions or the ECCC Agreement which require future funding to be secured in order for the operations of the ECCC to continue. [...]

313. The Office of Administration has painted a far less certain picture.⁴⁵³ As previously outlined by the CIJs:

The OA also opined to the ICIJ on several occasions during the budget negotiations for 2017 that in the Court's history, the funding outlook had never been so dire and that the future budget negotiations would be a struggle beyond the usual level of arduousness; that the Court was indeed in danger of falling victim to an accidental closure because the funding might simply stop. The cash flow was a problem, because of the practice of the UN Controller to release advance payments only once a signed agreement regarding a donation had been received, not on the basis of mere pledges. After the 2017 subvention amount and the ensuing recruitment freeze was announced and upon the ICIJ's question as to what to tell the international staff and interns of the [OCIJ], it was said that while there was no need to "jump ship" immediately, staff who had job offers elsewhere should take them. Finally and more recently and before the announcement of the contract extensions in June, the ICIJ was informed that funding may be secure until the end of September 2017 but that the UN as a precaution was reserving 25% of that amount to cover the costs of sending the international staff home; this was not described as a standard procedure but as a sign of the precarious state of affairs.⁴⁵⁴

314. In their *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, the CIJs stated that this bleak outlook is shared by the Special Expert of the Secretary-General.⁴⁵⁵

315. The CIJs noted 'at least two distinct narratives about the state of the funding'; one provided by the Office of Administration and the Special Expert of the Secretary-General, and the other 'seemingly enjoying prevalence at the PDG Steering Committee at the seat of UNHQ'.⁴⁵⁶ The 'distinct narratives' appear, from the CIJs' comment, to fall into the camps of those 'on the ground' and those deliberating provisions of funds.

⁴⁵³ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, paras 19 and 25.

⁴⁵⁴ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 25.

⁴⁵⁵ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 26.

⁴⁵⁶ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 19.

316. The CIJs also noted that the United States of America – ‘one of the major donors within the PDG’ – publicly indicated that it was considering making contributions to the ECCC contingent upon the prosecution of Case 003.⁴⁵⁷
317. While finding, in August 2017, that ‘upon much deliberation and despite remaining misgivings, [...] it is not the time and place yet to address the [...] systemic shortcomings through the order of a full stay,’ the CIJs held that their ‘approach of judicial restraint’ would remain viable only if future funding matched the ECCC’s requirements.⁴⁵⁸ The CIJs stated: ‘We will therefore remain actively seised of the matter and will take the necessary measures, should matters deteriorate again to a degree that in our view judicial independence, fairness, and the integrity of the proceedings are threatened.’⁴⁵⁹

(b) Submissions

318. The CIJs stated that, to avoid staying the proceedings with full prejudice, they required ‘sufficiently specific and reliable information that the funding situation will improve drastically.’⁴⁶⁰ They also required ‘a sufficiently specific and reliable pro-active planning outlook’ that would provide them with the necessary assurance that they would be able to complete their mandate ‘in a timely and efficient manner until the issuance of a closing order in each case’ and that ‘effective measures will be implemented to ensure sufficient funding for any appellate review of the closing orders and, should a trial ensue, for the trial and appeals process.’⁴⁶¹
319. To the knowledge of the Defence, the CIJs have been provided with neither specific and reliable information that the funding situation would improve drastically nor sufficiently specific and reliable pro-active planning outlook guaranteeing the timely and efficient completion of their office and future proceedings. Accordingly, since it now falls to the CIJs to dismiss or indict Mr YIM Tith, the Defence submits that they must dismiss the proceedings against him.

⁴⁵⁷ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 48.

⁴⁵⁸ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, paras 65 to 66.

⁴⁵⁹ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 67.

⁴⁶⁰ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 79.

⁴⁶¹ *Ibid.*

(1) The Situation has Not ‘Improved Drastically’

320. The Defence submits that, 17 months after the CIJs’ initial deadline of the end of June 2017, the funding situation has not improved drastically, if at all.⁴⁶² Indeed, it appears to have worsened.
321. The Office of Administration has repeatedly told the ICIJ that, even in the context of the ECCC’s history of profound funding trouble, ‘the funding outlook had never been so dire’ and that securing future funds ‘would be a struggle beyond the usual level of arduousness.’ Despite its tone of assurance and optimism, the UN Secretariat has admitted that the ECCC has been consistently beset by serious funding crises to the extent that such have become so normal as to undermine the plausibility of being awarded further ‘exceptional subventions.’⁴⁶³ At the same time, subventions have been accompanied by recruitment freezes and advice to staff to take alternative job offers. Since these cost-saving measures lead to inefficiencies, they undermine the likelihood of being awarded yet another subvention. The Defence also noted that, ‘as a precaution,’ the UN reserved 25 *per cent* of secured funding ‘to cover the costs of sending the international staff home.’⁴⁶⁴ Withholding a quarter of desperately needed funds to cover the costs of sending staff home is an indication of the real anticipation of a catastrophic collapse of the court. As ‘a sign of the precarious state of affairs,’ it belies the confidence of the UN in a stable future for the ECCC.⁴⁶⁵
322. The CIJs noted the UN Secretary-General’s 2012 report highlighting the ‘acute financial crisis that could jeopardise the future operations’ of the ECCC and emphasised the ‘acute financial shortfall’ facing the international component.⁴⁶⁶ It is notable that these statements ‘followed the deficient funding period in 2011 and 2012 where contract

⁴⁶² *Ibid.*

⁴⁶³ Case 004/02, *Office of Administration’s Submission on the Budgetary Situation and its Impact on Cases 003, 004, and 004/2* (5 June 2017, D349/3), *Annex 1: Observations of the United Nations Secretariat in Relation to the Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, undated, D349/3.1.1, para. 11.

⁴⁶⁴ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 25.

⁴⁶⁵ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 25.

⁴⁶⁶ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 25, citing: UNGA Report of the Secretary-General, 19 September 2012, *Khmer Rouge Trials*, A/67/380, p. 1 and para. 56.

extensions were issued only on a monthly basis and a recruitment freeze was implemented.⁴⁶⁷

323. In 2013, a year in which pay conditions and delays drove ECCC staff to strike,⁴⁶⁸ the Supreme Court Chamber held:

The ECCC's funding crisis affects the judicial institution as a whole, and that crisis must be swiftly resolved – either by a firm and unwavering commitment by donor countries to provide their voluntary contributions or by a shift in the ECCC's funding process to the UN Regular Budget by way of assessed funds – in order to effectively complete the proceedings in Case 002 and the other matters properly before the court. If there is insufficient funding to guarantee a trial driven by law, all ECCC proceedings must be terminated and the court must close down. Barring this, proceedings must go on without individual decisions on matters of law and fact being unduly influenced by financial considerations.⁴⁶⁹

324. While subventions provided by the UN, and some voluntary contributions, enabled the ECCC to limp through 2014 to 2017,⁴⁷⁰ these have become so normal as to undermine the plausibility of being awarded further 'exceptional subventions.'⁴⁷¹

325. The UN Special-Expert has informally made comments about his own optimism that the ECCC's funding requirements will be met in the future, while admitting that the ECCC must negotiate yet another UN General Assembly subvention for 2019.⁴⁷² He has also noted the vulnerability to world events that has rendered the ECCC's funding model even more unstable.⁴⁷³ This cannot possibly be considered a sound reason to believe that there

⁴⁶⁷ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 25, citing: UNGA Report of the Secretary-General, 19 September 2012, *Khmer Rouge Trials*, A/67/380, para. 62.

⁴⁶⁸ BBC News, 'Khmer Rouge tribunal workers strike over unpaid wages,' 2 September 2013, accessible at: <http://www.bbc.co.uk/news/world-asia-23928097> (last accessed by the Defence on 24 November 2018).

⁴⁶⁹ Case 002, *Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002*, 25 November 2013, E284/4/8, para. 75. Cited by the CIJs in *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 44.

⁴⁷⁰ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, paras 27 to 33.

⁴⁷¹ Case 004/02, *Office of Administration's Submission on the Budgetary Situation and its Impact on Cases 003, 004, and 004/2* (5 June 2017, D349/3), *Annex 1: Observations of the United Nations Secretariat in Relation to the Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, undated, D349/3.1.1, para. 11.

⁴⁷² FSU-UNAKRT Newsletter, 'Our "Carpenter of Courts", Professor David Scheffer has Gone Off-Deck but Assures Us that the ECCC Ship is Still Entirely Seaworthy,' September 2017, pp. 4 and 5.

⁴⁷³ FSU-UNAKRT Newsletter, 'Our "Carpenter of Courts", Professor David Scheffer has Gone Off-Deck but Assures Us that the ECCC Ship is Still Entirely Seaworthy,' September 2017, p. 2.

will be adequate and secure funding for trial and appellate proceedings in Case 004. Quite the reverse.

326. The most up to date information available to the Defence suggests that the ECCC's funding requirements for 2018 remain unmet, despite the efforts of the RGC and the UN General Assembly's issuance of another limited subvention 'as an exceptional measure.' Half way through 2018, the ECCC had received \$4.48 million against its approved budget of \$24.68 million.⁴⁷⁴

Following the expression of support from the Royal Government of Cambodia, the General Assembly authorised the Secretary-General on 24 December 2017, as an exceptional measure, to enter into commitments in an amount not to exceed \$8 million to supplement the voluntary financial resources of the international component of the Extraordinary Chambers for the period from 1 January to 31 December 2018. This timely action greatly facilitated the uninterrupted operations of the Extraordinary Chambers for the first six months of 2018, opening space for continued solicitation of voluntary contributions. In addition, the Royal Government's commitment of direct contribution of \$4.0 million, to cover, as in 2017, the first six months of national staff salaries costs as well as operational costs arising in 2018 is a key measure facilitating the ongoing operation of the Extraordinary Chambers national component. In combination, these measures have ensured that the ongoing phase of peak workload in the Extraordinary Chambers' work continues to receive sustained attention. Voluntary contributions are currently projected to amount to \$11 million for the international component and \$1.36 million for the national component, against the approved budget for 2018 of \$18.89 million for the international component and \$5.79 million for the national component. Of these projected contributions, the international component has received \$4.35 million and the national component has received \$0.13 so far. The balance is expected during the year.⁴⁷⁵

327. As noted by the CIJs, the language of the UN-RGC Agreement is mandatory; it legally binds the United Nations to satisfy the financial requirements of the international component of the ECCC.⁴⁷⁶ The CIJs observed that neither 'a plain reading of the UN-RGC Agreement' nor reliance on an expansive interpretation of Resolution 57/228 permits the UN to 'plead lack of donor funding in failing to meet its expenses under the agreement and law.'⁴⁷⁷ Nonetheless, the ECCC remains dependant on donor funding,

⁴⁷⁴ Completion Plan 17, 30 June 2018, para. 13: calculated by combining the sums received by both the international and national components (\$4.35 million plus \$0.13 million is \$4.48 million) and the international and national approved budgets (\$18.89 million plus \$5.79 million is \$24.68 million).

⁴⁷⁵ Completion Plan 17, 30 June 2018, para. 13.

⁴⁷⁶ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, paras 10 to 12, 14, 16 to 18.

⁴⁷⁷ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, paras 18 to 23.

which may or may not transpire, and therefore remains at the mercy of will, whim, and world events.

(2) The CIJs are Precluded from Completing their Mandate in a Timely and Efficient Manner

328. It is disingenuous of the UN Secretariat to claim that the insecurity, and indeed real lack, of funding ‘has not affected the ECCC’s ability to conduct and complete investigations, pre-trial work, trials and appeals in accordance with international standards of justice, fairness and due process of law.’⁴⁷⁸ It goes without saying that ‘international standards of justice, fairness and due process of law’ include proceeding without unjustified delays and having recourse to effective and timely appellate proceedings. In any event, the UN Secretariat is not in a position to assess the legal ramifications of the lack of funding.

329. As unyieldingly observed by the CIJs, ‘less funding means longer proceedings, with greater total expenditure in the long run.’⁴⁷⁹ The proceedings in Case 004 have already been gravely and irremediably impacted by the all too real effects of chronic financial insecurity. In May 2017, the CIJs warned that ‘staff attrition will lead to potentially dramatic loss of institutional memory and only cause more delays and hence, more costs.’⁴⁸⁰ In June 2018, they explained that:

Staff attrition has also heavily affected this team: One of the two remaining team members, the consultant with the longest institutional memory of the case, resigned effective end of June 2018. The exact impact of this 50% loss of team capacity on the progress of the drafting is as yet unclear.⁴⁸¹

330. In the most recent Completion Plan, dated 30 September 2018, the CIJs explained that the OCIJ team working on Case 004 had to be built ‘from scratch’ since the final international team member resigned in mid-August 2018:

Staff attrition has heavily affected this case. Both remaining international team members resigned, the last one in mid-August 2018. The team thus had to be completely re-built, partly through the re-assignment of existing staff as far this did not impact on the progress of case 003 and partly through the

⁴⁷⁸ Case 004/02, *Office of Administration’s Submission on the Budgetary Situation and its Impact on Cases 003, 004, and 004/2* (5 June 2017, D349/3), *Annex 1: Observations of the United Nations Secretariat in Relation to the Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, undated, D349/3.1.1, para. 13.

⁴⁷⁹ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 42.

⁴⁸⁰ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 73.

⁴⁸¹ Completion Plan, Revision 17, 30 June 2018, para. 20(c).

expedited recruitment of new staff, who will, however, need time to familiarise themselves with the case. The exact impact of the total loss at this late stage of institutional memory and team capacity on the most complex of the remaining cases remains unclear. The drafting process, however, will not be finalised before April 2019 under any circumstances.⁴⁸²

331. The CIJs' lamentations in this regard have been deepening in successive Completion Plans,⁴⁸³ including:

The limited staffing and its composition make the Office vulnerable to staff shortages and even minor staff turnover, posing a serious risk to ensuring the Office's institutional memory. Key staff leaving – for instance against the background of the overall funding situation, the approaching end of the Office's mandate, or career planning – represents another serious risk to the projected timelines.

A case in point is the international co-investigating judge's team working on case file 003, where *all* staff from the original team except one legal officer resigned over the last few months, making urgent new recruitment efforts and re-assignment of current staff from the other teams necessary and resulting in a loss of actual case work time and efficiency: None of the newly recruited staff [has] any deep knowledge of the case when they arrive and need to familiarise themselves with the proceedings and the massive [volume] of evidence on the case file before being able to work effectively. The full impact of this development on the progress of case 003 is as yet unclear but already now an additional three months needs to be added to the timeline, leading to a projected date for the closing order by the second quarter of 2018.

Lack of adequate resources will have a massive impact on the drafting of the closing orders in all cases. The drafting time for the closing order was around three months in the rather compact case 001 and about eight months in case 002, which was similar to case 004 in complexity. However, in case 004/01, which is larger than case 001 but less complex than case 004, the drafting of the reasons for the dispositive part of the closing order of 22 February 2017 took almost five months from that date alone but had obviously been going on before then. Case 004/02 is more complex than case 004/01 but somewhat less than case 004.

Timely provision of translation services and the continued availability of experienced legal staff are thus of paramount importance during the drafting phase. This is a problem shared by all protagonists in the proceedings. The international co-prosecutor has advised the co-investigating judges that based on his own resource restrictions he will not be able to submit his final submissions in Khmer and another working language in full within the three months allotted by the Internal Rules; similar concerns have been voiced by

⁴⁸² Completion Plan, Revision 18, 30 September 2018, para. 19(b).

⁴⁸³ Completion Plan, Revision 7, 31 December 2015, para. 27; Completion Plan, Revision 8, 31 March 2016, para. 28; Completion Plan, Revision 9, 30 June 2016, para. 27; Completion Plan, Revision 10, 30 September 2016, para. 22; Completion Plan, Revision 11, 31 December 2016, para. 19; Completion Plan, Revision 12, 31 March 2017, para. 20; Completion Plan, Revision 13, 30 June 2017, paras 19, 20 and 23; Completion Plan, Revision 14, 30 September 2017, paras 21 to 25; Completion Plan, Revision 15, 31 December 2017, paras 23 to 25 and 27; Completion Plan, Revision 16, 31 March 2018, paras 20 to 22; Completion Plan, Revision 17, 30 June 2018, paras 19 to 21; Completion Plan, Revision 18, 30 September 2018, para. 19(b).

all defence teams with regard to their responses. The judges deem those concerns legitimate and have accordingly accommodated them and agreed to a variation of the submission procedure. Full translations of final submissions and defence responses, as recently advised by the Interpretation and Translation Unit, will take 4-5 weeks from submission of the full final versions of the relevant documents.

The above-mentioned factors, as already indicated in the last revision, now exert a measurable knock-on effect in cases 003 and 004, with case 004/02 still being monitored for potential extensions. The timelines in case 004 may require significant additional extensions purely as a matter of law if any appeals are filed against decisions on investigative requests taken during the period of Internal Rule 66(1). The timelines still cannot and should not be considered as anything more than a fair-weather estimate.⁴⁸⁴

332. The closing order in Case 004 was projected to be issued by: the second quarter of 2017;⁴⁸⁵ the third quarter of 2017;⁴⁸⁶ the first quarter of 2018;⁴⁸⁷ the second quarter of 2018;⁴⁸⁸ the fourth quarter of 2018;⁴⁸⁹ the second quarter of 2019;⁴⁹⁰ and, at the latest estimate, and as a direct result of staff attrition, '[t]he drafting process [...] will not be finalised before April 2019 under any circumstances.'⁴⁹¹ The horizon consistently edges away, demonstrating all too acutely how threadbare resources impact proceedings.

333. The repeated extension of the timeline estimates demonstrates the continual 'measurable knock-on effect' of the staff shortages, staff attrition, movement of staff to plug mass staff resignation, lack of adequate resources, timeliness of translation services, and availability of experienced legal staff.⁴⁹² In 2015, the CIJs observed:

These time projections remain contingent on a number of previously-identified factors such as, among others, retention of key staff, sufficient funds for the timely recruitment of new and qualified staff to fill vacant posts, timely translation of documents, sufficient interpretation and transcription capacity made available to support field missions and witness interviews, timely resolution of any appeals filed with the Pre-Trial Chamber and full support from the judicial police.⁴⁹³

⁴⁸⁴ Completion Plan, Revision 14, 30 September 2017, paras 21 to 25.

⁴⁸⁵ Completion Plan, Revision 7, 31 December 2015, para. 26; Completion Plan, Revision 8, 31 March 2016, para. 27.

⁴⁸⁶ Completion Plan, Revision 9, 30 June 2016, para. 36; Completion Plan, Revision 10, 30 September 2016, para. 37; Completion Plan, Revision 11, 31 December 2016, para. 29.

⁴⁸⁷ Completion Plan, Revision 12, 31 March 2017, para. 25; Completion Plan, Revision 13, 30 June 2017, para. 25.

⁴⁸⁸ Completion Plan, Revision 14, 30 September 2017, para. 25.

⁴⁸⁹ Completion Plan, Revision 15, 31 December 2017, para. 28; Completion Plan, Revision 16, 31 March 2018, para. 23.

⁴⁹⁰ Completion Plan, Revision 17, 30 June 2018, para. 21.

⁴⁹¹ Completion Plan, Revision 18, 30 September 2018, para. 19(b).

⁴⁹² *Ibid.*

⁴⁹³ Completion Plan, Revision 7, 31 December 2015, para. 27.

In 2018, they revealed:

The progress of all cases continues to depend substantially on sufficient funding, adequate staffing, timely recruitment for vacant posts and expeditious translations.

Based on internal communications from staff to the [International Co-Investigating] Judge, staff attrition on the international side of the Office is likely to rise in the coming months due to the uncertain funding and employment situation at the ECCC and the ensuing increased job-seeking activity by all staff, which has been ongoing for some time now. As an example, one core P-3 staff member of Team 004/02, who was also in charge of handling and updating all civil party applications across all cases, recently resigned and will leave in mid-April 2018. A second member of Team 004/02, who worked on site as a consultant, is also leaving. Both replacements will lead to a loss of drafting capacity. The previous timeline for case 004/02 will thus be compromised. Though still unclear to which extent a spill-over into the third quarter is now unavoidable. Any further extensions will be advised to the Office of Administration as soon as the picture has become clearer.

Generally, given the increasingly threadbare staffing cover of the Office, even minor staff turnover poses a serious risk to ensuring the Office's institutional memory and keeping to the projected timelines. New staff need time to familiarise themselves with the proceedings and the evidence in order to work effectively on the case; this will have an unavoidable impact on the progress of the cases, especially at this late stage.⁴⁹⁴

334. More recently, the CIJs have described the tangible and inevitable effect of the pernicious funding crisis, which is now undeniable:

To make the extent of the problem clear, it is worth pointing out that the Court's Interpretation and Translation Unit (ITU) informed the International Co-Investigating Judge by email of 17 May 2018 that – based on their own logistical and staffing strictures – translations from English into Khmer and their revisions would on average take around 8 weeks for 300 pages, and 12 weeks for 500 pages. Staff attrition on the international side of the Office has moved from being a real concern to becoming a concerning reality, and has risen to an unprecedented level in the last year, resulting in virulent staff retention difficulties: In the period from June 2017 to the end of June 2018, the international side lost 13 staff members and consultants through resignation, 10 alone since October 2017, triggering the need for multiple and time-consuming recruitment procedures. On average, the Office has thus lost one person each month. The staffing cover of the Office is now so threadbare that even minor staff turnover seriously impacts the Office's institutional memory and its ability to keep to the projected timelines [...], especially at this late stage in the investigation.⁴⁹⁵

335. The CIJs have outlined the current acute impediments to Case 004's expeditious progress:

⁴⁹⁴ Completion Plan, Revision 16, 31 March 2018, paras 20 to 22.

⁴⁹⁵ Completion Plan, Revision 17, 30 June 2018, para. 19.

Case 004 saw the national co-prosecutor filing her final submission on 31 May 2018 in both English (11 pp.) and Khmer (15 pp.); the international co-prosecutor filed his 732-page submission on 4 June 2018 in English only. Because of resource constraints, he was not able to file it simultaneously in Khmer within the three months allotted by the Internal Rules. Final closing order drafting work can only begin once the defence has filed its response which will be 3 months after the Khmer translation of the ICP submission has been notified, which, based on ITU's revised estimate of 7 June 2018, is expected for 20 August 2018. Staff attrition has also heavily affected this team: One of the two remaining team members, the consultant with the longest institutional memory of the case, resigned effective end of June 2018. The exact impact of this 50% loss of team capacity on the progress of the drafting is as yet unclear. Due to the complexity of the case, translation logistics and the staff loss, finalising the draft and the translation will, however, not now be feasible until the first quarter of 2019.⁴⁹⁶

336. The loss of the final remaining OCIJ Case 004 team member has meant 'the total loss at this late stage [of the investigative proceedings] of institutional memory and team capacity on the most complex of the remaining cases remains unclear,' though it has certainly delayed the Closing Order drafting process.⁴⁹⁷

(3) The CIJs' Requirements Remain Unmet

337. The Defence submits that, for the reasons outlined above, and though the ECCC has limped through the past few months in much the same way as it has for the past few years, albeit with quickening staff attrition and increasingly 'threadbare' offices,⁴⁹⁸ the situation has not materially improved. Indeed, given the diminishing reliability of future subventions,⁴⁹⁹ and given the ECCC's precarious reliance on voluntary contributions in a time of global financial crisis, there can be no financial certainty. The outlook is grim.
338. The Defence submits that the CIJs cannot be considered to have been 'provided with sufficiently specific and reliable information that the funding situation will improve drastically,' nor 'with a sufficiently specific and reliable pro-active planning outlook,' so that they may be satisfied that they 'will be able to successfully complete [their] mandate in a timely and efficient manner until the issuance of a closing order in each case' and

⁴⁹⁶ Completion Plan, Revision 17, 30 June 2018, para. 20(c).

⁴⁹⁷ Completion Plan, Revision 18, 30 September 2018, para. 19(b).

⁴⁹⁸ Completion Plan, Revision 16, 31 March 2018, para. 21.

⁴⁹⁹ Case 004/02, *Office of Administration's Submission on the Budgetary Situation and its Impact on Cases 003, 004, and 004/2* (5 June 2017, D349/3), *Annex 1: Observations of the United Nations Secretariat in Relation to the Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, undated, D349/3.1.1, para. 11.

‘that effective measures will be implemented to ensure sufficient funding for any appellate review of the closing orders and, should a trial ensue, for the trial and appeals process.’⁵⁰⁰

339. Acceptance of prevailing economic conditions as a justification for the violation of fundamental rights carries with it the risk of subordinating minimum standards of fair trials to prevailing political priorities. The continued insecurity of funding precludes any certainty that fair trial and appellate proceedings will be possible. The effect of the funding crisis is already undeniable: the speed and efficiency with which both the OCIJ and PTC can operate has, by the OCIJ’s own admission, been severely hindered by staff attrition.⁵⁰¹ A lack of adequate budgetary appropriations for the administration of criminal justice cannot justify delays in the adjudication of Mr YIM Tith’s case.⁵⁰²
340. On 11 August 2017, deferring their decision on a stay of the proceedings, the CIJs stated: ‘Should a future lack of funds or financial uncertainty threaten judicial independence, fairness, and the integrity of the proceedings, we will take the measures that we consider necessary to address the situation.’⁵⁰³ The Defence submits that the fairness and integrity of the proceedings have been irremediably damaged by the consistent and worsening lack of funds and increasing lack of financial certainty. This is no longer plausibly deniable. It is now imperative to reconsider terminating the proceedings.
341. As previously recognised and indicated by the CIJs, serious questions remain as to the plausibility that trial proceedings can be financially sustained.⁵⁰⁴ Mr YIM Tith cannot be guaranteed a trial, let alone a fair and expeditious trial, violating his right to be heard. As already recognised by the CIJs, it would be wholly immoral to indict a man under these circumstances:

It is in our understanding not compatible with the basic demand of the rule of law to let an unfinished investigation and, *a minore ad maius*, even an indictment hang over the charged person by simply ceasing the operations of

⁵⁰⁰ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 79.

⁵⁰¹ Completion Plan, Revision 17, 30 June 2018, para. 20(c); Completion Plan, Revision 18, 30 September 2018, para. 19(b).

⁵⁰² ECtHR, *Zimmermann and Steiner v. Switzerland*, Application Number 8737/79, *Judgment*, 13 July 1983, para. 29; UN HRC, *Fillastre and Others v. Bolivia*, Communication number 336/1988, UN Doc CCPR/C/43/D/336/1988 (1991), 6 November 1991, para.6.5.

⁵⁰³ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, Disposition, para. 69.

⁵⁰⁴ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, paras 1-4, 6, 24-33, 40, 42-43, 45, 52-54, 75-79.

the ECCC and locking the doors to the court because there is no more budget to pay for the staff and non-staff expenses of either the national or international components. This scenario as we will explain below, is not an adequate closure mechanism under the principles of fair trial, and judicial independence and the rule of law – it is not foreseen under the UN-RGC Agreement, either.⁵⁰⁵

342. The United Nations Secretariat stated that the CIJs may indict without confidence in the future security of funding and allow it to fall to the Pre-Trial, Trial or Supreme Court Chambers to determine what judicial steps to take in relation to the proceedings.⁵⁰⁶ It erred. The CIJs clearly understand the heavy responsibility borne by their office, and their legal obligation to dismiss the charges against a man when his right to be heard by an independent and competent tribunal in accordance with the law, including at the appellate level, cannot be absolutely guaranteed.⁵⁰⁷ The Defence need labour this transparent point no further.
343. The Defence notes that the ‘PDG reaffirmed their deep and ongoing commitment to the proper funding of the Court at their meeting with the CIJs on 20 June 2018.’⁵⁰⁸ No matter how welcome, and while the Defence acknowledges that it does not know the content of the meeting, this constitutes only an expression of good intention. It is not a legally binding guarantee as demanded by the UN-RGC Agreement. As such, in the submission of the Defence, it cannot constitute sufficiently specific and reliable information that the funding situation will improve drastically and allow Mr YIM Tith, if indicted, to be tried in a timely and efficient manner.
344. The ECCC remains without the financial guarantees necessary to complete its task. Fundamental defence rights have already been impacted, and a Principal Donor has indicated that its continued funding is contingent on the indictment of Meas Muth.⁵⁰⁹ Though the Defence has every belief that the CIJs are immune to the ‘whims and caprices

⁵⁰⁵ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 54.

⁵⁰⁶ Case 004/02, *Office of Administration’s Submission on the Budgetary Situation and its Impact on Cases 003, 004, and 004/2* (5 June 2017, D349/3), *Annex 1: Observations of the United Nations Secretariat in Relation to the Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, undated, D349/3.1.1, para. 6.

⁵⁰⁷ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, paras 17 and 18.

⁵⁰⁸ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 44.

⁵⁰⁹ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 69; *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, paras 45 to 48.

of governments,’ they need resources in order to function efficiently and have certainly been placed in a position in which their judicial independence is under attack from major UN donors.⁵¹⁰

345. The current situation and the ‘outlook going forward’ remain incompatible with the basic principles of fair trial, the rule of law and judicial independence.⁵¹¹ Without absolute confidence in the viability of future trial and appellate proceedings to enable Mr YIM Tith to exercise, at long last, his right to be heard, the CIJs cannot issue an indictment. As they themselves observed, their ‘concern must not only relate to the investigation stage but must adopt a longer perspective.’⁵¹²
346. At this point in the proceedings, it falls to the CIJs to indict or dismiss.⁵¹³ The Defence accordingly invites the CIJs to dismiss the case now.

(4) The CIJs’ Cannot Relinquish Responsibility to Judicial Chambers

347. In their *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, the CIJs stated that they would not issue an indictment unless they were certain that a fair trial would be held:

It is in our understanding not compatible with the basic demands of the rule of law to let an [...] indictment hang over the charged person by simply ceasing the operations of the ECCC and locking the doors to the court because there is no more budget to pay for the staff and non-staff expenses of either the national or international components.⁵¹⁴

348. The CIJs have confirmed that, while they may be ‘in principle’ *functus officio* after issuing the last closing order, they maintain their office until the final decision of the Pre-Trial

⁵¹⁰ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 68, citing: SCSL Appeals Chamber, *Prosecutor v. Sam Hinga Norman*, ‘Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)’ (SCSL-2004-14-AR72(E)), 13 March 2004, para. 26.

⁵¹¹ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 1.

⁵¹² *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 48.

⁵¹³ Rule 67(1).

⁵¹⁴ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 54 (see also, para. 4).

Chamber on an appeal against a closing order.⁵¹⁵ The CIJs therefore retain their jurisdiction and therefore their responsibility over the fair trial rights of Mr YIM Tith.

349. Since it is they, and they alone, who hold the authority to issue an indictment in Case 004, the CIJs cannot relinquish this heavy responsibility. Because the CIJs ‘can no longer interfere’ after they issue the last closing order, *i.e.* in Case 004, the CIJs must be absolutely satisfied, *right now*, that fair trial and appellate proceedings will be adequately and appropriately funded.
350. Since the budgetary situation remains precarious, and Case 004 has already suffered irreparable damage as a result of chronic underfunding, the risk remains that the operation of the ECCC might suddenly cease. The Principal Donors Group’s ‘deep and ongoing commitment to the proper funding of the Court’ is not sufficiently secure, nor is it a guarantee; as stated *supra*, it is merely an expression of good intention, easily given but far less easily fulfilled.⁵¹⁶ The risk that an indictment might thus be left hanging over Mr YIM Tith is untenable. The CIJs cannot be certain that a trial, let alone a fair trial, will be held. It would be a dereliction of their responsibility, and contrary to their initial position, to issue an indictment in these circumstances. The Defence submits that the CIJs must therefore dismiss Case 004.
351. The CIJs remain without guarantee that the financial situation of the ECCC will improve ‘drastically.’ Indeed, they remain without guarantee that the financial situation of the ECCC will improve at all; in fact, all indications appear to be that matters will deteriorate as donors tire yet further and the provision of ‘exceptional subventions’ becomes less likely. There remain serious doubts as to whether full and fair (including expeditious) trial and appellate proceedings can be guaranteed in Case 004.

iii. Undue Delay

352. Justice delayed is justice denied.⁵¹⁷ Mr YIM Tith’s fundamental right to be tried without undue delay is unequivocally enshrined in the law applicable at the ECCC.⁵¹⁸ This ancient

⁵¹⁵ Establishment Law, Article 27; *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 18; Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 45, including fn 90.

⁵¹⁶ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 44.

⁵¹⁷ Often attributed to William Gladstone.

⁵¹⁸ UN-RGC Agreement, Articles 12(2) and 13(1); Establishment Law, Articles 33 *new* and 35 *new*; Rule 21(4); ICCPR, Article 14(3)(c).

right and tenet of just proceedings finds further modern articulation in the supranational human rights conventions and the statutes of all international criminal tribunals, as well as national legislation and jurisprudence.⁵¹⁹ It is, in the words of the ECtHR, intended to protect parties against ‘excessive procedural delays’ and ‘in criminal matters, especially, it is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate.’⁵²⁰ As noted by Judge Pikis at the ICC, ‘[t]he reasonableness of the time within which judicial proceedings are conducted and concluded and the absence of undue delay constitute an inseparable element of a fair trial, forming part of internationally recognised human rights.’⁵²¹

353. The proceedings against Mr YIM Tith have been beset by woeful and unjustifiable delays. It has already been over twelve years since a preliminary investigation was opened against him on 10 July 2006, and any trial and appellate proceedings would be likely to extend into several years.⁵²² As previously recognised and indicated by the CIJs, serious questions remain as to the plausibility that trial proceedings could be financially sustained (as considered *supra*).⁵²³ Continued extreme financial constraints on the proceedings would also likely spell further unacceptable delays. These cannot be justified by reference to prevailing economic conditions since it is incumbent upon Cambodia as a State Party to the ICCPR to order its affairs such that it can comply with its obligations under the treaty.

⁵¹⁹ See, for example: Magna Carta 1215, Chapter 29: *we will not deny or defer to any man either justice or right*; ICCPR, Article 14(3)(c); ECHR, Article 6(1); American Convention on Human Rights, Article 8(2)(1); African Charter on Human and Peoples’ Rights, Article 7(1)(d); ICC Statute, Article 67(1)(c); ICTY Statute, Articles 20(1) and 21(4)(c); ICTR Statute, Articles 19(1) and 20(4)(c); SCSL Statute, Article 17(4)(c); STL Statute, Article 16(4)(c).

⁵²⁰ ECtHR, *Stogmuller v. Austria*, Application Number 1602/62, Judgment, 10 November 1969, As to the Law, para. 5; *Stoianova and Nedelcu v. Romania*, Application Numbers 77517/01 and 77722/01, Judgment, 4 August 2005, para. 23.

⁵²¹ ICC, *The Prosecutor v. Lubanga*, Separate Opinion of Judge Georgios M. Pikis to ‘Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008,’ 21 October 2008, ICC-01/04-01/06-1486, para. 44.

⁵²² Case 004/01, *International Co-Prosecutor’s Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7, the investigation opened on 10 July 2006. The trial proceedings in Case 002 commenced on 21 November 2011.

⁵²³ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, paras 1 to 4, 6, 24 to 33, 40, 42 to 43, 45, 52 to 54, and 75 to 79.

354. The rights set forth in the ICCPR constitute minimum standards that both Cambodia and the UN have agreed to observe.⁵²⁴ Consequently, overload of the justice system, difficult economic circumstances, or the written form of criminal proceedings are not admissible excuses for failure to comply with Article 14(3)(c).⁵²⁵ It is for the authorities to prove that the complexity of this case justifies the delays suffered.⁵²⁶ Mere affirmation that a delay was not excessive is not sufficient.⁵²⁷
355. Since serious prejudice inheres in the very fact of unjustified delay in the first place, there is no requirement that the accused demonstrate any additional serious prejudice emanating from the delay.⁵²⁸ That notwithstanding, the delays suffered by Mr YIM Tith do indeed compound and create further prejudice to him, as set out below.

(a) The Length of the Proceedings

356. Rule 21(4) dictates that '[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time.'
357. The UN Human Rights Committee has determined that the right to be tried without undue delay is a guarantee 'relat[ing] not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place "without undue delay."'⁵²⁹ The period to be taken into consideration last until the conclusion of the final appellate pronouncement on the merits of the charge(s).⁵³⁰
358. The NCIJ has held that 'any assessment of the delay must be objective,' meaning that 'it should be made professionally, impartially and honestly having regard to all aspects of

⁵²⁴ Constitution of Cambodia, Article 31; UN-RGC Agreement, Articles 12(2) and 13; Establishment Law, Article 35 new. See also: UN HRC, *Lubuto v. Zambia*, Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995), 31 October 1995, para. 7.3.

⁵²⁵ UN HRC, *Lubuto v. Zambia*, Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995), 31 October 1995, para. 7.3; *Fillastre, Bizouarn v. Bolivia*, Communication No. 336/1988, U.N. Doc. CCPR/C/43/D/336/1988 at 96 (1991), 5 November 1991, paras 4.6 and 6.6.

⁵²⁶ UN HRC, *Fillastre, Bizouarn v. Bolivia*, Communication No. 336/1988, U.N. Doc. CCPR/C/43/D/336/1988 at 96 (1991), 5 November 1991, para. 6.6.

⁵²⁷ UN HRC, *Trevor Walker and Lawson Richards v. Jamaica*, Communication No. 639/1995, U.N. Doc. CCPR/C/60/D/639/1995 (2001), 28 July 1997, para. 8.2.

⁵²⁸ High Court of Australia, *Jago v The District Court of New South Wales*, 12 October 1989, 63 ALJR 640, *per* Mason CJ at 644.

⁵²⁹ UN HRC, *CCPR General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, para. 35. See also: ECtHR, *Eckle v. Germany*, Application Number 8130/78, 15 July 1982, para. 76; *Wemhoff v. Germany*, Application Number 2122/64, 27 June 1968, The Law, para. 18.

⁵³⁰ *Neumeister v. Austria*, Application Number 1936/63, Judgment, 27 June 1968, para. 19; *Wemhoff v. Germany*, Application Number 2122/64, 27 June 1968, The Law, para. 18.

the proceedings starting with the initial phase of the work of the Office of the Co-Prosecutors, the lawyers, the administration and the Pre-Trial Chamber.⁵³¹

359. Investigations are not to be temporally unlimited; lengthy efforts to bolster a weak case are not to be tolerated.⁵³² Where, as here, proceedings are vitiated by undue delay, to proceed with the trial would require the ICP and the ECCC to act in a way incompatible with and in continuous violation of the ICCPR, the Cambodian Constitution and the Law of the ECCC.
360. The Closing Order(s) in Case 004 is/are currently estimated to be completed by the second quarter of 2019.⁵³³ Pre-trial appeal proceedings may be expected to take one year.⁵³⁴ To the extent that it is possible to estimate, the Defence suggests that any trial hearings in Case 004 would be likely to last approximately four years. The Defence bases this assessment on the CIJs' comparison of Case 004 with Case 002, and notes that the substantive hearings in Case 002/01 and 002/02 cumulatively lasted approximately four years.⁵³⁵ The Defence notes the CIJs' comment that the 'overall expected time for Cases 003, 004 and 004/2 [...] might be longer given the number of remaining crime bases even after the application of Internal Rule 66bis.'⁵³⁶ The relevant trial judgement could be expected to take approximately one year, assuming the Trial Chamber were equipped with full and efficient resources.⁵³⁷ Appellate proceedings could take two or three years.⁵³⁸ From these broad-brush calculations, the Defence conservatively estimates that full trial and appellate proceedings might extend to 2026. This would be 20 years from

⁵³¹ Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 8.

⁵³² UK, *Cooke v Purcell* (1988) 36 A Crim R 425.

⁵³³ Completion Plan, Revision 17, 30 June 2018, para. 11.

⁵³⁴ The PTC has, perhaps optimistically, suggested that it may expect to issue the judgment on any appeal against the Case 004 Closing Order by the first quarter of 2020. This assumes that there will be only one Closing Order. In Case 004/01, the CIJs issued the *Closing Order (Disposition)* [Case 004/01-D308] on 22 February 2017, and the *Closing Order (Reasons)* [Case 004/01-D308/3] on 10 July 2017. The PTC issued its *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)* [Case 004/01-D308/3/1/20] on 28 June 2018. The issues in Case 004/01 were discreet. In Case 004/02, the CIJs issued their respective Closing Orders on 16 August 2018 [Case 004/02-D359 and D360]. At the time of filing this Consolidated Response, the parties to Case 004/02 had yet to seise the PTC with their appeals. In view of the dual appeals and the complexity of the issues, the Defence suggests that it is not likely that the appellate proceedings in Case 004/02 will be fully disposed of by August 2019. The translations of the conflicting Closing Orders took *circa* eleven weeks.

⁵³⁵ ECCC Completion Plan, Revision 11, para. 24; Case 002, *Case 002/1 Judgement*, 7 August 2014, E313, paras 7 to 8; Completion Plan, Revision 15, 31 December 2017, para. 38.

⁵³⁶ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 52.

⁵³⁷ Case 002, *Case 002/1 Judgement*, 7 August 2014, E313, para. 8.

⁵³⁸ Case 002/01, *Appeal Judgement*, 23 November 2016, F36. This was issued over two years after the *Case 002/1 Judgement*. The Defence's estimate is premised on the assumption that any trial against Mr YIM Tith would be conducted as one, rather than severed as in Case 002.

the opening of the ICP's Preliminary Investigation.⁵³⁹ If these proceedings were to be held in parallel with another case, with only one courtroom and single Trial and Appellate benches, these estimated timelines would need to be significantly extended. In view of the issuance of conflicting Closing Orders in Case 004/02, this prospect is not merely hypothetical and must be accorded serious attention.⁵⁴⁰

361. The period to be taken into account in assessing the reasonableness of the length of proceedings commences from the point at which the situation of a suspect becomes 'substantially affected.'⁵⁴¹ In Mr YIM Tith's case, this may be considered from the point at which the preliminary investigation was opened against him: 10 July 2006.⁵⁴² The ICP's Third Introductory Submission and the accusations against Mr YIM Tith were made public by 26 May 2011.⁵⁴³ Mr YIM Tith was first *formally* notified of his rights as a suspect in Case 004 on 24 February 2012, at which point his right to expeditious proceedings had certainly become 'relevant,' as acknowledged by the ICIJ.⁵⁴⁴

362. The Defence submits that the ECCC is obliged to consider that the relevant period commenced from the earliest point at which Mr YIM Tith's interests were in fact substantially affected. Arguably, this was the point from which the preliminary investigation was opened, or at least the point at which the ICP's Third Introductory Submission triggered the opening of the judicial investigation. Indeed, the Defence notes that the NCIJ has recently held that '[t]he status of a charged person is considered from the time the Co-Prosecutors issued their Introductory Submission and charges are only a

⁵³⁹ Case 004/01, *International Co-Prosecutor's Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7.

⁵⁴⁰ Case 004/02, *Order Dimissing the Case against Ao An*, 16 August 2018, D359; *Closing Order (Indictment)*, 16 August 2018, D360.

⁵⁴¹ ECtHR, *Eckle v. Germany*, Application Number 8130/78, Judgment, 15 July 1982, para. 73; *Kangashuoma v. Finland*, Application Number 48339/99, Judgment, 20 January 2004, para. 26; *Corigliano v. Italy*, Application Number 8304/78, Judgment, 15 10 December 1982, para. 34; *Coëme and Others v. Belgium*, Application Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment, 22 June 2000, para. 133; *Hozee v. The Netherlands*, Application Number 81/1997/865/1076, Judgment, 22 May 1998, para. 43; *Deweert v. Belgium*, Application Number 6903/75, Judgment, 27 February 1980, para. 46.

⁵⁴² Case 004/01, *International Co-Prosecutor's Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7.

⁵⁴³ D72/1.1.11, WRIA, 2 September 2011, reporting that Ms Yuko Maeda, an ECCC Press Officer, 'stated that from her memory she can recall that back to 26 May 2011 M. Jared Ferrie, a freelance journalist had first publish [*sic*] in a Jurist Newspaper about a confidential document from the Court and then a second time on 15 June 2011 in the Christian Science Monitor.'

Ferrie, J., 'More Leaked Documents Highlight KR Tribunal Under Fire in Cambodia,' *The Christian Science Monitor*, 15 June 2011. On Case File 004: D72/1.1.3.

⁵⁴⁴ *Notification of Suspect's Rights [Rule 21(1)(D)]*, 24 February 2012, D109. *Consolidated Decision on the Requests for Investigative Action Concerning the Crime of Forced Pregnancy and Forced Impregnation*, 13 June 2016, D301/5, para. 93.

procedure whereby a charged person is entitled to legal representation to defend himself.’⁵⁴⁵ It is beyond doubt that Mr YIM Tith’s interests, both personal and legal, were substantially affected by 26 May 2011, when the ICP’s Third Introductory Submission and documents relating to the disagreement between the Co-Prosecutors were leaked to the media and published.⁵⁴⁶ This could have been leaked only by an official or officials of the ECCC, and therefore by ‘the authorities.’⁵⁴⁷

363. The ICP’s Third Introductory Submission is a highly prejudicial confidential document which asserts that Mr YIM Tith bears responsibility for crimes under the jurisdiction of the ECCC. As discussed above, it was presumptuously written as though the judicial investigation had been concluded, while it of course served merely to circumscribe the judicial investigation. Mr YIM Tith was repeatedly named in subsequent media articles and video footage,⁵⁴⁸ later linked to specific alleged crime sites, and stated to be ‘in charge of Khmer Rouge zones where hundreds of thousands of people are thought to have died through overwork, starvation or execution.’⁵⁴⁹ It is clear that journalists pursued the subjects of the ICP’s Third Introductory Submission well before proper attempts were made to inform Mr YIM Tith of the proceedings against him or to permit him his rightful legal representation.⁵⁵⁰

⁵⁴⁵ Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 5.

⁵⁴⁶ D72/1.1.11, WRIA, 2 September 2011, reporting that Ms Yuko Maeda, an ECCC Press Officer, ‘stated that from her memory she can recall that back to 26 May 2011 M. Jared Ferrie, a freelance journalist had first publish [sic] in a Jurist Newspaper about a confidential document from the Court and then a second time on 15 June 2011 in the Christian Science Monitor.’

Ferrie, J., ‘More Leaked Documents Highlight KR Tribunal Under Fire in Cambodia,’ *The Christian Science Monitor*, 15 June 2011. On Case File 004: D72/1.1.3.

⁵⁴⁷ *Infra*, fn 582.

⁵⁴⁸ Manning, S. and Thompson, A., ‘Leaked Documents Suggest UN Backing Off Khmer Rouge Trials,’ *Scoop Independent News*, 27 June 2011. Accessible, along with functioning hyperlinks to, *inter alia*, the ICP’s Third Introductory Submission, at: <http://www.scoop.co.nz/stories/print.html?path=HL1106/S00165/leaked-documents-suggest-un-backing-off-khmer-rouge-trials.htm>. Also on Case File 004: D72/1.1.5.

Sok, K., ‘Ex-KR Cadre Not Fearful of Tribunal and Guardian of Hell,’ *VOA Khmer*, 10 August 2011, on Case File 004: D72/1.1.2.

Written Record of Investigative Action, 6 September 2011, D72/1.1.13

⁵⁴⁹ Sok, K., ‘Crime Sites, Victim Information Released in Pending Tribunal Case,’ *VOA Khmer*, 20 December 2012. Accessible at: <https://www.voacambodia.com/a/crime-sites-victim-information-released-in-pending-tribunal-case/1568123.html>.

⁵⁵⁰ Men, K., ‘Journalists Fear Media Environment of Self-Censorship,’ *VOA Khmer*, 9 September 2011: ‘In July and August [2011], Sok Khemara traveled to remote Cambodian villages to interview three suspects in cases 003 and 004, reporting that he said contributed to better informing both victims and suspects on the work of the tribunal. His reporting included citation of a November 2008 prosecutor’s submission that had been publicized in the international media earlier in the year.’ Reserve ICIJ Kasper-Ansermet sought to inform Mr YIM Tith formally that he was a suspect in Case 004 and of his basic trial rights only on 26 February 2012, D109.

364. Whether and to what extent the ECCC took steps to investigate and punish those responsible for leaking the ICP's Third Introductory Submission is irrelevant to the impact this act had on Mr YIM Tith's fair trial rights. The bell cannot be unrung.
365. The proper and comprehensive involvement of the Defence is an integral part of the truth-seeking exercise to be conducted by any court. Treating the involvement of the Defence as an after-thought or an inconvenience fundamentally undermines the judicial process and, by neglecting to subject investigative practices and evidence to rigorous scrutiny, leaves the truth permanently unknowable.
366. Despite this, the Defence was granted access to Case File 004 only on 4 December 2015; over nine years since the Preliminary Investigation was opened against Mr YIM Tith.⁵⁵¹

(b) Assessment of Reasonable Time for Proceedings

367. Criteria relevant to the assessment of 'reasonable time' for proceedings include:
- i. the length of the delays;
 - ii. the complexity of the proceedings (as indicated by, for example, the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law);
 - iii. the conduct of the parties;
 - iv. the conduct of the relevant authorities; and
 - v. the burden upon and/or prejudice to the accused, if any.⁵⁵²

These criteria are to be considered in their totality.⁵⁵³

368. Delays which might otherwise be excused in isolation are to be considered impermissible where they indicate a systemic issue in the functioning of the court.⁵⁵⁴

⁵⁵¹ Case 004/01, *International Co-Prosecutor's Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7.

⁵⁵² ECtHR, *König v. Germany*, Application Number 6232/73, Judgment, 28 June 1978, para. 99; *Neumeister v. Austria*, Application Number 1936/63, Judgment, 27 June 1968, para. 21; *Ringeisen v. Austria*, Application Number 2614/65, Judgment, 16 July 1971, para. 110; *Pélissier and Sassi v. France* [GC], Application Number 25444/94, Judgment, 25 March 1999, para. 67; *Pedersen and Baadsgaard v. Denmark*, Application Number 49017/99, Judgment, 17 December 2004, para. 45.

⁵⁵³ ICTR Trial Chamber III, *Prosecutor v. Bizimungu Casimir et al.* (ICTR-98-44C-PT), Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, 3 June 2005, para. 19; ECtHR, *Ruotolo v. Italy*, Application Number 12460/86, 27 February 1992, para. 17.

⁵⁵⁴ ECtHR, *König v. Germany*, Application Number 6232/73, Judgment, 28 June 1978, para. 105; *Deumeland v. Germany*, Application Number , Judgment, 29 May 1986, para. 90; *Erkner and Hofbauer v. Austria*, Application

(1) Length of Delays So Far Endured in Case 004

369. The proceedings against Mr YIM Tith commenced over 12 years ago.⁵⁵⁵ By any assessment, this is a very long time to be subject to investigation. The judicial investigation was triggered on 2 September 2009 and concluded on 5 September 2017.⁵⁵⁶ Mr YIM Tith remains without any clarity as to when the full complement of proceedings might finally cease. Comparison with Case 002, said by the CIJs to be similar to Case 004 in size and complexity, suggests that the proceedings could – and therefore *should* – have been completed far more swiftly. The Case 002 Introductory Submission was filed on 18 July 2007 and the case is now in its final appellate stage.⁵⁵⁷
370. Even in cases of high complexity, lengthy periods of inactivity cannot be considered ‘reasonable.’⁵⁵⁸ Even where complexity may justify a certain lapse of time, it will not automatically justify the entirety of the length of the proceedings.⁵⁵⁹ Case 004 has already been protracted for reasons other than its complexity.
371. Successive Completion Plans demonstrate that the progress of Case 004 has been dramatically stalled due to lack of resources.⁵⁶⁰ On 30 June 2017, the Closing Order was projected to be completed by the first quarter of 2018.⁵⁶¹ On 30 June 2018, it was said that Mr YIM Tith might expect the Closing Order, or Closing Orders, in the second quarter of 2019.⁵⁶² The current projection for the judgment on any appeal against the Closing Order is ‘by the first quarter of 2020,’ and the disposal of appeals regarding civil party applications will require approximately one further quarter.⁵⁶³ This presupposes that the PTC will face only one Closing Order in Case 004 and is reliant on ‘sufficient staffing

Number 9616/81, Judgment, 29 September 1987, paras 69 and 70; *Poiss v. Austria*, Application Number 9816/82, Judgment, 23 April 1987, para. 60; *Ruotolo v. Italy*, Application Number 12460/86, Judgment, 27 February 1992, para. 17.

⁵⁵⁵ Case 004/01, *International Co-Prosecutor’s Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7.

⁵⁵⁶ *Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission*, 7 September 2009, D1/1; *ICP’s Third Introductory Submission*, D1; *Second Notice of Conclusion of Judicial Investigation against Yim Tith*, 5 September 2017, D368.

⁵⁵⁷ Case 002, *Case 002/01 Judgement*, 7 August 2014, E313, paras 2 to 8.

⁵⁵⁸ ECtHR, *Adiletta and Others v. Italy*, Application Numbers 13978/88, 14236/88 and 14237/88, 19 February 1991, para. 17.

⁵⁵⁹ ECtHR, *Rutkowski and Others v. Poland*, Application Number 72287/10, 7 July 2015, para. 137.

⁵⁶⁰ *Supra*, para. 332.

⁵⁶¹ Completion Plan, Revision 13, 30 June 2017, para. 25.

⁵⁶² Completion Plan, Revision 17, 30 June 2018, para. 21; Completion Plan, Revision 18, 30 September 2018, para. 20.

⁵⁶³ Completion Plan, Revision 18, 30 September 2018, paras 23(b) and 25.

of the Pre-Trial Chamber, the expeditious translation of the parties' submissions and the judicial decisions into the three languages of the Extraordinary Chambers.⁵⁶⁴ The Defence suggests that it is likely that these projections will need to be extended.

372. Written litigation schedules at the ECCC are strictly dictated by Article 8 of the Practice Direction on Filing of Documents/Rev. 8. The obvious reason for this is to circumscribe the periods within which legal issues are resolved. While this benefits all parties to the proceedings, it is clearly intended to ensure that accused are not subjected to unduly elongated proceedings. Pursuant to Article 8, judicial Chambers should be fully seised of a motion within 40 calendar days (in advance of oral arguments) or 45 calendar days (where no oral hearings will be heard) of the initial application or pleading. The schedules annexed hereto demonstrate the practical impact of the delays to translations occasioned by the deficient support provided to ITU.⁵⁶⁵ The Defence appreciates the CIJs' pragmatic approach, including proceeding to issue decisions on the basis of filings in one language only. The PTC, however, has adopted a practice of delaying notifications of initial filings, which has not accelerated proceedings in Case 004.
373. The ICIJ has also explained that '[a] large part of the OCIJ's staff time was also taken up by the many disclosure requests from the ICP related to Case 002.'⁵⁶⁶ He stated, unambiguously and unequivocally, that '[t]his work detracted from the capacity available to progress the actual investigations.'⁵⁶⁷ The conduct of the ICP, therefore, has certainly slowed the proceedings against Mr YIM Tith. The validity of the ICP's conduct *vis-à-vis* Case 002 is irrelevant: the ICIJ did not have the capacity to fulfil his requests without deleterious impact on Case 004.

(2) Asserted Lack of Complexity of Case 004

374. The ICP, the CIJs, and the PTC have all asserted that Case 004 is not sufficiently complex to warrant affording the Defence any more than a little over 18 months to become fully acquainted with the evidential and legal intricacies of Case File 004.⁵⁶⁸

⁵⁶⁴ Completion Plan, Revision 18, 30 September 2018, para. 24.

⁵⁶⁵ Annex I and Annex II.

⁵⁶⁶ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 33.

⁵⁶⁷ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 33.

⁵⁶⁸ *International Co-Prosecutor's Response to Yim Tith's Request for Additional Time*, 23 June 2017, D361/2. *Decision on Yim Tith's Request for Adequate Time*, 5 July 2017, D361/4. *Decision on Yim Tith's Appeal against the Decision on Yim Tith's Request for Adequate Preparation Time*, 13 November 2017, D361/4/1/10.

375. The CIJs have contradictorily commented that the complexity of the judicial investigation in Case 004 ‘approximately mirrored’ that of Case 002.⁵⁶⁹ It is instructive to consider the timelines of the respective investigations.
376. The Introductory Submission relevant to Case 002 was submitted by the Co-Prosecutors on 18 July 2007.⁵⁷⁰ The Charged Persons were arrested between 19 September and 19 November 2007 and immediately notified of the charges against them.⁵⁷¹ The judicial investigation in Case 002 lasted three years and the Charged Persons were indicted on 15 September 2010 for crimes against humanity, genocide, grave breaches of the Geneva Conventions and violations of the 1956 Penal Code.⁵⁷² The Case 002 Closing Order was confirmed on appeal on 13 January 2011 and the Accused were remitted to trial, the first part of which, after the settlement of a number of pre-trial issues including the severance of the proceedings, commenced on 21 November 2011.⁵⁷³ The evidential hearings in Case 002/01 concluded on 23 July 2013, and the parties’ Closing Statements concluded on 31 October 2013.⁵⁷⁴ The *Case 002/1 Judgement* was issued on 7 August 2014.⁵⁷⁵ The Case 002/01 *Appeal Judgement* was issued on 23 November 2016.⁵⁷⁶ The evidential hearings in Case 002/02 concluded on 11 January 2017, and the parties’ Closing Statements concluded on 23 June 2017.⁵⁷⁷ The *Case 002/2 Judgement* was pronounced, in summary, on 16 November 2018.⁵⁷⁸
377. The Defence notes the ICP’s contention that ‘Case 004 is not of “greater” legal and factual complexity than Case 002’:⁵⁷⁹

Case 002 involves crimes spanning the territory of Cambodia, with crime sites in five of the seven Democratic Kampuchea Zones for the entire period from 17 April 1975 to 6 January 1979. The position of authority of Nuon Chea and Khieu Samphan at the top of the Community Party of Kampuchea also required addressing a longer chain of command to link them to the crime. The

⁵⁶⁹ ECCC Completion Plan, Revision 11, para. 24.

⁵⁷⁰ Case 002, *Case 002/1 Judgement*, 7 August 2014, E313, para. 2, citing *Introductory Submission*, 18 July 2007, D3.

⁵⁷¹ Case 002, *Case 002/1 Judgement*, 7 August 2014, E313, para. 3.

⁵⁷² Case 002, *Case 002/1 Judgement*, 7 August 2014, E313, para. 3, citing *Closing Order*, 15 September 2010, D427, para. 1613.

⁵⁷³ Case 002, *Case 002/1 Judgement*, 7 August 2014, E313, paras 3 to 7.

⁵⁷⁴ Case 002, *Case 002/1 Judgement*, 7 August 2014, E313, para. 8.

⁵⁷⁵ Case 002, *Case 002/1 Judgement*, 7 August 2014, E313.

⁵⁷⁶ Case 002/01, *Appeal Judgement*, 23 November 2016, F36.

⁵⁷⁷ ECCC Press Releases, ‘Trial Chamber Concludes Evidentiary Hearings in Case 002/02, schedules closing briefs and closing arguments’ and ‘Closing Statements in Case 002/02 Conclude.’

⁵⁷⁸ Case 002/02, *Summary of Judgement* [Courtesy Copy – Not Checked against Delivery], 16 November 2018.

⁵⁷⁹ *International Co-Prosecutor’s Response to Yim Tith’s Request for Additional Time*, 23 June 2017, D361/2, para. 5.

overarching nationwide policies including forced marriage, genocide of two groups, and persecution of another group also distinguishes Case 002.⁵⁸⁰

378. Nevertheless, despite the ICP's assertions regarding its relative simplicity and lesser size, the judicial investigation in Case 004 lasted from 7 September 2009 to 5 September 2017: a period of almost nine years.⁵⁸¹ This is three times the length of the judicial investigation in Case 002. The difference between the relative swiftness with which the judicial investigation in Case 002 proceeded and the sluggish protraction of Case 004 cannot be justified. The fact that the accused in Case 002 were remanded in custody, while Mr YIM Tith was not, does not adequately explain or justify the inordinate protraction of Case 004 already suffered.

(3) Conduct of Parties

The International Co-Prosecutor

379. The Co-Prosecutors are to be considered authorities for purposes of criminal proceedings and thus, in this context, for the assessment of undue delay.⁵⁸² The Co-Prosecutors hold an obligation to proceed as expeditiously as possible and not to violate or impede Mr YIM Tith's right to be tried without undue delay. Accordingly, the conduct of the ICP is considered below.

The Defence

380. The Defence has operated with all possible expeditiousness both before and throughout the period since eventually being admitted to Case 004. In begging to be admitted to Case File 004, Mr YIM Tith has demonstrated his commitment to active participation in the proceedings.⁵⁸³ Each of the Defence's applications to be granted access to Case File 004

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission*, 7 September 2009, D1/1. *ICP's Third Introductory Submission*, D1; *Second Notice of Conclusion of Judicial Investigation against Yim Tith*, 5 September 2017, D368, Disposition (paras 27 and 28).

⁵⁸² In criminal proceedings, prosecutors act as agents of the state. As such, they constitute an organ of the judicial authorities and are obliged to uphold defence rights. *See, for example:* ICTR, *Prosecutor v. Nyiramasuhuko et al.* (ICTR-98-42-1), Appeal Judgement, 14 December 2015, paras 366 and 367. *See also:* Council of Europe, *The Length of Civil and Criminal Proceedings in the Case-Law of the European Court of Human Rights*, 2nd Edition, 2007, p. 58.

⁵⁸³ *YIM Tith's Urgent Motion Requesting Access to the Case File and to Take Part in the Judicial Investigation*, 6 March 2014, D186; *YIM Tith's Application to the Co-Investigating Judges Requesting them to Seize the Pre-Trial Chamber with View to Annul the Judicial Investigation*, 20 May 2014, A157; *YIM Tith's Urgent Request for Relief Based on New Information*, 24 April 2014, D192; *YIM Tith's Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence Filings on the Case File*, 24 June 2014, D202; *YIM Tith's Request*

in order to uphold Mr YIM Tith's basic fair trial rights was denied.⁵⁸⁴ Mr YIM Tith's cooperative approach is to be given high positive consideration in determining whether the delays suffered by him can be found to be 'due.'⁵⁸⁵ It is understood that diplomatic circles have blamed 'delaying tactics by the defence' for perceived slowness of the investigations.⁵⁸⁶ The Defence considers this contention to be professionally offensive, and is grateful to the CIJs for noting that this 'was not an issue in the investigations.'⁵⁸⁷

381. The ICP has passively accused the Defence of deploying 'delay tactics' for filing (initially on 12 September 2017) an application to annul certain material on Case File 004 due to its asserted procedural defectiveness.⁵⁸⁸ As had previously been observed by the ICIJ, this application for annulment '[was] not the type of appeal that must be determined by the PTC [...] before the Case File can be forwarded to the Co-Prosecutors,' so the accusation was unfounded.⁵⁸⁹ Moreover, since the annulment of defective material on Case File 004 will streamline matters before the judges and enhance the efficiency and expeditiousness of proceedings, the ICP's argument was misconceived. It is notable that the ECtHR has

for Clarification that He Can Conduct His Own Investigation, 3 June 2014, D203; *YIM Tith's Request to the Co-Investigating Judges to Provide their Understanding of the Law Should there Be Disagreement Between the Co-Investigating Judges When Issuing the Closing Order*, 19 June 2014, D205; *YIM Tith's Request for Clarification Regarding the Validity of Summons Issued by One Co-Investigating Judge for the Purposes of Charging Him*, 21 August 2014, D212; *YIM Tith's Urgent Request for the Five Documents Referred to in the 'International Co-Prosecutor's Disclosure of Statements from Case File 004'*, 24 October 2014, D226; *YIM Tith's Request for the International Co-Investigating Judge to Reconsider this Disclosure of Case 004 Witness Statements in Case 002/02*, 17 November 2014, D229.

⁵⁸⁴ *Decision on YIM Tith's Request for the Provision of Four Documents Cited in D186/3*, 1 August 2014, D186/3/3; *Considerations of the Pre-Trial Chamber on YIM Tith's Appeals Against the International Co-Investigating Judge's Decisions Denying His Requests to Access the Case File and to Take Part in the Investigation*, 31 October 2014, D192/1/1/2; *Decision on YIM Tith's Request to the Co-Investigating Judges to Order the OCIJ Greffier to Immediately Place the Defence's Filings on the Case File*, 4 August 2014, D202/2; *Considerations of the Pre-Trial Chamber on YIM Tith's Appeal Against the Decision Regarding His Request for Clarification that He Can Conduct His Own Investigation*, 19 January 2015, D203/1/1/2; *Decision on YIM Tith's Appeal Against the Decision Denying His Request for Clarification*, 13 November 2014, D205/1/1/2; *Decision on YIM Tith's Appeal Against the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-Investigating Judge*, 4 December 2014, D212/1/2/2; *Decision on Suspect's Request for Clarification*, 19 December 2014, D226/1/1/1; *Decision on YIM Tith's Notice of Withdrawal of Appeal Against the International Co-Investigating Judge's Decision on Urgent Requests to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02*, 2 June 2016, D229/3/1/4.

⁵⁸⁵ The Defence is not obliged to cooperate actively. ECtHR, *Corigliano v. Italy*, Application Number 8304/78, 10 December 1982, paras 41-43; ECtHR, *Eckle v. Germany*, Application Number 8130/78, 15 July 1982, para. 82.

⁵⁸⁶ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 23.

⁵⁸⁷ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 23.

⁵⁸⁸ *Yim Tith's Application to Seize the Pre-Trial Chamber with a View to Annulment of the Requests for and Use of Civil Parties Supplementary Information from Civil Parties and Associated Investigative Products in Case 004*, 12 September 2017, D370. *International Co-Prosecutor's Response to Yim Tith's Application to Annul Certain Civil Party Materials*, 26 October 2017, D370/1/1/3, para. 2.

⁵⁸⁹ *Decision on Yim Tith's Application to Seize the Pre-Trial Chamber with a View to Annulment of Certain Documents Relating to Civil Parties*, 25 September 2017, D370/1, para. 10.

refused to cite the silence of the accused or efforts by the Defence to seek remedies or even requests for postponement as reasons for delay.⁵⁹⁰ The reasons are conceptually obvious: the right to expeditious proceedings belongs to the accused, time spent pursuing legal remedies cannot constitute ‘undue delay,’ and, in any event, and though Mr YIM Tith is actively cooperating with the judicial authorities, his right to be tried without undue delay is not premised upon a requirement that the accused actively cooperate with the judicial authorities.⁵⁹¹

382. Mr YIM Tith was only belatedly granted access to Case File 004, despite repeated requests for access in which the Defence explained that its involvement would ultimately expedite proceedings.⁵⁹² This placed the Defence in the untenable position of having to seek additional time to prepare its case;⁵⁹³ it was deemed to have had such.⁵⁹⁴ Any argument that the Defence’s arguments in this regard vitiate or in any way impede the Defence’s submissions regarding undue delay would be misconceived. Any time reasonably spent on preparation of a defence, *i.e.* exercising a fundamental fair trial right, ‘could not possibly lead to a violation of the right to be tried within a reasonable time.’⁵⁹⁵ As has been observed with regard to the ECHR:

Of course, there is no contradiction between Articles 6(1) and (3). The priority lies clearly with the *lex specialis* of Article 6(3)(b). In the case-law concerning the length of the proceedings, the exercise of the right to prepare the defence has never even been considered a possible excuse for a violation.⁵⁹⁶

By extension of this logic, nor can it be considered to condone undue delay elsewhere in the proceedings.

(4) Conduct of Relevant Authorities

383. The more serious the charges and the graver the potential consequences for the accused, the stronger the obligation on the authorities to act diligently and avoid any delay.⁵⁹⁷ For

⁵⁹⁰ ECtHR, *Corigliano v. Italy*, Application Number 8304/78, 10 December 1982, paras 41-43; ECtHR, *Eckle v. Germany*, Application Number 8130/78, 15 July 1982, para. 82.

⁵⁹¹ *Ibid.*

⁵⁹² *Written Record of Initial Appearance*, 9 December 2015, D281.

⁵⁹³ *Yim Tith’s Request for Adequate Time*, 16 June 2017, D361; *Yim Tith’s Appeal against the Decision on Yim Tith’s Request for Adequate Preparation Time*, 26 July 2017, D361/4/1/5.

⁵⁹⁴ *Decision on Yim Tith’s Request for Adequate Time*, 5 July 2017, D361/4.

⁵⁹⁵ ECtHR, *Kemmache v. France* (Nos. 1 and 2), Application Nos. 12325/86 and 14992/89, 21 March and 22 October 1991, para. 64.

⁵⁹⁶ Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 216.

⁵⁹⁷ Trechsel, S., *Human rights in criminal proceedings*, Oxford University Press, 2005, p. 144.

example, a case carrying the most serious penalties demands greater diligence from the authorities.⁵⁹⁸

384. It is for the authorities to justify the length of the proceedings. Noting that ‘Contracting States [to the ECHR] are under the obligation to organize their legal systems “so as to ensure compliance with the requirements of [Article 6(1)],”’ the ECtHR has rejected arguments that inadequate staffing or general administrative inconvenience justified failure to meet the reasonable time standard even in exceptional circumstances of political transition.⁵⁹⁹
385. The conduct of the authorities should be construed as the primary criterion in assessing whether delay is undue. *Any* unexplained delays or periods of inactivity,⁶⁰⁰ at any stage of the proceedings including the investigation,⁶⁰¹ are to be considered. The ECtHR has considered delay in taking first investigative steps,⁶⁰² delay in providing the case file to the accused,⁶⁰³ or periods of stagnation to constitute undue delay.⁶⁰⁴
386. Delays are also to be considered cumulatively. Delays that might, in isolation, be justifiable or at least understandable, may in sum be excessive.⁶⁰⁵ The period is to be assessed in its entirety and authorities must adequately justify the full period of delays.

⁵⁹⁸ ECtHR, *Portington v. Greece*, Application Number 28523/95, Judgment, 23 September 1998, para. 34.

⁵⁹⁹ Although the Court considered the exceptional circumstances surrounding Portugal’s return to democracy in the *Guincho* case, the ECtHR held that they were not such as to deprive the applicant of his entitlement to a judicial determination within a reasonable time; see ECtHR, *Guincho v. Portugal*, Application Number 8990/80, Judgment, 10 July 1984, paras 37, 38, and 41; see also ECtHR, *De Cubber v. Belgium*, Application Number 9186/80, Judgment, 26 October 1984, paras 23, and 34 to 36.

⁶⁰⁰ Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 146; see ECtHR, *Portington v. Greece*, Application Number 28523/95, 23 September 1998, para. 33.

⁶⁰¹ ECtHR, *Pélissier and Sassi v. France*, Application Number 25444/94, Judgment, 25 March 1999, para. 73; *Viezzier v. Italy*, Application Number 12598/86, Judgment, 19 February 1991, paras 15 to 17; *Tumminelli v. Italy*, Application Number 13362/87, Judgment, 27 February 1992, para. 18.

⁶⁰² ECtHR, *König v. Germany*, Application Number 6232/73, Judgment, 28 June 1978, para. 104.

⁶⁰³ ECtHR, *Allenet de Ribemont v. France*, Application Number 15175/89, Judgment, 10 February 1995, para. 56

⁶⁰⁴ ECtHR, *Corigliano v. Italy*, Application Number 8304/78, Judgment, 10 December 1982, paras 47 and 68; *Zimmermann and Steiner v. Switzerland*, Application Number 8737/79, Judgment, 13 July 1983, paras 27 and 32; *Deumeland v. Germany*, Application Number 9384/81, Judgment, 29 May 1986, paras 81 to 88; *Poiss v. Austria*, Application Number 9816/82, Judgment, 23 April 1987, para. 59.

⁶⁰⁵ ECtHR, *Ruotolo v. Italy*, Application Number 18/1991/270/341, Judgment, 24 January 1992, para. 17: *The Court stresses that special diligence is necessary in employment disputes [...]. Italy moreover acknowledged this by amending, in 1973, the special procedure laid down in this field and by introducing, in 1990, emergency measures intended to speed up the conduct of such proceedings [...]. // The case was one of some complexity and the parties caused five adjournments of hearings. It should also be noted that the applicant did not resume his action until more than nine months after the first judgment of the Court of Cassation (27 March 1986 – 17 January 1987). In addition and above all, the examination of the case gave rise to two consecutive sets of proceedings, the first of which lasted from 18 October 1979 to 27 March 1986, and the second, after then Court of Cassation had remitted the case to a different court, until at least 31 May 1991. // The Government pleaded the backlog of cases*

387. It is recognised that the conduct of the pre-trial stage has a direct influence on the conduct and fairness of subsequent proceedings, and that therefore the requirement to act expeditiously certainly applies during the investigation.⁶⁰⁶

388. Authorities seeking to place people on trial assume the heavy responsibility of ensuring that the fundamental guarantees of fair trials are met. The RGC and the UN have assumed this responsibility and are thus obliged to ensure that every fair trial guarantee is met.⁶⁰⁷ Where they are unable to do so, they cannot put people on trial. A lack of adequate budgetary appropriations for the administration of criminal justice will not justify unreasonable delays in the adjudication of criminal cases.⁶⁰⁸

Translation delays

389. As detailed above, the ECCC has been consistently beset by pernicious funding crises.⁶⁰⁹ The inevitable consequence of overburdening the Interpretation and Translation Unit has been long delays in receiving translations. The annexed schedules illustrate the impact this has had on the length of the proceedings in Case 004.⁶¹⁰

The Co-Investigating Judges

390. The Office of the Co-Investigating Judges has been distinctly troubled through many years of the judicial investigation in Case 004. It has suffered periods of dispute, inactivity and mass resignation.⁶¹¹ The unilateral and disputed initiation of the judicial investigation

in the relevant courts, but [Article 6(1)] imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of its requirements [...]. // Viewed separately, several of the delays observed may appear normal; however, having regard to the sum of such periods and several delays for which the competent courts were responsible – in particular as regards the filing of the decision of 2 July 1982 (more than seven and a half months) and of the judgment of 24 October 1985 (more than five months) -, the Court considers an overall lapse of time of more than twelve years excessive. // There has therefore been a violation of [Article 6(1)].

⁶⁰⁶ ECtHR, *Imbrioscia v. Switzerland*, Application Number 13972/88), Judgment, 24 November 1993, para. 38.

⁶⁰⁷ UN-RGC Agreement, Articles 1, 12, and 13.

⁶⁰⁸ ECtHR, *Zimmermann and Steiner v. Switzerland*, Application Number 8737/79, Judgment, 13 July 1983, para. 29; UN HRC, *Fillastre and Others v. Bolivia*, Communication number 336/1988, UN Doc CCPR/C/43/D/336/1988 (1991), 6 November 1991, para.6.5.

⁶⁰⁹ *Supra*, paras 302 to 326.

⁶¹⁰ Annexes I and II.

⁶¹¹ Gillison, D., 'UN Legal Team Walk Out on Stymied KR Cases,' Cambodia Daily, 13 June 2011. Gillison, D., '6th UN Official Resigns from KR Judges' Office,' Cambodia Daily, 22 June 2011.

has undermined the jurisdiction and authority of the CIJs, and the investigations have drawn political resentment.⁶¹² Mr YIM Tith bears no responsibility for any of this.

391. ICIJ Blunk, who was appointed soon after the submission of the ICP's Introductory Submission, and the NCIJ both expressed their 'serious doubts whether the [Case 004] suspects are "most responsible" according to the jurisdictional requirement of Article 2 ECCC Law' and concomitantly noted that this would mean that the ECCC 'had no jurisdiction.'⁶¹³
392. In the face of strong opposition to Case 004, including repudiation of the international involvement in determining whether to indict further suspects, Former ICIJ Blunk resigned.⁶¹⁴ The subsequent appointment of the RICIJ was rejected, though he sought to ensure that the OCIJ was funded sufficiently to allow its effective functioning and the investigation of Cases 003 and 004.⁶¹⁵ After submitting records of disagreement regarding his competence to participate in the judicial investigation,⁶¹⁶ and after issuing the *Notification of Suspect's Rights [Rule 21(1)(D)]* informing Mr YIM Tith that he was named as a suspect in the ongoing judicial investigation initiated by the ICP's Third Introductory Submission,⁶¹⁷ the RICIJ tendered his resignation.⁶¹⁸

⁶¹² *Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission*, 7 September 2009, D1/1. ICP's Third Introductory Submission, D1; Zsombor Peter and Phorn Bopha, 'No More Khmer Rouge Trials, Premier Tells Ban,' Cambodia Daily, 28 October 2010, A157/2/1/1.1.6; 'Foreign Minister Hor Namhong told reporters following the meeting that Prime Minister Samdech Hun Sen considered pending investigations in Cases 003 and 004 a threat to the Kingdom's "stability". Samdech [Hun Sen] clearly affirmed that Case 003 will not be allowed,' he said. 'We have to think about peace in Cambodia or the court will fail.' 'The court will try the four senior leaders successfully and then finish with Case 002.' Cheang Sokha & James O'Toole, 'Hun Sen shoots from the lip,' Phnom Penh Post, 28 October 2010, A157/2/1/1.1.2. 'The 2003 agreement between the government and the UN that established the tribunal empowers the court to prosecute 'senior leaders' and those 'most responsible' for crimes committed under Democratic Kampuchea. By pursuing possible prosecutions in Cases 003 and 004, court officials were violating this, Minister of Information Khieu Kanharith said yesterday.' Cheang Sokha & James O'Toole, 'Hun Sen shoots from the lip,' Phnom Penh Post, 28 October 2010, A157/2/1/1.1.2. Minister of Information, Khieu Kanharith, is quoted as stating, 'If we continue the third case, we should be wrong track from the original agreement between the UN and Cambodian government, which enshrined about trial for the senior and most responsible leaders only. It also affected the 'stability and national reconciliation' for the country. If the members of Khmer Rouge flee to struggle in jungle, and who will be responsible for that issue, and moreover, the other cases should hand over to local courts for dealing these cases.' Chhorng Long Heng, 'UN Secretary General talks on regional and bilateral issues,' Southeast Asia, 31 October 2010, A157/2/1/1.1.5; *Press Release by the International Co-Investigating Judge*, 10 October 2011.

⁶¹³ *Press Release by the International Co-Investigating Judge*, 10 October 2011; *Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)*, 08 August 2011, p. 1.

⁶¹⁴ *Press Release by the International Co-Investigating Judge*, 10 October 2011.

⁶¹⁵ *Press Release by the International Reserve Co-Investigating Judge*, 9 February 2012. [Emphasis added.]

⁶¹⁶ *Press Release by the International Reserve Co-Investigating Judge*, 9 February 2012.

⁶¹⁷ *Notification of Suspect's Rights [Rule 21(1)(D)]*, 24 February 2012, D109.

⁶¹⁸ *Press Release by the International Reserve Co-Investigating Judge*, 19 March 2012.

393. On 4 May 2012, the RICIJ issued a press release in which he claimed that ‘the suspects were granted access to the case file.’ As noted below, and despite the exhaustive efforts of the Defence, Mr YIM Tith was not in fact granted access to Case File 004 until 4 December 2015.⁶¹⁹ The RICIJ noted, further, that his work had been ‘severely impeded’ for ‘reasons which are manifestly more political and financial than strictly judicial.’⁶²⁰
394. On 20 June 2012, the Supreme Council of the Magistracy of the Kingdom of Cambodia appointed Judge Mark Harmon as ICIJ.⁶²¹ ICIJ Harmon investigated Mr YIM Tith for the duration of his tenure, but refused to grant him access to Case File 004 and indeed revoked the nominal access granted by RICIJ Kasper-Ansermet.⁶²² Mr YIM Tith remained excluded from the Case File even while the ICP and his co-defendants were involved in litigation of profound relevance to him. While impossible to quantify with precision, this period of protracted and undue exclusion has had a deleterious impact on the duration of Case 004. The timely inclusion of the Defence would have assisted the judicial investigation and streamlined the litigation of contentious practices.⁶²³
395. The Defence appreciates the incumbent ICIJ’s significant efforts to proceed expeditiously. One of his earliest actions was to ensure that Mr YIM Tith was finally granted access to the case file, and he has brought an energetic and pragmatic approach to the handling of Case 004.⁶²⁴ Unfortunately, this belated quest for expeditiousness cannot ameliorate the impact of the inherited lengthy delays already endured.
396. Additionally, the CIJs have admitted that resource constraints and staff turn-over have impaired their ability to proceed expeditiously.⁶²⁵ While the Defence is sympathetic to these professional challenges – which it shares – these do not constitute legitimate justifications for the delays suffered by Mr YIM Tith.⁶²⁶

⁶¹⁹ *Written Record of Initial Appearance*, 9 December 2015, D281.

⁶²⁰ *Press Release by the Reserve International Co-Investigating Judge*, 4 May 2012.

⁶²¹ *Deployment of New International Co-Investigating Judge*, 30 July 2012.

⁶²² *Decision on Yim Tith’s Urgent Request for Relief Based on New Information*, 25 April 2014, D192/1, para. 7.

⁶²³ *Supra*, para. 305.

⁶²⁴ *Written Record of Initial Appearance*, 9 December 2015, D281. Case 004/01, *International Co-Prosecutor’s Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7.

⁶²⁵ Completion Plan, Revision 18, 30 September 2018, para. 19(b).

⁶²⁶ ECtHR, *Zimmermann and Steiner v. Switzerland*, Application Number 8737/79, Judgment, 13 July 1983, para. 29; UN HRC, *Fillastre and Others v. Bolivia*, Communication number 336/1988, UN Doc CCPR/C/43/D/336/1988 (1991), 6 November 1991, para.6.5.

The Pre-Trial Chamber

397. The impact of the ECCC's chronic underfunding and the inceptive bifurcation of the investigation is keenly illustrated by the slow functioning of the PTC. In order to assist the CIJs, the Defence annexes hereto a schedule of the process of motions before the PTC in Case 004.⁶²⁷ The process of arguing appeal points has been severely hindered by long periods awaiting necessary translations.⁶²⁸ As previously observed by the CIJs, 'based on past experience, it may take the [PTC], up to six months to decide on [appellate] motions.'⁶²⁹ It has often been longer.⁶³⁰ Presumably, in some cases, the parties wait while the PTC admirably strives for a quorate decision.⁶³¹ Frequently, however, no quorate has been reached, and the parties thus remain without substantive appellate resolution.⁶³²

The International Co-Prosecutor

398. It is incumbent upon the ICP to act with all due expedition at all times.⁶³³ He has failed to do so. Instead, his dilatory conduct has directly contributed to the violation of Mr YIM Tith's right to be tried without undue delay.

399. The ICP acted unilaterally in conducting a preliminary investigation in Case 004, without even informing the NCP.⁶³⁴ The majority of PTC judges considered his action illegal.⁶³⁵ It was another a year before the Acting ICP submitted the ICP's Third Introductory Submission and triggered the investigation.

400. Delays occasioned by the exploitation of technicalities, or by seeking an improper tactical advantage, are undue.⁶³⁶ Though proceeding in English, the ICP consistently exploits the

⁶²⁷ Annex I.

⁶²⁸ See Annex I.

⁶²⁹ Completion Plan, Revision 8, 31 March 2016, para. 20.

⁶³⁰ See Annex I.

⁶³¹ See Annex I.

⁶³² See Annex I.

⁶³³ *Supra*, fn 582.

⁶³⁴ *Acting international Co-Prosecutor's Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, Decision of the Pre-Trial Chamber, para. 38, citing 'National Co-Prosecutor's Response to Directions,' para. 19, and 'National Co-Prosecutor's Reply to Directions,' paras 22 and 25.

⁶³⁵ *Acting international Co-Prosecutor's Notice of Filing of the Third Introductory Submission (7 September 2009, D1/1), Annex I: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71*, 18 August 2009, D1/1.3, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, paras 18 and 19.

⁶³⁶ ICTY, *Prosecutor v. Kovačević*, Decision Stating Reasons for Appeals Chambers Order of 29 May 1998, IT-97-24-AR73, Appeals Chamber, 2 July 1998, para. 32.

extension of filing deadlines resulting from the long periods it can take ITU to translate the Defence's filings into Khmer.⁶³⁷ Since the ICP has somehow frequently been equipped to provide his arguments simultaneously in both English and Khmer, he has also been afforded additional time when compared to the Defence, thus enjoying a procedural advantage. This conduct is to be assessed in relation to its impact on the proceedings against Mr YIM Tith alone.

401. Having had access to Case File 004 since at least November 2008 and without providing any explanation or justification, the ICP requested and was granted a thirty-day extension of the Rule 66(1) period and proceeded to submit extensive and multi-faceted investigative requests at the very limit of that time.⁶³⁸ The ECtHR has held that waiting until being informed of the imminent conclusion of an investigation to request a number of additional investigative measures demonstrates an intention to delay the investigation.⁶³⁹
402. Delays occasioned by lengthy efforts to bolster a weak prosecution case are indicative of irretrievable unfairness.⁶⁴⁰ The ICP has repeatedly and belatedly argued for further investigations to be undertaken regarding Prison No. 8. The ICIJ has clearly and consistently explained that the issues have been sufficiently investigated and, having considered each individually in detail, that the ICP's requests were unwarranted.⁶⁴¹ As noted by the ICIJ, the last investigative action relating to Prison No. 8 occurred on 22 October 2015 and 'it [was] unclear why the ICP has requested supplemental investigations only on the very last day available to file such requests' (*i.e.* 28 July 2017).⁶⁴² Nevertheless, the ICP appealed the ICIJ's decision on 25 October 2017, alleging that the ICIJ's decision not to charge Mr YIM Tith where, after a full investigation, he considered the evidence was insufficient amounted to an *ultra vires* reduction in the scope

⁶³⁷ See Annexes I and II.

⁶³⁸ ICP's Third Introductory Submission, D1. International Co-Prosecutor's Response to Yim Tith's Request for Additional Time, 23 June 2017, D361/2, paras 1 and 8. Decision on Yim Tith's Request for Adequate Time, 5 July 2017, D361/4. International Co-Prosecutor's Request for Investigative Action Regarding Prison No. 8 in Kandieng District and Sexual Violence in Bakan District, Pursat Province, 28 July 2017, D365. International Co-Prosecutor's Request for Investigative Action in Case 004 with Annex A, 28 July 2017, D366.

⁶³⁹ ECtHR, *I.A. v. France*, Application Number 1/1998/904/116, Judgment, 23 September 1998, para. 21.

⁶⁴⁰ *Cooke v Purcell* (1988) 36 A Crim R 425.

⁶⁴¹ Order Amending the Charges against Yim Tith, 29 March 2017, D350; Annex: Notification of Amended Charges against Yim Tith, 29 March 2017, D350.1 ('Notification of Amended Charges, D350.1'); Decision on the International Co-Prosecutor's Request for Investigative Action Regarding Prison No. 8 and Sexual Violence in Bakan District, 4 September 2017, D365/3, paras 33, 34, 36-40, 42-47, and 50;

⁶⁴² Decision on the International Co-Prosecutor's Request for Investigative Action Regarding Prison No. 8 and Sexual Violence in Bakan District, 4 September 2017, D365/3. para. 31.

of the investigation. This hallucinatory contortion of logic and misconstruction of the nature of an investigation and the discretions and prerogatives of the CIJs had the effect of preventing the CIJs from issuing a Forwarding Order in Case 004 until 1 March 2018.⁶⁴³

403. The Defence notes the coincidence of this unnecessary delay with the ICP's commitments in Cases 003, 004/1 and 004/2. Neither such commitments nor a judicial backlog can justify delays to the proceedings faced by Mr YIM Tith.⁶⁴⁴
404. The ICP has cited the 'entitlement' of the Civil Parties and the general public 'to see justice delivered sooner rather than later.'⁶⁴⁵ In so doing, he selectively relied upon a source which in fact refers to 'protecting all parties to court proceedings' in *civil* as well as criminal proceedings. The 'internal citations' that the ICP elected to omit clearly emphasise that the right to expeditious *criminal* proceedings is 'designed to avoid that a person *charged* should remain too long in a state of uncertainty about his fate.'⁶⁴⁶ In doing so, the ICP has sought to claim for himself protection for parties to civil suits, and evade the *obligation* to act with all due expedition in the interests of the accused that is incumbent upon him under ECCC and international law. This is dishonest.
405. The right to be tried without undue delay is held exclusively by the accused.⁶⁴⁷ The Defence recognises a general *interest* in expeditiousness in criminal proceedings; it remains the case, however, that it is only Mr YIM Tith who holds the *right* and the ICP who holds the *obligation*. It is offensive to the proper administration of justice for the ICP – an 'authority' within the context of criminal proceedings – to seek to invoke the principle of expeditiousness against the Defence.

⁶⁴³ Confidential Memorandum entitled 'Yim Tith's Annulment Application D372 of 8 November 2017,' 22 November 2017, D373, para. 6; Forwarding Order Pursuant to Internal Rule 66(4), 1 March 2018, D378.

⁶⁴⁴ ECtHR, *Zimmermann and Steiner v. Switzerland*, Application Number 8737/79, Judgment, 13 July 1983, paras 30 to 32; ECtHR, *Bottazzi v. Italy*, Application Number 34884/97, Judgment, 28 July 1999, para. 22.

⁶⁴⁵ International Co-Prosecutor's Response to Yim Tith's Request for Additional Time, 23 June 2017, D361/2, para. 7, citing OSCE Legal Digest of International Fair Trial Rights, p. 126: 'The purpose of [the guarantee of trial without undue delay], which is also known as the maxim "justice delayed is justice denied," is to avoid keeping persons in a state of uncertainty by protecting parties to court proceedings against excessive procedural delays, which may, in turn, jeopardise the effectiveness and credibility of the administration of justice.' Notably, the ICP omits its fatally instructive 'internal citations.'

⁶⁴⁶ Emphasis added. UN HRC, CCPR General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, para. 35; ECtHR, *Stogmüller v. Austria*, Application Number 1602/62, Judgment, 10 November 1969, 'As to the Law,' para. 5.

⁶⁴⁷ ICCPR, Article 14(3)(c).

(c) The Prejudice to Mr YIM Tith

406. Any unjustified delay constitutes a violation of Mr YIM Tith's fundamental right to be tried without undue delay. It is not legally necessary for the Defence to demonstrate any further prejudice. Nonetheless, the delay of course means that Mr YIM Tith has suffered actual prejudice, both objective and subjective. That this is, in some instances, shared with other parties compounds rather than ameliorates the severity of the impact of the delay.
407. Since Mr YIM Tith has no avenue, either domestic or international, by which to seek to enforce his right to a hearing within a reasonable time, the Defence submits that his right to effective remedy is also jeopardised in this regard.⁶⁴⁸

Objective prejudice

408. Long periods between events and trial proceedings may 'so seriously erode' the fairness of the proceedings that it would be oppressive to continue.⁶⁴⁹ In such circumstances, an assessment of whether the delays can be justified becomes moot: the question is whether a fair trial is possible. Forensic difficulties, shared by all parties, may very well be insurmountable:

With the lapse of time, memories fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, the prospects that any effective investigation can be undertaken will increasingly diminish and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness.⁶⁵⁰

409. The investigation into Mr YIM Tith's alleged criminal activity between 1975 and 1979 took place between 2006 and 2017.⁶⁵¹ The lapse of three to four decades is significant

⁶⁴⁸ ECtHR, *Kudla v. Poland*, Application Number 30210/96, Judgment, 26 October 2000, paras 148 and 160; ECtHR, *Bottazzi v. Italy*, Application Number 34884/97, Judgment, 28 July 1999, para. 22.

⁶⁴⁹ United Kingdom, *R v J.A.K.* (1992) Crim LR 30. The defendant was accused of rape and other indecent assaults 20 years prior to the bringing of charges. The case was stayed on the grounds of abuse of process due to the passage of time. The test was whether a fair trial would be possible. In this case, as in Case 004, the delay had been very long, and there was no physical evidence, only witness testimony. Due to the passage of time, the defence would be restricted in its scope to cross-examine the witnesses, rendering a fair trial impossible.

⁶⁵⁰ Council of Europe, *International and national Courts confronting large scale violations of Human Rights - Genocide, Crimes against Humanity and war crimes*, 2016, p. 6.

⁶⁵¹ Case 004/01, *International Co-Prosecutor's Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7; *Second Notice of Conclusion of Judicial Investigation against Yim Tith*, 5 September 2017, D368; *Decision on Yim Tith's Appeal against the Decision on Yim Tith's Request for Adequate Preparation Time*, 13 November 2017, D361/4/1/10.

and obviously detrimental to the quality of witness evidence available.⁶⁵² The additional excessive delay between the initial investigation into these alleged crimes and the potential trial further affects the availability of witnesses and the clarity and accuracy of their memories. This is compounded by the abundance of political rhetoric, both international and domestic, surrounding the crimes of the Khmer Rouge, as well as the public litigation of Cases 001 and 002. This perfect storm of circumstances leaves the witness evidence available to the ECCC irremediably contaminated.

410. Long delays between the events in question and prosecution can perhaps be tolerated in cases in which the primary evidence is documentary, for instance in complex fraud cases. Prosecutions so reliant on witness testimony, such as that potentially faced by Mr YIM Tith, are far more susceptible to forensic deterioration over time. The passage of such a long period since the events in question, coupled with untenably and unnecessarily interrupted and lengthy investigative proceedings in Case 004, renders the evidential basis for any prosecution or defence unreliable. Its continuing deterioration is inevitable. While this is lamentable for all concerned, it is fatal to the ECCC's search for truth and incompatible with justice.⁶⁵³

411. As observed by the CIJs, evidential issues emanating from the lapse of such a great period of time certainly cannot be 'laid at the feet of the Defence,' not least because they perhaps impact the accused most acutely:

The fact that after such a long time some of the crucial evidence, through witnesses or otherwise, may have deteriorated to a point where reliable details, and indeed witnesses, may be difficult to come by, is not something which can ever be laid at the feet of the defence in criminal investigations or give rise to a lesser standard of proof for indictment or conviction. The defence are entitled to a dispassionate evaluation of the evidence and interpretation of the law at all levels of the ECCC's judicial hierarchy, beginning with the OCIJ.⁶⁵⁴

412. Vague witness testimony, meaning a paucity of reliable details, is extraordinarily difficult, if not impossible, to refute. As noted by Professor Combs:

A vague account devoid of details is an account that cannot be effectively challenged. When a witness cannot date the events she witnessed, the witness prevents the defendant from presenting an alibi. When a witness cannot name the make of the defendant's car, then the witness's account cannot be

⁶⁵² As detailed herein, Case 004 is almost exclusively reliant on witness testimony.

⁶⁵³ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004 and 004/2*, 5 May 2017, D355, para. 4.

⁶⁵⁴ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 36

undermined by evidence showing that the defendant drove a car of a different make. When a witness is unable to say for how long the rebels occupied his village, then the witness's testimony cannot be inconsistent with that of another witness who might estimate a shorter or longer occupation. And when a witness professes not to understand maps or photographs, the witness renders the defense unable to prove that she was never even at the scene of the crime. In other words, all manner of innocent inaccuracies as well as deliberate lies can be concealed through a witness's plausible claim that he is unable to answer a question.⁶⁵⁵

413. The lapse of time also enormously impedes the ability of an accused to provide specifically detailed instructions to rebut witness evidence (for instance regarding alleged presence at certain meetings or crime sites), and thus creates further difficulties for the Defence. As put by British Judge Baron Alderson in 1844:

I ought not to allow this case to go further. It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accused a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about that the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial.⁶⁵⁶

Subjective prejudice

414. Security of the person includes freedom from the heavy cloud of suspicion. Prolonged exposure to the threat of criminal proceedings has a profound impact on the security of the accused. The very purpose of the right to expeditious proceedings is to avoid holding persons facing criminal proceedings in a state of uncertainty, which is recognised as an obvious source of acute anxiety.⁶⁵⁷
415. The ICP seeks, through the application of the doctrine of JCE, to hold Mr YIM Tith responsible for the actions even of more senior members of the Khmer Rouge regime. This is a heavy psychological burden. It is also likely to attract acute public hostility.

⁶⁵⁵ Combs, N. A., *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press, 2010, p. 44. Recited in 'Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions,' *Washington and Lee Law Review* 75 (2018) 223-300, pp. 242 to 243.

⁶⁵⁶ *R v John Robins* (1844) 1 Cox CC 114, as cited by Brennan J, High Court of Australia in *Jago v The District Court of New South Wales*, 12 October 1989, 63 ALJR 640.

⁶⁵⁷ UN HRC General Comment 32, para. 35; ECtHR, *Stogmuller v. Austria*, Application Number 1602/62, Judgment, 10 November 1969, As to the Law, para. 5; *Stoianova and Nedelcu v. Romania*, Application Numbers 77517/01 and 77722/01, Judgment, 4 August 2005, para. 23.

iv. Conclusion: The Remedy at this Stage of Case 004 is Dismissal

416. The fairness and integrity of Case 004 has been irremediably vitiated by: (i) the interference with the administration of justice occasioned by the illegal leaking and subsequent publication of the ICP's Third Introductory Submission and other contaminations; (ii) the continued insecurity of funding and its pernicious consequences; and (iii) periods of undue delay. Each of these manifest violations of Mr YIM Tith's fundamental rights renders it impossible to piece together the constituent elements of a fair trial. The Defence therefore submits that the continuation of the proceedings in Case 004 would constitute abuse of process and the proceedings must be terminated.
417. The remedy demanded by a finding of abuse of process is a permanent stay of proceedings, or, in the words previously employed by the CIJs, 'stay with full prejudice': a stay of proceedings that would be permanent and prevent any re-opening of the investigations.⁶⁵⁸ This is, also as previously noted by the CIJs, equivalent in all but name to a dismissal.⁶⁵⁹
418. The Defence notes, further, that Rule 67(3) sets out enumerated circumstances calling for mandatory dismissal. To consider these exhaustive would be to undermine the inherent jurisdiction of the CIJs to dismiss the case against Mr YIM Tith at this point of the proceedings where otherwise demanded by law. That is the current circumstance and the Defence accordingly submits that its request for the relief of dismissal is appropriate. Should the CIJs consider that the two remedies are in fact distinct, the Defence asks that a request for a permanent stay with full prejudice be regarded as implicit within its request for dismissal.
419. The unique or special circumstances of a particular case, such as political concerns or a desire for symbolic redress for serious atrocities, are reasons to uphold rather than erode public confidence in the proper administration of justice. To hold otherwise would be to undermine the entire enterprise of the ECCC and all other courts. It is not the purpose of the criminal law to overstep its jurisdiction, persecute the innocent, or to punish the guilty at all costs. The overriding public interest in the due administration of justice necessarily

⁶⁵⁸ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 May 2017, D355, para. 80: 'We choose to employ the term "stay with full prejudice" rather than "dismissal" because the applicable law before the ECCC, in particular Internal Rule 67(3), reserves the latter term for different enumerated scenarios. However, the use of a different term is just that – a matter of terminology.'

⁶⁵⁹ *Ibid.*

extends to ensuring that Court process is used fairly by State and citizen alike. It is contrary to the public interest to allow confidence in the judicial system to be eroded by a concern that court processes may lend themselves to oppression and injustice.

420. As observed by Judge Hunt at the ICTY:

The Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials. The Majority Appeals Chamber Decision and others in which the Completion Strategy has been given priority over the rights of the accused will leave a spreading stain on this Tribunal's reputation.⁶⁶⁰

421. The doctrine of abuse of process requires the permanent stay (or 'dismissal' – see below) of proceedings where it is impossible to grant the accused a fair trial, and/or where it would offend the court's sense of justice and propriety to try the accused in the circumstances of a particular case.⁶⁶¹ It is trite law to observe that a conviction obtained in contravention of a fair trial cannot stand.⁶⁶²

422. This principle has been resoundingly adopted by the international tribunals, including the ECCC.⁶⁶³ During one of the ECCC's funding crises, the SCC held:

⁶⁶⁰ ICTY, *Prosecutor v. Slobodan Milošević*, 'Dissenting Opinion of Judge David Hunt on admissibility of evidence in chief in the form of a written statement,' IT-02-54-AR73.4), 21 October 2003, para. 22. Cited with emphatic endorsement by the CIJs in *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004 and 004/2*, 5 May 2017, D355, para. 38.

⁶⁶¹ *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004 and 004/2*, 5 May 2017, D355, para. 39.

United Kingdom House of Lords, *R v Horseferry Road Magistrates' Court, Ex p. Bennett (No. 1)* [1994] 1 A.C. 42 H.L.(E) 74G. See also: ICTR, *Jean-Bosco Barayagwiza v. The Prosecutor*, 'Decision,' 3 November 1999, ICTR-97-19-AR72, paras 74-75, 77. Court of Appeal of England and Wales, *R v Derby Crown Court ex p Brooks* [1988] 80 Cr App R 164, *per* Lord Chief Justice Ormrod at 168: 'The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or (b) on the balance of probabilities, the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable.'

⁶⁶² United Kingdom House of Lords, *R v A (No. 2)* [2001] UKHL 25, *per* Lord Steyn, p. 65, para. 38.

⁶⁶³ *Combined Decision on the impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 16. See, for example: ICC, *The Prosecutor v. Lubanga*, 'Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,' 14 December 2006, ICC-01/04-01/06-772, paras 26-39. ICTY, *The Prosecutor v. Tadić*, 'Judgement on Allegations of Contempt against Prior Counsel, Milan Vujan,' 31 January 2000, IT-94-1-A, para. 13; *The Prosecutor v. Stanišić and Župljanin*, 'Decision on Mićo Stanišić's Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement,' 2 April 2014, IT-08-91-A, para. 35; *The Prosecutor v. Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement,' 12 October 2009, IT-95-5/18-AR-73-4, para. 45; *The Prosecutor v. Bobetko*, 'Decision on Challenge by Croatia to Decision and Orders of Confirming Judge,' 29 November 2002, IT-02-62-AR54bis, para. 15; ICTR, *Barayagwiza v. The Prosecutor*, 'Decision,' 3 November 1999, ICTR-97-19-AR72, paras 73 to 77.

The ECCC's funding crisis affects the judicial institution as a whole, and that crisis must be swiftly resolved – either by a firm and unwavering commitment by donor countries to provide their voluntary contributions or by a shift in the ECCC's funding process to the UN Regular Budget by way of assessed funds – in order to effectively complete the proceedings in Case 002 and the other matters properly before the court. If there is insufficient funding to guarantee a trial driven by law, all ECCC proceedings must be terminated and the court must close down. Barring this, proceedings must go on without individual decisions on matters of law and fact being unduly influenced by financial considerations.⁶⁶⁴

423. It is an inherent judicial power and fundamental judicial obligation to terminate proceedings that cannot be held fairly:

[It is the] inherent power which any court of justice must possess to prevent misuse of its procedure which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.⁶⁶⁵

424. Contrary to the ICP's claims,⁶⁶⁶ the jurisprudence of the ECCC as well as other international tribunals demonstrates a clear acceptance that this doctrine belongs to the corpus of applicable international law and applies at all stages of legal proceedings.⁶⁶⁷ Chambers of the international criminal tribunals have consistently acknowledged that the Court is empowered to discontinue irremediably vitiated proceedings before a final determination of the case.⁶⁶⁸ The Defence notes that the CIJs also 'conducted an extensive study of the law relating to a stay of proceedings, both nationally and international' and

⁶⁶⁴ Case 002, *Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002*, 25 November 2013, E284/4/8, para. 75.

⁶⁶⁵ United Kingdom House of Lords, *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, per Lord Diplock at 536. See also *Hui Chi-Ming v R* [1992] 1 AC 34, per Lord Lowry at 57B.

⁶⁶⁶ *International Co-Prosecutor's Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, 5 June 2017, D355/3, paras 2 and 9 to 13.

⁶⁶⁷ Case 002, *Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002*, 25 November 2013, E284/4/8, para. 75. ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,' 14 December 2006, ICC-01/04-01/06-772, paras 26-39. ICTY, *The Prosecutor v. Tadić*, 'Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin,' 31 January 2000, IT-94-1-A, para. 13; *The Prosecutor v. Stanišić and Župljanin*, 'Decision on Mićo Stanišić's Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement,' 2 April 2014, IT-08-91-A, para. 35; *The Prosecutor v. Karadžić*, 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement,' 12 October 2009, IT-95-5/18-AR-73-4, para. 45; *The Prosecutor v. Bobetko*, 'Decision on Challenge by Croatia to Decision and Orders of Confirming Judge,' 29 November 2002, IT-02-62-AR54bis, para. 15.

⁶⁶⁸ See, for example: ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,' 14 December 2006, ICC-01/04-01/06-772; *The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Decision on the Admissibility and Abuse of Process Challenges,' 24 June 2010, ICC-01/05-01/08-802.

are absolutely confident that both Cambodian and international law foresee scenarios in which ordering the termination of proceedings may be appropriate.⁶⁶⁹

425. The Defence notes the clear articulation of the doctrine of abuse of process as delivered by the ICC Appeals Chamber in *Lubanga*:

Where fair trial become impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped.⁶⁷⁰

Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. [...] Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.⁶⁷¹

426. The Defence also notes that, in applying the principles laid down by the Appeals Chamber decision, ICC Trial Chamber I held that a finding of abuse of process and the imposition of a stay does not require a finding that the prosecuting authorities acted in bad faith. It is sufficient to demonstrate that the rights of the accused have been violated to such an extent that the ‘essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process.’⁶⁷² This was subsequently positively reviewed and upheld by the Appeals Chamber.⁶⁷³

⁶⁶⁹ *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith*, 11 August 2017, D355/9, para. 16.

⁶⁷⁰ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,’ 14 December 2006, ICC-01/04-01/06-772, para. 39.

⁶⁷¹ ICC, *The Prosecutor v. Lubanga*, ‘Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,’ 14 December 2006, ICC-01/04-01/06-772, para. 39.

⁶⁷² ICC, *The Prosecutor v. Lubanga*, ‘Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008,’ 13 June 2008, ICC-01/04-01/06-1401, para. 91.

⁶⁷³ ICC, *The Prosecutor v. Lubanga*, ‘Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008,” 21 October 2008, ICC-01/04-01/06-1486, para. 76.

427. The ECCC's internal legal framework does not expressly provide the burden or standard of proof for an application of abuse of process. Pursuant to Article 23 new of the Establishment Law, it is instructive to seek guidance from the ICC: the burden lies with the Defence to demonstrate, on the balance of probabilities, that the continuation of a case would amount to abuse of process.⁶⁷⁴ The Defence of course cannot be obliged to prove anything beyond reasonable doubt.⁶⁷⁵
428. The inherent judicial power to stay proceedings permanently may – indeed must – be exercised ‘where either the foundation of the prosecution of the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course.’⁶⁷⁶ As set out by the ICC Appeals Chamber in *Lubanga*, such will be the case where:
- i. It would be ‘odious’ or ‘repugnant’ to the administration of justice to allow the proceedings to continue;⁶⁷⁷ or
 - ii. The Accused's rights have been breached to the extent that a fair trial has been rendered impossible.⁶⁷⁸
429. In this instance, for the reasons set out below, the Defence submits that both criteria are satisfied because (i) the integrity of the judicial process has been irremediably vitiated by such serious prejudice that to continue the proceedings would offend the fundamental principles of justice, and (ii) it is no longer possible to guarantee Mr YIM Tith a fair trial.

⁶⁷⁴ ICC, *Prosecutor v. Bemba*, ‘Decision on Admissibility and Abuse of Process Challenges,’ 24 June 2010, ICC-01/05-01/08-802-24-06-2010, paras 201 to 204.

⁶⁷⁵ *Ibid.*

⁶⁷⁶ ICC, *The Prosecutor v. Lubanga*, ‘Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,’ 14 December 2006, ICC-01/04-01/06-772, para. 31.

⁶⁷⁷ ICC, *The Prosecutor v. Lubanga*, ‘Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,’ 14 December 2006, ICC-01/04-01/06-772, paras 27 and 30.

⁶⁷⁸ ICC, *The Prosecutor v. Lubanga*, ‘Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006,’ 14 December 2006, ICC-01/04-01/06-772, para. 37.

II. RESPONSE TO THE NCP'S FINAL SUBMISSION

430. The Defence fully concurs with the NCP's call for 'all allegations' against Mr YIM Tith to be dismissed in full pursuant to Rule 67(3)(a).⁶⁷⁹
431. The Defence agrees with the NCP's detailed exposition of the UN-RGC Agreement and other founding documents of the ECCC, including the *lex specialis* nature of the personal jurisdiction provisions.⁶⁸⁰ In assessing the personal jurisdictional parameters provided by the applicable law, the NCP notes the object and purpose of the UN-RGC Agreement and Establishment Law, namely: 'to bring prosecutions against [senior leaders and those most responsible], achieving national reconciliation and unification and in particular leaving a legacy for the next generation to be able to understand the brutal and heinous Democratic Kampuchea regime.'⁶⁸¹
432. Though initially excluded from the preliminary investigation by the ICP, the NCP has considered the results of both it and the judicial investigation. She finds that Mr YIM Tith does not fall under the ECCC's personal jurisdiction.⁶⁸²
433. The NCP is the person responsible for the prosecution of senior Khmer Rouge leaders and those most responsible for the worst atrocities of the DK period on behalf of the nation which suffered those crimes. This is a heavy responsibility. Her professional views must be afforded the highest consideration.

⁶⁷⁹ NCP's Final Submission, D378/1, para. 36.

⁶⁸⁰ NCP's Final Submission, D378/1, paras 24 to 34.

⁶⁸¹ NCP's Final Submission, D378/1, para. 30.

⁶⁸² NCP's Final Submission, D378/1, para. 34.

III. RESPONSE TO THE ICP'S FINAL SUBMISSION

A. THE ICP IMPERMISSIBLY SEEKS TO EXPAND THE SCOPE OF THE CHARGES

434. The ICP has requested that Mr YIM Tith be indicted for both matters that are beyond the scope of the investigation and for matters for which he was not charged.⁶⁸³ Both requests are legally impermissible for the reasons set out below. For the sake of clarity, the Defence will set out the boundaries of the investigation, charges, and any permissible indictment.

i. Mr YIM Tith Cannot be Indicted on Facts Outside the Scope of the Investigation

435. Rule 55(2) provides: 'The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.' This fundamental jurisdictional principle has been and must be strictly adhered to by the ECCC. The PTC has held that:

The Co-Investigating Judges have no jurisdiction to investigate acts unless they are requested to do so by the Co-Prosecutors, as confirmed by Internal Rule 55(3).⁶⁸⁴ The Pre-Trial Chamber notes that pursuant to Internal Rule 55(3), new facts alleged in the Final Submission are not part of the judicial investigation.⁶⁸⁵

The CIJs can neither charge nor subsequently indict an individual on facts with which they were not seised as these lie outside the parameters of their investigation.

⁶⁸³ See strikethrough in Annex III.

⁶⁸⁴ Rule 55(3) states: 'The absence of any of the formalities provided in sub rule 1 shall render the submission void.' Rule 55(1) states: 'If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons. The submission shall contain the following information: a) a summary of the facts; b) the type of offence(s) alleged; c) the relevant provisions of the law that defines and punishes the crimes; d) the name of any person to be investigated, if applicable; and e) the date and signature of both Co-Prosecutors.'

⁶⁸⁵ Case 001, *Decision on Appeal against Closing Order indicting Kaing Guek Eav alias "Duch"*, 5 December 2008, D99/3/42, para. 36. See also: Case 004/01, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, Opinion of Judges Beauvallet and Baik, para. 128. 'At the outset, the Undersigned Judges recall that, pursuant to Internal Rule 55(2), the Co-Investigating Judges shall investigate all, but only, the facts of which they were seised, *i.e.* the facts which are alleged in an introductory and any supplementary submissions.'

The ICP's request that Mr YIM Tith be indicted for facts outside the temporal and geographic scope of the investigation is impermissible

436. The temporal and geographic scope of the investigation was delimited by the ICP in his Introductory Submission thus:

- a. 'TA Tith was Secretary of the Kirivong District (District 109) of Takeo province, part of Sector 13 of the Southwest Zone, from 1976 until the end of 1977 or early 1978;'⁶⁸⁶ and
- b. 'In mid-1977, Ta Mok, TA Tith and other senior CPK leaders planned and initiated a massive purge of the Northwest Zone...'⁶⁸⁷

None of the Supplementary Submissions expanded the temporal or geographic scope of the investigation.⁶⁸⁸

437. In accordance with the Introductory and Supplementary Submissions, the temporal scope for facts in the Southwest Zone is from 1976 until early 1978;⁶⁸⁹ and for facts in the Northwest Zone is from mid-1977 to 6 January 1979.⁶⁹⁰

438. In the ICP's Final Submission, the ICP has requested that Mr YIM Tith be indicted on facts beyond the temporal and geographic scope of the investigation. Regarding the Southwest Zone, the ICP asserts that:

Yim Tith held four key roles in the Southwest Zone from 17 April 1975 through 6 January 1979. He served first as deputy secretary and then secretary of Kirivong District (also known as District 109), and later as deputy secretary and then secretary of Sector 13. Although it is difficult to establish the precise dates on which he held each position [...].⁶⁹¹

439. As the temporal scope for facts in the Southwest Zone is from 1976 until early 1978,⁶⁹² the CIJs cannot indict Mr YIM Tith upon facts in the Southwest Zone from 17 April 1975

⁶⁸⁶ ICP's Third Introductory Submission, D1, para. 93.

⁶⁸⁷ ICP's Third Introductory Submission, D1, para. 94.

⁶⁸⁸ Rather, the Supplementary Submissions consolidate the temporal scope of the positions set out in the ICP's Third Introductory Submission. For example: 'As set forth in paragraph 93 of the 3rd IS, Suspect **YIM TITH alias Ta Tith** was the CPK Secretary of Kirivong District from 1976 to 1977 or early 1978.' Co-Prosecutors Supplementary Submission regarding Sector 1 crime sites and persecution of Khmer Krom, 18 July 2011, D65, para. 13. '**Yim Tith** became a member of the Northwest Zone Committee in mid-1978...' Co-Prosecutors' Supplementary Submission regarding forced marriage and sexual or gender based violence, 24 April 2014, D191, para. 8.

⁶⁸⁹ ICP's Third Introductory Submission, D1, para. 93.

⁶⁹⁰ ICP's Third Introductory Submission, D1, para. 94.

⁶⁹¹ ICP's Final Submission, D378/2, para. 10.

⁶⁹² ICP's Third Introductory Submission, D1, para. 93.

until 31 December 1975 and from early 1978 until 6 January 1979 as requested in the ICP's Final Submission.

440. Regarding the Northwest Zone, the ICP asserts that: 'The earliest evidence of Yim Tith exercising an important *de facto* leadership role in the Northwest Zone is from late 1976 or early 1977.'⁶⁹³ As the temporal scope for facts in the Northwest Zone is from mid-1977 to 6 January 1979,⁶⁹⁴ the CIJs cannot indict Mr YIM Tith upon facts in the Northwest Zone from late 1976 or early 1977 until mid-1977 as requested in the ICP's Final Submission.
441. Rule 55(3) sets out in pertinent part that facts that are 'aggravating circumstances' may not require a supplementary submission where they are related to an existing submission:
- If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission.
442. The requested expansion of the scope of the investigation by the ICP cannot fall under 'aggravating circumstances.' As the scope of the investigation does not situate Southwest Zone cadre in the Northwest Zone until June 1977,⁶⁹⁵ there is no reason why 'aggravating circumstances' should exist from late 1976.
443. As the scope of the investigation does not allegedly place Mr YIM Tith as District Secretary of Kirivong and/or Member of Sector 13 until 1976,⁶⁹⁶ there is no reason why 'aggravating circumstances' should exist from 1975.
444. Any 'aggravating circumstances' relating to crimes alleged by Mr YIM Tith in the Southwest Zone can have taken place only when he was alleged to be District Secretary of Kirivong and/or Member of Sector 13, which was only from 1976. Were the new facts to have been serious enough to expand the scope of the investigation, the CIJs would have referred them back to the Co-Prosecutors or the Co-Prosecutors would have submitted a Supplementary Submission.

⁶⁹³ ICP's Final Submission, D378/2, para. 49.

⁶⁹⁴ ICP's Third Introductory Submission, D1, para. 94.

⁶⁹⁵ ICP's Third Introductory Submission, D1, para. 94.

⁶⁹⁶ ICP's Third Introductory Submission, D1, para. 93.

Mr YIM Tith cannot be indicted for the JCEs with which he was charged where they step outside the scope of the investigation

445. The ICIJ should not have charged Mr YIM Tith through three JCEs. The contours of all three JCEs stepped outside the temporal scope of the investigation.⁶⁹⁷ The ICIJ set out the following scopes for the alleged JCEs:

- i. Northwest Zone JCE – early or mid-1977 until at least 6 January 1979;⁶⁹⁸
- ii. Khmer Krom JCE – from at least 1976 to January 1979;⁶⁹⁹ and
- iii. Wat Pratheat JCE – from at least 17 April 1975 until 6 January 1979.⁷⁰⁰

446. These JCEs fall outside the scope of the investigation:

- i. Northwest Zone JCE – the Introductory and Supplementary Submissions do not place Mr YIM Tith in the Northwest Zone until ‘mid-1977.’⁷⁰¹ The CIJs were seised to investigate facts in relation to Mr YIM Tith in the Northwest Zone from mid-1977 only. The scope of the investigation in the Northwest Zone in relation to Mr YIM Tith does not cover early 1977. Mr YIM Tith was charged on the basis of facts outside the scope of the investigation. He cannot be subsequently indicted on facts in relation to the Northwest Zone – including the Northwest Zone JCE – before mid-1977.
- ii. Khmer Krom JCE – The Khmer Krom JCE is located in both the Southwest Zone and the Northwest Zone. In accordance with the Introductory and Supplementary Submissions, the temporal scope for facts in the Southwest Zone is from 1976 until early 1978;⁷⁰² and for facts in the Northwest Zone is from mid-1977 to 6 January 1979.⁷⁰³ Accordingly, the Khmer Krom JCE must be split thus: it can take account only of facts in the Southwest Zone from 1976 until early 1978 and in the Northwest Zone from mid-1977 to 6 January 1979. The Khmer Krom JCE in the Northwest Zone can only continue until 6 January 1979, rather than ‘January 1979’ as set out

⁶⁹⁷ ICP’s Final Submission, D378/2, paras 10 and 49.

⁶⁹⁸ Notification of Amended Charges, D350.1, para. 13.

⁶⁹⁹ Notification of Amended Charges, D350.1, para. 15.

⁷⁰⁰ Notification of Amended Charges, D350.1, para. 17.

⁷⁰¹ ICP’s Third Introductory Submission, D1, para. 94. The Supplementary Submissions do not expand the scope of the investigation in this regard.

⁷⁰² ICP’s Third Introductory Submission, D1, para. 93.

⁷⁰³ ICP’s Third Introductory Submission, D1, para. 94.

by the ICIJ,⁷⁰⁴ as the temporal jurisdiction of the ECCC is from 17 April 1975 to 6 January 1979.⁷⁰⁵

- iii. Wat Pratheat JCE – Wat Pratheat is in the Southwest Zone.⁷⁰⁶ The Introductory and Supplementary Submissions relate the facts to Mr YIM Tith in the Southwest Zone only from 1976 until early 1978.⁷⁰⁷ Mr YIM Tith was charged on the basis of facts outside the scope of the investigation. He cannot be subsequently indicted on facts in relation to the Southwest Zone – including the Wat Pratheat JCE – from 17 April 1975 until 31 December 1975 and from early 1978 until 6 January 1979.

ii. Mr YIM Tith Cannot be Indicted on Facts for Which He was Not Charged

447. Contrary to the Rules and jurisprudence set out below, the ICP has requested that Mr YIM Tith be indicted on facts for which he was not charged.⁷⁰⁸

448. Rule 57(1) sets out in pertinent part: ‘At the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silent.’ Rule 67(1) states in pertinent part: ‘The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.’ At the ECCC, only facts which have been charged beforehand can be considered for indictment. This position has been made clear by both the CIJs⁷⁰⁹ and the PTC:

In a civil law system, only facts which have been charged beforehand can be considered for indictment. In the Case 002 decision to which the International Co-Prosecutor refers, the Co-Investigating Judges indeed made extremely clear that they “may not indict a person for facts in relation to which he or she has not *first been charged*” and that they would make in the Closing Order a decision in respect of all the facts of which they have been validly seised “either by indicting the charged persons, *after having charged them*, or by issuing a dismissal order [...]”. This finding reflects the explicit provisions of Internal Rule 67(1), according to which the closing order can indict “a *Charged Person*”, and the Cambodian and French criminal procedure,

⁷⁰⁴ *Notification of Amended Charges*, D350.1, para. 15.

⁷⁰⁵ UN-RGC Agreement, Article 1; Establishment Law, Article 1.

⁷⁰⁶ *Notification of Amended Charges*, D350.1, para. 4.

⁷⁰⁷ *ICP’s Third Introductory Submission*, D1, para. 93. The Supplementary Submissions do not expand the scope of the investigation.

⁷⁰⁸ See strikethrough in Annex III.

⁷⁰⁹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 245. Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 47. Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 74.

according to which only a person charged beforehand can be indicted and sent for trial.⁷¹⁰

449. The PTC has previously explained the rationale behind why only facts which have been charged beforehand can be considered for indictment:

The underlying reason for making the charging process a requirement for subsequent indictment is the protection of the rights of the suspect or accused person. It is through the charging process, and not through the introductory and supplementary submissions, that a person is not only informed but also put in a position to answer allegations and prepare a defence, to such an extent that he or she is able to exercise his or her rights.⁷¹¹

450. The PTC has held that the ‘Co-Investigation Judges remain seised of all facts and can modify the charges up until the closing order.’⁷¹² Should the CIJs consider indicting Mr YIM Tith for facts for which he has not been charged, the CIJs will first need to notify and charge Mr YIM Tith with these new facts,⁷¹³ and second will need to reopen the investigation in order for Mr YIM Tith to answer the new facts, prepare a defence and exercise his rights.⁷¹⁴

451. It has been open to the ICP to request additional charges since the inception of the judicial investigation on 7 September 2009. The ICP did not do so. Even after the ICP was notified of the charges against Mr YIM Tith on 9 December 2015,⁷¹⁵ he still did not request additional charges. The ICP cannot now, well after the conclusion of the investigation, simply request that Mr YIM Tith be indicted on facts with which he has not been charged.

As set out by the international Judges of the PTC:

It was [...] open to the Co-Prosecutors to request additional charges by way of requests for investigative action at any time during the judicial investigation... There is [...] no doubt that the Co-Prosecutors were aware that they had to trigger a decision from the Co-Investigating Judges on further charges and eventually raise an appeal, should that decision not correspond to their

⁷¹⁰ *Decision on the International Co-Prosecutor’s Appeal of Decision on request for request for Investigative Action regarding sexual violence at Prison No. 8 and in Bakan District*, 13 February 2018, D365/3/1/5, para. 35 (citations omitted).

⁷¹¹ *Decision on the International Co-Prosecutor’s Appeal of Decision on request for request for Investigative Action regarding sexual violence at Prison No. 8 and in Bakan District*, 13 February 2018, D365/3/1/5, para. 36. See also Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, paras 106 to 112.

⁷¹² *Decision on the International Co-Prosecutor’s Appeal of Decision on request for request for Investigative Action regarding sexual violence at Prison No. 8 and in Bakan District*, 13 February 2018, D365/3/1/5, para. 38.

⁷¹³ Rule 57(1).

⁷¹⁴ *Decision on the International Co-Prosecutor’s Appeal of Decision on request for request for Investigative Action regarding sexual violence at Prison No. 8 and in Bakan District*, 13 February 2018, D365/3/1/5, paras 35 to 36.

⁷¹⁵ *Written Record of Initial Appearance*, 9 December 2015, D281; *Notification of Amended Charges*, D350.1.

satisfaction... the International Co-Prosecutor cannot simply argue, at this stage, that the charges do not reflect his expectations.⁷¹⁶

A comparison on the indictment process between Case 002 and Case 004 is inapposite

452. The Defence is aware of the jurisprudence in Case 002 where the CIJs informed the Suspects when being charged that ‘the acts set out in the Introductory Submission by the Co-Prosecutors are open to legal characterisation.’⁷¹⁷ This notice is understandable in Case 002 as the specific modes of liability were not set out, instead only a reference to Article 29new of the Establishment Law was made,⁷¹⁸ and the Suspects were not charged for specific crime sites, but rather ‘placed under judicial investigation for the acts of which he has just been notified [the Introductory Submission].’⁷¹⁹
453. Unlike in Case 002, in Case 004 the charges from the ICIJ set out the facts upon which Mr YIM Tith was charged: namely the crime site and the crime committed. The ICIJ further circumscribed the charges available for indictment by delimiting the mode(s) of liability.⁷²⁰ Consequently, in Case 004, the boundaries of any potential indictment have been set by factually particular charges⁷²¹ (rather than an entire Introductory Submission) and the facts set out in the Introductory and Supplementary Submissions no longer require legal characterisation.⁷²²

⁷¹⁶ Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, paras 113 to 115.

⁷¹⁷ Case 002, *Written Record of Initial Appearance of Nuon Chea*, 19 September 2007, E3/54, EN 00148815. See also Case 002, *Written Record of Initial Appearance of Ieng Sary*, 12 November 2007, E3/92, EN 00153312.

⁷¹⁸ Case 002, *Written Record of Initial Appearance of Nuon Chea*, 19 September 2007, E3/54, EN 00148816. See also: *Written Record of Initial Appearance of Ieng Sary*, 12 November 2007, E3/92, EN 00153313.

⁷¹⁹ Case 002, *Written Record of Initial Appearance of Nuon Chea*, 19 September 2007, E3/54, EN 00148816; *Written Record of Initial Appearance of Ieng Sary*, 12 November 2007, E3/92, EN 00153313.

⁷²⁰ *Written Record of Initial Appearance*, 9 December 2015, D281; *Notification of Amended Charges*, D350.1.

⁷²¹ *Written Record of Initial Appearance*, 9 December 2015, D281; *Notification of Amended Charges*, D350.1.

⁷²² The legal recharacterisation of facts between the time a Charged Person is charged and the issuance of the Closing Order is not prescribed in the Rules, as it is for the Trial Chamber and the Supreme Court Chamber when each is seised of the case. Rule 98(2) states in pertinent part: ‘The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.’ Rule 110 states: ‘In all cases, the Chamber may change the legal characterisation of the crime adopted by the Trial Chamber. However, it shall not introduce new constitutive elements that were not submitted to the Trial Chamber.’

(a) Mr YIM Tith Cannot be Indicted for Alleged Positions for Which He was Not Charged

454. The ICP has requested that Mr YIM Tith be indicted as deputy leader of Kirivong District;⁷²³ deputy Secretary of Sector 13;⁷²⁴ Secretary of Sector 13;⁷²⁵ *de facto* Secretary of Sector 1;⁷²⁶ Secretary of Sector 2;⁷²⁷ and *de facto* leader of the Northwest Zone.⁷²⁸
455. These facts go beyond those with which Mr YIM Tith was charged. The ICIJ charged Mr YIM Tith with the following crimes ‘in his capacity as the member and later Secretary of Kirivong District and Sector 13 committee member in the Southwest Zone; and as Secretary of Sector 1, Secretary of Sector 3, Secretary of Sector 4 and Deputy Secretary of the Northwest Zone of Democratic Kampuchea.’⁷²⁹
456. As set out above, Mr YIM Tith cannot be indicted on facts for which he was not charged. Accordingly, Mr YIM Tith cannot be indicted as deputy leader of Kirivong District; deputy Secretary of Sector 13; Secretary of Sector 13; *de facto* Secretary of Sector 1; Secretary of Sector 2; or *de facto* leader of the Northwest Zone.

(b) Mr YIM Tith Cannot be Indicted for Genocide of the Vietnamese

457. The ICP has requested that Mr YIM Tith be indicted for crimes against the ‘Vietnamese national group in Cambodia (including Khmer Krom).’⁷³⁰
458. The Genocide Convention defines genocide as ‘[specified] acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’⁷³¹ Two of the elements that are needed to prove the crime of genocide is the requirement of a specific ‘group’ and the ‘specific intent’ to destroy this particular group.⁷³² The Defence agrees with the ICP that the Khmer Krom and Vietnamese are two separate groups.⁷³³

⁷²³ ICP’s Final Submission, D378/2, paras 10, 137, 194, 220, 238, 242, 259, 1114, 1128.

⁷²⁴ ICP’s Final Submission, D378/2, paras 10, 130, 214, 307, 311, 1114, 1128, 1143.

⁷²⁵ ICP’s Final Submission, D378/2, para. 10.

⁷²⁶ ICP’s Final Submission, D378/2, paras 48 to 49, 148, 386, 412, 448, 1114, 1133, 1143.

⁷²⁷ ICP’s Final Submission, D378/2, paras 46, 815, 886, 1127, 1133, 1143.

⁷²⁸ ICP’s Final Submission, D378/2, paras 45, 144, 534, 1114, 1127, 1133, 1143, 1144.

⁷²⁹ Notification of Amended Charges, D350.1, para. 6.

⁷³⁰ ICP’s Final Submission, D378/2, para. 822. See Annex III.

⁷³¹ Convention on the Prevention and Punishment of the Crime of Genocide, Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 (‘Genocide Convention’), Article 2.

⁷³² Case 002, Closing Order, 15 September 2010, D427, para. 1312.

⁷³³ See *infra*, paras 625 to 632.

Accordingly, as he has not been charged for it, Mr YIM Tith cannot be charged with the crime of genocide against the Vietnamese.

459. Further, specific intent to destroy the Vietnamese cannot be substituted for the specific intent required to destroy the Khmer Krom.⁷³⁴ Mr YIM Tith was charged for the crime of genocide against the Khmer Krom⁷³⁵ and has participated in the investigation and prepared his case accordingly. Mr YIM Tith cannot be indicted on the basis of specific intent to destroy the Vietnamese.

(c) Mr YIM Tith Cannot be Indicted Upon the JCE Set Out in the ICP's Final Submission

460. Mr YIM Tith has been charged for genocide, crimes against humanity and grave breaches of the Geneva Conventions using JCE,⁷³⁶ and has been put on notice as such when he was charged and the charges were subsequently amended ('Notification of Charges').⁷³⁷ Under the Notification of Charges, Mr YIM Tith has been charged under three separate JCEs as set out by the ICIJ for three discrete areas: Northwest Zone JCE; Khmer Krom JCE; and Wat Pratheat JCE ('ICIJ discrete JCEs').⁷³⁸ These are the limits of the JCE for which Mr YIM Tith can be indicted.
461. In contrast, the ICP's Final Submission relies upon one all-encompassing JCE ('ICP all-encompassing JCE') which is wider than the ICIJ's discrete JCEs:

The members of the JCE shared a common criminal purpose to maintain the CPK in power by identifying and eliminating perceived opposition and enemies and to achieve an atheist, classless society with a single national and ethnic identity by implementing the CPK central leadership's radical agrarian, economic, and social policies in the Southwest and Northwest Zones.

In order to maintain the CPK in power, the plan involved the commission of the crimes against humanity of extermination, murder, deportation, torture, imprisonment, persecution, and other inhumane acts (forcible transfer, inhumane treatment, and enforced disappearance) against various categories of perceived enemies, including CPK cadres seen as disloyal, their families, and others perceived as connected to them; former soldiers and officials of the Lon Nol regime; the group of people forcibly transferred from cities and towns, commonly referred to as "new people" or "17 April people"; those considered spies for the CIA or KGB; Khmer Krom; ethnic Vietnamese residents of Cambodia; Khmer Krom in Cambodia; evacuees from the East

⁷³⁴ See *infra*, paras 633 to 639.

⁷³⁵ *Notification of Amended Charges*, D350.1, para. 7.

⁷³⁶ Apart from crime site 16: Samlaut District.

⁷³⁷ *Notification of Amended Charges*, D350.1.

⁷³⁸ *Notification of Amended Charges*, D350.1, paras 13 to 18.

Zone; individuals from the “bourgeois”, “feudalist”, or “capitalist” classes; and all ordinary citizens perceived as disloyal to the regime or the revolution for any reason whatsoever. The plan also involved the commission of the crime of genocide with the intent to destroy the Vietnamese national group in Cambodia, particularly the Khmer Krom (*i.e.*, ethnic Khmer with origins in territory then in Vietnam).

In order to facilitate the CPK’s military, economic, social, and agrarian policies, the plan involved the commission of the crimes against humanity of: enslavement, murder, and other inhumane acts (inhumane treatment and enforced disappearances) against workers at cooperatives and worksites; and other inhumane acts through forced marriages and rape by compelling couples forced to marry to consummate the marriage without the consent of one or both spouses.

The JCE involved or amounted to all of the crimes described in this Submission, each of which was intended by Yim Tith and the other JCE members.⁷³⁹

462. The CIJs have set out that a Charged Person can be indicted only for crimes and modes of liability of which he has been charged and duly notified:

Nevertheless, the ICP requests the CIJs to indict Im Chaem for a much wider set of crimes, committed via more modes of liability, than those that she was charged with. As correctly objected to by the Defence, this is impermissible. Being informed in detail of the nature and cause of the charges is a fundamental pillar of due process, and it is critical to the effective exercise of a charged person's right to prepare his or her defence. A charged person may thus only be indicted for crimes that he or she has been charged with and duly notified of.⁷⁴⁰

This finding was put into practice in Case 004 when Mr YIM Tith’s charges were amended to include additional modes of liability.⁷⁴¹

463. Further, the logic set out by the PTC explaining the rationale behind why a Charged Person can be indicted only on facts upon which he has previously been charged is equally applicable to modes of liability: ‘It is through the charging process, and not through the introductory and supplementary submissions, that a person is not only informed but also put in a position to answer allegations and prepare a defence, to such an extent that he or she is able to exercise his or her rights.’⁷⁴² During the investigation, the Defence has prepared on the basis of the guidance given in the Notification of Charges and

⁷³⁹ ICP’s Final Submission, D378/2, paras 4 to 7.

⁷⁴⁰ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 245.

⁷⁴¹ *Order amending the charges against YIM Tith*, 29 March 2017, D350. See also *Notice of intention to add modes of liability by way of judicial order and of provisional discontinuance*, 20 January 2017, D342.

⁷⁴² *Decision on the International Co-Prosecutor’s Appeal of Decision on request for request for Investigative Action regarding sexual violence at Prison No. 8 and in Bakan District*, 13 February 2018, D365/3/1/5, para. 36.

Amendment of Charges and the discrete JCEs with which he was charged. As Mr YIM Tith was not charged with the ICP's all-encompassing JCE, he cannot be indicted upon it.

iii. The CIJs Should Not Indict Mr YIM Tith on Crimes that the Co-Prosecutors have Not Requested in Their Final Submissions

464. In her Final Submission, the NCP has requested that Mr YIM Tith face no indictment and a Dismissal Order be issued.⁷⁴³ In his Final Submission, the ICP has not requested that Mr YIM Tith be indicted for some of the crimes with which he has been charged.⁷⁴⁴
465. Although the Defence is aware that the Co-Prosecutors' Final Submissions are requests⁷⁴⁵ that the CIJs are not obliged to follow,⁷⁴⁶ and that the Office of the Co-Prosecutors has accepted that the CIJs are not so bound,⁷⁴⁷ the Defence invites the CIJs not to indict Mr YIM Tith on these charges.
466. The fact that the Co-Prosecutors' have not requested that Mr YIM Tith be indicted for these crimes demonstrate: a. a lack of prosecutorial will; and b. in the case of the ICP, an acknowledgement that much of the investigation has not produced the expected fruits. It would be judicially inefficient for Mr YIM Tith to be indicted on matters where there is no prosecutorial appetite to continue with these matters during any trial phase.
467. The Defence is cognisant that the ICIJ in Case 004/02 was not 'persuaded of the necessity or utility in dispensing with national crimes on such grounds [as] any time saving that might be achieved in doing so would be minimal given that the facts and evidence required to establish international crimes will significantly, if not completely, overlap with the facts and evidence required to establish national crimes.'⁷⁴⁸ Should the CIJs decide to indict Mr YIM Tith, the Defence submits that not indicting Mr YIM Tith for

⁷⁴³ NCP's Final Submission, D378/1.

⁷⁴⁴ See Annex IV.

⁷⁴⁵ "Final Submission" refers to a written submission by the Co-Prosecutors requesting the Co-Investigating Judges to make a specific Closing Order in a particular case.' Rules, Glossary.

⁷⁴⁶ CPC, Article 247: 'The investigating judge is not obliged to conform with the final submission of the Prosecutor.'

⁷⁴⁷ Case 002, Co-Prosecutors' Response to IENG Sary's expedited appeal against OCIJ's refusal to accept Defence response to OCP's Final Submission and Request for Stay of Proceedings, 8 September 2010, D390/1/2/2, para. 7.

⁷⁴⁸ Case 004/02, Closing Order (Indictment), 16 August 2018, D360, para. 59.

charges as requested by the ICP will save time as additional elements of crimes will need to be proved which will require the exploration of further facts at trial:

- i. Crimes under the 1956 Cambodian Penal Code. The modes of liability for domestic crimes are different to international crimes. Notably, the ICIJ has indicted AO An for international crimes under JCE and for domestic crimes under co-perpetration.⁷⁴⁹ Though co-perpetration and JCE share some features, they call for distinct focuses for both proof and contradiction.⁷⁵⁰ As set out by the Trial Chamber in Case 002:

While both [co-perpetration and JCE] require the shared intent by participants that the crime be committed, participation in a JCE, even if it has to be significant, would appear to embrace situations where the accused may be more remote from the actual perpetration of the *actus reus* of the crime than the direct participation required under domestic law.⁷⁵¹

- ii. Grave Breaches of the Geneva Conventions 1949. Unlike any of the other crimes with which Mr YIM Tith has been charged,⁷⁵² Grave Breaches of the Geneva Conventions 1949 requires the additional factual proof of existence of an international armed conflict.⁷⁵³
- iii. Crime site 1: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Wat Pratheat security centre.⁷⁵⁴ Crimes against humanity of: enslavement,⁷⁵⁵ persecution on racial grounds against Khmer

⁷⁴⁹ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, paras 409 to 415.

⁷⁵⁰ See *infra*, paras 555 to 566.

⁷⁵¹ Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 41.

⁷⁵² Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 72.

⁷⁵³ Case 002, *Closing Order*, 15 September 2010, D427, para. 1480.

⁷⁵⁴ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁵⁵ 'The elements of enslavement are: a. *Actus Reus*: the exercise of any or all powers attaching to ownership over a person. Forced or involuntary labour may constitute enslavement. Proof of ill treatment is not necessary to find the existence of the crime of enslavement. b. *Mens Rea*: the perpetrator must have intentionally exercised a power attaching to ownership over a person.' Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 75.

Krom,⁷⁵⁶ and other inhumane acts:⁷⁵⁷ confinement/working in inhumane conditions, require further elements to be proven, and consequently, at trial, the exploration of further facts at Wat Pratheat security centre.

- iv. Crime site 2: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Kraing Ta Chan security centre.⁷⁵⁸ Crimes against humanity of: persecution on racial grounds against Khmer Krom⁷⁵⁹ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Kraing Ta Chan security centre.
- v. Crime Site 3: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Preil Village execution site.⁷⁶⁰ Crimes against humanity of: persecution on racial grounds against Khmer Krom⁷⁶¹ requires

⁷⁵⁶ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79: *The elements of the crime of persecution are: a. Actus Reus: an act or omission which discriminates in fact and denies or infringes upon a fundamental right laid down in international customary law or treaty. The discriminatory element in the actus reus is established when the victim is targeted due to membership of a group that is subjectively defined and consequently persecuted by the perpetrator on political, racial, or religious grounds. The victim must actually belong to a sufficiently discernible political, racial, or religious group, such that persecutory consequences must occur for the group. In this regard, the SCC has held that there is no discrimination when there is a mistake of fact by the perpetrator as to whether a victim actually belongs to the defined targeted group, or when the perpetrator targets victims irrespective of whether they fall under the discriminatory criterion or, in other words, when the targeting is "indiscriminate". Persecution on political grounds takes into account the perpetrator's perspective when defining the group that is the object of persecution and thus does not require that the members of the targeted group hold common, or even any, political views. b. Persecution may be committed through one or more of the other underlying crimes against humanity listed in Article 5 of the ECCC Law, as well as through other acts which are characterised by the same level of gravity or seriousness, including acts which are not necessarily international crimes in and of themselves. c. Mens Rea: the deliberate perpetration of an act or omission with the intent to discriminate on political, racial, or religious grounds. Even when the underlying acts constitute crimes under international law, the mens rea required for these crimes need not be established: it suffices to prove that the underlying act was carried out with the required discriminatory intent.*

⁷⁵⁷ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 80: *The elements of other inhumane acts are: a. Actus Reus: an act or omission of the perpetrator causing serious bodily or mental suffering or injury or constituting a serious attack on human dignity. The acts or omissions of the perpetrator must be of a nature and gravity similar to the other crimes against humanity enumerated under Article 5 of the ECCC Law, assessed on a case-by-case basis, with due regard to the individual circumstances of the case. The effect of the suffering is not required to be long-term, although this may be a relevant factor for the determination of the seriousness of the act. b. Mens Rea: the perpetrator must have deliberately performed the act or omission with the intent to inflict serious bodily or mental harm or commit a serious attack upon the human dignity of the victim at the time of the act or omission, or knew that the act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity.*

⁷⁵⁸ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁵⁹ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79.

⁷⁶⁰ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁶¹ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79.

further elements to be proven, and consequently, at trial, the exploration of further facts at Preil Village execution site.

- vi. Crime Site 4: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Wat Angkun execution site.⁷⁶² Crimes against humanity of: persecution on racial grounds against Khmer Krom⁷⁶³ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Wat Angkun execution site.
- vii. Crime Site 5: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Slaeng Village forest execution site.⁷⁶⁴ Crimes against humanity of: extermination,⁷⁶⁵ persecution on racial grounds against Khmer Krom⁷⁶⁶ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Slaeng Village forest execution site.
- viii. Crime Site 6: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Prey Sokhon execution site and Wat Ang Serei Muny.⁷⁶⁷ Crimes against humanity of: persecution on racial grounds against Khmer Krom⁷⁶⁸ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Prey Sokhon execution site and Wat Ang Serei Muny.

⁷⁶² Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁶³ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79.

⁷⁶⁴ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁶⁵ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 74: *The elements of extermination are:*
a. Actus Reus: an act, omission, or a combination of both, resulting in the death of persons on a massive scale. There is no minimum number of victims required to establish extermination. The assessment of the 'massive scale' requirement must be made on a case-by-case basis, having regard to such factors as the time and place of the killings, the selection of the victims and the manner in which they were targeted, and whether the killings were aimed at the collective group rather than the victims in their individual capacity. b. Mens Rea: 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. The SCC took the position that the aim of extermination is to eliminate individuals that are part of a group and that it is thus incompatible with the notion of dolus eventualis. It then clarified, however, that knowledge that the actus reus would cause certain death is not required, but rather, what is necessary is "a showing that the killing of members of a group is what was desired by the perpetrator, irrespective of whether he was certain that this would actually happen. Mere knowledge that deaths may occur would be insufficient."

⁷⁶⁶ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79.

⁷⁶⁷ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁶⁸ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79.

- ix. Crime Site 10: Crimes against humanity of: torture⁷⁶⁹ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Kang Hort Dam worksite.
- x. Crime Site 12: Crimes against humanity of: enslavement⁷⁷⁰ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Khnang Kou security centre.
- xi. Crime Site 13: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Kampong Kol sugar factory.⁷⁷¹
- xii. Crime Site 17: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Phum Veal security centre.⁷⁷² Crimes against humanity of: persecution on racial grounds against Khmer Krom⁷⁷³ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Phum Veal security centre.
- xiii. Crime Site 18: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Svay Chrum security centre.⁷⁷⁴
- xiv. Crime Site 19: Crimes against humanity of: persecution on racial grounds against Khmer Krom⁷⁷⁵ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Tuol Seh Nhauv execution site.
- xv. Crime Site 20: Crimes against humanity of: persecution on racial grounds against Khmer Krom⁷⁷⁶ requires further elements to be proven, and

⁷⁶⁹ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 77: *The elements of torture are: a. Actus Reus: any act causing severe pain or suffering, considering both the objective severity of harm inflicted and subjective characteristics of the victim, whether physical or mental, committed or instigated by a public official. b. Mens Rea: the perpetrator must intend to inflict severe pain or suffering on the victim. c. The act must have been for such purposes as obtaining information or a confession, punishment, or intimidation.*

⁷⁷⁰ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 75.

⁷⁷¹ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁷² Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁷³ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79.

⁷⁷⁴ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁷⁵ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79.

⁷⁷⁶ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79.

consequently, at trial, the exploration of further facts at Prey Krabau execution site.

- xvi. Crime Site 22: Crimes against humanity of: enslavement⁷⁷⁷ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Wat Kirirum security centre.
- xvii. Crime Site 27: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Kampong Prieng commune.⁷⁷⁸ Crimes against humanity of: persecution on racial grounds against Khmer Krom⁷⁷⁹ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Kampong Prieng commune.
- xviii. Crime Site 28: Genocide requires the additional element, and additional factual proof at trial, of Mr YIM Tith's specific intent of genocide against the Khmer Krom which is manifest at Reang Kesei commune.⁷⁸⁰ Crimes against humanity of: persecution on racial grounds against Khmer Krom⁷⁸¹ requires further elements to be proven, and consequently, at trial, the exploration of further facts at Reang Kesei commune.

468. Consequently, should the CIJs decide to indict Mr YIM Tith, they should not indict him for charges which are not requested by the ICP. This will save time at trial as the exploration of further facts will not be required.

B. THE ICP MISINTERPRETS THE REQUISITE STANDARD OF PROOF

469. In his Final Submission, the ICP asserts that there needs to be 'sufficient evidence' to indict a Charged Person, and that 'sufficient evidence' is probability of guilt rather than mere possibility of guilt:

The CIJs have applied the standard of "sufficient evidence" in Cases 001 and 002 to send the Charged Persons forward for trial. They held that the applicable standard of proof encompassed by the term "sufficient evidence" is probability of guilt rather than mere possibility of guilt. The CIJs explained

⁷⁷⁷ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 75.

⁷⁷⁸ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁷⁹ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79.

⁷⁸⁰ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 94.

⁷⁸¹ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 79.

that “the evidentiary material in the Case File must be sufficiently serious and corroborative to provide a certain level of probative force.”⁷⁸²

A number of differing standards of proof to indict a Charged Person have been set out at the ECCC. Consequently, the Defence considers it prudent to set out submissions regarding the standard of evidence required to indict Mr YIM Tith.

Differing standards of proof for an indictment at the ECCC

470. In Cases 002 and 004/01, the CIJs have found that an indictment is based on a ‘probability standard.’⁷⁸³

471. In Case 004/01, the PTC initially cited the Case 002 Closing Order in setting out the standard of evidence:

While it is obviously not required at this stage to ascertain the guilt of the Charged Person (given that only the Trial Chamber has such jurisdiction), it is clear that “probability” of guilt is necessary (i.e. more than a mere possibility). Accordingly, the assessment of the charges at this stage must not be confused with the “*beyond a reasonable doubt*” standard at the trial stage, yet the evidentiary material in the Case File must be sufficiently serious and corroborative to provide a certain level of probative force.⁷⁸⁴

472. Along with the ‘probability’ standard, the PTC further set out a ‘plausibility’ standard: ‘it is clear that the legal requirements for judicial proceedings progress incrementally from a “mere possibility” to a “probability” or “plausibility” of guilt during the investigation.’⁷⁸⁵

473. As noted by the ICIJ in Case 004/02,⁷⁸⁶ the PTC further obscured the requisite standard of proof by asserting that “sufficient charges” corresponds *a minima* to Internal Rule 55(4)’s “clear and consistent evidence” indicating that a person may be criminally responsible for the commission of a crime, and thus indicted by the Co-Investigating

⁷⁸² ICP’s Final Submission, D378/2, para. 1070.

⁷⁸³ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 2, citing Case 002, *Closing Order*, 15 September 2010, D427, paras 1323 to 1326 and Rule 87(1).

⁷⁸⁴ Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, para. 61, citing Case 002, *Closing Order*, 15 September 2010, D427, para. 1323.

⁷⁸⁵ Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, para. 62.

⁷⁸⁶ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 37(a)(vii).

Judges.’⁷⁸⁷ Consequently, the PTC set out that the standard of indictment at three possible different levels: ‘probability,’ ‘plausibility,’ and ‘clear and consistent evidence.’

i. ‘Sufficient Evidence’ and ‘Charges Suffisantes’ / ‘Sufficient Charges’

474. The Rules, in English and Khmer, provide that the CIJs shall issue a Dismissal Order where ‘[t]here is not sufficient evidence against the Charged Person.’⁷⁸⁸ It follows that to indict, there must be ‘sufficient evidence.’⁷⁸⁹

475. The French Rules, *prima facie*, appear to provide a different test to issue a Dismissal Order. A Dismissal Order is issued where there are ‘no sufficient charges’ against the Charged Person or persons of the charges. The French Rules mirror the French Criminal Code of Procedure.⁷⁹⁰

476. In Case 001, the CIJs stated that: ‘In view of the facts set out above [...] the Co-Investigating Judges consider there is sufficient evidence (*charges suffisantes*) to indict KAINING Guek Eav alias DUCH and send him for trial for the following offences defined in the ECCC Law, and based on applicable law in 1975.’⁷⁹¹ It appears that the CIJs used ‘*charges suffisantes*’ to mean ‘sufficient evidence,’ in line with the term used in the Khmer and English rules.

477. In Case 002, the French and International jurisprudence reviewed by the CIJs included the terminology ‘*charges suffisantes*’⁷⁹² and ‘*sufficient evidence*.’⁷⁹³

⁷⁸⁷ Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, para. 62.

⁷⁸⁸ Rule 67(3)(c).

⁷⁸⁹ CPC, Article 247 provides a similar test: *The investigating judge shall issue a non-suit order in the following circumstances: 3. There is insufficient evidence for a conviction of the charged person.*

⁷⁹⁰ Article 177 of the French Criminal Code of Procedure provides: *If the investigating judge considers that the facts do not constitute a felony, a misdemeanour, or a petty offence, or if the perpetrator has remained unidentified, or if there are no sufficient charges against the person under judicial examination, he makes an order ruling that there is no cause to prosecute [...].* [Translated from: *Si le juge d’instruction estime que les faits ne constituent ni crime, ni délit, ni contravention, ou si l’auteur est resté inconnu, ou s’il n’existe pas de charges suffisantes contre la personne mise en examen, il déclare, par une ordonnance, qu’il n’y a lieu à suivre.*]de

⁷⁹¹ Case 001, *Closing Order indicting Kaing Guek Eav alias Duch*, 8 August 2008, D99, para. 130. See also the Disposition which states: *Consequently, as a result of the judicial investigation, there is sufficient evidence (charges suffisantes) that KAINING Guek Eav alias DUCH, through his acts or omissions in Phnom Penh and within the territory of Cambodia, between 17 April 1975 and 6 January 1979, as Deputy Secretary or Secretary of S21, planned, instigated, ordered, committed, or aided and abetted, or is responsible by virtue of superior responsibility for the following crimes.*

⁷⁹² Case 002, *Closing Order*, 15 September 2010, D427, para. 1322.

⁷⁹³ Case 002, *Closing Order*, 15 September 2010, D427, para. 1325.

478. In Case 004/01, the CIJs,⁷⁹⁴ ICP⁷⁹⁵ and IM Chaem Defence⁷⁹⁶ imply that the terms ‘sufficient evidence’ and ‘charges suffisantes’ / ‘sufficient charges’ followed the same definition.

479. It would appear that although the terminology is different, in Cases 001, 002 and 004/01, the CIJs found that the definition of ‘sufficient evidence’ and ‘charges suffisantes’ / ‘sufficient charges’ followed a common approach.⁷⁹⁷ This would also satisfy the requirement of legal certainty as set out in Rule 21.⁷⁹⁸

ii. Sufficient Evidence Means ‘Substantial Probability of Guilt’

480. The Closing Order in Case 001 does not provide a definition of ‘sufficient evidence.’⁷⁹⁹

481. In Case 002, regarding the definition of the standard of proof required for sending a Charged Person for trial, the CIJs found:

- a. There is no clear definition of ‘sufficient evidence’ in the Rules,⁸⁰⁰ Cambodian law,⁸⁰¹ or the French Code of Criminal Procedure,⁸⁰²
- b. There is no jurisprudence available from the Cambodian national courts⁸⁰³ or France⁸⁰⁴ concerning the definition of ‘sufficient evidence’; and
- c. In France, in practice the assessment of the existence of ‘sufficient charges’ is left to the ‘unfettered discretion’ of the judges conducting the investigation (who are not required to apply any specific standard in determining whether sufficient charges exist), since the Cour de Cassation abstains from ruling upon such assessments.⁸⁰⁵ However, it is clear that ‘probability’ of guilt is necessary (i.e.

⁷⁹⁴ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 2.

⁷⁹⁵ Case 004/01, *International Co-Prosecutor’s Rule 66 Final Submission against Im Chaem*, 27 October 2016, D304/2, para. 27.

⁷⁹⁶ Case 004/01, *IM Chaem’s Response to the International Co-Prosecutor’s Rule 66 Final Submission against her*, 28 November 2016, D304/6, para. 37.

⁷⁹⁷ Case 002, *Closing Order*, 15 September 2010, D427, para. 1326.

⁷⁹⁸ Rule 21(1) states in pertinent part: ‘The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.’

⁷⁹⁹ Case 001, *Closing Order indicting Kaing Guek Eav alias Duch*, 8 August 2008, D99.

⁸⁰⁰ Case 002, *Closing Order*, 15 September 2010, D427, para. 1321.

⁸⁰¹ Case 002, *Closing Order*, 15 September 2010, D427, para. 1321.

⁸⁰² Case 002, *Closing Order*, 15 September 2010, D427, para. 1322.

⁸⁰³ Case 002, *Closing Order*, 15 September 2010, D427, para. 1321.

⁸⁰⁴ Case 002, *Closing Order*, 15 September 2010, D427, para. 1322.

⁸⁰⁵ Case 002, *Closing Order*, 15 September 2010, D427, para. 1322.

more than a mere possibility), and the evidentiary material in the Case File must be sufficiently serious and corroborative to provide a certain level of probative force.⁸⁰⁶

482. In Case 002, the CIJs found that the jurisprudence of national and international courts take a ‘common approach’ regarding the standard of proof required for sending a Charged Person for trial.⁸⁰⁷ The CIJs do not specifically define ‘sufficient evidence’ for the purposes of ECCC proceedings.
483. In Case 004, the ICIJ has used the ‘insufficient evidence’ standard to reduce the scope of the investigation,⁸⁰⁸ but has not provided any definition of the term. The ICIJ used his discretion to determine whether there was ‘insufficient evidence’ to support a charge.⁸⁰⁹ This discretion has not, to date, been challenged by the Defence,⁸¹⁰ the ICP⁸¹¹ or the Ao An Defence Team.⁸¹²
484. Both the UN-RGC Agreement and the Establishment Law allow for guidance to be sought in procedural rules established at the international level where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law.⁸¹³ Like the ECCC, the ICTY⁸¹⁴ and ICTR⁸¹⁵ use the ‘sufficient evidence’ standard when deciding to issue an indictment.

⁸⁰⁶ Case 002, *Closing Order*, 15 September 2010, D427, para. 1323.

⁸⁰⁷ Case 002, *Closing Order*, 15 September 2010, D427, para. 1326.

⁸⁰⁸ *Request for comments regarding alleged facts not to be investigated further*, 4 March 2016, D302; *Notice of Provisional Discontinuance regarding individual allegations*, 25 August 2016, D302/3; *Request for comments regarding alleged facts not to be investigated further*, 19 April 2016, D307; *ICIJ Notice of Provisional Discontinuance regarding individual allegations*, 25 August 2016, D307/3.

⁸⁰⁹ *Request for comments regarding alleged facts not to be investigated further*, 4 March 2016, D302; *Notice of Provisional Discontinuance regarding individual allegations*, 25 August 2016, D302/3; *Request for comments regarding alleged facts not to be investigated further*, 19 April 2016, D307; *ICIJ Notice of Provisional Discontinuance regarding individual allegations*, 25 August 2016, D307/3.

⁸¹⁰ *Yim Tith Submissions on alleged facts not to be investigated further*, 8 April 2016, D302/1.

⁸¹¹ *International Co-Prosecutor's Response to the International Co-Investigating Judge's Request for Comments regarding alleged facts not to be investigated further*, 11 April 2016, D302/2; *International Co-Prosecutor's Response to the International Co-Investigating Judge's Request for comments regarding alleged facts not to be investigated further*, 3 June 2016, D307/2.

⁸¹² *Ta An Submissions in Response to the ICIJ Request for comments regarding alleged facts not to be investigated further*, 18 May 2016, D307/1.

⁸¹³ UN-RGC Agreement, Article 12; Establishment Law, Article 23*new*.

⁸¹⁴ ICTY Rules of Evidence and Procedure, Rule 47(B): ‘The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.’

⁸¹⁵ ICTR Rules of Evidence and Procedure, Rule 47(B): ‘The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has

However, at the ICTY and ICTR, the threshold the Prosecutor needs to meet is ‘sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime,’ rather than simply ‘sufficient evidence.’

485. Indictments at the ICTY⁸¹⁶ and ICTR⁸¹⁷ are prepared by the prosecutor following an investigation in which neither the defence nor a judge is involved. The indictment is then assessed by a judge with supporting material provided by the prosecution in order to determine whether there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime.⁸¹⁸ It is thus the Prosecutor who is responsible for presenting a *prima facie* case to the judge for indictment. The requisite threshold is ‘a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused.’⁸¹⁹
486. Similarly, at the ICC it is the Prosecutor who is invested with investigatory powers and tasked with preparing an indictment.⁸²⁰ This is then subjected to the confirmation of charges proceedings, before which the Prosecutor must disclose relevant information and at which the Defence may both challenge the evidence presented by the Prosecutor and present its own evidence.⁸²¹ To confirm any or all of proposed charges, the ICC Pre-Trial Chamber must ‘determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.’⁸²² The ICC Prosecutor is obliged to present the ‘fruits of a full and proper investigation,’ which is to be analysed and assessed as a whole.⁸²³ The Prosecutor ‘must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations.’⁸²⁴

committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.’

⁸¹⁶ ICTY Rules of Evidence and Procedure, Rule 47(B).

⁸¹⁷ ICTR Rules of Evidence and Procedure, Rule 47(B).

⁸¹⁸ ICTY Statute, Article 19(1); ICTY Rules of Evidence and Procedure, Rule 47(B); ICTR Rules of Evidence and Procedure, Rule 47(B).

⁸¹⁹ ICTY, *Prosecutor v. Milošević* (IT-01-51-I), ‘Decision on the Review of the Indictment,’ 22 November 2001, para. 14.

⁸²⁰ ICC Statute, Articles 13, 14, 15, 42, 53, 54, 61.

⁸²¹ ICC Statute, Article 61.

⁸²² ICC Statute, Article 61(7).

⁸²³ ICC, *Prosecutor v. Gbagbo*, ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute,’ 3 June 2013, ICC-02/11-01/11-432, para. 35; *Prosecutor v. Lubanga*, ‘Decision on the Confirmation of charges,’ 19 January 2007, ICC-01/04-01/06-803t, para. 39; *Prosecutor v. Katanga and Ngudjolo*, ‘Decision on the Confirmation of Charges,’ 30 September 2008, ICC-01/04-01/07-717, para. 66.

⁸²⁴ ICC, *Prosecutor v. Lubanga*, ‘Decision on the Confirmation of charges,’ 19 January 2007, ICC-01/04-01/06-803t, para. 39; *Prosecutor v. Katanga and Ngudjolo*, ‘Decision on the Confirmation of Charges,’ 30 September 2008, ICC-01/04-01/07-717, para. 65.

The Defence may present evidence, including by calling witnesses, to counter the Prosecutor's case for indictment.⁸²⁵

iii. Conclusion

487. In the French-influenced inquisitorial structure of the ECCC, the role of the CIJs is to conduct an objective investigation, with the input of the Co-Prosecutors and the Defence, and the oversight of the PTC.⁸²⁶ Although the French criminal code offers no further definition of the term 'insufficient charges,' the doctrine assumes – confirmed by jurisprudence⁸²⁷ – that the referral of a case to trial requires charges serious enough to give rise to a substantial probability of guilt, and not a mere possibility.⁸²⁸ However, there appears to be a lack of clarity within the French criminal code. Although there is some commentary which states that the indictment standard is 'substantial probability,' the commentary cited by the CIJs in Case 002 states that only 'probability' is the standard to send a Charged Person to trial.⁸²⁹ In accordance with the principle *in dubio pro reo*, enshrined in the Cambodian Constitution and to which the CIJs have confirmed their commitment, the Defence submits that the CIJs are obliged to apply the standard of 'substantial probability.'⁸³⁰

C. EVIDENTIARY CONSIDERATIONS

i. *Prima Facie* Categorisation of Documents is Permissible and Warranted

488. In his Final Submission, the ICP asserts that '[t]he CIJs explained that "the evidentiary material in the Case File must be sufficiently serious and corroborative to provide a

⁸²⁵ ICC Statute, Article 61(6).

⁸²⁶ In this, the ECCC directly mirrors the French system. See: Articles 80, 80-1, 151 and 184 of the French Criminal Code of Procedure.

⁸²⁷ Christian Guéry (Président de la chambre de l'instruction de Grenoble), Dalloz action Droit et pratique de l'instruction préparatoire, Section 3, Chapitre 551.52: Juge d'instruction et intime conviction, 2015].

⁸²⁸ On the prohibition of hypothetical grounds for the referral of a case, see Crim. 19 June 1984, no 84-91.908, Bull. crim., No. 231.

⁸²⁹ Case 002, *Closing Order*, 15 September 2010, D427, para. 1323, citing at n. 5229, "Droit et Pratique de l'Instruction Préparatoire Dalloz 2007 Six.Ed. para.213.11: «Les juridictions d'instruction n'ont point à rechercher si le prévenu est coupable, mais seulement s'il est probable qu'il le soit. La probabilité est la mesure du jugement. Ce ne sont pas des preuves mais seulement des indices qu'il faut demander à la procédure écrite» [TRANSLATION: It is not for examining chambers to ascertain whether the defendant is guilty, but only whether the defendant may be guilty. Probability is the threshold for such assessment. It is not evidence, but rather indicia that should be sought in the indictment.]"

⁸³⁰ *In dubio pro reo* is enshrined in Article 38 of the Cambodian Constitution, which dictates: 'The doubt shall benefit the accused.' Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 27.

certain level of probative force.”⁸³¹ The ICP fails to develop the CIJs’ holding regarding the determination of the probative value of evidence. The Defence considers it prudent to set out submissions thereon.

Evidentiary considerations in Closing Orders at the ECCC

489. In the Case 004/01 Closing Order, the CIJs included ‘evidentiary considerations,’ in which they provided their views on the probative value of different categories of evidence.⁸³² The CIJs cannot issue a Closing Order without conducting a thorough assessment of Case File 004.⁸³³

490. The Defence submits that the CIJs’ approach is necessary and wholly appropriate since it provides clarity as to how evidence has been assessed and is thus both judicially efficient and consistent with the obligation to ensure that the Closing Order is reasoned and reviewable.⁸³⁴

491. The PTC criticised the CIJs’ approach as ‘an error of law’:

There are in fact no grounds for distinguishing statements based on their provenance. All evidence is admissible and generally enjoys the same legal presumption of reliability, provided it has been legally collected.

The Pre-Trial Chamber therefore finds that it is an error of law, in an inquisitorial system based on written proof, to make general assertions as to the value of certain categories of evidence, thus creating a hierarchy of evidence based on its nature rather than on its substance, and to consequently give less weight to evidence collected by other entities for strictly formal reasons. The only relevant criterion should be the impact that the substance of the evidence may have on the personal conviction of the Co-Investigating Judges regarding whether there is sufficient evidence for the charges.⁸³⁵

492. In their respective Case 004/02 Closing Orders, the CIJs found that the PTC erred in its critique and invited the PTC ‘to reconsider its opinion’ in any appeal to the Case 004/02 Closing Order.⁸³⁶ Both CIJs again elected to provide evidentiary considerations.⁸³⁷

⁸³¹ ICP’s Final Submission, D378/2, para. 1070.

⁸³² Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 103-139.

⁸³³ Rule 67(3)(c).

⁸³⁴ Rule 67(4).

⁸³⁵ Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, paras 51-52.

⁸³⁶ Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, paras 485-491. Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 35.

⁸³⁷ Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, paras 485-491. Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, paras 123-156.

493. It appears that the PTC has taken guidance from the rules of evidence during the trial phase.⁸³⁸ Rule 87(1) and the equivalent rule in the Cambodian Code of Criminal Procedure ('CPC'), Article 321,⁸³⁹ are applicable during the trial phase of proceedings. Rule 87(1) states in pertinent part: 'Unless provided otherwise in these IRs, all evidence is admissible.' Article 321 CPC goes further, providing that: 'The court has to consider the value of the evidence submitted for its examination, following the judge's intimate conviction.' The Rules and the CPC are unclear as to the rules regarding the treatment of evidence during the investigation phase.
494. Should Article 321 of the CPC be followed at the ECCC during the investigation phase, the standard of 'intimate conviction' accords the CIJs broad discretion in their assessment. As recognised by the ICIJ, such discretion comes with responsibilities: 'free evaluation of evidence grants discretion to the judges, not a licence for arbitrariness: judges have to give reasons for their decisions and those reasons have to be consistent and relate to certain general parameters accepted by the law and the courts.'⁸⁴⁰ The Rules,⁸⁴¹ the CPC,⁸⁴² and the jurisprudence of the PTC⁸⁴³ and TC,⁸⁴⁴ all confirm that the CIJs are obliged to provide a reasoned decision. In Case 004/01⁸⁴⁵ and in Case 004/02,⁸⁴⁶ the CIJs

⁸³⁸ Case 004/01, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, para. 44.

⁸³⁹ CPC, Article 321 states in pertinent part: 'Unless it is provided otherwise by law, in criminal cases all evidence is admissible.'

⁸⁴⁰ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 37(a)(iii).

⁸⁴¹ Rule 67(4): 'The Closing Order shall state the reasons for the decision.'

⁸⁴² CPC, Article 247: 'A closing order shall always be supported by a statement of reasons.'

⁸⁴³ Case 002, *Decision on Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons' Knowledge of the Crimes*, 15 June 2010, D365/2/10, para. 24.

⁸⁴⁴ The Trial Chamber has stated that the 'reasoning of judicial decisions is considered to be a critical component of the right to a fair trial as protected by Article 14(1) of the [ICCPR],' which is necessary to 'protect parties from arbitrariness and to safeguard legal certainty; to ensure that the accused and the public understand the decision and to demonstrate to the parties that they have been heard; to permit public scrutiny of the administration of justice and to ensure that courts display special diligence in the conduct of proceedings; to reinforce the obligation on judges to base their reasoning on objective arguments; to guarantee appeal mechanisms by affording the parties a possibility to appeal, and by allowing review by higher or appellate courts. Case 002, *Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith*, 16 February 2011, E50, para. 25-26 [citing jurisprudence of the ECHR] (footnotes omitted). Article 14 of the ICCPR is applicable at the ECCC through Articles 12(2) and 13 of the Agreement; Article 35new of the Establishment Law; and Article 31 of the Cambodian Constitution.

⁸⁴⁵ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 103 to 139.

⁸⁴⁶ Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, paras 485 to 491. Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, paras 123 to 156.

did so by providing evidentiary considerations. The evidentiary considerations also provide transparency.⁸⁴⁷

495. At best, the PTC's assertion that 'all evidence generally has the same probative value'⁸⁴⁸ can be considered to be *obiter dictum*. The PTC was not seised of an appeal challenging the probative value of the evidence or the manner in which the CIJs assessed the evidence and thus overstepped its mandate by holding that the CIJs erred in law when providing evidentiary considerations. As noted above, Rule 110, which concerns appeals to the Supreme Court Chamber provides: 'The scope of the appeal shall be limited to the issues raised in the notice or in the immediate appeal.' Similarly, Article 397 of the CPC, which concerns appeals from trial courts in Cambodia, provides: 'A case will be transferred to the Court of Appeal within the scopes determined by the appeal and according to the status of the appellant.'

496. In any event, the PTC erred in stating that 'all evidence generally has the same probative value.'⁸⁴⁹ While the PTC purports to rely on French law in making this assertion,⁸⁵⁰ there is in fact, as set out by the ICIJ, a hierarchy of evidence both under French law⁸⁵¹ and in the CPC.⁸⁵² Further, ECCC jurisprudence also provides examples of evidence being

⁸⁴⁷ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 37(a)(i).

⁸⁴⁸ Case 004/01, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, para. 44.

⁸⁴⁹ Case 004/01, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, paras 44 ('All evidence is admissible and generally enjoys the same legal presumption of reliability, provided it has been legally collected.') and 51.

⁸⁵⁰ *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, para. 44, citing: Frédéric Debove, François Falletti and Emmanuel Dupic, *Précis de droit pénal et de procédure pénale*, Presses Universitaires de France, 5th ed., 2013, p. 697.

⁸⁵¹ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 37(a)(iii), n.58. 'This applies even in French law, as one example will show: *Procès-verbaux* have different probative value depending on how/by whom they were established. Article 429 of the French Criminal Code of Procedure provides: 'Any official record or report has probative value only if it is formally regular, and if its drafter acted in the performance of his duties and reported what he personally saw, heard or found on a subject-matter within his jurisdiction.' Article 430 of the French Criminal Code of Procedure provides: 'Except where the law provides otherwise, official records and reports establishing the existence of misdemeanours only have the value of simple information.' Article 431 of the French Criminal Code of Procedure provides: 'In the cases where judicial police officers, judicial police agents or the civil servants and agents entrusted with certain judicial police duties have been granted by a special legislative provision the power to establish misdemeanours by official records or reports, proof of the contrary may only be brought in writing or through witnesses.'

⁸⁵² See, for example: CPC, Articles 110 ('Generally, the written records established by judicial police officers are for information only. However, such records shall be deemed original and valid unless the contrary is proven. Counterevidence may be freely presented to the judge by all means permissible by laws. Judges and prosecutors freely evaluate the records established by Judicial Police officers in the framework of investigation of flagrant offenses.') and 118 ('Generally, the written records established by judicial police officers are for information only. However, such records shall be deemed original and valid unless the contrary is proven. Counterevidence may be freely presented to the judge by all means permissible by laws. Judges and prosecutors freely evaluate the records established by Judicial Police officers in the framework of a police inquiry.')

weighted with different *prima facie* probative value. For example, the Trial Chamber has repeatedly held that ‘statements taken during the judicial investigation are entitled to a presumption of relevance and reliability,’ while ‘[s]tatements or other evidence collected not under judicial supervision but instead by diverse intermediary organizations or other entities external to the ECCC enjoy no such presumption of reliability.’⁸⁵³

497. The PTC relies on the principle that all evidence is admissible to find that all evidence has the same probative value.⁸⁵⁴ This is fallacious. Admissibility and probative value are wholly distinct evidential concepts. Evidence can be simultaneously admissible and of minimal or no probative value.⁸⁵⁵ Indeed, the PTC has itself recognised as such in finding that ‘[a]ny concern relating to the reliability of the supplementary information sought would not affect the validity of the civil party applications as such, but merely their probative value, which is to be fully assessed at a later stage.’⁸⁵⁶ As aptly noted by the ICIJ:

The view, expressed at such a level of generality, that all evidence enjoys the same presumption of reliability as long as it has been legally collected, is inaccurate. Two examples may suffice: numerous S-21 confessions were over the years lawfully collected from either DC-Cam or S-21; yet, because they are tainted by torture, they enjoy no presumption of reliability at all, quite the contrary. Taking the view of the PTC at its most literal would also mean that, for example, an anonymous letter given to an OCIJ investigator in the field and passed on to the Case File as part of the investigator’s action report, bearing only the words “*Ao An did it!*” would enjoy the same presumption of reliability as a 200-page WRI taken by the CIJs themselves.⁸⁵⁷

498. In Case 004/01, it appears that the PTC found that the CIJs first categorised evidence without assessing its content and then decided to accord some evidential categories lower probative value. As a result, the PTC concluded the CIJs have failed to carry out their

⁸⁵³ Case 002, *Decision on Co-Prosecutors’ Rule 92 Submission regarding the admission of witness statements and other documents before the Trial Chamber*, 20 June 2012, E96/7, paras 26 and 29.

⁸⁵⁴ ‘In other words, all evidence is admissible as provided under Internal Rule 87. Furthermore, all evidence generally has the same probative value. Article 23 *new* of the ECCC Law reflects this principle by establishing that “[t]he Co-Investigating Judges shall conduct investigations on the basis of information *obtained from any institution*”. Article 321 of the Cambodian Code of Criminal Procedure moreover states that, unless provided otherwise by law, all evidence is admissible in criminal cases and the court has to consider the value of the evidence submitted for its examination, according to the judge’s personal conviction.’ Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, para. 44 (footnotes omitted).

⁸⁵⁵ Black’s Law Dictionary, 9th Edition, 2009, p. 53: ‘Admissible. Capable of being legally admitted; allowable; permissible <admissible evidence>’; and p. 1323: ‘Probative. Tending to prove or disprove.’

⁸⁵⁶ *Decision on YIM Tith’s Application to annul the requests for and use of Civil Parties’ supplementary information and associated investigative products in Case 004*, 20 August 2018, D370/1/1/6, para. 22.

⁸⁵⁷ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 37(a)(iii).

obligations in accordance with Article 321 of the CPC.⁸⁵⁸ The PTC has no basis for this conclusion, nor was one provided. In accordance with the presumption of regularity,⁸⁵⁹ the Defence considers that the CIJs provided their evidentiary considerations *following* the review of all the evidence in Case 004/01 and Case 004/02, and will do the same in Case 004.

499. The Defence submits that according evidence rebuttable *prima facie* categorisation is a pragmatic and judicially efficient way to provide reasons when assessing probative value. Similarly, in Case 003, the PTC has promoted the approach of categorising evidence as a judicially efficient way in which evidence can be annulled, for example torture-tainted evidence.⁸⁶⁰

ii. Probative Values of Categories of Documents

500. Following an assessment of the evidence of the Case File, the Defence has the following submissions regarding the probative value of categories of the evidence in Case 004. Where the Defence has a particular view on a specific document, it will provide this view in the evidential section of this Response.
501. Written Records of Interviews ('WRI') generated by the OCIJ: The CIJs have held that WRIs 'generated by the OCIJ during the investigation [...] are prepared under judicial supervision and subject to specific legal and procedural safeguards, and are thus entitled to a presumption of relevance and reliability.'⁸⁶¹ There is a rebuttable presumption of regularity with which the OCIJ conducts its investigation.⁸⁶² In light of this rebuttable

⁸⁵⁸ The PTC appears to have assumed that the CIJs categorised the evidence prior to any assessment taking place: 'The Pre-Trial Chamber therefore finds that it is an error of law, in an inquisitorial system based on written proof, to make general assertions as to the value of certain categories of evidence, thus creating a hierarchy of evidence based on its nature rather than on its substance, and to consequently give less weight to evidence collected by other entities for strictly formal reasons.' Case 004/01, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, para. 52.

⁸⁵⁹ There is a rebuttable presumption of regularity with which the OCIJ conducts its investigation: 'It follows that where the propriety of the conduct of OCIJ investigators is challenged or allegations of evidence manipulation or tampering made the applicant will bear the burden of showing that the presumption of regularity attached to the OCIJ's acts in question should no longer apply.' Case 002, *Decision on Nuon Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews*, 13 March 2012 (corrected version notified on 30 May 2012), E142/3, para. 10.

⁸⁶⁰ Case 003, *Decision on [redacted] Application for the annulment of torture-derived written records of interview*, 24 July 2018, D257/1/8.

⁸⁶¹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 103 (footnotes omitted). See also, Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 123; Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 485.

⁸⁶² 'It follows that where the propriety of the conduct of OCIJ investigators is challenged or allegations of evidence manipulation or tampering made the applicant will bear the burden of showing that the presumption of regularity

presumption, the Defence invites the CIJs to carefully assess Defence arguments in the evidential section of this Response regarding the unreliability of some of the WRIs. For example, there are a number of WRIs for which the presumption is rebutted because the investigator(s): i. failed to follow up on exculpatory leads; ii. fed inculpatory information; iii. led the witness; iv. failed to objectively test inculpatory information; v. had to off-the-record interviews; vi. failed to adequately record evidence; and vii. bullied/intimidated the witness. The PTC has held that off-the-record interviews would affect the probative value of WRIs.⁸⁶³

502. Transcripts of trial proceedings from other ECCC cases: The CIJs have held that transcripts of trial proceedings from other ECCC cases placed on Case File 004/01 and Case File 004/02 are entitled to a presumption of relevance and reliability because of their ‘relevance to the allegations’ and because they are prepared ‘under judicial supervision’ and subject to specific legal and procedural safeguards.⁸⁶⁴
503. The Defence notes that the transcripts of trial proceedings from other ECCC cases placed on Case File 004 have been the subject to an annulment application.⁸⁶⁵ The PTC held that transcripts of Case 002 trial proceedings were admissible as evidence because this category of evidence ‘was ordered pursuant to Internal Rule 55(5) and falls under the Co-Investigating Judges’ discretion to take any investigative action conducive to ascertaining the truth.’⁸⁶⁶ The PTC dealt only with the issue of the transcripts being placed on to Case File 004 without making any assessment of the probative value to be afforded to such evidence.
504. The Defence submits that transcripts of trial proceedings from other ECCC cases placed on Case File 004 should, under no circumstances, be used in Case 004 even for the

attached to the OCIJ’s acts in question should no longer apply.’ Case 002, *Decision on Nuon Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews*, 13 March 2012 (corrected version notified on 30 May 2012), E142/3, para. 10.

⁸⁶³ *Decision on YIM Tith's Application to annul the investigative material produced by Paolo Stocchi*, 25 August 2017, D351/1/4, para. 24: ‘The Pre-Trial Chamber further considers that the existence of off-the-record conversations, even if proven, would not affect the validity of the impugned interviews but merely their probative value.’

⁸⁶⁴ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 103. Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 123. Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 485.

⁸⁶⁵ *Yim Tith's Application to Annul the placement of Case 002 oral testimonies onto Case File 004*, 30 June 2017, D360/1/1/2.

⁸⁶⁶ *Decision on Yim Tith's Application to Annul the placement of Case 002 oral testimonies onto Case File 004*, 26 October 2017, D360/1/1/6, para. 10.

purposes of corroborating, or assessing the reliability of, other evidence already on the Case File. These transcripts were made under the following circumstances: questioning by one of the parties to the Case 004 investigation – the international component of the OCP – which has an inherent interest in the outcome in Case 004; during the Case 004 investigation without the CIJs or a member of the OCIJ to protect the judicial integrity of the Case 004 investigation; with no other party present having an interest in protecting Mr YIM Tith's rights; and without a judicial chamber who protected the judicial integrity of the Case 004 investigation but rather actively usurped the CIJs protection of the judicial integrity of the Case 004 investigation.⁸⁶⁷ The use of transcripts of trial proceedings from other ECCC cases in the Case 004 Closing Order by the CIJs would prove that the judicial investigation in Case 004 has been usurped.

505. Interviews conducted by the OCP during their preliminary investigation: The CIJs have held that:

[I]nterviews conducted by the Co-Prosecutors during their preliminary investigations, although prepared specifically for criminal proceedings, are not conducted under oath and are prepared by a party with an inherent interest in the outcome of the case. Such statements are, however, collected for the purpose of a criminal trial and are therefore, in principle, afforded higher probative value than evidence not collected specifically for that purpose.⁸⁶⁸

A more cautious approach has been adopted in the assessment of this category of evidence, and the information contained therein has been relied on by the CIJs only when corroborated by other sources.⁸⁶⁹

506. Following an assessment of this category of evidence, the Defence submits that the CIJs should assess this category of evidence as completely unreliable. As set out by the CIJs, evidence falling under this category is not conducted under oath and is prepared by a party

⁸⁶⁷ Judge Lavergne actively questioned witnesses on matters pertinent to Case 004 but not relevant to Case 002. 'Judge Lavergne: Does the name Ta Tit meaning anything to you? SORY Sen: I heard about him. Judge Lavergne: Did you see Ta Tit at Krang Ta Chan? [...] SORY Sen: I heard about Ta Tit but I never saw him coming to Krang Ta Chan. Judge Lavergne: Did you see any other leaders of the district [...]?' In addition, despite the witness giving no evidence as to Mr YIM Tith's alleged positions at the district level, Judge Lavergne asserted through his questioning, that Mr YIM Tith was one of the '*leaders of the district*.' Case 002, Transcript of Trial Hearing, 5 February 2015, E1/257.1 at ERN EN 01064634, lines 2 to 18. At the time of the hearing, the CIJs had not publically named any suspect in Case 004. However, Mr YIM Tith's identity and alleged role as a district leader in Case 004 were no doubt known to Judge Lavergne, due to the illegal leaking of the Second Introductory Submissions and subsequent press coverage. See VOA Khmer, Kong Sothanarith, *Defense Attempts to Raise Controversial Suspects at Tribunal*, 30 January 2012.

⁸⁶⁸ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 105 to 106. See also Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 125.

⁸⁶⁹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 108.

with an inherent interest in the outcome of the case.⁸⁷⁰ The NCIJ has further found this category of evidence to be unreliable as such statements have no thumb-print nor is signed by the witness.⁸⁷¹ The Defence submits that evidence collected for the purposes of a criminal trial by a party with an inherent interest in the outcome of the case cannot logically or justly be afforded a higher probative value than evidence not collected specifically for that purpose. Indeed, the CIJs have held that evidence collected without judicial supervision enjoys no presumption of relevance and reliability.⁸⁷² Interviews conducted by the Co-Prosecutors during their preliminary investigations fall into this category.

507. Statements prepared by DC-Cam: In the Case 004/01 Closing Order the CIJs repeated the finding of the Trial Chamber that statements collected by DC-Cam ‘enjoy a rebuttable presumption of *prima facie* relevance and reliability.’⁸⁷³ Nevertheless, the CIJs went further, finding that ‘DC-Cam statements were generated without the judicial guarantees and formality that characterise WRIs’⁸⁷⁴ and that as DC-Cam statements were not prepared for the purpose of a criminal trial, they have in principle, a lower probative value than evidence not collected specifically for that purpose.⁸⁷⁵ The CIJs adopted a more cautious approach in the assessment of this category of evidence, and the information contained therein has been relied on by the CIJs only when corroborated by other sources.⁸⁷⁶

508. The Case 004/01 probative value of DC-Cam statements was upheld by the NCIJ in Case 004/02,⁸⁷⁷ but the ICIJ rightly lowered the presumed probative value of DC-Cam statements in Case 004/02, finding that as they ‘were generated without the judicial guarantees and formality that characterise WRIs,’ DC-Cam statements enjoy no presumption of relevance and reliability.⁸⁷⁸

⁸⁷⁰ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 105 to 106.

⁸⁷¹ Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 487.

⁸⁷² Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104 (citations omitted).

⁸⁷³ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104.

⁸⁷⁴ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104.

⁸⁷⁵ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 106 (citations omitted).

⁸⁷⁶ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 108. Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 127. Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 489.

⁸⁷⁷ Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 486.

⁸⁷⁸ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 124.

509. Following an assessment of this category of evidence, the Defence submits that the CIJs should assess this category of evidence as completely unreliable. As *per* interviews conducted by the OCP during their preliminary investigation, statements prepared by DC-Cam are not prepared under oath and fall under evidence which has been collected by an entity with an inherent interest in the outcome of the case.
510. As set out above, DC-Cam's mandate is to collect evidence with the mindset that there were crimes against humanity and there was genocide, and not with the mindset to investigate the truth. DC-Cam's aim is first and foremost to 'help to hold leaders accountable' before the ECCC. DC-Cam is interested in obtaining only inculpatory evidence and is not bound by judicial checks and balances.⁸⁷⁹
511. The CIJs have held that evidence collected without judicial supervision enjoys no presumption of relevance and reliability.⁸⁸⁰ Accordingly, the CIJs erred in following the Trial Chamber holding that DC-Cam documents 'enjoy a rebuttable presumption of *prima facie* relevance and reliability.'⁸⁸¹ There is no principle of *stare decisis* at the ECCC⁸⁸² and, as set out below, there is ample evidence demonstrating that material collected by DC-Cam is inherently tainted by bias and witness statements are not collected under oath. As a result of these fundamental flaws, the Defence submits that the CIJs, in accordance with their intimate conviction, should assess evidence collected by DC-Cam as completely unreliable.
512. Statements or other evidence collected without judicial supervision: The CIJs have held that statements or other evidence collected without judicial supervision enjoy no presumption of relevance and reliability⁸⁸³ and the information contained therein has been relied on by the CIJs only when corroborated by other sources.⁸⁸⁴ In Case 004/02, the ICJ recognised that the majority of the ICC Appeals Chamber had 'clear words' about the reliability and probative value of unsworn statements.⁸⁸⁵ Judges of the ICC Appeals

⁸⁷⁹ See *supra*, paras 278 to 301.

⁸⁸⁰ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104 (citations omitted).

⁸⁸¹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104.

⁸⁸² Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 10.

⁸⁸³ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104 (citations omitted). Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 124; *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 486.

⁸⁸⁴ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 108. Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 127; *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 489.

⁸⁸⁵ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, fn 62.

Chamber majority have held, for instance, that unsworn *procès-verbaux* are not ‘considered to have great evidentiary value in the legal systems that are based upon the French model.’⁸⁸⁶

513. Following an assessment of the evidence, the Defence agrees, in general, with the CIJs approach to this category of evidence. Where factors render a particular piece of evidence falling under this category irrelevant or unreliable – such as bias – the Defence will discuss this in the evidential section of this Response.
514. Civil Party applicants: In the Case 004/01 Closing Order the CIJs held that ‘Civil party applications enjoy no presumption of reliability and have been afforded little, if any, probative value if the circumstances in which they were recorded are not known. Civil party applications [not offering] personal experiences have been treated as insufficient to establish relevant facts. Out-of-court statements by civil parties have been afforded low probative value.’⁸⁸⁷ The CIJs adopted a more cautious approach in the assessment of this category of evidence, and the information contained therein has been relied on by the CIJs only when corroborated by other sources.⁸⁸⁸ In Case 004/02, the NCIJ adopted the same approach, but remained silent on out-of-court statements by civil parties.⁸⁸⁹ In Case 004/02, the ICIJ adopted the same approach, but further elaborated that ‘[o]ut-of-court statements by civil parties, other than those taken by the OCIJ, have been afforded low probative value, while in-court civil party testimony has been assessed with caution.’⁸⁹⁰
515. Following an assessment of this category of evidence, the Defence submits that the CIJs should assess such evidence as completely unreliable. This includes interviews conducted by the OCIJ of civil party applicants which – like civil party applications – have been prepared without an oath having been taken. Evidence from civil party applicants is not conducted under oath and is provided by a party with an inherent interest in the outcome of the case. The CIJs found the same flaws in collected evidence by the OCP during its preliminary investigation and limited its probative value.⁸⁹¹ The Defence is not asserting that civil party evidence should not have any standing at the ECCC. As set out by the

⁸⁸⁶ ICC, *Prosecutor v. Bemba*, Judgement, Joint separate opinion by Judges Van den Wyngaert and Morrison, 8 June 2018, ICC-01/05-01/08-3636-Anx2, para. 9.

⁸⁸⁷ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 107 (citations omitted).

⁸⁸⁸ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 108.

⁸⁸⁹ Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 488.

⁸⁹⁰ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 126.

⁸⁹¹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 105-106.

PTC, '[t]he ECCC is the first court trying mass international crimes that provides an opportunity for victims to participate directly in the criminal proceedings as civil parties.'⁸⁹² Civil party applicant evidence can have the same weight attached as WRIs where such evidence has been collected by the OCIJ under oath. Evidence provided by civil party applicants does not meet the evidentiary threshold for witnesses as set out in the Rules.⁸⁹³ Accordingly, the Defence submits that the CIJs, in accordance with their intimate conviction, should assess civil party applicants as unreliable.

516. Hearsay evidence: In Case 004/02, relying on jurisprudence from the Trial Chamber and SCC, the ICIJ found 'that hearsay evidence can [cautiously] be relied upon, where sufficiently relevant and probative,' on a case-by-case basis.⁸⁹⁴

517. The ICIJ relied upon the following Case 002/01 jurisprudence in which the SCC set out that: 'While not specifically referring to the term "hearsay evidence", the Trial Chamber stated that "[a]bsent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence."' ⁸⁹⁵ The SCC continued: 'In sum, a trial chamber has broad discretion to consider and rely on hearsay evidence, though this must be done with caution; it is for the appealing party to demonstrate that no reasonable trier of fact could have relied upon it in reaching a specific finding.'⁸⁹⁶ The Trial Chamber has found reasons for having limited, or no, probative value includes where the original source of information was not confronted or where there are significant deficiencies in the evidence.⁸⁹⁷ The Trial Chamber's reasoning should equally apply during the investigative stage of proceedings.

⁸⁹² Case 004/01, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 July 2018, D308/3/1/20, para. 54.

⁸⁹³ See, for example, Rule 60.

⁸⁹⁴ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 129.

⁸⁹⁵ Case 002/01, *Appeal Judgement*, 23 November 2016, F36, para. 300.

⁸⁹⁶ Case 002/01, *Appeal Judgement*, 23 November 2016, F36, para. 300.

⁸⁹⁷ Case 002, *Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber*, 20 June 2012, E96/7, paras 25 and 27: *In its practice, the Chamber ultimately had recourse to the fundamental fair trial principles enshrined in Internal Rule 21 and Article 33 (new) of the ECCC Law, as well as to the jurisprudence of international criminal tribunals. In light of this jurisprudence, the Chamber has considered hearsay and circumstantial evidence to be admissible where sufficiently relevant and probative. With regard to hearsay statements, the Chamber gave particular consideration to whether the Accused was able to confront the source of such statements. In keeping with international jurisprudence, the Chamber has also found that the testimony of a single witness can establish a fact at issue where such evidence is sufficiently relevant and probative.* Case 001, *Judgement*, 26 July 2010, E188, para. 43: *Where evidence in the form of written statements or transcripts is allowed to be put before the Chamber without requiring the attendance of their authors at trial in accordance with these criteria, the Chamber shall in due course assess what, if any, probative value and weight may be afforded to it. The absence of oral testimony and an opportunity*

518. In Case 004/02, the ICIJ further found that:

In principle, uncorroborated hearsay evidence can also be relied upon. However, factors such as the source of that hearsay, the circumstances in which the witness learned about it, the consistency of that evidence with other related evidence on the Case File, and all other relevant circumstances need to be carefully assessed in cases of uncorroborated hearsay, especially when the evidence relates to specific elements of crimes or to the conduct of the charged person.⁸⁹⁸

519. Judges of the ICC Appeals Chamber majority have similarly considered it impermissible to make findings beyond a reasonable doubt on the basis of ‘hearsay or anonymous hearsay without any specific indication as to the source of the information,’ especially when a Chamber ‘does not seem to have tried to establish the reliability of the source of the information.’⁸⁹⁹

520. The events which took place during the temporal jurisdiction of the ECCC have been the subject of 40 years of discussion in forums ranging from DC-Cam and ECCC outreach programmes to, presumably, amongst friends and family of witnesses.⁹⁰⁰ Discussions in such forums can very easily result in one witness providing an unsafe hearsay account which is then taken as hearsay by others in the forum. This results in numerous accounts of hearsay which are uncorroborated and can be supported only by other hearsay. No reliability can be attached to such evidence.

521. Deceased witnesses: Where a witness is deceased, the Trial Chamber has held that ‘[a]dmission of the written statement or transcript of deceased or unavailable witnesses has been granted where the Chamber is satisfied that the witness is genuinely unavailable and that the proposed evidence is reliable, and where it considers that the probative value

for confrontation is a relevant consideration in this regard and it follows that the probative value and weight to be accorded to such evidence may in many circumstances be limited... Where the OCIJ statements of individuals not called to give evidence at trial are instead proposed to be put before the Chamber absent the testimony of their authors, the Defence shall be accorded an equivalent right to pose relevant objections, if any, to this material (Section 4.4). These statements may be entitled to little, if any, probative value or weight either because of the lack of opportunity for confrontation or because significant deficiencies in these statements or transcripts have been credibly alleged and identified.

⁸⁹⁸ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 130.

⁸⁹⁹ *Prosecutor v. Bemba*, Judgement, ICC Appeals Chamber, Joint separate opinion by Judges Van den Wyngaert and Morrison, 8 June 2018, ICC-01/05-01/08-3636-Anx2, para. 8.

⁹⁰⁰ See outreach page on ECCC website which sets out outreach discussions throughout Cambodian on matters in issue in Case 004, available at: <https://www.eccc.gov.kh/en/media-center/activities-outreach>.

of this evidence is not substantially outweighed by the need to ensure a fair trial.’⁹⁰¹ The SCC has supplemented this by adding that:

In laying out its approach to the final assessment of the evidence in the Trial Judgement, the Trial Chamber recalled that, absent the opportunity for examination, it excluded statements going to proof of the acts and conduct of the Accused, except where the witness was deceased, though, in such cases, ‘it would not base any conviction decisively thereupon.’ The Trial Chamber also stated that ‘[a]bsent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence.’⁹⁰²

522. Witness opinion: Witness opinion risks being nothing more than conjecture, supposition, or speculation. Witnesses may provide opinion on the basis of incomplete facts. An example of witness opinion can be found in the WRI of Dim Kimheat. Dim Kimheat retracted the opinion he had just put forward:

A91: Actually, from what I know, Khmer Krom were taken to be killed by the Khmer Rouge because they were from Vietnam. This is the only connection I know about. However, from a legal perspective, it is not right to make such assumption; it is wrong. This is my opinion only based on the fact that the Khmer Rouge hated Vietnam; thus, when Khmer Krom came here, they accused them of having connection with Vietnam. This is my opinion only. I only knew that Khmer Krom suffered and died. Even the base people died, not only the 17th April people. I did not know why the Khmer Rouge hated Khmer Krom. I also wonder about this.

Investigator’s note: The witness wishes to delete this part of his answer because he does not want to raise any assumption as this part of the answer is solely his personal opinion. The investigator informs him that he has been requested to tell the truth as a witness, so he should not provide any assumption. Therefore, except the answer provided is untrue, the recorded answer cannot be tampered. In addition, the written record must be consistent with the audio record.⁹⁰³

As set out by the investigator, a witness’s opinion is an ‘assumption’ which does not go towards ascertaining the truth. Witness opinion cannot have any probative value.

523. Corroboration: Should the CIJs consider that evidence can be relied upon only when corroborated by other sources, the ‘other source’ must be of high probative value. For example, statements or other evidence collected without judicial supervision can only be corroborated by an OCIJ generated WRI of a witness where the presumption of regularity has not been rebutted. Failing to do so will lead to the unsafe situation envisaged by the

⁹⁰¹ Case 002, *Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber*, 20 June 2012, E96/7, para. 32.

⁹⁰² Case 002/01, *Appeal Judgement*, 23 November 2016, F36, para. 280.

⁹⁰³ D219/737, Dim Kimheat, WRI, A91, EN 01300135.

SCC that relying on a ‘multiplicity of evidentiary items [...] irrespective of their probative value’ may not necessarily meet the requisite standard of proof, and ‘indeed, such an approach would mean that an accused could be convicted merely on the basis of widespread rumours.’⁹⁰⁴

D. INAPPLICABILITY OF JCE AT THE ECCC

524. The ICP seeks Mr YIM Tith’s indictment as a senior leader and one of those most responsible through his alleged involvement in a JCE.⁹⁰⁵

525. Mr YIM Tith seeks departure from the PTC’s *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)* (‘PTC JCE Decision’), in which the PTC erred by finding that ‘had the drafters of the ECCC Law intended to limit the “commission” envisaged in Article 29 to persons who physically and directly carry out the *actus reus* of the crime(s), they would have made such restriction explicit.’⁹⁰⁶

526. The Defence submits that: (i) the CIJs have the inherent power and obligation to depart from the PTC JCE Decision; (ii) all subsequent ECCC findings regarding JCE are based on the impugned PTC JCE Decision and thus may be departed from for the same reasons; (iii) the PTC erred in finding, through invalid induction, that the application of JCE was within the intention of the drafters of the Establishment Law; (d) the application of JCE before the ECCC is accordingly *ultra vires*; and (e) in any event, JCE has not attained the status of a norm of customary international law.

527. As a jurisdictional challenge, this matter is appropriately raised during the pre-trial phase.⁹⁰⁷

i. The CIJs Have the Inherent Power and Obligation to Reconsider

528. The CIJs are not bound by previous judicial findings at the ECCC.⁹⁰⁸ The Defence notes and appreciates the pragmatic basis for the CIJs’ previous declaration regarding ‘practical judicial deference’ to the ECCC’s chamber of final instance despite Cambodia’s lack of

⁹⁰⁴ Case 002/01, *Appeal Judgement*, 23 November 2016, F36, para. 419.

⁹⁰⁵ ICP’s *Final Submission*, D378/2, paras 1125 to 1149, in connection with paras 10 to 109.

⁹⁰⁶ Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 49.

⁹⁰⁷ Rule 74(3)(a); *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, paras 19 to 25.

⁹⁰⁸ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 10.

stare decisis.⁹⁰⁹ Practical judicial deference cannot, however, justify or legitimise *ultra vires* action that leads the court to violate the principle of legality and causes serious detriment to Mr YIM Tith's fundamental fair trial rights.⁹¹⁰

529. Notwithstanding that the CIJs are legally completely free to determine that the doctrine of JCE is inapplicable at the ECCC, the Defence notes that Mr YIM Tith has never been heard on this matter and submits that the fact that he is presenting a new argument constitutes an exceptional and cogent reason to depart from the previous judicial findings to the contrary.⁹¹¹
530. Mr YIM Tith has never been heard on this critical issue, which has obvious serious detrimental ramifications for his legal rights as well as for the legitimacy of the ECCC. Once Mr YIM Tith had been appointed representation but before he was granted access to Case File 004, the Defence sought to intervene in the Case 002/01 appeal proceedings on the matter of the applicability of JCE III.⁹¹² In denying the Defence that opportunity to be heard, the SCC held that '[t]he interests of the Case 003 and 004 Suspects in the outcome of the Co-Prosecutors' Appeal coincide with those of NUON Chea and KHIEU Samphân' and that the SCC assumed that the Defence 'could not offer any further submissions in addition to those already submitted to shed further light on the matter.'⁹¹³
531. None of the submissions received by the ECCC has in fact dealt with the relationship between the doctrine of JCE and the object and purpose of the ECCC's carefully confined legislative framework.⁹¹⁴ Accordingly, and in view of the repeated opportunities afforded

⁹⁰⁹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 10.

⁹¹⁰ UN-RGC Agreement, Article 12; Establishment Law, Article 33; Rule 21.

⁹¹¹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 10.

⁹¹² Case 002/1, *Request to Submit Amicus Brief on Joint Criminal Enterprise*, 14 January 2015, F19.

⁹¹³ Case 002/1, *Decision on Requests to Intervene or Submit Amici Curiae Briefs in Case 002/01 Appeal Proceedings*, 8 April 2015, F20/1, paras 9 and 12. Given co-perpetration's 'top-down' attribution of principal liability to those 'in control,' the weaker liability afforded by JCE to those furthest from the crimes may have been more attractive to accused occupying significantly more senior positions within the DK regime. The Defence considers that this calls into doubt the assumption that the 'interests of the Case 003 and 004 Suspects [...] coincide with those of Nuon Chea and Khieu Samphân.'

⁹¹⁴ Case 001: *Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise*, 8 June 2009, E73; *Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise theory in the Present Case*, 17 September 2009, E73/2.

Case 002: *Ieng Sary's Motion against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise*, 28 July 2008, D97; *Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise*, 11 August 2008, D97/II; *Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC*, 24 November 2008, D97/7; [Kaing Guek Eav alias Duch] *Defence's Submissions Concerning Application of the Form of Responsibility Known as Joint Criminal Enterprise*, 24 December 2008, D97/3/1; *Ieng Thirith Submissions on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise pursuant to the Order of the Co-Investigating Judges of 16 September 2008*, 30

to the Co-Prosecutors to submit arguments on the applicability and contours of JCE at the ECCC,⁹¹⁵ the Defence submits that the CIJs are obliged to hear Mr YIM Tith on this matter in order to satisfy his right to be heard.⁹¹⁶

December 2008, D97/3/2; [Nuon Chea's] *Submissions on Applicability at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise*, 30 December 2008, D97/3/3; *Response of the Co-Lawyers for the Civil Parties on Joint Criminal Enterprise*, 30 December 2008, D97/3/4; *Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise*, 31 December 2008, D97/8; *Ieng Sary's Supplementary Submission to his Supplementary Observations on Joint Criminal Enterprise Filed on 24 November 2008: Limited to the Applicable United Nations General Assembly Resolutions as Argued/ Omitted by the OCP*, 31 July 2009, D97/12; *Ieng Thirith Defence Appeal against 'Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise' of 8 December 2009*, 18 January 2010, D97/15/1; *Ieng Sary's Appeal against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise*, 22 January 2010, D97/14/5; *Co-Prosecutor's Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise*, 19 February 2010, D97/14/10 and D97/16/5; [Ieng Thirith] *Defence Reply to Co-Prosecutors' Response to Defence Appeal on the Application of Joint Criminal Enterprise*, 15 March 2010, D97/15/8; *Ieng Sary's Reply to the Co-Prosecutors' Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise*, 18 March 2010, D97/14/14; *Reply of Mr Khieu Samphan's Defence to the Co-Prosecutors' Joint Response on Joint Criminal Enterprise*, 25 March 2010, D97/16/9; *Ieng Thirith Defence's Preliminary Objections*, 14 February 2011, E44; [Khieu Samphan] *Preliminary Objections Concerning Jurisdiction*, 14 February 2011, E4 6; *Ieng Sary's Motion to Strike Portions of the Closing Order Due to Defects*, 24 February 2011, E58; *Civil Parties' Joint Response to Defence Rule 89 Preliminary Objections*, 7 March 2011, E51/5/4; *Co-Prosecutors' Response to Ieng Sary's Motion to Strike Portions of the Closing Order due to Defects*, 16 March 2011, E58/1; *Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections*, 21 March 2011, E51/5/3/1; *Co-Prosecutors' Request for the Trial Chamber to Consider Joint Criminal Enterprise III as an Alternative Mode of Liability*, 17 June 2011, E100; [Ieng Thirith] *Defence Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability*, 22 July 2011, E100/1; *Ieng Sary's Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability and Request for an Oral Hearing*, 22 July 2011, E100/2; *Réponse à la demande des co-procureurs relative à la troisième catégorie d'entreprise criminelle commune*, 22 July 2011, E100/3; [Civil Party Lead Co-Lawyers'] *Brief in Support of the Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability*, 22 July 2011, E100/4; [Nuon Chea] *Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability*, 22 July 2011, E100/5.

Cassese, A., *Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine*, 27 October 2008, D99/3/24; McGill Centre for Human Rights and Legal Pluralism, *Amicus Curiae Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University*, 27 October 2008, D99/3/25; Ambos, K., *Amicus Curiae concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02)*, 27 October 2008, D99/3/27. In his *Amicus Curiae Brief* (at pp. 22 and 23), Kai Ambos noted, *inter alia*, 'the [Co-Prosecutors'] brief mixes policy arguments with a literal interpretation of Art 29 ECCC Law apparently overlooking that the latter cannot be outplayed by the former. Finally, the Co-Prosecutors overlook that there is an alternative form of imputation for superiors, i.e. *indirect perpetration based on the theory of control by way of a hierarchical organisational structure*. While it would go beyond the scope of this brief to further analyse this theory, it is important to note that it has recently been recognised and explained by the ICC's Pre-Trial Chamber I and that it may also be applied before the ECCC, since it can be considered as a form of commission, namely a commission through another person.'

⁹¹⁵ Case 001: *Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise*, 8 June 2009, E73.

Case 002: *Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise*, 11 August 2008, D97/II; *Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise*, 31 December 2008, D97/8; *Co-Prosecutor's Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise*, 19 February 2010, D97/14/10 and D97/16/5; *Co-Prosecutors' Response to Ieng Sary's Motion to Strike Portions of the Closing Order due to Defects*, 16 March 2011, E58/1; *Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections*, 21 March 2011, E51/5/3/1; *Co-Prosecutors' Request for the Trial Chamber to Consider Joint Criminal Enterprise III as an Alternative Mode of Liability*, 17 June 2011, E100.

⁹¹⁶ UN-RGC Agreement, Article 12. Establishment Law, Article 33(1) and (2); Rule 21; ICCPR, Article 14(1). The importance of this fundamental and ancient principle, expressed as *audi alteram partem* ['listen to the other side'], has been recognised by the ICJ in *Nuclear Tests Case (Australia v. France)*, Judgment, 20 December 1974,

532. The application of JCE at the ECCC has been strongly derived from *Tadić*. Critically, and providing a cogent reason to depart from the PTC JCE Decision, the Presiding Appeal Judge of the Appeals Chamber in *Tadić*, Judge Shahabuddeen, has disavowed himself of the position taken in *Tadić*. Noting what he refers to as ‘an error of the Tribunal, to which he was a party,’ Judge Shahabuddeen observes that the doctrine of JCE cannot claim the status of customary international law.⁹¹⁷ The Defence submits that the doubt cast on the security of *Tadić*’s ‘discernment’ of JCE as a norm of customary international law provides a further cogent reason to depart from the ECCC’s previous findings. JCE is at most *recognised* in international law, not dictated, and its application is neither warranted nor appropriate at the ECCC.
533. Moreover, as a further cogent reason to depart from the PTC JCE Decision, the common law basis for JCE as discerned by the *Tadić* Appeals Chamber has been undermined by the UK Supreme Court’s decision in *R v Jogee*.⁹¹⁸ The more modern common law cases relied on by the *Tadić* Appeals Chamber rely on what has been termed the ‘severe’ Chan Wing-siu principle (that secondary liability can be found in a contribution made by D2 to crime B by continued participation in crime A with foresight of the possibility of crime B).⁹¹⁹ The UK Law Commission sought reform of this common law development due to the lessened *mens rea* requirements and the possibility that ‘the scope of a joint enterprise, even in the case of spontaneous violence, can be drawn so wide that those who would appear to have little or no culpability for the killing can be included within it.’⁹²⁰ In *R v*

para. 33. As noted *supra* at para. 186, the right to be heard is enshrined in Article 14(1) of the ICCPR, as well as other modern human rights instruments such as the European Convention on Human Rights. See: UN HRC, *Hermosa v. Peru*, Communication 203/1986, CCPR/C/34/D/203/1986 (1988), individual opinion of Committee members Joseph Cooray, Vojin Dimitrijevic and Rajsoomer Lallah, para. 3: ‘The principles of a fair hearing, known in some systems as the rules of natural justice, and guaranteed under article 14, paragraph 1 of the Covenant, include the concept of *audi alteram partem*’; ECtHR, *Quadrelli v. Italy*, no. 28168/95, 11 January 2000, para.34. The ECtHR cited a previous Italian case, stating ‘[t]he right to submit observations guaranteed to the parties by Article 6(1) of the Convention can only be regarded as effective if these observations are really “heard”, that is to say, duly examined by the court seised,’ citing ECtHR, *Artico v. Italy*, judgment of 13 May 1980, Series A no 37, page 16, para. 33.

⁹¹⁷ Shahabuddeen, M., ‘Judicial Creativity and Joint Criminal Enterprise,’ in *Judicial Creativity at the International Criminal Tribunals*, eds Shane Darcy and Joseph Powderly, Oxford University Press, 2010, pp. 184 to 203, at p. 202. See also ICTR Appeals Chamber, *Sylvestre Gacumbitsi v. The Prosecutor* (ICTR-2001-64-A), Judgement, 7 July 2006, Separate Opinion of Judge Shahabuddeen, para. 47.

⁹¹⁸ *R v Jogee; Ruddock v The Queen (Jamaica)* [2016] UKSC 8 and UKPC 7, 18 February 2016.

⁹¹⁹ ICTY, *Prosecutor v. Tadić* (IT-94-1-A), Judgment, 15 June 1999 (‘Appeal Judgement’), para. 224, citing: *R v Hyde*; *R v Sussex*; *R v Collins* [1991] 1QB 134; *R v Anderson*; *R v Morris* [1966] 2 QB 110; *Hui Chi-ming v The Queen* [1992] 1 AC 34. Each of these cases relied upon *Chan Wing-siu v. The Queen* [1985] AC 168, which has been fundamentally overturned.

⁹²⁰ House of Commons Justice Committee, *Joint Enterprise*, Eleventh Report of Session 2010-12, 17 January 2012, paras 11 and 15, citing Tim Maloney QC and Simon Natas: *The prosecution will usually find it easier to adduce evidence that the defendant foresaw what the principal might do than to adduce evidence that he actually intended*

Jogee, the UK Supreme Court criticised, in stringent terms, the principle derived from *Chan Wing-Siu*, determining that intent – not merely foresight – must be demonstrated in order to convict an accomplice of a crime of intent, and that contemplation does not prove authorisation. In resolutely overturning the principle of secondary liability on the basis of foresight of the possibility of a criminal act, the UK Supreme Court urged against the imputation of any liability that might be perceived to be ‘a form of guilt by association or of guilt by simple presence without more,’ observing that this ‘has no proper part in the common law.’ In the event that JCE were applicable, this stricter standard must be recognised.⁹²¹

ii. Subsequent Findings of the CIJs, PTC, TC and SCC were Reliant on the PTC JCE Decision

534. In Case 001, the CIJs did not include JCE as a mode of liability in the Closing Order seeking the indictment of Kaing Guek Eav.⁹²² Though appealed by the Co-Prosecutors,⁹²³ this was upheld on the basis that the charged person had not received the requisite notification prior to the Final Submission and that ‘facts relevant to a joint criminal enterprise [...] were not included in [Case File 001]’; the PTC noted that it was therefore not necessary to consider the status of JCE at the relevant time, nor ‘to determine the applicability of joint criminal enterprise liability, as compared to other forms of liability under Cambodian law, before the ECCC.’⁹²⁴

535. In Case 002, however, on 20 May 2010, the PTC issued the PTC JCE Decision, in which it noted that ‘[t]o reach its finding [of the applicability of JCE at the ICTY], the ICTY Appeals Chamber in *Tadić* interpreted the ICTY Statute on the basis of its purpose as set out in the report of the United Nations Secretary-General to the Security Council.’⁹²⁵ The PTC entirely failed, however, to seek to interpret Article 29 on the basis of its purpose as

the principal to cause serious injury or to kill – indeed, such evidence may not go far beyond evidence of association (or alleged “gang membership”) added to alleged presence at the scene. For this reason, the Chan Wing-siu principle increases the likelihood that cases will be prosecuted on the basis of weak and tenuous evidence.

⁹²¹ Rule 21. Cambodian Criminal Code 2009, Article 10.

⁹²² Case 001, *Closing Order Indicting Kaing Guek Eav alias Duch*, 8 August 2008, D99.

⁹²³ Case 001, *Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav “Duch” dated 8 August 2008*, 5 September 2008, D99/3/3.

⁹²⁴ Case 001, *Decision on Appeal against Closing Order indicting Kaing Guek Eav alias “Duch”*, 5 December 2008, D99/3/42, paras 117 to 123, and 142.

⁹²⁵ Case 002, *Decision on the Appeals against the Co-Investigating Judges’ Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 55.

set out in both the UN-RGC Agreement and the Establishment Law.⁹²⁶ Tacitly noting the faulty teleological approach, the PTC continued:

[The ICTY Appeals Chamber in *Tadić*] also considered the specific characteristics of many crimes perpetrated in war. In this respect, the Pre-Trial Chamber concurs with the approach in *Tadić* that the development of the forms of responsibility applicable to violations of international criminal law has to be seen in the light of the very nature of such crimes, often carried out by groups of individuals acting in pursuance of a common criminal design.⁹²⁷

536. Following an examination of certain cases, the PTC held that JCE I and JCE II were ‘recognised’ forms of responsibility in customary international law at the time under the temporal jurisdiction of the ECCC but dismissed JCE III.⁹²⁸ The PTC did not consider the applicability of JCE ‘as compared to other forms of liability under Cambodian law’ as required and as it had indicated it would in Case 001.⁹²⁹ It considered only that the ‘co-perpetration’ afforded under the 1956 Penal Code provided an ‘underpinning’ for JCE.⁹³⁰ This approach is also fatally teleological.

537. The PTC JCE Decision has since been consistently followed before the ECCC, though neither the applicability of JCE in view of the object and purpose of the UN-RGC Agreement and Establishment Law nor as compared to other forms of liability has been considered.⁹³¹

538. On 26 July 2010, two months after the issuance of the PTC JCE Decision, the Trial Chamber issued its Judgement in Case 001.⁹³² Therein, it recharacterised the modes of liability as set out in the Closing Order and convicted Kaing Guek Eav on the basis of ‘his participation in the systemic joint criminal enterprise at S-21.’⁹³³ Following the

⁹²⁶ Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 49.

⁹²⁷ *Ibid.*

⁹²⁸ *Ibid.*, paras 69, 72, 83, 87 and 88.

⁹²⁹ Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9. Case 001, *Decision on Appeal against Closing Order indicting Kaing Guek Eav alias “Duch”*, 5 December 2008, D99/3/42, para. 142.

⁹³⁰ Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 41.

⁹³¹ Case 002, *Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise*, 8 December 2009, D97/13; *Decision on the Applicability of Joint Criminal Enterprise*, 12 September 2011, E100/6; *Appeal Judgement*, 23 November 2016, F36.

⁹³² Case 001, *Judgement*, 26 July 2010, E188.

⁹³³ Case 001, *Judgement*, 26 July 2010, E188, para. 516.

PTC's reasoning in the PTC JCE Decision, the Trial Chamber similarly noted that '[a]ccording to jurisprudence from international criminal tribunals, "committing" [...] includes [...] commission through the participation in a joint criminal enterprise.'⁹³⁴ The Trial Chamber explicitly noted that the Defence for Kaing Guek Eav had not addressed the general applicability of JCE before the ECCC.⁹³⁵ It too held, also citing the *Tadić* Appeal Judgement and relying on the PTC JCE Decision, that JCE I and II 'were forms of liability recognised in customary international law between 1975 and 1979' and foreseeable to the Accused.⁹³⁶ The Trial Chamber subsequently took the same approach in Case 002/01.⁹³⁷

539. In Case 002/01, and also noting the PTC JCE Decision, the Supreme Court Chamber was able to discern some recognition of the doctrine of JCE in the post-Nuremberg era tribunals, but conceded that much of the post-World War II case law does not clearly identify the mode of liability relied upon 'and therefore needs to be treated with caution.'⁹³⁸

540. Mr YIM Tith has received notification of charges through both JCE I and JCE II.⁹³⁹ The Defence notes the CIJs' detailed commentary on JCE as articulated in the Case 004/1 Closing Order, considered below, and their finding that:

Pursuant to Article 29 of the ECCC Law, an individual may be held criminally responsible through the modes of liability of commission (including by participation in a JCE), planning, instigating, ordering, aiding and abetting, and superior responsibility. These forms of liability were all part of customary international law during the time period covered by the ECCC's temporal jurisdiction.⁹⁴⁰

541. All subsequent ECCC findings regarding JCE are based on the impugned PTC JCE Decision and thus should be departed from for the same reasons. None of the decisions subsequent to the PTC JCE Decision has considered the applicability of JCE either in

⁹³⁴ Case 001, *Judgement*, 26 July 2010, E188, para. 479.

⁹³⁵ Case 001, *Judgement*, 26 July 2010, E188, para. 487.

⁹³⁶ Case 001, *Judgement*, 26 July 2010, E188, para. 512, citing Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 41.

⁹³⁷ Case 002, *Decision on the Applicability of Joint Criminal Enterprise*, 12 September 2011, E100/6, para. 22; *Case 002/01 Judgement*, 7 August 2014, E313, para. 691.

⁹³⁸ Case 002/01, *Appeal Judgement*, 23 November 2016, F36, paras 773 *et seq.*

⁹³⁹ *Written Record of Initial Appearance*, 9 December 2015, D281.

⁹⁴⁰ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 78, and 90 to 100.

view of the distinct object and purpose of the UN-RGC Agreement and Establishment Law or as compared to co-perpetration under Cambodian law.⁹⁴¹

542. The Defence respectfully disagrees with the assertion that Mr YIM Tith may be held criminally liable through the mode of liability of commission through participation in a JCE, and seeks departure from the PTC JCE Decision and all subsequent ECCC decisions applying JCE.

iii. The PTC Erred in Finding that the Application of JCE was Within the Intention of the Drafters

(a) Object and Purpose of the UN-RGC Agreement

543. Previous arguments on the applicability of JCE at the ECCC have overlooked the clear and comprehensive articulations and limits of the law as dictated by the UN-RGC Agreement and the Establishment Law.⁹⁴² The Defence contends that the stated object

⁹⁴¹ Case 001, *Judgement*, 26 July 2010, E188; *Decision on the Applicability of Joint Criminal Enterprise*, 12 September 2011, E100/6; Case 002/01 *Judgement*, 7 August 2014, E313; Case 002/01, *Appeal Judgement*, 23 November 2016, F36; Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3.

⁹⁴² Case 001, *Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise*, 8 June 2009, E73; *Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise theory in the Present Case*, 17 September 2009, E73/2.

Case 002: Ieng Sary's *Motion against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise*, 28 July 2008, D97; *Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise*, 11 August 2008, D97/II; Ieng Sary's *Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC*, 24 November 2008, D97/7; [Kaing Guek Eav alias Duch] *Defence's Submissions Concerning Application of the Form of Responsibility Known as Joint Criminal Enterprise*, 24 December 2008, D97/3/1; Ieng Thirith *Submissions on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise pursuant to the Order of the Co-Investigating Judges of 16 September 2008*, 30 December 2008, D97/3/2; [Nuon Chea's] *Submissions on Applicability at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise*, 30 December 2008, D97/3/3; *Response of the Co-Lawyers for the Civil Parties on Joint Criminal Enterprise*, 30 December 2008, D97/3/4; *Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise*, 31 December 2008, D97/8; Ieng Sary's *Supplementary Submission to his Supplementary Observations on joint Criminal Enterprise Filed on 24 November 2008: Limited to the Applicable United Nations General Assembly Resolutions as Argued / Omitted by the OCP*, 31 July 2009, D97/12; Ieng Thirith *Defence Appeal against 'Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise' of 8 December 2009*, 18 January 2010, D97/15/1; Ieng Sary's *Appeal against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise*, 22 January 2010, D97/14/5; *Co-Prosecutor's Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise*, 19 February 2010, D97/14/10 and D97/16/5; [Ieng Thirith] *Defence Reply to Co-Prosecutors' Response to Defence Appeal on the Application of Joint Criminal Enterprise*, 15 March 2010, D97/15/8; Ieng Sary's *Reply to the Co-Prosecutors' Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise*, 18 March 2010, D97/14/14; *Reply of Mr Khieu Samphan's Defence to the Co-Prosecutors' Joint Response on Joint Criminal Enterprise*, 25 March 2010, D97/16/9; Ieng Thirith *Defence's Preliminary Objections*, 14 February 2011, E44; [Khieu Samphan] *Preliminary Objections Concerning Jurisdiction*, 14 February 2011, E46; Ieng Sary's *Motion to Strike Portions of the Closing Order Due to Defects*, 24 February 2011, E58; *Civil Parties' Joint Response to Defence Rule 89 Preliminary Objections*, 7 March 2011, E51/5/4; *Co-Prosecutors' Response to Ieng Sary's Motion to Strike Portions of the Closing Order due to Defects*, 16 March 2011, E58/1; *Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections*, 21 March 2011,

and purpose of the UN-RGC Agreement and explicit provisions of the Establishment Law preclude the application of the doctrine of JCE at the ECCC.⁹⁴³ The Defence submits that a proper assessment of JCE's applicability at the ECCC betrays the PTC's reliance on *Tadić* to be unsound and the application of JCE to constitute a breach of the UN-RGC Agreement.

544. The UN-RGC Agreement and the Establishment Law are the foundational documents of the ECCC. Both documents clearly explicate that the object and purpose of the ECCC is 'to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for [crimes under the ECCC's jurisdiction].'⁹⁴⁴

545. The UN-RGC Agreement dictates, in pertinent part:

Article 1: Purpose

The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

Article 2: The Law on the Establishment of Extraordinary Chambers

1. The present Agreement recognises that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in "the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea", as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia. The present Agreement further recognises that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.
2. The present Agreement shall be implemented in Cambodian through the Law on the Establishment of the Extraordinary Chambers as adopted and

E51/5/3/1; *Co-Prosecutors' Request for the Trial Chamber to Consider Joint Criminal Enterprise III as an Alternative Mode of Liability*, 17 June 2011, E100; [Ieng Thirith] *Defence Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability*, 22 July 2011, E100/1; Ieng Sary's *Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability and Request for an Oral Hearing*, 22 July 2011, E100/2; *Réponse à la demande des co-procureurs relative à la troisième catégorie d'entreprise criminelle commune*, 22 July 2011, E100/3; [Civil Party Lead Co-Lawyers'] *Brief in Support of the Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability*, 22 July 2011, E100/4; [Nuon Chea] *Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability*, 22 July 2011, E100/5.

⁹⁴³ UN-RGC Agreement, Article 2(2): *The present Agreement shall be implemented in Cambodian through the Law on the Establishment of the Extraordinary Chambers as adopted and amended. The Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.*

⁹⁴⁴ UN-RGC Agreement, Article 1; Establishment Law, Article 1.

amended. The Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.

3. In case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties.

Article 6: Prosecutors

3. The co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

546. In recommending that the ECCC have personal jurisdiction over ‘senior leaders’ and those ‘most responsible,’ successive Resolutions adopted by the UN General Assembly recognised ‘the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security.’⁹⁴⁵ The UN-RGC Agreement accordingly dictates that ‘the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes [under the jurisdiction of the ECCC].’⁹⁴⁶

547. This stands in direct and profound contrast to the ICTY, which was established by mandate of the UN Security Council in ‘Decid[ing] that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.’⁹⁴⁷ Resolution 808 did not, therefore, circumscribe the personal jurisdiction of the tribunal.

548. Moreover, without conceding that the approach in *Tadić* was correct, the individual criminal responsibility provided under Article 7(1) of the ICTY Statute is broader than

⁹⁴⁵ Resolution adopted by the General Assembly at the 77th plenary meeting on 18 December 2002, 27 February 2003, UN Doc. A/RES/57/228.

Resolution adopted by the General, 27 February 1998, UN Doc. A/RES/52/135, para. 16

⁹⁴⁶ UN-RGC Agreement, Article 6(3).

⁹⁴⁷ UN Security Council Resolution 808 (1993), 22 February 1993, S/RES/808, p. 2. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25701, 3 May 1993, para. 1.

that under the Establishment Law.⁹⁴⁸ In *Tadić*, the ICTY Appeals Chamber considered whether criminal responsibility for participating in a common criminal purpose falls within the ambit of Article 7(1) of the ICTY Statute.⁹⁴⁹ Notably, and despite the ECCC's finding of similarity, Article 7(1) of the ICTY Statute attributes criminal responsibility to those 'who planned, instigated, ordered, committed *or otherwise aided and abetted in the planning, preparation or execution* of a crime.'⁹⁵⁰ Since this attributes responsibility to those with a greater degree of separation from the physical perpetration of the criminal act than Article 29^{new} of the Establishment Law, the distinction is material.

549. As later observed by the presiding judge of the *Tadić* Appeals Chamber, 'the mission which the Appeals Chamber set itself in *Tadić* was to identify the elements of individual criminal responsibility for a crime collectively perpetrated.'⁹⁵¹ It is worth recounting its 'clever but regrettable'⁹⁵² teleological argument in full:

An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to *all* those "responsible for serious violations of international humanitarian law" committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders (see in particular Article 1, which refers to committing or *ordering* to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy, incitement, attempt and complicity*).

It should be noted that this notion is spelled out in the Secretary General's Report, according to which:

The Secretary-General believes that *all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.

Thus, *all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to*

⁹⁴⁸ ICTY Statute, Article 7(1): A person who planned, instigated, ordered, committed or *otherwise aided and abetted in the planning, preparation or execution* of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. [Emphases added.]

⁹⁴⁹ ICTY, *Prosecutor v. Tadić*, Appeal Judgement, paras 186 to 190.

⁹⁵⁰ Emphasis added.

⁹⁵¹ ICTR Appeals Chamber, *Sylvestre Gacumbitsi v. The Prosecutor* (ICTR-2001-64-A), Judgement, 7 July 2006, Separate Opinion of Judge Shahabuddeen, para. 41.

⁹⁵² Ohlin, J., 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,' *Journal of International Criminal Justice* 5 (2007), pp. 69 to 90, p. 72.

justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions [...].

The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the perpetration and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.⁹⁵³

550. The argument, as noted by Ohlin, works ‘backwards from the proposition that the defendants must be punished.’⁹⁵⁴ To ‘assume culpability in order to offer an interpretation of the statute’ wrongly inverts the proper process of interpreting statutory provisions.⁹⁵⁵ In so doing, it relied heavily on cases also arguably working backwards from the proposition that the defendants were ‘obviously guilty,’ further undermining the intellectual honesty and fairness of the findings in *Tadić*.⁹⁵⁶ Such interpretive behaviour contravenes the presumption of innocence.⁹⁵⁷

551. Conversely, the Establishment Law *does* ‘stop there.’⁹⁵⁸ Its jurisdiction is strictly restricted to senior leaders and those most responsible, necessarily requiring a high degree

⁹⁵³ ICTY, *Prosecutor v. Tadić*, Appeal Judgement, paras 189 to 191. [Emphasis added.]

⁹⁵⁴ Ohlin, J., ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,’ *Journal of International Criminal Justice* 5 (2007), pp. 69 to 90, p. 72.

⁹⁵⁵ *Ibid.*

⁹⁵⁶ Ohlin, J., ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,’ *Journal of International Criminal Justice* 5 (2007), pp. 69 to 90, p. 86: *The early examples of joint criminal enterprise from Tadić stem from the World War II era. Prosecutors and judges from the Allied countries were concerned with penalising war criminals they felt were obviously guilty.*

⁹⁵⁷ Establishment Law, Article 35new; Rule 87(1).

⁹⁵⁸ ICTY, *Prosecutor v. Tadić*, Appeal Judgement, para. 190.

of perpetration and, vis-à-vis other perpetrators (whether living or dead), the highest level of responsibility for the commission of serious crimes. The Establishment Law stops well short of the loose confines of ‘whoever contributes to the commission of crimes by the group of persons or some members of the group in execution of a common criminal purpose.’⁹⁵⁹

552. It is notable and instructive that the ICTR Appeals Chamber has acknowledged that the absence of statutory authority for JCE leads to confusion and violates fundamental fairness:

The Statute does not provide for criminal liability other than for those forms of participation stated therein, expressly or implicitly. In particular, it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law.⁹⁶⁰

553. To paraphrase Ohlin: there is no warrant for extending liability to a JCE simply because the very nature of the crimes is collective; the question is what kind of collective action is criminal under the statute.⁹⁶¹ The Establishment Law already makes explicit reference to modes of liability that may accommodate the collective nature of criminal acts: planning, instigating, ordering, or aiding and abetting. It demands, in accordance with the principle of culpability, that individuals be prosecuted for their actions, not merely their associations. As recognised by Ohlin:

So while it is certainly true that genocide and war crimes are collective in nature, this is a far cry from establishing that the doctrine of joint criminal enterprise can be deduced from the nature of the criminal activity.... the collective moral guilt suggested by these crimes cannot be used as a justification to blindly impose criminal liability to all members of a conspiracy, regardless of their level of participation.⁹⁶²

554. Accordingly, the ECCC cannot rely on JCE at all, and certainly not for the convenience of the ICP. As noted by Weigend:

Importantly, under the approach suggested here, control needs to be proved upon the particular facts concerning the relationship between the persons involved, and the prosecution does not satisfy its burden of proof by merely establishing the existence of an organization (with whatever qualities). That

⁹⁵⁹ ICTY, *Prosecutor v. Tadić*, Appeal Judgement, para. 190.

⁹⁶⁰ ICTR, *Prosecutor v. Bagilishema* ICTR-95-1A-A, Appeal Judgement, 3 July 2002, para. 34.

⁹⁶¹ Ohlin, J., ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,’ *Journal of International Criminal Justice* 5 (2007), pp. 69 to 90, p. 74.

⁹⁶² Ohlin, J., ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,’ *Journal of International Criminal Justice* 5 (2007), pp. 69 to 90, p. 74.

interpretation may make life a bit harder for the prosecution, but it has rightly been said that legality and fair trial principles prohibit the expansion of any theory of criminal liability in order to circumvent a lack of evidence.⁹⁶³

(b) Article 29^{new}

555. The individual responsibility of Suspects⁹⁶⁴ is governed by Article 29^{new} of the Establishment Law, which stipulates:

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in Articles 3 ^{new}, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3 ^{new}, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

556. The PTC erred in holding:

[T]he Pre-Trial Chamber notes that [Article 29 of the ECCC Law] mirrors Article 6 of the ICTR Statute and Article 7 of the ICTY Statute. The *ad hoc* tribunals have consistently held that they regarded participation in a JCE as a form of “commission”. The Pre-Trial Chamber is of the view that in light of this consistent and precedential case law, had the drafters of the ECCC Law intended to limit the “commission” envisaged in Article 29 to persons who physically and directly carry out the *actus reus* of the crime(s), they would have made such restriction explicit.⁹⁶⁵

557. On any plain reading of the full text of Article 29^{new}, the use of ‘committed’ is clearly intended to denote direct perpetration. Contorting JCE liability into ‘commission’ would render the other express direct, indirect and accessory provisions duplicative and thus

⁹⁶³ Weigend, T., ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept,’ *Journal of International Criminal Justice* 9 (2011), pp. 91 to 111, p. 109.

⁹⁶⁴ Establishment Law, Article 2^{new}: ‘Suspects’ refers exclusively to ‘senior leaders of Democratic Kampuchea and those who were most responsible for [the crimes under the jurisdiction of the ECCC].’

⁹⁶⁵ Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 49.

redundant as well as invert the normative framework for discerning culpability.⁹⁶⁶ Further supporting the plain exclusive reading, the use of ‘committed’ in describing liability under command responsibility would also be divested of sensible meaning were it to be interpreted to include JCE. As noted by Judge Lindholm at the ICTY, ‘[i]f something else other than participation as co-perpetrator is intended to be covered by the concept of joint criminal enterprise, there seems to arise a conflict between the concept and the word “committed”.’⁹⁶⁷

558. By its reference to individual responsibility, Article 29^{new} also demands adherence to the principle of culpability, which, as ‘the foundation of criminal responsibility,’ dictates that ‘nobody may be held criminally responsible for acts or transactions in which he was not personally engaged or in some other way participated’ and that culpability should be linked to the degree of personal responsibility of each individual.⁹⁶⁸ This also contributes to the possibility of an accurate, specific, and nuanced understanding of how and why crimes occurred.⁹⁶⁹ The guilt of the minor participant and the architect of crimes are different: ‘it is this central truth that the current version of joint criminal enterprise obscures.’⁹⁷⁰ There is an ‘obvious difficulty in conforming to that requirement in the case

⁹⁶⁶ See also: Ambos, K., ‘Joint Criminal Enterprise and Command Responsibility,’ *Journal of International Criminal Justice* 5 (2007), pp. 159 to 183, p. 178: *A closer look at the meaning of the term ‘committed’ as a form of individual criminal responsibility shows that it is understood as a form of direct perpetration beside other forms of participation listed as ‘planned, instigated, ordered... or otherwise aided and abetted’ in Article 7(1): from this wording clearly follows that, in particular, aiding and abetting cannot be included in the meaning of committed.*

⁹⁶⁷ ICTY, *Prosecutor v. Simić et al* (IT-95-9-T), Trial Judgement, 17 October 2003, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, para. 2.

⁹⁶⁸ Cambodian Criminal Code, 2009, Article 24: *No one shall be criminally responsible except for his or her own conduct.* 1956 Penal Code, Article 76. Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, 18 February 1999, para. 107. The French Penal Code states that ‘one may be held criminally responsible only for one’s own actions.’ Code Pénal, 121-1 (2003). ICTY, *Prosecutor v. Tadić*, Appeal Judgement, para. 186. The Judgment of the International Military Tribunal at Nuremberg declared as ‘one of the most important’ well-settled legal principles ‘that criminal guilt is personal, and that mass punishments should be avoided’ (p. 256).

⁹⁶⁹ Danner, A. and Martinez, J., ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,’ 93(1) *California Law Review* 75 (2005), pp. 75 to 169, pp. 166 to 167.

⁹⁷⁰ Ohlin, J., ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,’ *Journal of International Criminal Justice* 5 (2007), pp. 69 to 90, p. 88: *The architect, the executioner, and the background supplier all perform distinct functions within the conspiracy and they should be held responsible relative to the importance of their personal conduct. It is possible to prove who joined the group first, who directed and planned its activities and who carried out its order. While these activities are all undoubtedly criminal, they are not equally criminal. Any legal doctrine that equate them does a disservice to the project of codifying difficult moral distinctions into a legal system.*

of a group crime which the accused member of the group himself did not personally accomplish'; JCE does not adequately do so.⁹⁷¹

559. As previously noted by the CIJs, the application of strict construction of criminal law is acutely important in international proceedings, and judicial restraint is particularly important at the ECCC, the legal contours of which were so carefully drawn in 'contentious negotiations between a national government and the international community in a post-conflict transitional scenario.'⁹⁷² As articulated by Danner and Martinez:

Because of the wide discretion granted to international prosecutors in a variety of areas, because of the novelty of the international forum, because of the heavily political nature of many of the prosecutions, and because of the lack of international consensus about the meaning of some of the crimes in international criminal law, it is especially important that international criminal judges protect defendants through careful attention to the culpability principle and similar doctrines that seek to ensure that defendants are convicted for their own conduct and not merely for the violent trauma experienced by entire nations. The human rights and transitional justice paradigms quite correctly inform the goals of international criminal law. But

⁹⁷¹ ICTR Appeals Chamber, *Sylvestre Gacumbitsi v. The Prosecutor* (ICTR-2001-64-A), Judgement, 7 July 2006, Separate Opinion of Judge Shahabuddeen, paras 43 and 44: *The obvious difficulty in conforming to that requirement in the case of a group crime which the accused member of the group himself did not personally accomplish requires proof of a link between the accused and the perpetration of the crime so as to show that the crime could not have been committed without his participation.*

However, "in general, there is no specific legal requirement that the accused make a substantial contribution to [a] joint criminal enterprise." Exceptionally such a requirement may exist, but only "to determine whether [the accused] participated in the joint criminal enterprise." It is therefore apparent that, in a JCE, "the Prosecutor need not demonstrate that the accused's participation is a *sine qua non*, without which the crimes could or would not have been committed." In other words, the accused could "participate" in a JCE without bearing a substantial individual link to the perpetration of the actual crime. But to visit him with individual criminal responsibility in such a case is to impute to him the criminality of the member who in fact committed the crime. The culpability of the accused would be derived, not personal; that is not the same as saying that he should only be culpable for what he himself has done, which is the leading principle of individual criminal responsibility.

Danner and Martinez note the influence of human rights law on the teleological development of the doctrine of JCE, arguing, ultimately, that the lofty ambition to 'fix individual responsibility for history's violent march' will be best served by strict adherence to criminal culpability principles. (Danner, A. and Martinez, J., 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,' 93(1) California Law Review 75 (2005), pp. 75 to 169, particularly pp. 77 and 146.)

Ohlin, J., 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,' *Journal of International Criminal Justice* 5 (2007), pp. 69 to 90, p. 77: *To suggest that all members of a conspiracy are equally culpable ignores the internal structure of the conspiracy and treats it as if it were some kind of group person whose internal structure was morally irrelevant. [...] this is untrue. The internal structure of a common criminal plan is morally and legal significant, especially where the crime in question is genocide or crimes against humanity.*

⁹⁷² Case 004/02, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 471. Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 27. The CIJs noted, additionally: *This is true not least because of the pressure exerted by the public's expectations and the media on the grounds of concerns around the concept of impunity for mass atrocities, political agendas as well as previous historical research into the underlying events. In other words, in scenarios of this kind, the guilt of the suspects, charged persons and accused often seems beyond debate ab initio and the judicial proceedings are not infrequently expected simply to attach the seal of official approval and confirmation to the pre-existing general view of history.*

over-reliance in doctrinal exegesis on interpretive techniques drawn from the human rights paradigm or on the less praiseworthy strands of the transitional trial tradition may pose a threat to the legitimacy of international criminal law.⁹⁷³

560. In considering the intentions of the drafters, and in view of the role of the Royal Government of Cambodia in the negotiation of the Establishment Law, it is instructive to consider the relevant provisions of Cambodian law. The interpretation advocated by the Defence, namely, at most, the doctrine of co-perpetration, is supported by reference to the 1956 Penal Code,⁹⁷⁴ which explicitly provides thus:

Article 82

Any person participating voluntarily, either directly or indirectly, in the commission of a crime or infraction, is liable for the same punishment as the principle perpetrator. Direct participation constitutes co-perpetration, indirect participation constitutes complicity.

Article 83

Indirect participation or complicity is punishable only if it is committed by provocation, instruction, means supplied, aid or assistance.

Its provisions are, notably, mirrored by Article 29^{new} of the Establishment Law.⁹⁷⁵

561. The ICTY Trial Chamber in *Stakić* expressed dissatisfaction with a lazy resort to the judicially created doctrine of JCE before due consideration is given to the forms of co-perpetration afforded by the Statute: ‘a more direct reference to “commission” in its traditional sense should be given priority before considering responsibility under the judicial term “joint criminal enterprise.”’⁹⁷⁶

562. In Case 001, the Trial Chamber has held that recognition of forms of co-perpetratorship in national jurisdictions ‘serve[s] to illustrate that the notion of joint criminal enterprise (or common purpose) upheld in international criminal law has an underpinning in many national systems including Cambodia.’⁹⁷⁷ That contention is logically flawed. It serves only to illustrate that forms of tightly defined direct and indirect perpetratorship were widely criminalised to an extent that ‘may also partially overlap with the notion of joint

⁹⁷³ Danner, A. and Martinez, J., ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,’ 93(1) California Law Review 75 (2005), pp. 75 to 169, p. 100.

⁹⁷⁴ Pursuant to Article 1 of the Establishment Law, the Cambodian law applicable at the ECCC is the 1956 Penal Code. It is not restricted to national crimes.

⁹⁷⁵ As recognised by the Trial Chamber in Case 001, *Judgement*, 26 July 2010, E188, para. 474.

⁹⁷⁶ ICTY Trial Chamber, *Prosecutor v. Stakić* (IT-97-24-T), *Judgement*, 31 July 2003, para. 438.

⁹⁷⁷ Case 001, *Judgement*, 26 July 2010, E188, para. 510.

criminal enterprise.⁹⁷⁸ ‘Partially’ emphasises the limited similarities, and the extent to which JCE *exceeds* what may, in various conceptions, be widely acknowledged by national jurisdictions. It is striking that the Trial Chamber referred to the clear co-perpetration provisions to support its conclusions regarding the applicability of JCE, yet did not pause to consider co-perpetration as an alternative mode of liability.⁹⁷⁹

563. As recognised by the Pre-Trial Chamber in Case 001 in refusing to apply the doctrine of JCE:

[T]he significance and exclusivity of the notion of joint criminal enterprise, at least in its basic form, lies in its conceptual underpinning. This allows individual responsibility at the level of a co-perpetrator to be attributed to participants in collective criminal action even though they may be physically divorced from the actual offences. Joint criminal enterprise liability has a subjective focus on the common purpose and the intent of the participant.⁹⁸⁰

In Case 002, the Trial Chamber similarly recognised that co-perpetratorship and JCE I and II are not identical:

While both require the shared intent by participants that the crime be committed, participation in a JCE, even if it has to be significant, would appear to embrace situations where the accused may be more remote from the actual perpetration of the *actus reus* of the crime than the direct participation required under domestic law.⁹⁸¹

564. JCE clearly grants a wider scope of liability than co-perpetration, with fewer demands for proof of direct participation.⁹⁸² This is obviously the very reason it is attractive to the ICP, and belies the PTC’s finding that JCE is not a ‘more severe’ form of liability.⁹⁸³ It is also precisely the reason that, in its looser forms, it offends the principles of culpability and legality, leading it to be explicitly rejected by so many national and international forums,

⁹⁷⁸ Case 001, *Judgement*, 26 July 2010, E188, para. 510.

⁹⁷⁹ *Ibid.*

⁹⁸⁰ Case 001, *Decision on Appeal against Closing Order indicting Kaing Guek Eav alias “Duch,”* 5 December 2008, D99/3/42, para. 136.

⁹⁸¹ Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 41.

⁹⁸² ICTR Appeals Chamber, *Sylvestre Gacumbitsi v. The Prosecutor* (ICTR-2001-64-A), *Judgement*, 7 July 2006, Separate Opinion of Judge Shahabuddeen, para. 50: *As has been noticed, the contribution of an accused to a JCE does not have to be a sine qua non of the commission of the crime. Indeed, the contribution does not have to be substantial, as it has to be in the case of aiding and abetting. By contrast, under the co-perpetratorship theory, since the non-fulfilment by a participant of his promised contribution would “ruin” the accomplishment of the enterprise as visualised, the making of his contribution would appear to be a sine qua non. Therefore, though the two theories overlap, they arrive at a point of incompatibility touching guilt or innocence: at that point one theory is wrong, the other right. This would seem to indicate that only one of the two theories can prevail in the same legal system.*

⁹⁸³ Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 41.

including the United Kingdom, its birthplace.⁹⁸⁴ The principles deduced from the UK cases relied upon by the *Tadić* Appeals Chamber have all been fundamentally undermined by explicit legislative changes and damningly critical jurisprudence from the UK Supreme Court and the Privy Council.⁹⁸⁵ In view of this shift, and the general demand for the application of the rule favouring the accused enshrined in Cambodian and international law, the Defence submits that the ECCC is obliged to consider that *Tadić* is no longer sound law.⁹⁸⁶

565. Importantly, apparently inspired by the broadening of liabilities favoured by the UK and US post-World War II courts, France introduced into its criminal code provisions bearing a resemblance to JCE in 1948; these were repealed in 1953 following 'severe criticism for potentially violating universal human rights principles, such as presumption of

⁹⁸⁴ Case 001, McGill Centre for Human Rights and Legal Pluralism, *Amicus Curiae Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University*, 27 October 2008, D99/3/25, para. 27.

As noted by Kai Ambos in his amicus curiae brief submitted in Case 001, the ICC has explicitly rejected JCE insofar as it tends towards conspiracy liability, and allowing the application of JCE II (in its broad sense) would involve overriding the will of the drafters of the Rome Statute and thus violating the principle of legality. See: Case 001, Ambos, K., *Amicus Curiae concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02)*, 27 October 2008, D99/3/27, pp. 14 and 15: *Given the similarity between responsibility based on JCE and conspiracy, the inclusion of the former in Article 25(3)(d) would, as stated above, conflict with the will of the drafters of the ICC Statute, who explicitly rejected conspiracy and drafted Article 25(3)(d) as a compromise formula. Against this background, Article 25(3)(d) can rightly be seen as a "statutory surrogate of JCE."* For the future case law of the ICC, this means that the application of JCE II (in the broad sense) and III on the basis of Article 25 – and this is the only basis it has – is not possible. This would ultimately mean introducing the law of conspiracy through the backdoor, ignoring the will of the drafters of the Rome treaty and violating the principle of legality. Only an explicit codification could reconcile JCE II and III with this principle's requirement for a, *inter alia*, strict and precise construction of criminal law provisions (Article 22[2] ICC Statute). All this leads to the conclusion that JCE II and III constitute autonomous (systemic) concepts of imputation without an explicit basis in codified ICL. (See also: Ambos, K., 'Joint Criminal Enterprise and Command Responsibility,' *Journal of International Criminal Justice* 5 (2007), pp. 159 to 183, p. 173.)

That the United States has sought to rely upon international JCE as a basis upon which to prosecute what it terms 'terrorists' demonstrates the degree to which the ICTY-incubated version of the doctrine extends beyond the already unusually broad US law on complicity. See: Danner, A. and Martinez, J., 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,' 93(1) *California Law Review* 75 (2005), pp. 75 to 169, p. 80: *The military commission recently instituted by the U.S. government to try suspected terrorists include both command responsibility and a liability theory that closely resembles joint criminal enterprise, and the first indictments of Guantanamo detainees expressly rely on this joint criminal enterprise theory of liability* (citing Department of Defense News Release, *Two Guantanamo Detainees Charged* (24 February 2004), available at <http://www.defenselink.mil/releases/2004/nr20040224-0363.html>); Department of Defense News Release, *Guantanamo Detainee Charged* (June 10 2004), available at <http://www.defenselink.mil/releases/2004/nr20040610-0893.htm>.

⁹⁸⁵ United Kingdom Criminal Justice Act 1967, s. 8. *R v Jogee; Ruddock v The Queen (Jamaica)* [2016] UKSC 8 and UKPC 7, 18 February 2016.

⁹⁸⁶ Rule 21. Cambodian Criminal Code, Article 10.

innocence, due process and *nullem crimen sine lege*.⁹⁸⁷ The exclusion of JCE provisions in the French-influenced 1956 Penal Code should not be considered accidental.

566. It can, on the other hand, properly be said that principles of co-perpetration were common to many jurisdictions (including Cambodia) and had also appeared in the prosecution of international crimes by 1975.⁹⁸⁸ As recognised by the *Tadić* Appeals Chamber, many post-World War II courts ‘did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration.’⁹⁸⁹ The Rome Statute similarly recognises the wide acknowledgement of co-perpetratorship and indirect perpetratorship in Article 25(3); in considering the framework of the Rome Statute and the intention of its drafters, the judges of the ICC have rejected the ‘reading in’ of JCE.⁹⁹⁰

The Inclusion of ‘Superior Responsibility’ Indicative of Intention of Drafters

567. The principle of superior responsibility in international armed conflicts is included in the law based on Cambodia’s ratification of relevant treaties.⁹⁹¹ Accordingly, the inclusion of superior responsibility in Article 29^{new} is properly founded and appropriate. Its inclusion demonstrates the careful contemplation and intention of the drafters of the Establishment Law and is entirely consistent with the object and purpose of the UN-RGC Agreement. Conversely, there is nothing to suggest that the drafters intended to include JCE, either explicitly or through the use of the word ‘commission,’ but omitted it by oversight.
568. The inclusion of superior responsibility in Article 29^{new} demonstrates the drafters’ intention that, in keeping with the principle of culpability, the attribution of criminal liability for the actions of subordinates requires proof of effective control.⁹⁹² The application of the doctrine of JCE permits the circumvention of this requirement: where

⁹⁸⁷ Case 001, McGill Centre for Human Rights and Legal Pluralism, *Amicus Curiae Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University*, 27 October 2008, D99/3/25, para. 27.

⁹⁸⁸ 1956 Penal Code, Articles 82 and 83.

⁹⁸⁹ ICTY, *Prosecutor v. Tadić*, Appeal Judgement, para. 201.

⁹⁹⁰ ICC, *The Prosecutor v. Lubanga*, ‘Decision on the Confirmation of Charges,’ 29 January 2007, ICC-01/04-01/06-803-tEN, paras 322 to 338.

⁹⁹¹ Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146; Hague Convention for the Protection of Cultural Property, Article 28. ICRC, State Parties to the Following International Humanitarian Law and Other Related Treaties.

⁹⁹² *Infra*, paras 605 to 617.

effective control is not proven, the same conduct might be found not criminal under superior responsibility, but criminal under JCE.⁹⁹³ This is impermissible.

569. There is no doubt that the ECCC must avoid recourse to a lower standard than that provided by the Establishment Law. In any event, the accused must always benefit from any doubt as to which standard to apply.⁹⁹⁴ To do otherwise would indeed be to construct a ‘barbarous legal mechanism unworthy of modern law.’⁹⁹⁵

iv. Application of JCE at ECCC in Breach of UN-RGC Agreement and *Ultra Vires*

570. Interpretation of the UN-RGC Agreement is governed by the VCLT.⁹⁹⁶ It therefore must be interpreted in conformity with the interpretative criteria enshrined in VCLT Articles 31 and 32: in good faith in accordance with the ordinary meaning to be given to the terms of the Statute, taking into consideration the relevant context and in light of its object and purpose. Recourse may, if necessary, be had to the *travaux préparatoires* or negotiating history as a supplementary means of interpretation.⁹⁹⁷

571. The stated object and purpose of the UN-RGC Agreement is ‘to bring to trial those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.’⁹⁹⁸ In this, it is wholly distinct from the *ad hoc* tribunals, where, according to *Tadić*, the Statutes were intended to extend the jurisdiction of the tribunal to *all* those responsible

⁹⁹³ This is not merely hypothetical: Through the *ultra vires* application of JCE before the ECCC, the Trial Chamber convicted Nuon Chea for the actions of his subordinates under JCE without concern for effective control. Case 002/1, *Appeal Judgement*, 23 November 2016, F36, see, for example, paras 48 (*In sum, contrary to Nuon Chea’s submission, the Supreme Court Chamber did not consider the hierarchical structure of the CPK to be an “essential component” of his criminal liability for any of the crimes he was convicted of based on JCE liability. The primary basis for holding Nuon Chea responsible was that the crimes in question could be imputed on at least one member of the JCE, which in turn resulted in liability being attributable to all members of the JCE, including Nuon Chea. While the Trial Chamber also found that his position of authority meant that there had been a “sufficient link” between the crimes’ direct perpetrators and Nuon Chea, this was only an additional, non-essential element to impute the crimes on Nuon Chea under the notion of JCE.*) and 1039 (The Supreme Court Chamber notes that the impugned findings of the Trial Chamber regarding the hierarchical structure of the CPK are relevant primarily to Nuon Chea’s conviction based on the modes of liability of planning, ordering and superior responsibility. As regards superior responsibility, the Trial Chamber did not enter a conviction on that basis, given that it found Nuon Chea “directly responsible” for the crimes at issue.)

⁹⁹⁴ Cambodian Constitution, Article 38; Rule 21.

⁹⁹⁵ Bradley Smith, as quoted by Danner, A. and Martinez, J., ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,’ 93(1) *California Law Review* 75 (2005), pp. 75 to 169, p. 115.

⁹⁹⁶ UN-RGC Agreement, Article 12.

⁹⁹⁷ VCLT, Article 32.

⁹⁹⁸ UN-RGC Agreement, Article 1.

for serious violations of international humanitarian law.⁹⁹⁹ There is an obvious crude contradiction between the ICP's requested sweeping application of criminal liability under the doctrine of JCE and the reconciliatory purposes of the restricted personal jurisdiction of the ECCC.

572. It is not for judges to make law where there is no ambiguity.¹⁰⁰⁰ Nor are judges empowered to make law even where there *is* a lacuna in the legislation.¹⁰⁰¹ The Defence notes this only to emphasis the stark impermissibility of judicially importing JCE liability into the legal framework of the ECCC. It is academic, however, since there is no lacuna in the applicable law.
573. Necessary amendments to the *law* applicable at the ECCC are governed by Article 2(3) of the UN-RGC Agreement, which stipulates that 'such amendments shall always be preceded by consultations between the parties [to the Agreement].'¹⁰⁰² This important provision protects the fundamental principle that a change of law is the jurisdiction of the law-giver and the role of the judge is simply to carry out the will of the former. Recourse to '*procedural* rules established at the international level' for guidance is permissible at the ECCC only where 'existing *procedures* do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards.'¹⁰⁰³
574. Modes of liability are central pillars of the substantive law of the ECCC and cannot in any way be considered as 'procedural' in nature. While it may be assumed that the drafters of the Establishment Law envisioned circumstances under which it might be more efficient to permit ECCC judges recourse to international procedure for guidance, it cannot be the case that they meant to permit the same approach to enable the expansion of carefully defined substantive legal provisions. Such a fundamental amendment would certainly require renegotiation between the UN and the RGC pursuant to Article 2(3) of

⁹⁹⁹ See *infra*: ICTY, *Prosecutor v. Tadić*, Appeal Judgement, paras 189 to 191. The language of ICTY Statute Article 1 is mirrored by that of the ICTR.

¹⁰⁰⁰ Blackstone, W., *Commentaries on the Laws of England*, p. 62: [*If the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.*]

¹⁰⁰¹ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, para. 105(2)(E).

¹⁰⁰² VCLT, Article 39 dictates that the express amendment rules of the UN-RGC Agreement mean that no other rules about amendment can be applied.

¹⁰⁰³ UN-RGC Agreement, Article 12(1). Establishment Law, Articles 20^{new}, 23^{new}, 33^{new}.

the UN-RGC Agreement. This has not occurred and the application of JCE is thus *ultra vires*.

575. The law is clear. There has been no need to amend the Establishment Law and accordingly no consultation between the UN and RGC to amend Article 29^{new} to include JCE. There is no lacuna in the applicable procedure, nor uncertainty as to the interpretation or application of a relevant rule or its consistency with international standards, so no guidance from procedural rules established at the international level is required or permitted. On the contrary, it is the *ultra vires* injection of the doctrine of JCE that brings uncertainty regarding interpretation and consistency with international standards of fairness.
576. Since JCE renders moot any assessment of the hierarchy of authority or degree of personal responsibility, it is incompatible with the personal jurisdiction assessment demanded by the statutory framework of the ECCC.¹⁰⁰⁴ Nor does it serve the interests of the truth, to which the Cambodian people are so entitled.

(a) PTC JCE Decision

577. Where it was neither warranted nor permitted, the PTC used ‘judicial creativity’ to read JCE into ‘commission,’ holding:

To reach its finding, the ICTY Appeals Chamber in *Tadić* interpreted the ICTY Statute on the basis of its purpose as set out in the report of the United Nations Secretary-General to the Security Council. It also considered the specific characteristics of many crimes perpetrated in war. In this respect, the Pre-Trial Chamber concurs with the approach in *Tadić* that the development of the forms of responsibility applicable to violations of international criminal law has to be seen in light of the very nature of such crimes, often carried out by groups of individuals acting in pursuance of a common criminal design. In the words of *Tadić*, “although only some members of the group may physically perpetrate the criminal act [...], the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such perpetration is often no less – or indeed no different – from that of those actually carrying out the acts in question”. These crimes differ from ordinary crimes not only in scale, but also due to the fact that they often take place during conflict. In contrast to ordinary crimes, which are usually perpetrated by an individual or a small group of individuals, these crimes are often only

¹⁰⁰⁴ Case 002/1, *Appeal Judgement*, 23 November 2016, F36, para. 48.

made possible by the involvement of state organs pursuing criminal policies and using all available means to those criminal ends.¹⁰⁰⁵

578. The Defence submits that this assessment was: (i) unwarranted since there was no lacuna or ambiguity in the Establishment Law; (ii) impermissible since it contravenes the intention of the drafters of the UN-RGC Agreement; and (iii) therefore *ultra vires*.

(b) PTC Minority and ICP in Breach of UN-RGC Agreement

579. The Co-Prosecutors and the judges of the ECCC are entrusted to effectuate the ECCC in accordance with the law and within the limits of their carefully delineated powers. The ICP and international PTC Judges are obliged to respect the terms and spirit of the UN-RGC Agreement. They have not.

580. The object of the UN-RGC Agreement and the legal framework deriving its power therefrom is to bring persons properly within its jurisdiction to trial within the strict confines of the law, in the interests of national reconciliation. The *ultra vires* application of a doctrine not specified or accommodated by the Establishment Law goes against the object and purpose of the ECCC. This constitutes a material breach of the UN-RGC Agreement within the meaning of Article 60(1) and (3)(b) of the VCLT.¹⁰⁰⁶ Article 28 of the UN-RGC Agreement recognises withdrawal of cooperation is the appropriate remedy where the ECCC has been caused ‘to function in a manner that does not conform with the terms of the present Agreement.’

581. The Defence submits that the invocation of the doctrine of JCE is also inconsistent with the reconciliatory purpose of the UN-RGC Agreement and the establishment of the ECCC.¹⁰⁰⁷

582. By way of example: in its recent *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)* (‘Considerations on Case 004/01 Closing Order’), the PTC opined that ‘in holding that ordinary Cambodian courts have no jurisdiction to hear

¹⁰⁰⁵ Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, D97/15/9, para. 55, citing: Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25701, 3 May 1993; ICTY, *Prosecutor v. Tadić* Appeal Judgement, para. 191.

¹⁰⁰⁶ VCLT, Article 60(3)(b): *A material breach of a treaty, for the purposes of this article, consists in the violation of a provision essential to the accomplishment of the object or purpose of the treaty.*

¹⁰⁰⁷ Resolution adopted by the General Assembly at the 77th plenary meeting on 18 December 2002, 27 February 2003, UN Doc. A/RES/57/228.

cases involving Khmer Rouge-era crimes, the Co-Investigating Judges overstepped their mandate.’¹⁰⁰⁸ This mischaracterises the CIJs’ consideration of the hypothetical impact of dismissing a case for lack of personal jurisdiction, namely whether a potential ‘impunity gap’ should have any bearing on their decision-making.¹⁰⁰⁹ Nevertheless, and proceeding on the aforementioned misapprehension, the PTC emphasised the RGC’s ‘freedom’ and, ‘prior to the establishment of the ECCC,’ ‘obligation’ to prosecute senior leaders or those alleged to be most responsible for international crimes under the DK regime.¹⁰¹⁰ The Defence recalls the reconciliatory basis of the UN-RGC Agreement and submits that it is inappropriate for judges of the ECCC to make proclamations that risk being interpreted as an incitement to local courts to try those found to fall outside the ECCC’s jurisdiction.

583. The approach taken by the Minority Judges in their *Opinion on Considerations on Case 004/01 Closing Order* firmly illustrates the dangers of applying JCE at the ECCC.¹⁰¹¹ Therein, the Minority Judges criticise the CIJs for excluding uncharged crimes from their assessment of IM Chaem’s participation in the alleged JCE, concluding that she ought ultimately to be held personally responsible ‘as a member of a joint criminal enterprise for crimes against humanity committed not only at Phnom Trayoung Security Centre and Spean Sreng Canal Worksite [for which she had been charged], but also at least in all of Sector 5 of the Northwest Zone [for which she had not been charged].’¹⁰¹² Despite consistent references to IM Chaem’s lower position of authority and lesser ability to control the alleged criminal acts, the Minority Judges assert that the CIJs ought to have counted evidence from crime sites for which IM Chaem was not charged (outside the scope of the charges and implicitly not sufficient) in order to implicate her in further crimes through JCE as a mode of responsibility.¹⁰¹³ This endorses prosecution on the basis of weak and tenuous evidence, even unsubstantiated rumour, and epitomises guilt by association. It cannot be tolerated.

¹⁰⁰⁸ Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 72.

¹⁰⁰⁹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 11 to 25.

¹⁰¹⁰ Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 75.

¹⁰¹¹ Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, Opinion of Judges Baik and Beauvallet, particularly paras 132 to 142.

¹⁰¹² Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, Opinion of Judges Baik and Beauvallet, paras 135, 139 to 142.

¹⁰¹³ Case 004/01, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, Opinion of Judges Baik and Beauvallet, paras 132 to 142.

584. Also directly contradicting the express purposes of the UN-RGC Agreement and Establishment Law, the absurdly broad parameters of the JCE as delineated in the ICP's Final Submission seek to implicate every level of Khmer Rouge cadre:

Yim Tith acted in concert with other members of the JCE. The other members of the JCE included: Pol Pot; Nuon Chea; Khieu Samphan; Son Sen; the members of the Standing and Central Committees; Ta Mok, the secretary of the Southwest Zone and later the Northwest Zone; Vean Em *alias* Sarun, Member of the Northwest Zone Committee with Yim Tith and Ta Mok as well as Sector 2 and Sector 7 Secretary; Ros Nhim, Ta Mok's predecessor as secretary of the Northwest Zone; Kung Sophal *alias* Ta Keu, deputy secretary of the Northwest Zone under Ros Nhim; Ta Mok's subordinates in the military and security forces of both the Southwest and Northwest Zones; all of the secretaries, deputy secretaries, and members of the district and sector committees in the Southwest and Northwest Zones serving at various times; and the category of all of Yim Tith's other direct and indirect subordinates. This category includes all the commune and village chiefs in Kirivong District during the time that Yim Tith served as the deputy secretary or secretary there; all of the commune and village chiefs of Sector 13 during the time that Yim Tith served as the deputy secretary and secretary of Sector 13; and all of the commune and village chiefs within the Northwest Zone during the time Yim Tith was present in *de facto* or formal leadership roles in the Northwest Zone. Cadres responsible for security, militia, and the military in all areas of Yim Tith's control or influence were either members of the JCE or used by members of the JCE to commit the crimes. Similarly, members of the CPK military, zone, sector, district, and commune militias who physically perpetrated the crimes were either also part of the JCE or were used by members of the criminal plan to commit the crimes.¹⁰¹⁴

585. In the absence of a proper evidential basis, this is merely an appeal to emotion and should be dismissed as such.

586. The Defence is aware of 25 witnesses who received letters of assurance from the ICIJ.¹⁰¹⁵ Through these letters, the ICIJ undertook to assure potential witnesses that 'in no case

¹⁰¹⁴ ICP's Final Submission, D378/2, para. 1113.

¹⁰¹⁵ D117/71/1, PRAK Yuth, 12 June 2013; D174/2, SOTR Saing, 14 November 2013; D118/170/1, SEK Sam At (alias YEAY Rim), 27 November 2013; D119/69/1, KRAUCH Tim, 3 December 2013; D118/179/1, SOU Hoeun, 31 January 2014; D119/96/1, IM Man, 26 February 2014; D119/108/1, SOK Rom, 19 March 2014; D119/110.1, CHUM Kan, 26 March 2014; D118/285/1, NOP Ngim, 21 April 2014; D119/142/1, SEM Nuon, 11 August 2014; D219/103/1, SUM Sal, 2 December 2014; D119/65/1, TUM Soeun, 16 October 2013; D219/102/1, TUM Soeun, 2 December 2014; D230/1, TUM Soeun, 4 December 2014; D219/188/1, PHAN Khan, 17 February 2015; D219/284/1, POV Sarom, 8 April 2015; D219/347/1, CHHIM Phan, 1 June 2015; D219/397.1, BIN Sokh, 30 June 2015; D219/427/1, HIM Huy, 22 July 2015; D219/497/1, ORM Launh (alias SUON Lonh), 10 August 2015; D219/497/2, ORM Launh (alias SUON Lonh), 30 September 2015; D219/499/1, NHEY, 8 September 2015; D219/518/1, SIN Sot, 21 September 2015; D219/442/2, CHOM Vong (alias NGOY), 30 September 2015;

will the statements that you [provide] ever be used against you, directly or indirectly, as part of any prosecution before the ECCC.’ Through impugning ‘cadres responsible for security, militia, and the military in all areas of Yim Tith’s control or influence’ and ‘members of the CPK military, zone, sector, district, and commune militia,’¹⁰¹⁶ the ICP actively flouts the careful undertakings given by the ICIJs. His actions are both duplicitous and actively destabilising.

587. The ICP’s inflammatory and sweeping accusation that potentially implicates every level of Khmer Rouge membership for all crimes committed during the relevant period is reckless and wrong under the law of the ECCC. The implications of such a broadly defined JCE are untenable and directly contravene the express purpose of the ECCC as well as the principles of culpability and legality. Applying the same logic to the whole of the DK regime would implicate the Prime Minister of Cambodia, the President of Cambodia’s National Assembly, and the late President of the Senate, all of whom held positions of responsibility in the DK regime.

588. It is, moreover, not for the ICP to judge whether his accusations threaten to destabilise a sovereign nation.¹⁰¹⁷ This is the jurisdiction of the RGC, and it alone.¹⁰¹⁸ In so flagrantly disregarding the carefully negotiated confines of the ECCC’s jurisdiction and the principle of culpability, the ICP has certainly overstepped his mandate.

v. JCE has not Attained the Status of a Norm of Customary International Law

589. The focus of previous arguments has been on the status of the doctrine of JCE in customary international law in 1975 to 1979.¹⁰¹⁹ Though its recognition in international

D219/626.1, MUY Sot, 4 December 2015; D219/672/1, KAING Guek Eav (alias DUCH), 1 February 2016; D219/870/1, RY Nhor, 10 November 2016; D219/871/1, KHUN Khim (alias PIN Poy), 22 November 2016.

¹⁰¹⁶ ICP’s Final Submission, D378/2, para. 1113.

¹⁰¹⁷ ICP’s Final Submission, D378/2, paras 1151 to 1153.

¹⁰¹⁸ Cambodian Constitution 1993, Article 52: *The Royal Government of Cambodia shall protect the independence, sovereignty, territorial integrity of the Kingdom of Cambodia, adopt the policy of national reconciliation to ensure national unity, and preserve the good national traditions of the country. The Royal Government of Cambodia shall preserve and protect the law and ensure public order and security.*

¹⁰¹⁹ Case 001: *Co-Prosecutors’ Request for the Application of the Joint Criminal Enterprise*, 8 June 2009, E73; *Defence Response to the Co-Prosecutors’ Request for the Application of the Joint Criminal Enterprise theory in the Present Case*, 17 September 2009, E73/2.

Case 002: *Ieng Sary’s Motion against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise*, 28 July 2008, D97; *Co-Prosecutors’ Response to Ieng Sary’s Motion on Joint Criminal Enterprise*, 11 August 2008, D97/II; *Ieng Sary’s Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC*, 24 November 2008, D97/7; [Kaing Guek Eav alias Duch] *Defence’s Submissions Concerning Application of the Form of Responsibility Known as Joint Criminal Enterprise*, 24 December 2008, D97/3/1; *Ieng Thirith Submissions on the Application at the ECCC of the Form of Liability Known*

law is not strictly pertinent to its applicability before this court,¹⁰²⁰ the Defence also submits that the basis upon which the ECCC has held that JCE was an applicable doctrine of customary international law was in any event incorrect.

590. As is well-known, the International Court of Justice has determined that for a rule to attain the status of customary international law, there must exist uniform state practice underpinned by *opinio juris sive necessitatis*.¹⁰²¹

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the essence of a rule requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must

as Joint Criminal Enterprise pursuant to the Order of the Co-Investigating Judges of 16 September 2008, 30 December 2008, D97/3/2; [Nuon Chea's] Submissions on Applicability at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, 30 December 2008, D97/3/3; Response of the Co-Lawyers for the Civil Parties on Joint Criminal Enterprise, 30 December 2008, D97/3/4; Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise, 31 December 2008, D97/8; Ieng Sary's Supplementary Submission to his Supplementary Observations on joint Criminal Enterprise Filed on 24 November 2008: Limited to the Applicable United Nations General Assembly Resolutions as Argued / Omitted by the OCP, 31 July 2009, D97/12; Ieng Thirith Defence Appeal against 'Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise' of 8 December 2009, 18 January 2010, D97/15/1; Ieng Sary's Appeal against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 22 January 2010, D97/14/5; Co-Prosecutor's Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise, 19 February 2010, D97/14/10 and D97/16/5; [Ieng Thirith] Defence Reply to Co-Prosecutors' Response to Defence Appeal on the Application of Joint Criminal Enterprise, 15 March 2010, D97/15/8; Ieng Sary's Reply to the Co-Prosecutors' Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise, 18 March 2010, D97/14/14; Reply of Mr Khieu Samphan's Defence to the Co-Prosecutors' Joint Response on Joint Criminal Enterprise, 25 March 2010, D97/16/9; Ieng Thirith Defence's Preliminary Objections, 14 February 2011, E44; [Khieu Samphan] Preliminary Objections Concerning Jurisdiction, 14 February 2011, E4 6; Ieng Sary's Motion to Strike Portions of the Closing Order Due to Defects, 24 February 2011, E58; Civil Parties' Joint Response to Defence Rule 89 Preliminary Objections, 7 March 2011, E51/5/4; Co-Prosecutors' Response to Ieng Sary's Motion to Strike Portions of the Closing Order due to Defects, 16 March 2011, E58/1; Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, 21 March 2011, E51/5/3/1; Co-Prosecutors' Request for the Trial Chamber to Consider Joint Criminal Enterprise III as an Alternative Mode of Liability, 17 June 2011, E100; [Ieng Thirith] Defence Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 22 July 2011, E100/1; Ieng Sary's Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability and Request for an Oral Hearing, 22 July 2011, E100/2; Réponse à la demande des co-procureurs relative à la troisième catégorie d'entreprise criminelle commune, 22 July 2011, E100/3; [Civil Party Lead Co-Lawyers'] Brief in Support of the Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 22 July 2011, E100/4; [Nuon Chea] Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 22 July 2011, E100/5.

¹⁰²⁰ Case 001, Appeal Judgement, 3 February 2012, F28, para. 97. See also: ICTY, Prosecutor v. Tadić, Appeal Judgement, para. 296: It is open to the Security Council – subject to respect for peremptory norms of international law (*jus cogens*) – to adopt definitions of crimes in the Statute which deviate from customary international law.

¹⁰²¹ ICJ, North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands*), Merits, Judgment of 20 February 1969 [1969] ICJ Rep. 3, para. 77; Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986 [1986] ICJ Rep. 14, paras 183 and 207.

therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.¹⁰²²

591. As recognised by the *Tadić* Appeals Chamber, it is not the case that the major legal systems of the world take the same approach to criminalising participation in a common plan.¹⁰²³ A proper assessment of the doctrine of JCE betrays that it has not attained the status of customary international law, which would demand that states feel *legally obliged* to apply it in relevant proceedings.¹⁰²⁴ The most that can be said is that it is *a doctrine recognised* in international proceedings: it is but one ‘[instance] of adaptation from criminal law principles that enjoy far-from-universal application.’¹⁰²⁵
592. The availability of alternative doctrines of liability have been noted in multiple decisions at the ICTY and ICTR, notably including from judges on the *Tadić* Appeals bench, criticising the application of JCE.¹⁰²⁶ Prominent judges have opined that the *ad hoc* tribunals ought to have considered applying the control theory of co-perpetration as expounded by Claus Roxin.¹⁰²⁷ Referring to the seminal application of the JCE doctrine in *Tadić* as ‘an error of the Tribunal,’ Judge Shahabuddeen has elaborated:

It is usual to speak of the ‘theory’ of joint criminal enterprise and of the ‘theory’ of co-perpetratorship. That is a convenient course [...]. However, it should not be lost sight of that what is involved is the law represented by those theories. Joint criminal enterprise has roots in the common law and co-perpetratorship has roots in the civil law. Neither, considered with the problem of intent, can claim the status of customary international law. It is

¹⁰²² ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Merits, Judgment of 20 February 1969 [1969] ICJ Rep. 3, para. 77.

¹⁰²³ ICTY, *Prosecutor v. Tadić*, Appeal Judgement, paras 224 to 225.

¹⁰²⁴ As observed by Neha Jain: *At first glance, it seems scarcely possible that the entire edifice of international criminal law could have been constructed in the absence of a philosophical foundation for what it means to be responsible as a principle part to an international crime. The crisis witnessed today, with competing conceptions of perpetration responsibility that are borrowed from domestic legal systems, but without serious thought to their application to crimes that are distinct from the garden variety wrongs that a large proportion of domestic criminal law encounters, is a natural consequence of this lack of doctrinal sophistication. In some ways, this is a pervasive feature of international criminal law, and the conceptual confusion surrounding modes of responsibility is reflective of deeper issues, methodological as well as doctrinal, that international criminal lawyers have been remiss in addressing.* ‘The Control Theory of Perpetration in International Criminal Law,’ *Chicago Journal of International Law*, Vol. 12, No. 1, Article 8, 2011, pp. 159 to 200, at pp. 198 to 199.

¹⁰²⁵ Jain, N., ‘The Control Theory of Perpetration in International Criminal Law,’ *Chicago Journal of International Law*, Vol. 12, No. 1, Article 8, 2011, pp. 159 to 200, at p. 189.

¹⁰²⁶ ICTY, *Prosecutor v. Stakić* (IT-97-24-T), Judgement, 31 July 2003, para. 438.

ICTR, *Sylvestre Gacumbitsi v. The Prosecutor* (ICTR-2001-64-A), Judgement, 7 July 2006, Separate opinion of Judge Schomburg, especially paras 14 to 23.

Separate Opinion of Judge Shahabuddeen, paras 40 and 41, citing: Smith and Hogan, *Criminal Law*, 10th ed. (London, 2002), p. 160, para. 8 (speaking of “a joint criminal enterprise”); ICTY, *Prosecutor v. Tadić*, Appeal Judgement, para. 194; Court of Appeal of England and Wales, *Lewis v. Attorney General of Jamaica and Another* [2001] 2 AC 50 at 90, Lord Hoffmann, dissenting.

¹⁰²⁷ *Ibid.*

recognised that universality of support is not needed for the development of customary international law; generality approaching universality will do, depending on the particular situation. But in this case such generality of support is lacking: each of the two theories is supported by a considerable part of the world. That is not consistent with either theory being regarded as customary international law.¹⁰²⁸

593. JCE is a principle extrapolated from prominent common law systems, where the term denotes a fairly strict and confined form of co-perpetratorship.¹⁰²⁹ No matter the assertions of the ICTY Appeals Chamber in *Tadić*, JCE is historically linked to conspiracy and to the prosecution of criminal organisations.¹⁰³⁰ Notably, the proposed inclusion of conspiracy in the London Charter shocked the French delegation, who reportedly ‘viewed it as a barbarous legal mechanism unworthy of modern law.’¹⁰³¹ Though ultimately deployed at Nuremberg, conspiracy law remains unknown to civil jurisdictions. The appearance of joint purpose liability, where truly discernible to the exclusion of co-perpetration, in the post-World War II military tribunals held by the United Kingdom and the United States is both unsurprising and of little international legal significance.¹⁰³² *Tadić*’s reliance on the Nuremberg-era trials, many of which are of ‘dubious precedential value,’¹⁰³³ in order to attribute liability for broadly drawn JCEs is seriously ill-founded.¹⁰³⁴

¹⁰²⁸ Shahabuddeen, M., ‘Judicial Creativity and Joint Criminal Enterprise,’ in *Judicial Creativity at the International Criminal Tribunals*, eds Shane Darcy and Joseph Powderly, Oxford University Press, 2010, pp. 184 to 203, at pp. 202 and 188. See also: ICTR Appeals Chamber, *Sylvestre Gacumbitsi v. The Prosecutor* (ICTR-2001-64-A), Judgement, 7 July 2006, Separate Opinion of Judge Shahabuddeen, para. 51: *Since several states adhere to one theory while several other states adhere to the other theory, it is possible that the required state practice and opinio juris do not exist so as to make either theory part of customary international law.*

¹⁰²⁹ See, for example: *R v Swindall and Osborne* (1846) 2 Car. & K. 230 [; *R v Craig and Bentley* (1953) [Bentley was hanged for ‘mentally aiding’ Craig, who fired a gun in the course of an attempted burglary, by stating ‘let him have it’ in the presence of the police. The obvious ambiguity in the phrase led to Bentley’s posthumous pardon. Notably, Bentley’s potential liability for murder in this circumstance was legally reliant on the transfer of the requisite *mens rea* from the crime of armed burglary]; *R v Lovesey and Peterson* (1969) 53 Cr. App. R. 461 [gang members held responsible for death of jeweller because it was the result of agreed use of violence to overpower him during robbery].

¹⁰³⁰ Nuremberg Judgment. Danner, A. and Martinez, J., ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,’ 93(1) California Law Review 75 (2005), pp. 75 to 169, pp. 109 to 120.

¹⁰³¹ Bradley Smith, as quoted by Danner, A. and Martinez, J., ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,’ 93(1) California Law Review 75 (2005), pp. 75 to 169, p. 115.

¹⁰³² See also Ambos, K., ‘Joint Criminal Enterprise and Command Responsibility,’ *Journal of International Criminal Justice* 5 (2007), pp. 159 to 183, at p. 170: *The Tadić Appeals Chamber acknowledged the identity between co-perpetration and JCE I, at least terminologically, by calling JCE I ‘co-perpetratorship’ and comparing it with co-perpetration as invoked in the German and Italian post-World War II cases.* (Citing ICTY, *Tadić Appeal Judgement*, paras 198 and 201.)

¹⁰³³ Ohlin, J., ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,’ *Journal of International Criminal Justice* 5 (2007), pp. 69 to 90, p. 75.

¹⁰³⁴ Danner, A. and Martinez, J., ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,’ 93(1) California Law Review 75 (2005), pp. 75 to 169, p. 111.

594. As observed by the SCC, blanket extrapolation of domestic principles to the international sphere is unsound, not least because this risks over-broadening forms of liability that are tightly applied in domestic circumstances.¹⁰³⁵ Moreover, it is notable that English law has seen such ‘a progressive move away from the historic tendency of the common law to presume as a matter of law that the “natural and probable consequences of a man’s act were intended”’ that the legislature removed this presumption by statute in 1967.¹⁰³⁶ This tendency, of course, underpinned the attitudes of the World War II British tribunals relied upon by the *Tadić* Appeals Chamber. As noted *supra*, in resolutely overturning the principle relied upon in *Tadić* and narrowing the availability of secondary liability for a criminal act, the UK Supreme Court urged against the imputation of any liability that might be perceived to be ‘a form of guilt by association or of guilt by simple presence without more,’ observing that this ‘has no proper part in the common law.’¹⁰³⁷
595. Notably, the ICTR did not apply JCE until after its elucidation by the ICTY Appeals Chamber in *Tadić*, suggesting that this form of liability was not clearly foreseeable to the lawyers working in, or drafting the statutory instruments for, international tribunals before 1999.¹⁰³⁸ Of the other mixed tribunals, only the East Timorese Special Panel for Serious Crimes and the Special Court for Sierra Leone have applied the JCE doctrine.¹⁰³⁹ Unlike the ICTY and ICTR, the ICC operates under a statute that sets out modes of liability in great detail and deliberately avoids the broader definition provided by Article 7(1) of the ICTY Statute.¹⁰⁴⁰
596. The drafters of the Establishment Law had the benefit of awareness of the doctrine’s application at the ICTY and ICTR, as well as the preference for co-perpetration in the

¹⁰³⁵ Case 002/1, *Appeal Judgement*, 23 November 2016, F36, paras 805 and 806.

¹⁰³⁶ *R v Jogee; Ruddock v The Queen (Jamaica)* [2016] UKSC 8 and UKPC 7, 18 February 2016, *per* Lords Hughes and Toulson (Lord Neuberger, Lady Hale and Lord Thomas agreeing), para. 73. The statutory action referred to is the Criminal Justice Act 1967, s. 8.

¹⁰³⁷ *R v Jogee; Ruddock v The Queen (Jamaica)* [2016] UKSC 8 and UKPC 7, 18 February 2016, *per* Lords Hughes and Toulson (Lord Neuberger, Lady Hale and Lord Thomas agreeing), *in particular* paras 56, 65, 73, 77, 81, 83, 87 and 91.) Overturning *Chan Wing-siu v. The Queen* [1985] AC 168, which was relied upon in each of the relevant cases cited in the *Tadić* Appeal Judgement, para. 224, namely: *R v Hyde*; *R v Sussex*; *R v Collins* [1991] 1QB 134; *R v Anderson*; *R v Morris* [1966] 2 QB 110; *Hui Chi-ming v The Queen* [1992] 1 AC 34.

¹⁰³⁸ ICTR Appeals Chamber, *Sylvestre Gacumbitsi v. The Prosecutor* (ICTR-2001-64-A), Judgement, 7 July 2006, Separate Opinion of Judge Shahabuddeen, para. 37.

¹⁰³⁹ Ambos, K., ‘Joint Criminal Enterprise and Command Responsibility,’ *Journal of International Criminal Justice* 5 (2007), pp. 159 to 183, at p. 161. Danner, A. and Martinez, J., ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,’ 93(1) *California Law Review* 75 (2005), pp. 75 to 169, pp. 155 to 156.

¹⁰⁴⁰ ICC Statute, Article 25(3).

Rome Statute. They elected neither to include JCE nor to permit recourse to the jurisprudence of the other tribunals for anything other than procedural instruction. Perhaps they, like Judge Lindholm at the ICTY, considered that '[t]he concept or "doctrine" [of JCE] has caused confusion and a waste of time, and is [...] of no benefit to the work of the Tribunal or the development of international criminal law.'¹⁰⁴¹

vi. Conclusion

597. The application of JCE at the ECCC contradicts the express object and purpose of the UN-RGC Agreement and the Establishment Law, and therefore contravenes the express intention of the drafters. There is no lacuna in the individual criminal responsibility provisions at Article 29^{new} of the Establishment Law, and therefore there has been no need to seek amendment to the law pursuant to Article 2(3) of the UN-RGC Agreement. Moreover, the previous imports of JCE liability at the ECCC on the basis that it constituted, in its basic forms, a form of commission under customary international law in 1975 were manifestly unsound: at most, it may be said that JCE has been *recognised* in (not dictated by) international law. As developed by the *ad hoc* tribunals, the doctrine of JCE has indeed become the fearsome 'magic bullet,' placing very little burden on the prosecution to demonstrate real personal culpability and ultimately serving neither truth nor justice.¹⁰⁴² It has no place before the ECCC.

598. The modes of liability available under Article 29^{new}, and indeed the provisions of the 1956 Penal Code, contemplate the commission of collective crimes. These are more than adequate for the requisite assessment of personal responsibility for crimes and are applicable before this court. Application of the JCE before the ECCC is therefore unwarranted, impermissible, and *ultra vires*. The Defence submits, therefore, that the CIJs should exercise their inherent power to depart from the PTC JCE Decision and the ECCC jurisprudence it has engendered and desist from erroneously applying JCE in Case 004.

¹⁰⁴¹ ICTY, *Prosecutor v. Simić et al* (IT-95-9-T), Trial Judgement, 17 October 2003, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, para. 5.

¹⁰⁴² Ambos, K., 'Joint Criminal Enterprise and Command Responsibility,' *Journal of International Criminal Justice* 5 (2007), pp. 159 to 183, Abstract. *See also*: Danner, A. and Martinez, J., 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,' 93(1) *California Law Review* 75 (2005), pp. 75 to 169, p. 137: *JCE raises the spectre of guilt by association and provides ammunition to those who doubt the rigour and impartiality of the international forum. If conspiracy is the darling of the U.S. prosecutor's nursery, then it is difficult to see how JCE can amount to anything less than the nuclear bomb of the international prosecutor's arsenal.*

E. SUPERIOR RESPONSIBILITY

599. The ICP seeks Mr YIM Tith's indictment as a senior leader and one of those most responsible through his alleged superior responsibility.¹⁰⁴³ He fails, however, to expound the requisite indicators of effective control. Accordingly, the Defence provides the following assessment of the requirements of superior responsibility under international criminal law.

i. Status in Customary International Law in 1975 to 1979

600. Chambers of the ECCC have held that superior responsibility was recognised in customary international law relating to international armed conflicts by 1975 and accessible and foreseeable to the accused.¹⁰⁴⁴

601. None of the law or cases relied upon by the PTC in determining the customary status of superior responsibility in 1975, however, concerned non-international armed conflicts.¹⁰⁴⁵ The ICTY Appeals Chamber has found, without reference to any supporting information, that superior responsibility was recognised in customary international law in relation to non-international armed conflicts and in the absence of an armed conflict *by 1991*.¹⁰⁴⁶ In so holding, the ICTY Appeals Chamber acknowledged 'the fact that neither finding has been explicitly codified in an international agreement or treaty' nor 'been ruled on explicitly by an international judicial body.'¹⁰⁴⁷ It later held that the absence of reference to superior responsibility in Additional Protocol II to the Geneva Conventions did not undermine confidence in its status as a customary international norm of non-

¹⁰⁴³ ICP's Final Submission, D378/2, paras 1059 to 1067.

¹⁰⁴⁴ Case 002/01, *Judgement*, 7 August 2014, E313, paras 714, 718 and 719; Case 001, *Judgement*, 26 July 2010, E188, paras 476 to 477; D427/2/25, paras 190 to 230.

¹⁰⁴⁵ Case 002, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, D427/1/30, paras 421 to 457. *See also*: Case 002/01, *Judgement*, 7 August 2014, E313, paras 714, 718 and 719; Case 001, *Judgement*, 26 July 2010, E188, paras 476 to 477; D427/2/25, paras 190 to 230. ICTY Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura* (IT-01-47-AR72), *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, para. 29.

¹⁰⁴⁶ ICTY Trial Chamber, *Prosecutor v. Hadžihasanović and Kubura* (IT-01-47-PT), *Decision on Joint Challenge to Jurisdiction*, 12 November 2002, para. 93(v) and (vi). ICTY Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura* (IT-01-47-AR72), *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, para. 29.

¹⁰⁴⁷ ICTY Trial Chamber, *Prosecutor v. Hadžihasanović and Kubura* (IT-01-47-PT), *Decision on Joint Challenge to Jurisdiction*, 12 November 2002, para. 93.

international armed conflicts by 1977 as it might, essentially, have been omitted accidentally.¹⁰⁴⁸ This is unsound.

602. As recognised by the Trial Chamber in its Case 001 Judgement, the ICTY provides more extensive jurisprudence on the issue of superior responsibility than the other *ad hoc* tribunals precisely because these did not have jurisdiction over grave breaches of the Geneva Conventions due to the internal nature of the conflicts with which they were concerned.¹⁰⁴⁹
603. The ICTY Appeals Chamber made no reference to the *travaux préparatoire* to Additional Protocol II. It also failed to observe the clear distinction between detailed treaty provisions for international armed conflicts and scant provisions for non-international armed conflicts as delineated in the Geneva Conventions, and ignored the then-inherent connection of ‘war crimes’ to international armed conflict. Further, it did not demonstrate any recognition of the sensitivity regarding legislative incursions upon state sovereignty at a particularly troublesome period of the Cold War. Rewriting or ignoring history in order to retrospectively discern supposed smooth trajectories of developing norms of international law may be attractive, but it is not legally sound. The Defence submits that there is real doubt as to the status of superior responsibility in non-international armed conflicts, as well as in the absence of any armed conflict, in 1975. This doubt must be resolved in favour of the accused.¹⁰⁵⁰ Conclusively, without any expression in law, including in a 1977 treaty explicitly concerning non-international armed conflicts (Additional Protocol II), the principle of superior responsibility in non-international armed conflicts cannot be considered to have been sufficiently foreseeable to Mr YIM Tith in 1975.¹⁰⁵¹

¹⁰⁴⁸ ICTY Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura* (IT-01-47-AR72), Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 29: *The Appeals Chamber affirms the view of the Trial Chamber that command responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore, as the Trial Chamber considered, Articles 86 and 87 of Protocol I were in this respect only declaring the existing position, and not constituting it. In like manner, the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts. The Appeals Chamber considers that, at the time relevant to this indictment, it was, and that this conclusion is not overthrown by the play of factors responsible for the silence which, for any number of reasons, sometimes occurs over the codification of an accepted point in the drafting of an international instrument.*

¹⁰⁴⁹ Case 001, *Judgment*, 26 July 2010, E188, fn 748.

¹⁰⁵⁰ Cambodian Constitution, Article 38; Rule 21.

¹⁰⁵¹ ICCPR, Article 15.

604. The Defence notes that the CIJs have previously held that there existed an international armed conflict between Cambodia and Vietnam through the ECCC's temporal jurisdiction.¹⁰⁵² Charges characterised under superior responsibility must be linked to an international armed conflict; perpetration in the vicinity does not suffice.¹⁰⁵³

ii. Effective Control

605. Where the principle of superior responsibility is properly applicable, determining its true existence requires the strict assessment of the nature and degree of the relationship of responsibility.

606. The ICP has not adequately explicated the applicable law on command responsibility as a mode of criminal liability provided by Article 29 *new* of the Establishment Law. Specifically, the ICP has not fully recognised the requirements of the 'effective control' criterion that is crucial to determining the existence of a superior-subordinate relationship. The ICP thus fails to explicate the threshold requirement for establishing command responsibility.¹⁰⁵⁴ He states:

Regardless of whether an accused is a civilian or military superior,¹⁰⁵⁵ the superior-subordinate relationship between the accused and the perpetrator of the crime can exist either formally or informally, *i.e. de jure* or *de facto*.¹⁰⁵⁶ It must be shown that the superior had "effective control" over his subordinate,¹⁰⁵⁷ or in other words, the "material ability" to prevent or punish

¹⁰⁵² Case 002, *Closing Order*, 15 September 2010, D427, para. 1480.

¹⁰⁵³ ICTY Trial Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-T) ('Čelebići'), Judgement, 16 November 1998, paras 182 to 185, 193 to 195.

¹⁰⁵⁴ ICTY Appeals Chamber, *Prosecutor v. Blaškić* (IT-95-14-A), Judgement, 29 July 2004, para. 375; ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), Judgement, 20 February 2001, para. 256.

¹⁰⁵⁵ ICP's *Final Submission*, D378/2, para. 1061, citing: Case 001, *Trial Judgment*, 26 July 2010, E188, para. 477; Case 002, *Case 002/01 Trial Judgment*, E313, para. 720; Case 002, *Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order*, 15 February 2011, D427/2/15, paras 230, 232; Case 002, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, D427/1/30, paras 418, 459 and 460; Case 002, *Closing Order*, 15 September 2010, D427, paras 1319 and 1558; ICTY, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), 20 February 2001, para. 195; ICTR, *Kajelijeli v. The Prosecutor* (ICTR-98-44A-A), Judgement, 23 May 2005, para. 85; SCSL, *Brima et al.* (SCSL-2004-16-A), *Judgment*, 22 February 2008, para. 257.

¹⁰⁵⁶ Case 001, *Judgment*, 26 July 2010, E188, paras 477 and 540; ICTY, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), 20 February 2001, paras 193-197, 303; ICTY, *Prosecutor v. Halilović* (IT-01-48-A), Judgement, 16 October 2007, paras 59, 210; ICTR, *Prosecutor v. Nyiramasuhuko et al.* (ICTR-98-42-A), 14 December 2015, para. 995; SCSL, *Brima et al.* (SCSL-2004-16-A), *Judgment*, 22 February 2008, paras 257 and 289.

¹⁰⁵⁷ Establishment Law, Article 29*new*; Case 001, *Judgment*, 26 July 2010, E188, para. 540; Case 002/01, *Case 002/01 Trial Judgment*, E313, para. 720; ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), 20 February 2001, paras 196-197, 303; ICTY Trial Chamber, *Prosecutor v. Blaškić* (IT-95-14-T), Judgement, 3 March 2000, para. 69; ICTR Appeals Chamber, *Gacumbitsi v. The Prosecutor* (ICTR-2001-64-A), Judgement, 7 July 2006, paras 143 to 144; SCSL, *Prosecutor v. Fofana & Kondewa* (SCSL-04-14-A), Judgement, 28 May 2008, para. 175.

the subordinate's commission of a crime.¹⁰⁵⁸ The exercise of effective control by one commander does not necessarily exclude effective control being exercised by another.¹⁰⁵⁹

The test of effective control is the same for both military and civilian superiors.¹⁰⁶⁰ When superior responsibility is applied to a civilian, there is no requirement that the control exercised by him be of the same nature as that exercised by a military commander; it need only be of the same degree.¹⁰⁶¹

607. In his Closing Order in Case 004/02, the ICIJ held the following:

Superior (or command) responsibility is a mode of criminal responsibility by culpable omission pursuant to which a military or civilian superior may be held criminally responsible for having failed to prevent and/or punish crimes committed by subordinates.¹⁰⁶²

The first requirement is the existence of a superior-subordinate relationship,¹⁰⁶³ which can be either *de jure* or *de facto*.¹⁰⁶⁴ Further, superior responsibility applies to both military and civilian superiors.¹⁰⁶⁵ The superior, whether military or civilian, must have had effective control, which is the material ability to prevent and/or punish the crimes of the subordinate-perpetrator.¹⁰⁶⁶ Finally, the superior must have failed to take the necessary and reasonable measures to prevent the commission of such crime or punish the perpetrator.¹⁰⁶⁷ According to the jurisprudence of the *ad hoc* tribunals, it

¹⁰⁵⁸ Case 001, *Judgment*, 26 July 2010, E188, para. 540; Case 002, *Case 002/01 Judgment*, 7 August 2014, E313, para. 715; ICTY, *Prosecutor v. Popović* (IT-05-88-A), *Judgment*, 30 January 2015, para. 1857; ICTR, *Prosecutor v. Nahimana* (ICTR-99-52-A), 28 November 2007, para. 625; SCSL, *Brima et al.* (SCSL-2004-16-A), *Judgment*, 22 February 2008, para. 257.

¹⁰⁵⁹ ICTY, *Prosecutor v. Prlić et al.* (IT-04-74-A), *Judgment*, 29 November 2017, para. 1859; ICTY, *Prosecutor v. Popović* (IT-05-88-A), *Judgment*, 30 January 2015, para. 1892 (considering that two parallel chains of command existed, see *Popović*, paras 1890 and 1891).

¹⁰⁶⁰ ICP's *Final Submission*, D378/2, para. 1061, citing: Case 002, *Case 002/01 Trial Judgment*, E313, para. 720; ICTY, *Prosecutor v. Aleksovski* (IT-95-14/1-A), *Judgment*, 24 March 2000, para. 76; ICTR, *Prosecutor v. Ignace Bagilishema* (ICTR-95-1A-A), *Judgment*, 3 July 2002, para. 50; SCSL, *Brima et al.* (SCSL-2004-16-A), *Judgment*, 22 February 2008, para. 257.

¹⁰⁶¹ ICP's *Final Submission*, D378/2, para. 1061, citing: ICTY, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('*Čelebići*'), 20 February 2001, paras 197 to 198; ICTR, *Prosecutor v. Bagilishema* (ICTR-95-1A-A), *Judgment*, 3 July 2002, paras 50, 52 and 55; ICTR, *Kajelijeli v. The Prosecutor* (ICTR-98-44A-A), *Judgment*, 23 May 2005, para. 87; ICTR, *Prosecutor v. Nahimana* (ICTR-99-52-A), 28 November 2007, paras 605 and 785.

¹⁰⁶² Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 104.

¹⁰⁶³ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 105, citing: Case 002, *Judgment*, 7 August 2014, E313, para. 715; Case 001, *Judgment*, 26 July 2010, E188, para. 538.

¹⁰⁶⁴ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 105, citing: Case 001, *Judgment*, 26 July 2010, para. 540; ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('*Čelebići*'), *Judgment*, 20 February 2001, paras 191 to 192; ICTY Trial Chamber, *Prosecutor v. Popović et al* (IT-05-88-T), *Judgment*, 10 June 2010, para. 1038.

¹⁰⁶⁵ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 105, citing: Case 002, *Judgment*, 7 August 2014, E313, para. 714; Case 001, *Judgment*, 26 July 2010, E188, paras 476 to 477.

¹⁰⁶⁶ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 105, citing: Case 002, *Judgment*, 7 August 2014, E313, para. 715; Case 001, *Judgment*, 26 July 2010, E188, paras 540 to 542.

¹⁰⁶⁷ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 105, citing: Case 002, *Judgment*, 7 August 2014, E313, para. 716; Case 001, *Judgment*, 26 July 2010, E188, paras 545 to 547.

is not necessary to prove a causal link between a superior's failure to prevent the subordinate's crimes and the occurrence of these crimes.¹⁰⁶⁸

In addition, to incur criminal responsibility the superior must have known or had reason to know, by being in possession of information sufficiently alarming to justify further enquiry, that a crime was about to be, or had been, committed by one or more of his or her subordinates.¹⁰⁶⁹ The superior need not know the precise identity of the subordinate-perpetrator, however their existence must be proved.¹⁰⁷⁰

The failure to prevent and failure to punish are legal and factually distinct modes of liability representing two distinct legal obligations. A superior may be held responsible for both failures.¹⁰⁷¹

Superiors may incur responsibility for crimes committed by subordinates who were not formally under their *direct* control, provided the other requirements of superior responsibility are met.¹⁰⁷²

The *mens rea* required for superiors to be held responsible for genocide is that the superior knew or had reason to know that their subordinates (1) were about to commit or had committed genocide, and (2) possessed the requisite specific intent.¹⁰⁷³

608. Regarding effective control, the ICIJ relied upon the previous findings of the Trial Chamber in Cases 001 and 002/1, outlined below.

609. In Case 001, the Trial Chamber found the following:

Formal designation as a commander or a superior is not required in order to trigger superior responsibility: such responsibility can arise by virtue of a superior's power, whether in law or in fact, over those who committed the crime.¹⁰⁷⁴ In order to demonstrate the existence of a superior-subordinate relationship, it must be established that the accused exercised effective

¹⁰⁶⁸ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 105, citing: ICTY Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura* (IT-01-47-A), Judgement, 22 April 2008, para. 40.

¹⁰⁶⁹ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 106, citing: Case 002, *Judgement*, 7 August 2014, E313, para. 715; Case 001, *Judgement*, 26 July 2010, E188, paras 543 to 544.

¹⁰⁷⁰ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 106, citing: ICTY, *Prosecutor v. Blagojević and Jokić* (IT-02-60-A), Judgement, 9 May 2007, para. 287; ICTY, *Prosecutor v. Orić* (IT-03-68-A), Judgement, 3 July 2008, para. 35.

¹⁰⁷¹ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 107, citing: Case 001, *Judgement*, 26 July 2010, E188, paras 545 to 547; ICTY Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura* (IT-01-47-A), Judgement, 22 April 2008, paras 259 to 260.

¹⁰⁷² Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 108, citing: Case 002, *Judgement*, 7 August 2014, E313, para. 721; Case 001, *Judgement*, 26 July 2010, E188, para. 542; ICTY Appeals Chamber, *Prosecutor v. Blaškić* (IT-95-14-A), Judgement, 29 July 2004, para. 67; ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('*Čelebići*'), Judgement, 20 February 2001, para. 252.

¹⁰⁷³ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 109, citing: ICTY Trial Chamber, *Prosecutor v. Blagojević and Jokić* (IT-02-60-T), Judgement, 17 January 2005, paras 682 and 686; ICTY Trial Chamber, *Prosecutor v. Brđanin* (IT-99-36-T), Judgement, 1 September 2004, paras 715-721.

¹⁰⁷⁴ Case 001, Trial Judgment, 26 July 2010, E188, para. 540, citing: ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('*Čelebići*'), 20 February 2001, paras 191-192.

control over the subordinate.¹⁰⁷⁵ In other words, the accused must have had the material ability to prevent or punish the subordinate's commission of the crime.¹⁰⁷⁶

Factors that would demonstrate that an accused exercised effective control over a subordinate include: the nature of the accused's position, including his or her position within the military or political structure; the procedure for appoint and the actual tasks performed;¹⁰⁷⁷ the accused capacity to issue orders and whether or not such orders are actually executed;¹⁰⁷⁸ the fact that subordinates show greater discipline in the presence of the accused;¹⁰⁷⁹ the authority to invoke disciplinary measures;¹⁰⁸⁰ and the authority to release or transfer prisoners.¹⁰⁸¹

Further, superior responsibility may ensue on the basis of both direct and indirect relationships of subordination. Every person in the chain of command who exercises effective control over subordinates is responsible for the crimes of those subordinates, provided that the other requirements of superior responsibility are met.¹⁰⁸²

610. In Case 002/1, the Trial Chamber found that:

Superior responsibility, applicable to both military and civilian superiors, was recognised in customary international law by 1975. Considering the senior positions of the Accused and the fact that superior responsibility was recognised in customary international law by 1975, the Chamber considers that this mode of liability was accessible and foreseeable to the Accused.

For a superior to be held responsible for the criminal conduct of his subordinates, there must first be a superior-subordinate relationship between an accused and the person who committed the crime. The superior must have exercised effective control over the perpetrator, in the sense of possessing the material ability to prevent or punish the crimes. Second, the superior must have known, or have had reason to know, that a crime was about to be or had been committed by his subordinate. The superior must have knowledge that

¹⁰⁷⁵ Case 001, *Judgement*, 26 July 2010, E188, para. 540, citing: Establishment Law, Article 29; ICTR Appeals Chamber, *Prosecutor v. Bagilishema* (ICTR-95-1A-A), *Judgement*, 3 July 2002, para. 61; ICTY Trial Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-T) ('Čelebići'), *Judgement*, 16 November 1998, paras 364 to 378.

¹⁰⁷⁶ Case 001, *Judgement*, 26 July 2010, E188, para. 540, citing: ICTR Appeals Chamber, *Prosecutor v. Ignace Bagilishema* (ICTR-95-1A-A), *Judgement*, 3 July 2002, para. 61; ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), 20 February 2001, para. 198; SCSL Appeals Chamber, *Brima et al.* (SCSL-2004-16-A), *Judgment*, 22 February 2008, para. 257.

¹⁰⁷⁷ Case 001, *Judgement*, 26 July 2010, E188, para. 541, citing: ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), *Judgement*, 16 October 2007, para. 66.

¹⁰⁷⁸ Case 001, *Judgement*, 26 July 2010, E188, para. 541, citing: ICTY Appeals Chamber, *Prosecutor v. Strugar* (IT-01-42-A), *Judgement*, 17 July 2008, paras 253 to 254.

¹⁰⁷⁹ Case 001, *Judgement*, 26 July 2010, E188, para. 541, citing: ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), 20 February 2001, para. 206.

¹⁰⁸⁰ Case 001, Trial Judgment, 26 July 2010, E188, para. 541, citing: ICTY Appeals Chamber, *Prosecutor v. Strugar* (IT-01-42-A), *Judgement*, 17 July 2008, paras 260 to 262.

¹⁰⁸¹ Case 001, *Judgement*, 26 July 2010, E188, para. 541, citing: ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), 20 February 2001, para. 206.

¹⁰⁸² Case 001, *Judgement*, 26 July 2010, E188, para. 542, citing: ICTY Appeals Chamber, *Prosecutor v. Blaškić* (IT-95-14-A), *Judgement*, 29 July 2004, para. 67; ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), 20 February 2001, para. 252.

his subordinate committed a crime and not simply knowledge of the occurrence of a crime. A superior has reason to know that a crime has been, or was about to be, committed where he possessed information sufficiently alarming to justify further enquiry.

Finally, a superior must have failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator. Necessary measures are those appropriate for a superior to discharge his obligation, showing a genuine effort to prevent or punish. Reasonable measures are those reasonably falling within the material power of a superior. Necessary and reasonable measures must be considered on a case-by-case basis. The failure to prevent and the failure to punish arise at different points in time: a superior's responsibility to prevent a crime arises prior to its commission, while the responsibility to punish a perpetrator arises after the commission of a crime.¹⁰⁸³

Indicia of Effective Control

The critical criterion of effective control is 'the actual possession, or non-possession, of powers of control over the actions of subordinates.'¹⁰⁸⁴ Should the CIJs determine that superior responsibility was foreseeable to Mr YIM Tith in 1975, they must, in order to indict, be satisfied that he indeed held effective control over the criminal actions of subordinates. The PTC and CIJs relied heavily on the jurisprudence of the ad hoc tribunals in their analysis of superior responsibility. Here, the Defence explicates the factors to be considered in order to determine whether the threshold of effective control has been met in order to find superior responsibility:

- (i) Accused's position: The accused's actual position must be assessed.¹⁰⁸⁵ This includes consideration of the accused's official position, his capacity to issue orders, the procedure for appointment, the position within the military or political structure, and the actual tasks he performed.¹⁰⁸⁶
- (ii) Degree of control, considered in full context: Evidence must be assessed in light of the rest of the evidence in order to ascertain the degree of control over the direct

¹⁰⁸³ Case 002/01, *Judgement*, 7 August 2014, E313, paras 714 to 716.

¹⁰⁸⁴ ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), *Judgement*, 20 February 2001, paras 192 to 194; ICTY Trial Chamber, *Prosecutor v. Kunarac et al.* (IT-96-23-T and IT-96-23/1-T), *Judgment*, 22 February 2001, para. 396; ICTY Trial Chamber, *Prosecutor v. Blaškić* (IT-95-14-T), *Judgement*, 3 March 2000, paras 300 to 303, 335; ICTY Trial Chamber, *Prosecutor v. Aleksovski* (IT-95-14/1/T), *Judgment*, 25 June 1999, para. 76.

¹⁰⁸⁵ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), *Judgment*, 26 February 2001, para. 418; ICTY Trial Chamber, *Prosecutor v. Delić* (IT-04-83-T), *Judgement*, 15 September 2008, para. 62; ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), *Judgement*, 16 October 2007, paras 58, 68, 70, 139.

¹⁰⁸⁶ *Ibid.*

perpetrators of the alleged crime.¹⁰⁸⁷ This includes the accused's ability to appoint and dismiss subordinates.

- (iii) Formal structure is insufficient: 'Only those superiors, either *de jure* or *de facto*, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of subordinates may incur criminal responsibility.'¹⁰⁸⁸ Since effective control can exist outside formal structures, it cannot be inferred solely on the basis of a formal structure.¹⁰⁸⁹
- (iv) The degree of *de facto* authority must be equivalent to *de jure* authority: 'Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates as a *de jure* superior in order to be held criminally responsible for their acts.'¹⁰⁹⁰
- (v) Material ability to prevent and punish: As recognised by the ICP, effective control demands the material ability to prevent and punish criminal behaviour.¹⁰⁹¹ As regards the material ability to punish, the ICTY Appeals Chamber held in *Halilović*:

The material ability to punish and its corresponding duty to punish can only amount to effective control over the perpetrators if they are premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators. In this regard, the ability to exercise effective control in the sense of a material power to prevent or punish necessitates a pre-existing relationship of subordination, hierarchy and chains of command. Of course, the concepts of subordination, hierarchy and chains of command need not be established in the sense of formal organisational structures so long as the fundamental requirement of effective control over the subordinate, in the sense of material ability to prevent or punish criminal conduct, is satisfied.¹⁰⁹²

¹⁰⁸⁷ ICTY, *Prosecutor v. Halilović* (IT-01-48-A), Judgement, 16 October 2007, paras 68, 70, 139.

¹⁰⁸⁸ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 416. See also: ICTR Trial Chamber, *Prosecutor v. Musema* (ICTR-96-13-A), Judgement, 27 January 2000, para. 141.

¹⁰⁸⁹ ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('*Čelebići*'), Judgement, 20 February 2001, paras 193, 248 to 268.

¹⁰⁹⁰ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 416; ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('*Čelebići*'), Judgement, 20 February 2001, para. 266.

¹⁰⁹¹ ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('*Čelebići*'), Judgement, 20 February 2001, para. 256; ICTY Trial Chamber, *Prosecutor v. Aleksovski* (IT-95-14/1-T), Judgment, 25 June 1999, para. 108.

¹⁰⁹² ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), Judgement, 16 October 2007, para. 59.

This demands consideration of the accused's capacity to apply disciplinary measures, including the authority to promote, demote, and remove subordinates.¹⁰⁹³

- (vi) Reporting to competent authorities indicative of only limited control: Reporting to competent authorities the criminal acts of subordinates for the taking of proper measures is indicative of the superior's limited ability to punish, which indicates only limited control:

If reporting criminal acts of subordinates to appropriate authorities is evidence of the material ability to punish them in the circumstances of a certain case, albeit only to a very limited degree, the Appellant had that limited ability in this case. That limited ability determines that the Appellant had limited effective control. His command responsibility is, consequently, an issue.¹⁰⁹⁴

- (vii) Actual tasks performed: It is necessary to analyse the actual tasks performed by the accused.¹⁰⁹⁵

- (viii) Capacity to issue orders that are actually followed: It is necessary to analyse the reality of the alleged authority and whether ordered tasks were in fact performed.¹⁰⁹⁶ In other words, proof is required that the superior was not only able to issue orders but that his orders were actually followed.¹⁰⁹⁷ The ICTY Trial Chamber provided detailed guidance on this in *Kordić and Čerkez*:

The capacity to sign orders will be indicative of some authority. The authority to issue orders, however, may be assumed *de facto*. Therefore[,] in order to make a proper determination of the status and actual powers of control of a superior, it will be necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon. For instance[,] in the *Ministries* case, the court found that the mere appearance of an official's name on a distribution list attached to an official document could simply provide evidence that it was intended that he be provided with the relevant information, and not that "those whose names appears on such distribution lists have responsibility for, or power and right of decision with respect to the subject matter of such document". Similarly, direct signing of release orders would demonstrate authority to

¹⁰⁹³ ICTY Trial Chamber, *Prosecutor v. Delić* (IT-04-83-T), Judgement, 15 September 2008, para. 62; ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ("Čelebići"), Judgement, 20 February 2001, para. 767.

¹⁰⁹⁴ ICTY Appeals Chamber, *Prosecutor v. Blaškić* (IT-95-14-A), Judgement, 29 July 2004, para. 499.

¹⁰⁹⁵ ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), Judgement, 16 October 2007, para. 66; ICTY Trial Chamber, *Prosecutor v. Perišić* (IT-04-81-T), Judgement, 6 September 2011, para. 148.

¹⁰⁹⁶ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, paras 419 to 424.

¹⁰⁹⁷ ICTY Trial Chamber, *Prosecutor v. Popović et al* (IT-05-88-T), Judgement, 10 June 2010, para. 1038; ICTY Appeals Chamber, *Prosecutor v. Blaškić* (IT-95-14-A), Judgement, 29 July 2004, para. 69; ICTY Appeals Chamber, *Prosecutor v. Strugar* (IT-01-42-A), Judgement, 17 July 2008, paras 254 and 256.

release. An accused's signature on such a document, however, may not necessarily be indicative of actual authority to release as it may be purely formal or merely aimed at implementing a decision made by others.¹⁰⁹⁸

In order to determine the formal powers and duties exercised by political and military superiors an analysis of the formal procedures for appointment to civilian and military offices (through national legislation and appointment orders for instance) would be a starting point. This will not be sufficient, as it must be shown that the powers are "real" for criminal responsibility to be attached to them.¹⁰⁹⁹

A superior status, when not clearly spelled out in an appointment order, may be deduced [through] an analysis of the actual tasks performed by the accused in question. [...] Evidence that an accused is perceived as having a high public profile, manifested through public appearances and statements, and thus as exercising some authority, may be relevant to the overall assessment of his actual authority although not sufficient in itself to establish it, without evidence of the accused's overall behaviour towards subordinates and his duties. Similarly, the participation of an accused in high-profile international negotiations would not be necessary in itself to demonstrate superior authority. While in the case of military commanders, the evidence of external observers such as international monitoring or humanitarian personnel may be relied upon, in the case of civilian leaders[,] evidence of perceived authority may not be sufficient, as it may be indicative of mere powers of influence in the absence of a subordinate structure.¹¹⁰⁰

It is necessary to consider the accused's power to order combat actions and to re-subordinate units, as well as the availability of material and human resources.¹¹⁰¹

- (ix) Substantial influence does not amount to effective control: 'Effective control' cannot be equated with, nor substituted by, 'substantial influence.'¹¹⁰² Only proof of effective control suffices for criminal liability:

While civilians occupying positions of authority in relation to a portion of a territory may be held responsible under the principle of superior

¹⁰⁹⁸ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 421, citing: ICTY Trial Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-T) ('Čelebići'), Judgment, 16 November 1998, para. 672; USA v. von Weizsaecker (*Ministries Case*), 14 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10 (1952), p. 693.

¹⁰⁹⁹ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 422.

¹¹⁰⁰ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 424.

¹¹⁰¹ ICTY Trial Chamber, *Prosecutor v. Perišić* (IT-04-81-T), Judgment, 6 September 2011, para. 148; ICTY Trial Chamber, *Prosecutor v. Strugar* (IT-01-42-T), Judgment, 31 January 2005, paras 393 to 397.

¹¹⁰² ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), Judgment, 20 February 2001, paras 266 and 303. See also: ICTY Trial Chamber, *Prosecutor v. Krnojelac* (IT-97-25-T), Judgment, Case No. 15 March 2002, para. 93; ICTY Trial Chamber, *Prosecutor v. Stakić*, (IT-97-24-T), Judgment, 31 July 2003, para. 459; ICTR Trial Chamber, *Prosecutor v. Karera* (ICTR-01-74-T), Judgment, 7 December 2007, para. 564.

responsibility, they will incur criminal responsibility only if they are found to possess the necessary powers of control over the actual perpetrators.¹¹⁰³

A government official will only be held liable under the doctrine of command responsibility if he is part of a superior-subordinate relationship, even if that relationship is an indirect one. Even though arguably effective control may be achieved through substantial influence, a demonstration of such powers of influence will not be sufficient in the absence of a showing that he had effective control over subordinates, in the sense of possessing the material ability to prevent subordinate offences or punish subordinate offenders after the commission of the crimes. A showing that the official merely was generally an influential person will not be sufficient.¹¹⁰⁴

- (x) Control must be effective at the time the crimes were committed: A superior cannot incur responsibility for crimes committed by a subordinate before he assumed the position as superior over the subordinate in question.¹¹⁰⁵ It must be proven that he had effective control at the time the offence was committed.¹¹⁰⁶

iii. Causal Link Between Failure to Prevent and Commission of Crimes

611. The ICIJ has held that ‘it is not necessary to prove a causal link between a superior’s failure to prevent the subordinate’s crimes and the occurrence of these crimes.’¹¹⁰⁷ The Defence contends that it was at the material time indeed necessary to prove a causal link between a superior’s failure to prevent the subordinate’s crimes and the occurrence of these crimes.

612. The Defence submits that the existence of a causation requirement in customary international law in 1975 is supported by the wording of Article 86(1) of Additional Protocol I, which states:

The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol *which result from* a failure to act when under a duty to do so.¹¹⁰⁸

¹¹⁰³ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 415.

¹¹⁰⁴ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 416.

¹¹⁰⁵ ICTY Trial Chamber, *Prosecutor v. Popović et al* (IT-05-88-T), Judgement, 10 June 2010, para. 1039.

¹¹⁰⁶ ICTY Trial Chamber, *Prosecutor v. Kunarac et al.* (IT-96-23-T and IT-96-23/1-T), Judgment, 22 February 2001, para. 399; ICTR Trial Chamber, *Prosecutor v. Karera* (ICTR-01-74-T), Judgement, 7 December 2007, para. 564.

¹¹⁰⁷ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 105, citing: ICTY Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura* (IT-01-47-A), Judgement, 22 April 2008, para. 40.

¹¹⁰⁸ Protocol I Additional to the Geneva Conventions etc., Article 86(1). [Emphasis added.]

613. Notably, this articulation is mirrored in Article 28 of the Rome Statute,¹¹⁰⁹ and there is, whatever may have been held at the *ad hoc* tribunals, very recent international judicial determination that the causation requirement remains a constituent of the customary international norm even today.¹¹¹⁰ As recognised by ICC Appeals Chamber Judges Monageng and Hofmański, ‘holding a commander “criminal responsible for crimes within the jurisdiction of the Court” committed by subordinates is only justified and indeed justifiable if there is a personal nexus between the crime and the superior’ since ‘it would be irreconcilable with basic tenets of criminal law if a superior were to be held responsible for crimes to which he or she has no connection.’¹¹¹¹
614. The Defence notes the reasoning of the ICTY Trial Chamber in *Halilović*, which provided the basis for the bare ICTY Appeals Chamber’s finding relied on by the ICIJ.¹¹¹² While appreciating the logic of this finding, it postdates and transforms the formulation of the normative principle of superior responsibility and was thus not sufficiently foreseeable to the accused at the material time.¹¹¹³ As such, it cannot be applied.

¹¹⁰⁹ ICC Statute, Article 28: *In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

¹¹¹⁰ ICC, *The Prosecutor v. Bemba*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgement Pursuant to Article 74 of the Statute,’ Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, 8 June 2018, ICC-01/05-01/08-3636-Anx1-Red, para. 334; Judgment Pursuant to Article 74 of the Statute, Separate Opinion of Judge Sylvia Steiner, 21 March 2016, ICC-01/05-01/08-3343, paras 6 to 8, citing: The ICRC, *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987) p. 1010, para. 3538.

¹¹¹¹ ICC, *The Prosecutor v. Bemba*, Judgment on the Appeal Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgement Pursuant to Article 74 of the Statute,’ Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, 8 June 2018, ICC-01/05-01/08-3636-Anx1-Red, para. 334.

¹¹¹² ICTY Trial Chamber, *Prosecutor v. Halilović* (IT-01-48-T), Judgment, 16 November 2005, para. 78. See also: Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 105, citing: ICTY Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura* (IT-01-47-A), Judgment, 22 April 2008, para. 40.

¹¹¹³ ICCPR, Article 15. This logic precluded the ECCC from applying ‘JCE III.’ See *supra*, para. 536.

iv. Applicability to Crimes of Specific Intent

615. The ICIJ has previously noted that '[t]he *mens rea* required for superiors to be held responsible for genocide is that the superior knew or had reason to know that their subordinates (1) were about to commit or had committed genocide, and (2) possessed the requisite specific intent.'¹¹¹⁴ The Defence submits that this principle must logically be applied to all crimes of specific intent, not merely to genocide, namely to persecution as a crime against humanity.

v. Conclusion

616. The Defence submits that the principle of superior responsibility was not sufficiently foreseeable to Mr YIM Tith in the period under the temporal jurisdiction of the ECCC and is thus inapplicable, at least as regards circumstances not amounting to international armed conflict. Should the CIJs determine that it was foreseeable and applicable, in order to indict Mr YIM Tith under superior responsibility for crimes to which it may be attached, they must be satisfied that sufficient evidence exists to prove that he had effective control. Indicators of 'effective control' are an evidentiary matter.¹¹¹⁵ In sum, and considering the jurisprudence discussed above, the positive and negative indicators of effective control include:

- (i) The accused's position with the military or political structure.¹¹¹⁶
- (ii) Degree of control, taken in full context, over direct perpetrators, including ability to appoint and dismiss subordinates.¹¹¹⁷
- (iii) Formal structure is insufficient.¹¹¹⁸

¹¹¹⁴ Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 109, citing: ICTY Trial Chamber, *Prosecutor v. Blagojević and Jokić* (IT-02-60-T), Judgement, 17 January 2005, paras 682 and 686; ICTY Trial Chamber, *Prosecutor v. Brdanin* (IT-99-36-T), Judgement, 1 September 2004, paras 715-721.

¹¹¹⁵ *Blaškić Appeals Judgement*, para. 69; *Orić Appeals Judgement*, para. 20.

¹¹¹⁶ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 418; ICTY Trial Chamber, *Prosecutor v. Delić* (IT-04-83-T), Judgement, 15 September 2008, para. 62; ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), Judgement, 16 October 2007, para. 58.

¹¹¹⁷ ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), Judgement, 16 October 2007, paras 68, 70, 139.

¹¹¹⁸ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 416; ICTR Trial Chamber, *Prosecutor v. Musema* (ICTR-96-13-A), Judgement, 27 January 2000, para. 141; ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('*Čelebići*'), Judgement, 20 February 2001, paras 193, 248 to 268.

- (iv) *De facto* authority must be commensurate with *de jure*.¹¹¹⁹
- (v) Material ability to prevent and punish.¹¹²⁰
- (vi) Reporting to competent authorities indicative of only limited control.¹¹²¹
- (vii) Actual tasks performed.¹¹²²
- (viii) Capacity to issue orders that are actually followed.¹¹²³
- (ix) Substantial influence does not amount to effective control.¹¹²⁴
- (x) Control must be effective at the time crimes were committed.¹¹²⁵

617. Further, as regards his ability to prevent the commission of crimes, and in order to abide by the principles of legality and culpability, the CIJs must be satisfied that there existed a causal link between Mr YIM Tith's alleged failure to prevent the commission of crimes and their commission.

¹¹¹⁹ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 416; ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), Judgment, 20 February 2001, para. 266.

¹¹²⁰ ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), Judgment, 20 February 2001, paras 256, 767; ICTY Trial Chamber, *Prosecutor v. Aleksovski* (IT-95-14/1-T), Judgment, 25 June 1999, para. 108; ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), Judgment, 16 October 2007, para. 59; ICTY Trial Chamber, *Prosecutor v. Delić* (IT-04-83-T), Judgment, 15 September 2008, para. 62.

¹¹²¹ ICTY Appeals Chamber, *Prosecutor v. Blaškić* (IT-95-14-A), Judgment, 29 July 2004, para. 499.

¹¹²² ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), Judgment, 16 October 2007, para. 66; ICTY Trial Chamber, *Prosecutor v. Perišić* (IT-04-81-T), Judgment, 6 September 2011, para. 148.

¹¹²³ ICTY Trial Chamber, *Prosecutor v. Popović et al* (IT-05-88-T), Judgment, 10 June 2010, para. 1038; ICTY Appeals Chamber, *Prosecutor v. Blaškić* (IT-95-14-A), Judgment, 29 July 2004, para. 69; ICTY Appeals Chamber, *Prosecutor v. Strugar* (IT-01-42-A), Judgment, 17 July 2008, paras 254 and 256; ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, paras 421, 422 and 424, citing: ICTY Trial Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-T) ('Čelebići'), Judgment, 16 November 1998, para. 672; USA v. von Weizsaecker (*Ministries Case*), 14 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10 (1952), p. 693.

¹¹²⁴ ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), Judgment, 20 February 2001, paras 266 and 303. See also: ICTY Trial Chamber, *Prosecutor v. Krnojelac* (IT-97-25-T), Judgment, Case No. 15 March 2002, para. 93; ICTY Trial Chamber, *Prosecutor v. Stakić*, (IT-97-24-T), Judgment, 31 July 2003, para. 459; ICTR Trial Chamber, *Prosecutor v. Karera* (ICTR-01-74-T), Judgment, 7 December 2007, para. 564; ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, paras 415 and 416.

¹¹²⁵ ICTY Trial Chamber, *Prosecutor v. Popović et al* (IT-05-88-T), Judgment, 10 June 2010, para. 1039; ICTY Trial Chamber, *Prosecutor v. Kunarac et al.* (IT-96-23-T and IT-96-23/1-T), Judgment, 22 February 2001, para. 399; ICTR Trial Chamber, *Prosecutor v. Karera* (ICTR-01-74-T), Judgment, 7 December 2007, para. 564.

F. GENOCIDE

i. The ICP Erred in Suggesting that the Khmer Krom are Part of the Vietnamese National Group

618. Despite the clear charge of ‘genocide against the Khmer Krom,’¹¹²⁶ the ICP requests that Mr YIM Tith be indicted for ‘the crime of genocide with intent to destroy the Vietnamese as a national group (particularly the Khmer Krom) in Cambodia.’¹¹²⁷ Notwithstanding that Mr YIM Tith cannot be indicted for crimes for which he has not been charged,¹¹²⁸ the ICP has erred by suggesting ‘that for the purposes of the definition of protected groups in the Genocide Convention and jurisprudence defining these terms, the Khmer Krom were part of the Vietnamese national group in Cambodia.’¹¹²⁹ The suggestion that the Khmer Krom were subsumed by the Vietnamese national group has no basis in law or in fact. In so doing, the ICP proceeds from the premise that there was a ‘plan to destroy the Vietnamese national group,’ and works backwards to contrive a ‘group’ which best suits his case theory.¹¹³⁰

(a) Principles Relevant to the Determination of a Protected Group

619. The criminalisation of genocide seeks to safeguard the continued existence of certain human groups.¹¹³¹ It is the *group*, as defined, that may be victim to the crime of genocide and that is protected as such.¹¹³² It has been resoundingly established in relevant jurisprudence, and accepted by the ICP,¹¹³³ that where more than one distinct group may have been targeted, the elements of genocide must be considered in relation to each group separately.¹¹³⁴ The ICTY Trial Chamber in *Stakić* discussed the material effect of this requirement, holding that:

¹¹²⁶ *Notification of Amended Charges*, D350.1, para. 7.

¹¹²⁷ *ICP's Final Submission*, D378/2, para. 822.

¹¹²⁸ *Supra*, paras 447 to 463.

¹¹²⁹ *ICP's Final Submission*, D378/2, para. 822.

¹¹³⁰ *ICP's Final Submission*, D378/2, para. 822.

¹¹³¹ *See, for example*: Cassese, A., *International Criminal Law*, Oxford, 2008, p. 127.

¹¹³² *See, for example*: Resolution 96(1) adopted by the General Assembly at the 55th plenary meeting on 11 December 1946, UN Doc. A/Res/1/96, p. 188-189: ‘Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such a denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups [...]’.

¹¹³³ *ICP's Final Submission*, D378/2, para. 917. This principle was affirmed by the ICIJ in Case 004/02, *Closing Order (Indictment)*, D360, para. 89.

¹¹³⁴ *See, for example*: ICTY Appeals Chamber, *Prosecutor v. Milomir Stakić* (IT-97-24-A), Judgement, 22 March 2006, para. 28; ICTY Trial Chamber II, *Prosecutor v. Radoslav Brđanin* (IT-99-36-T) Judgement, 1 September

In cases where more than one group is targeted, it is not appropriate to define that group in general terms [...] *a targeted group may be distinguishable on more than one basis* and the elements of genocide must be considered in relation to each group separately.¹¹³⁵

620. The threshold for assimilating two or more discernible groups is high. Unless the evidence can demonstrate that the Khmer Krom were *indistinguishable* as a human group from the Vietnamese national group, each of the elements of genocide must be established in relation to the Khmer Krom exclusively.¹¹³⁶ The requisite determination of whether a protected group existed, and composition of the group as defined, is to be undertaken on a case-by-case basis.¹¹³⁷
621. Should the CIJs find it necessary to engage with the ICP's suggestion that the Khmer Krom be considered a part of the Vietnamese national group, the Defence requests that, in making this assessment, particular regard be paid to the following three principles.
622. It must be established that the Vietnamese and the Khmer Krom *shared* a distinct identity.¹¹³⁸ As accepted by the ICP, 'the protected group must be defined positively, by reference to a common identity, not negatively, by reference to its lack of any particular identity.'¹¹³⁹ This identity must be proved by demonstrating the existence of distinguishing characteristics, common to both the Vietnamese and the Khmer Krom, rather than a lack thereof vis-à-vis the alleged perpetrators. The requirement that a protected group is defined *positively*, by reference to the unique characteristics commonly possessed by its constituent members, reflects the core object and purpose of the

2004, para. 686; ICTY Trial Chamber, *Prosecutor v. Radovan Karadžić* (IT-95-5/18T), Judgement, 25 March 2016, para. 541.

¹¹³⁵ ICTY, Trial Chamber II, *Prosecutor v. Milomir Stakić* (IT-97-24-T), Judgement, 31 July 2003, para. 512. This approach was affirmed on appeal in: ICTY Appeals Chamber, *Prosecutor v. Milomir Stakić* (IT-97-24-A), Judgement, 22 March 2006, paras 19, 28.

¹¹³⁶ Case 004/02, *Closing Order (Indictment)*, D360, para. 89. *See, also*: ICTY, Appeals Chamber, *Prosecutor v. Milomir Stakić* (IT-97-24-A), Judgement, 22 March 2006, para. 28; ICTY, Trial Chamber II, *Prosecutor v. Radoslav Brđanin* (IT-99-36-T) Judgement, 1 September 2004, para. 686; ICTY, Trial Chamber, *Prosecutor v. Radovan Karadžić* (IT-95-5/18T), Judgement, 25 March 2016, para. 541.

¹¹³⁷ *See, for example*: Case 004/02, *Closing Order (Indictment)*, D360, para. 88. *See, also*: ICTY, Trial Chamber I, Section A, *Prosecutor v. Vidoje Blagojević and Dragan Jokić* (IT-02-60-T), 17 January 2005, para. 667; ICTR, Trial Chamber, *Prosecutor v. Seromba* (ICTR-2001-66-I), Judgement, 13 December 2006, para. 318; ICTR, Trial Chamber III, *Prosecutor v. Gacumbitsi* (ICTR-2001-64-T), Judgement, 17 June 2004, para. 254.

¹¹³⁸ ICTY, Appeals Chamber, *Prosecutor v. Stakić* (IT-97-24-A), Judgement, 22 March 2006, para. 21: '[Genocide] was originally conceived of as the destruction of a race, tribe, nation, or other group with a particular positive identity – not as the destruction of various people lacking a distinct identity.' *See, also*: ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007, paras 193, 195; ICTY, Trial Chamber II, *Prosecutor v. Brđanin* (IT-99-36-T), Judgement, 1 September 2004, para. 685.

¹¹³⁹ ICP's Final Submission, D378/2, para. 917.

Genocide Convention, which is to protect unique human groups and ensure their continued contribution to a plural world.¹¹⁴⁰

623. As previously found by the CIJs,¹¹⁴¹ these common characteristics must distinguish the group on ‘national, ethnical, racial or religious’ grounds.¹¹⁴² In submitting that an identified group need only be ‘stable and permanent,’¹¹⁴³ and not necessarily a national, ethnic, racial or religious group, the ICP disregards the clear and ordinary meaning of the Genocide Convention and critically misunderstands the jurisprudence of the *ad hoc* tribunals.¹¹⁴⁴ While the jurisprudence of the *ad hoc* tribunals collectively refrains from providing a rigid definition of each of the enumerated grounds, this does not imply that the requirement that a group be ‘national, ethnical, racial or religious’ in character has been, or may be, dismissed. This jurisprudence demonstrates only that the definition of each enumerated ground is flexible to the extent that they are not to be treated as static or

¹¹⁴⁰ See, for example: Raphaël Lemkin, *Axis Rule in Occupied Europe*, Washington, 1944, p. 91; UN GAOR 3rd Sess, 6th Comm, 73rd Meeting (1948), pp. 91, 92, 96; ICJ, *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep 15, p. 23; ICTY, Appeals Chamber, *Prosecutor v. Radislav Krstić* (IT-98-33-A), Judgement, 19 April 2004, para. 36: ‘Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.’

¹¹⁴¹ The ICJ restated this clear limitation in: Case 004/02, *Closing Order (Indictment)*, D360, para. 87: ‘The ECCC has jurisdiction in respect of genocide directed against national, ethnical, racial and religious groups. Only the four explicitly listed groups enjoy protection.’

¹¹⁴² Genocide Convention, Article 2; Establishment Law, Article 4.

¹¹⁴³ ICP’s *Final Submission*, D378/2, para. 919. The ICP’s argument is summarised: ‘[It] falls within the Genocide Convention and customary international law to punish as genocide acts intended to destroy stable and permanent human groups, to which individuals belong regardless of their own desires, even if they do not fit neatly into one of the four group titles names in the Convention.’

¹¹⁴⁴ Article 2 is unambiguous in mandating that the four articulated groups enjoy exclusive protection. This is consistent with the intended object and purpose of the Genocide Convention as illustrated by the abandonment of the catch-all reference to ‘other groups’ (originally in: Resolution 96(1) adopted by the General Assembly at the 55th plenary meeting on 11 December 1946, UN Doc. A/Res/1/96) and the deliberate consideration and exclusion of certain groups during negotiation (see, for example: UN GAOR, 3rd Sess, 6th Comm, 75th Meeting (1948) p. 112). Further, Article 2 should be read considering the standard interpretive canon of *expressio unius est exclusio alterius*; it is implied through the express articulation of the listed grounds that those not covered are excluded. Thus, the drafters did not intend that the enumerated grounds were to be illustrative of a broader class to be protected; groups outside of those articulated were consciously and intentionally excluded regardless of their permanence or stability. In his submissions, the ICP relies primarily on a misreading of the jurisprudence of the tribunals. In the few cases where the ‘stable and permanent’ test has been theoretically endorsed, it has been applied as a *supplementary* interpretive tool rather than an *alternate* to the enumerated grounds. This is demonstrated by the fact that all genocide convictions before the *ad hoc* tribunals have determined the protected group to be a ‘national, ethnical, racial or religious group,’ each with significant deliberation in first instance. See, for example: ICTR, Trial Chamber I, *Prosecutor v. Akayesu* (ICTR-96-4-T), Judgement, 2 September 1998, paras 512-515, 702; ICTY, Appeals Chamber, *Prosecutor v. Krstić* (IT-98-33-A), Judgement, 19 April 2004, para. 6. The suggestion in *Akayesu* that it may be possible to solely use the ‘stable and permanent’ test has been subject to significant criticism. See, for example: Werle, G., and Jessberger, F., *Principles of International Criminal Law*, Oxford, 2014, p. 297, describing the finding on this point: ‘a result that is incompatible with the principle of legality.’ Even so, this case law has no relevance to the status of customary international law during the ECCC’s jurisdictional period.

in isolation; rather, each ground should be interpreted on a case-by-case basis considering the relevant ‘political, social, historical and cultural context.’¹¹⁴⁵ The list of enumerated grounds is exhaustive, not illustrative, and delimits the outer boundary of the Genocide Convention’s applicability.¹¹⁴⁶ When determining whether a human group is protected, the common characteristics that distinguish the group must satisfy one or more of the enumerated grounds.¹¹⁴⁷

624. The assessment of whether a human group possesses common characteristics that are protected under the Genocide Convention may be conducted with consideration to both objective and subjective criteria, but must be demonstrably grounded in objective reality.¹¹⁴⁸ To this end, subjective criteria may include both the perception of the protected group by the alleged perpetrator and self-identification in the protected group on behalf of its constituent members.¹¹⁴⁹ Significantly, however, it is not possible to adopt a *purely* subjective approach to protected group definition.¹¹⁵⁰ Rather, the assessment must be grounded by reference to the ‘*objective* particulars of a given social or historical

¹¹⁴⁵ ICTR, Trial Chamber I, *Prosecutor v. Rutaganda* (ICTR-96-3-T), Judgement and Sentence, 6 December 1999, para. 56: *The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there is no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. See, also: ICTR, Trial Chamber II, Prosecutor v. Kamuhanda* (ICTR-99-54A-T), Judgement and Sentence, 22 January 2003, para. 630; ICTR, Trial Chamber II, *Prosecutor v. Kajelijeli* (ICTR-98-44A-T), Judgement and Sentence, 1 December 2003, para. 811; ICTR, Trial Chamber I, *Prosecutor v. Musema* (ICTR-96-13-A), Judgement and Sentence, 27 January 2000, para. 161.

¹¹⁴⁶ Schabas, W., *Genocide in International Law*, Cambridge, 2009, p. 117; Kreß, C., ‘The Crime of Genocide in International Law’ (2006) *International Criminal Law Review* 461 p. 473. See, also: Case 004/02, *Closing Order (Indictment)*, D360, para. 87.

¹¹⁴⁷ See, for example: ICTY, Trial Chamber, *Prosecutor v. Radislav Krstić* (IT-98-33-T), Judgement, 2 August 2001, para. 554; Werle, G., and Jessberger, F., *Principles of International Criminal Law*, Oxford, 2014, p. 295.

¹¹⁴⁸ ICP’s Final Submission, D378/2, para. 920 (emphasis added); Trial Chamber II, *Prosecutor v. Brđanin* (IT-99-36-T) Judgement, 1 September 2004, para. 284; ICTY, Trial Chamber I, Section A, *Prosecutor v. Blagojević and Jokić* (IT-02-60-T), 17 January 2005, para. 667; ICTR, Trial Chamber II, *Prosecutor v. Kajelijeli* (ICTR-98-44A-T), Judgement and Sentence, 1 December 2003, para. 811.

¹¹⁴⁹ See, for example: ICTR, Trial Chamber II, *Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1-T), Judgement, 21 May 1999, para. 98; Trial Chamber II, *Prosecutor v. Brđanin* (IT-99-36-T), Judgement, 1 September 2004, para. 683.

¹¹⁵⁰ International jurisprudence predating the jurisdictional period of the ECCC definitively regards membership in a protected minority as a question of objective fact: ICJ, *Nottebohm Case Second Phase (Liechtenstein v. Guatemala)*, Judgement of 6 April 1955, ICJ Rep 1955 [4] p. 23; PCIJ, *Rights of Minorities in Upper Silesia (Germany v. Poland)*, Judgement of 26 April 1926, PCIJ Rep Series A, No. 15, p. 33-34. While early decisions from the *ad hoc* tribunals were interpreted as mixed on this issue, the Appeals Chamber in *Stakić* decided directly and resolutely that subjective criteria alone cannot be used to define a protected group. As the only appellate body to directly address this question, the Chamber reviewed prior Trial Chamber decisions from the ICTY and ICTR and correctly determined that none had used a solely subjective approach to group definition, and that the Genocide Convention does not allow such an approach. (ICTY, *Prosecutor v. Milomir Stakić* (IT-97-24-A), Judgement, 22 March 2006, para. 25. See, also: ICTY, *Prosecutor v. Radoslav Brđanin* (IT-99-36-T), Judgement, 1 September 2004, para. 685).

context.’¹¹⁵¹ The definition of a protected group cannot be based solely on subjective stigmatisation by the alleged perpetrator.¹¹⁵² While recourse to subjective evidence on the perception of a group is permissible, it *must* be supported by evidence that the group was an ‘objective feature of the society in question.’¹¹⁵³ Without this weighting in objective reality, a solely subjective approach ‘leads to a hypothetical absurdity [in which the] perpetrator could define virtually any group [...], irrespective of its objective attributes, and be held guilty of genocide.’¹¹⁵⁴

(b) The Khmer Krom Cannot be Considered to be an Indistinguishable Part of the Vietnamese National Group

625. The ICP’s suggestion that the Khmer Krom can be considered an indistinguishable part of the Vietnamese national group is legally erroneous and wilfully blind to the complex history that contextualises the Khmer Krom’s relationship to the Vietnamese nation.¹¹⁵⁵ The Khmer Krom population is primarily concentrated across southern Cambodia and Vietnam’s Mekong River delta region.¹¹⁵⁶ The Khmer Krom within Vietnamese territory are considered an ethnically Khmer minority group therein, and have been subject to oppressive and discriminatory policies implemented by consecutive Vietnamese governments.¹¹⁵⁷ The Khmer Krom are racially and ethnically Khmer, and share ‘deep linguistic, religious, customary and cultural links’ to Cambodia.¹¹⁵⁸ Like the majority of the Cambodian population, they primarily speak the Khmer language and traditionally

¹¹⁵¹ ICTR, *Prosecutor v. Semanza* (ICTR-97-20-T), Judgement and Sentence, 15 May 2003, para. 317.

¹¹⁵² The consequence of a purely subjective approach, based on a perpetrator’s perception, is well articulated by C Kreß, ‘The Crime of Genocide in International Law’ (2006) *International Criminal Law Review* 461 p. 474: ‘[The] interpretation of the attributes listed in the definition of the crime cannot be left to the perpetrators of the crime but must at least to a certain extent be based on objective criteria. A subjective approach would not only circumvent the drafters’ decision to confine the protection to certain groups, but would convert the crime of genocide into an unspecific crime of group destruction based on a discriminatory motive.’

¹¹⁵³ ICTR, Trial Chamber I, *Prosecutor v. Ignace Bagilishema* (ICTR-95-1A-T), Judgement, 7 June 2001, para. 65. Here the Trial Chamber notably distinguishes between the use of subjective perception in determining whether the perpetrator believed an *individual* was a member of a group and using purely subjective criteria to define a group and determine whether it is protected.

¹¹⁵⁴ Akhavan, P., ‘The Crime of Genocide in the ICTR Jurisprudence’ (2005) *Journal of International Criminal Justice* 989, p. 1002.

¹¹⁵⁵ ICP’s Final Submission, D378/2, para. 822.

¹¹⁵⁶ Cambodian Centre for Human Rights, *Citizenship Rights for Khmer Krom in Cambodia*, Report, Phnom Penh, January 2017, p. 3.

¹¹⁵⁷ See, for example: Human Rights Watch, *On the Margins: Rights Abuses of Ethnic Khmer in Vietnam’s Mekong Delta*, Report, New York, January 2009, pp. 15-37; Harris, I., *Buddhism Under Pol Pot*, D6.1.598, Documentation Center of Cambodia, 2007, pp. 247-257, EN00704110-20; Hickey, G., *Free in the Forrest*, Yale, 1982, p. 61; Whitaker, D., *Cambodia: A Country Study*, Washington, 1979, p. 80.

¹¹⁵⁸ Mohan, M., ‘Reconstituting the Un-Person: The Khmer Krom and the Khmer Rouge Tribunal’ (2008) 43, *Singapore Year Book of International Law* 43, p. 46.

practise Theravada Buddhism.¹¹⁵⁹ The ICP has himself distinguished between Vietnamese nationals and the Khmer Krom throughout the entirety of the ICP's Final Submission, and solely requests this contrived assimilation in relation to certain charges of genocide.¹¹⁶⁰

(1) The ICP Fails to Establish that the Khmer Krom and the Vietnamese National Group Share Objective Common Characteristics

626. Notwithstanding the significant and fatal evidentiary issues further discussed below, the ICP's submissions fail to demonstrate that the Khmer Krom and the Vietnamese constituted a single national group from which the Khmer Krom were indistinguishable.

627. The ICP submits that the Khmer Krom, like the Vietnamese, spoke Khmer with 'an accent.'¹¹⁶¹ Notwithstanding that not all Vietnamese spoke Khmer, the ICP does not contend, and the evidence does not demonstrate, that the Khmer Krom and the Vietnamese spoke Khmer with the *same* accent.¹¹⁶² A native German speaker and a native French speaker may both speak English with 'an accent'; this fact does nothing to establish that they belong to a common national group. Cambodia has significant linguistic diversity and distinctive regional accents.¹¹⁶³ At best, a discernible accent distinguishes the Khmer Krom vis-à-vis other regional Khmer groups.

628. The ICP submits that the Khmer Krom, like the Vietnamese, had a lighter skin tone and were identifiable by their clothing, as 'Khmer Krom women, like Vietnamese women,

¹¹⁵⁹ Harris, I., *Buddhism Under Pol Pot*, D6.1.598, Documentation Center of Cambodia, 2007, p. 247, EN00704110.

¹¹⁶⁰ For crime sites 19-20 the ICP requests that Mr YIM Tith be indicted for genocide against the Khmer Krom rather than genocide of the Vietnamese national group (*ICP's Final Submission*, D378/2, para. 686). Further, the ICP distinguished between the Khmer Krom and the Vietnamese national group when requesting the following indictment for crimes against humanity: crime sites 1-2, 13, 17-18 and 26-27, the ICP requests that Mr YIM Tith be indicted for persecution on political grounds of the Khmer Krom and the Vietnamese as separate groups; crime sites 3-6, 17-21, 28, Kirivong District, Tram Kak District, Koh Andet District, Bakan District, Sangkae District, District 41 and District 42, the ICP requests that Mr YIM Tith be indicted for persecution on political grounds of the Khmer Krom; For Kirivong District, Tram Kak District, Sangkae District, District 41 and District 42, the ICP requests that Mr YIM Tith be indicted for the crime against humanity of deportation of the Khmer Krom and the Vietnamese as separate groups; for Kirivong District, Tram Kak District, Bakan District, Sangkae District, District 41, District 42 and the Northwest Zone, the ICP requests that Mr YIM Tith be indicted for the crime against humanity of imprisonment of the Khmer Krom; Sangkae District, the ICP requests that Mr YIM Tith be indicted for the crime against humanity of murder, other inhumane acts of inhumane treatment and enforced disappearance, and extermination of the Khmer Krom (*See Annex III*).

¹¹⁶¹ *ICP's Final Submission*, D378/2, para. 821.

¹¹⁶² *ICP's Final Submission*, D378/2, para. 821, fn. 2937. Of the 28 witnesses cited by the ICP relating to the Khmer Krom dialect only two mention any similarity between the Vietnamese accent and the Khmer Krom accent.

¹¹⁶³ *See, for example*: C. Miller et al, *Cambodia*, Cavendish Square, 2017, p. 91.

wore pants, whereas Khmer women wore sarongs.’¹¹⁶⁴ The evidence provided by the ICP is not sufficient to establish either assertion.¹¹⁶⁵ Nor does the ICP establish that predominant dress was indicative of nationality rather than, say, the prevalence of garments available in the region. Even so, neither common skin tone nor clothing customs can be considered characteristics that distinguish individuals as members of a protected group on *national* grounds, however flexibly this criterion is interpreted.¹¹⁶⁶ On a plain and ordinary reading of the Genocide Convention, both skin tone and clothing customs would be considered characteristics of either common race or ethnicity.¹¹⁶⁷ In the absence of positively establishing that the Khmer Krom and the Vietnamese constitute a single *racial* or *ethnic* group, the fact that each may have a lighter skin tone or different clothing customs to other regional Khmer groups distinguishes each group only in the negative – as *different* vis-à-vis the alleged perpetrators. As discussed above, a protected group cannot be defined in the negative.¹¹⁶⁸

629. The ICP submits that the Khmer Krom used the same naming conventions as the Vietnamese.¹¹⁶⁹ Even if it could be established, this fact should be viewed considering its historical context. The Vietnamese State, particularly under Emperor Minh Mang and the

¹¹⁶⁴ ICP’s Final Submission, D378/2, para. 821. It is a trite observation that, during the Khmer Rouge regime, there was a common dress code. See, for example: *Written Record of Interview of MOM Pholla*, 13 October 2015, D219/568, A113, EN1182736: ‘Q: Did they dress differently from the Khmer? A113: The same. They wore black. They did not allow different colours to be worn.’

¹¹⁶⁵ ICP’s Final Submission, D378/2, para. 821, fn. 2938. Here, the ICP cites three witnesses in support of the assertion that the Khmer Krom had a lighter skin tone. Comparatively, evidence cited elsewhere in this passage refutes the statement: *Written Record of Interview of TEM Bunly*, 4 September 2014, D118/300, A203, EN01045439: ‘Q: What did Khmer Krom look like? A203: They had dark complexions’; *Written Record of Interview of SOY Sen*, D219/918, 10 February 2017, A27, EN0476148: ‘Q: Vietnamese were taken to Kraing Ta Chan. Khmer Krom who were treated as Vietnamese were also sent there. Where they classified as two races in that prison? A: Pure Vietnamese people were of very fair and delicate skin tone. Khmer Krom were of the same skin tone as ours.’ ICP’s Final Submission, D378/2, para. 821, fn 2939 and 2940. Here, the ICP cites two witnesses in support of the assertion that the Khmer Krom had the same clothing customs as the Vietnamese. Comparatively, evidence cited elsewhere in this passage refutes the statement: *Written Record of Interview of THEK Yeun*, 8 October 2013, D118/123, A33, EN00975877 (noting that this witness identifies as Khmer): ‘Q: How did the Khmer Krom dress? A33: The Khmer Krom dressed like us’; *Written Record of Interview of KEM Phen*, 22 March 2016, D219/733, A13, EN01238113: ‘Q: Were there any differences in their way of living in terms of culture? A13: No.’

¹¹⁶⁶ See: Genocide Convention, Article 2; Establishment Law, Article 4.

¹¹⁶⁷ For reference, the UN Security Council, *Report of the International Commission of Inquiry on Darfur*, 25 January 2005, pursuant to SC Res 1564 of 18 September 2004, para. 494 broadly describes the relevant enumerated grounds, as follows: ‘by ‘national groups,’ one should mean those sets of individuals which have a distinctive identity in terms of nationality or of national origin. On the other hand, ‘racial groups’ comprise those sets of individuals sharing some hereditary physical traits or characteristics. ‘Ethnic groups’ may be taken to refer to sets of individuals sharing a common language, as well as common traditions or cultural heritage.’ See, also: ICP’s Final Submission, D378/2, paras 921 to 924 where the ICP recognises the definitional distinctions in each criterion. It is a standard cannon of construction that all words in a provision be given effect.

¹¹⁶⁸ *Supra*, para. 622.

¹¹⁶⁹ ICP’s Final Submission, D378/2, para. 821.

Nho Dinh Diem regime, pursued oppressive policies directed at assimilating the Khmer Krom that ‘suppressed traditional Khmer social units and obliged the Khmer to take Vietnamese family names.’¹¹⁷⁰ The Defence respectfully asks the CIJs to consider the jurisprudential effect of finding that the material outcome of a discriminatory State practice, which forces a minority group to assimilate to the dominate national culture, can be used as evidence that the minority group are no longer distinguishable as a group which may be protected under the Genocide Convention in their own right.

630. The ICP submits that the Khmer Krom should be considered Vietnamese because their common territorial origin is within the borders of Vietnam.¹¹⁷¹ The ICP provides no support for this assertion and, once again, it is a gross generalization: many of the Khmer Krom communities living in Cambodia under the Khmer Rouge regime had been within the Cambodian State for decades previously.¹¹⁷² Further, it is antithetical to the object and purpose of the Genocide Convention that the national criterion be superficially interpreted and applied so as to assimilate otherwise distinct human groups. The ICP’s interpretation (that a common territorial origin should *negate* all other objective ethnic, racial, and religious difference) would frustrate the purpose and application of the Genocide Convention. It is for this reason that the Khmer Krom and the Vietnamese must be otherwise indistinguishable as a human group in order to establish that they are a common national group jointly protected under the Genocide Convention.¹¹⁷³ Indeed, the ICP aptly recognises this principle in the ICP’s Final Submission.¹¹⁷⁴ Here, the ICP cites the analogy of ‘German minorities in Poland or of Polish minorities in Germany’ in order to demonstrate that the drafters of the Genocide Convention did not intend the national criterion be interpreted with geographic rigidity and disregard to human diversity within a nation state.¹¹⁷⁵ The Defence agrees. Following this approach, Khmer Krom individuals who had lived within Vietnam are more accurately defined as ‘Cambodian minorities in Vietnam’; those who originated in Cambodia have no relevant relationship to the Vietnamese nation at all.

¹¹⁷⁰ Harris, I., *Buddhism Under Pol Pot*, Documentation Center of Cambodia, D6.1.598, 2007, p. 250, EN00704113.

¹¹⁷¹ *ICP’s Final Submission*, D378/2, para. 822.

¹¹⁷² Hickey, G., *Free in the Forrest*, Yale, 1982, p. 61; Whitaker, D., *Cambodia: A Country Study*, Washington, 1979, p. 80. See, also: *Written Record of Interview of SOEM Chhean*, D219/277, 219/568.

¹¹⁷³ ICTY, *Prosecutor v. Milomir Stakić* (IT-97-24-T), Judgement, 31 July 2003, para. 512.

¹¹⁷⁴ *ICP’s Final Submission*, D378/2, para. 921.

¹¹⁷⁵ *ICP’s Final Submission*, D378/2, para. 921.

(2) The ICP Fails to Establish that the Khmer Krom were Subjectively Viewed as an Indistinguishable Part of the Vietnamese National Group

631. The ICP submits that the Khmer Krom should be considered a part of the Vietnamese national group because the Khmer Rouge regime perceived them as such.¹¹⁷⁶ As discussed above, subjective perception alone cannot be used to define a protected group and the CIJs must demonstrate an objective basis for any such finding.¹¹⁷⁷ Even so, the ICP does not demonstrate that the Khmer Krom were perceived *as* the Vietnamese national group.¹¹⁷⁸ The ICP asserts that: ‘The Khmer Krom were accused of being “Yuon *agents*”, “Yuon *string*”, “*Khmer* changed for Yuon”, “Vietnamese *puppets*”, and having a “Yuon *link*”. The most common way the CPK described the Khmer Krom was having a “Khmer body and Vietnamese head”.’¹¹⁷⁹ These submissions clearly demonstrate that the Khmer Rouge regime viewed the Khmer Krom as ethnically Khmer and *distinct from* the Vietnamese national group proper. At best, the evidence cited demonstrates that the Khmer Krom were considered politically aligned to the Vietnamese. However, even this is a simplification. A proper inquiry into the history and demography of the Khmer Krom demonstrates that individuals who identify as Khmer Krom hail from diverse backgrounds, and that it is equally reasonable to assume that specific individuals may have been viewed with suspicion on grounds entirely unrelated to animus towards the Vietnamese.¹¹⁸⁰ It is worth noting that the Khmer Rouge leadership included Khmer Krom in the likes of IENG Sary and SON Sen.¹¹⁸¹

¹¹⁷⁶ ICP’s Final Submission, D378/2, para. 824.

¹¹⁷⁷ *Supra*, para. 624.

¹¹⁷⁸ ICP’s Final Submission, D378/2, para. 824, fns 2948 to 2955.

¹¹⁷⁹ ICP’s Final Submission, D378/2, para. 824. [Emphasis added.]

¹¹⁸⁰ The ICP’s approach to the evidence ignores the fact that Khmer Krom living in Cambodia under the Khmer Rouge regime were socially diverse and, on an individual basis, may have personified numerous Khmer Rouge enemies and grievances. For example: fighters associated with the White Scarves movement had been trained by the United States to fight against the North Vietnamese (Ciorciari, J., ‘The Khmer Krom and the Khmer Rouge Trials,’ Report, Phnom Penh, August 2008, p. 1); under the Lon Nol regime, Khmer Krom were: highly educated, disproportionately held government positions; ‘several thousand’ served in the armed forces; and, Khmer Krom communities existed in, and had connections to, both Thailand and Laos (Whitaker, D., *Cambodia: A Country Study*, Federal Research Division Library of Congress, Washington, 1979, pp. 70, 79). There is evidence the term ‘yuon’ was used as a broad epithet for any enemy of the regime. *See, for example:* D118/124, KIM So, WRIA, 9 October 2013, A27, EN 00975888; D118/128, CHAO Ny, WRIA, 9 October 2013A40, EN 00970009: ‘When the Khmer Rouge wanted to kill anyone, they would use this phrase [Khmer bodies with Yuon heads].’

¹¹⁸¹ Kiernan, B., ‘The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79,’ p. 298, on Case File 004: D1.3.17.5, ERN 00678500; Chandler, D., ‘Voices from S-21 - Terror and History in Pol Pot’s Secret Prison,’ on Case File 004: D6.1.83, ERN 00192698.

632. The ICP has failed to demonstrate that assimilating the Khmer Krom into the Vietnamese national group would appropriately reflect either the perception or the reality of the Khmer Krom during the relevant period. To do so would be to whitewash history for the sake of prosecutorial expediency. It would be legally unsound and unhelpful to ascertaining the truth for the Khmer Krom community.

ii. The ICP has Failed to Set Out the Specific Intent Required for Genocide

633. To indict Mr YIM Tith for the crime of genocide,¹¹⁸² it must be demonstrated that the underlying acts alleged were committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such ('specific intent').¹¹⁸³ The ICP fails to provide any explanation of specific intent for the crime of genocide further to the definition provided in the preceding sentence.¹¹⁸⁴ The Defence provides the requirements of specific intent below.

634. Specific intent requires that two distinct elements be established: first, that the perpetrator acted in furtherance of an overall objective of destroying the protected group ('intent to destroy'); and, second, that there was a causal relationship between the overall objective to destroy a protected group and the discriminatory grounds on which the group are protected ('a national, ethnical, racial or religious group, *as such*').¹¹⁸⁵

635. To satisfy the first element, the perpetrator must have 'consciously desired the prohibited acts he committed to result in the destruction, in whole or part, of the group as such.'¹¹⁸⁶

¹¹⁸² As charged, with intent to destroy the Khmer Krom: *Notification of Amended Charges*, D350.1, para. 7.

¹¹⁸³ Genocide Convention, Article 2; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Democratic Kampuchea, 27 October 2004, Article 4. The Defence notes that specific intent is referred to as 'genocidal intent' in Case 004/02, *Closing Order (Indictment)*, D360, paras 94 to 98. Here, these terms are used interchangeably.

¹¹⁸⁴ *ICP's Final Submission*, D378/2, para. 916.

¹¹⁸⁵ There is a discrepancy in the English translation whereby 'as such' is transcribed as 'such as'; it is settled that Article 4 of the Establishment Law is to be read as consistent with Article 2 of the Genocide Convention. See: Case 002, *Closing Order*, 15 September 2010, D427, para. 1311; Case 004/02, *Closing Order (Indictment)*, 16 August 2018, D360, para. 85, fn. 187. This structure was discussed in: ICTY, Trial Chamber, *Prosecutor v. Duško Sikirica et al* (IT-95-8-T), Judgement on Defence Motions to Acquit, 3 September 2001, para. 58: '[Article 2] expressly identifies and explains the intent that is needed to establish the crime of genocide. [...] There are two elements in the chapeau of [Article 2] which the Prosecution is required, as a matter of law, to establish. First, it must establish the intent to destroy in whole or part [the protected group]; secondly, it must also establish an intention to destroy [the protected group] as such. These two elements are cumulative, that is to say, the Prosecution must not only establish an intention to destroy [the protected group], but it must also establish the intention to destroy those groups as such.'

¹¹⁸⁶ UN Security Council, *Report of the International Commission of Inquiry on Darfur*, 25 January 2005, pursuant to SC Res 1564 of 18 September 2004, para. 491.

Genocide is a goal-oriented crime.¹¹⁸⁷ Indictment on a charge of genocide requires evidence that, through committing the acts alleged, the perpetrator *sought to achieve* the destruction of the protected group; as opposed to having incidentally targeted individuals on discriminatory grounds in furtherance of an ulterior goal.¹¹⁸⁸ This demands that the distinction be made between acts committed with mere discriminatory intent, and acts committed with the higher *specific intent* to destroy a protected group of which the individual is a member.¹¹⁸⁹ In order to be indicted as a *principal*, it must be established that the perpetrator desired the intended result, as opposed to having knowledge that the result would come about from his or her actions.¹¹⁹⁰

636. Specific intent requires not only that the perpetrator acted in furtherance of a goal, but also that this goal had a certain character.¹¹⁹¹ The function of the ‘as such’ requirement is to require a nexus between the intent to destroy a protected group and the enumerated grounds on which a group is protected. To satisfy the second element, it must be demonstrated that the perpetrator sought to destroy the protected group *on account of*

¹¹⁸⁷ See, for example: Ambos, K., ‘What does “intent to destroy” in genocide mean?’ (2009) *International Review of the Red Cross* 91 (876) 833, p. 835: ‘Indeed genocide [...] is a crime of ulterior intent or a goal-oriented crime (Absichts-oder Zieldelikt).’

¹¹⁸⁸ ICTY, *Prosecutor v. Jelisić* (IT-95-10-A), Judgement, 5 July 2001, para. 42. See, also: ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007, para. 187; ICTR, *Prosecutor v. Bagilishema* (ICTR-95-1A-T), Judgement, 7 June 2001, para. 61; ICTY, *Prosecutor v. Kupreškić et al* (IT-95-16-T), Judgement, 14 January 2000, para. 636: ‘Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack a person on account of their ethnic, racial, or religious characteristics [...]. While in the case of persecution the discriminatory intent can take multifarious inhumane forms [...], in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of genocide belong.’

¹¹⁸⁹ See, for example: ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007, para. 187: ‘It is not enough to establish, [...] that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. [...] It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part.’

¹¹⁹⁰ ICTR, *Prosecutor v. Akayesu* (ICTR-96-4-T), Judgement, 2 September 1998, para. 498; ICTY, *Prosecutor v. Krstić* (IT-98-33-A), Judgement, 19 April 2004, para. 134; ICTR, *Prosecutor v. Rutaganda* (ICTR-96-3A), Judgement, 26 May 2003, para. 524; UN Security Council, *Report of the International Commission of Inquiry on Darfur*, 25 January 2005, pursuant to SC Res 1564 of 18 September 2004, para. 491.

¹¹⁹¹ The goal of destroying a protected group must be motivated by animus towards the group ‘as such’: Behrens, P., ‘Genocide and the Question of Motives’ (2012) *Journal of International Criminal Justice* (10) 501, p. 505: ‘A killing campaign may be aimed at the destruction of so high a number of members of a protected group that the threshold of the words ‘in part’ is passed. Yet, the campaign will not be genocidal in nature (and thus the participants will not be responsible for genocide) if the victims are chosen not because they belong to one protected group but because of their, say, political opinions’; Cherkassky, L., ‘What Distinguishes the Evil of Genocide and How Should We Respond to it?’ (2008) *International Journal of Punishment and Sentencing* (4) 110, p. 112.

their national, ethnical, racial or religious characteristics.¹¹⁹² The perpetrator must be motivated to destroy a protected group on the discriminatory grounds for which the group is deemed protected.¹¹⁹³ Notably, this is distinct from a *personal* motive.¹¹⁹⁴ Contrary to the ICP's submissions,¹¹⁹⁵ this interpretation is demanded by the clear and ordinary

¹¹⁹² See, for example: ICTR, *Prosecutor v. Akayesu* (ICTR-96-4-T), Judgement, 2 September 1998, para. 521: 'the act must have been committed against one or several individuals, because such individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group'; ICTR, *Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1-T), Judgement, 21 May 1999, paras 98-9: 'The intent must exist to destroy a national, ethnical, racial or religious group as such. Thus, the acts must be directed towards a specific group on these discriminatory grounds. [...] The "destroying" has to be directed at the group as such, that is, qua group'; ICTR, Trial Chamber I, *Prosecutor v. Bagilishema* (ICTR-95-1A-T), Judgement, 7 June 2001, para. 61: 'For one of the underlying acts to be constitutive of the crime of genocide, it must have been committed against a person because this person was a member of a specific group, and specifically because of his or her membership in the group. [...] the victim of the crime of genocide is singled out by the offender not because of his or her individual identity, but on account of his or her being a member of a national, ethnical, racial or religious group.'; ICTY, *Prosecutor v. Stakić* (IT-97-24-T), Judgement, 31 July 2003, para. 521: 'The group must be targeted because of characteristics particular to it, and the specific intent must be to destroy the group as a separate and distinct entity.'; ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007, para. 187; ICTR, Appeals Chamber, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda* (ICTR-96-3A), Judgement, 26 May 2003, para. 524; ICTR, Trial Chamber I, *Prosecutor v. Musema* (ICTR-96-13-A), Judgement and Sentence, 27 January 2000, para. 166; ICTR, *Prosecutor v. Kajelijeli* (ICTR-98-44A-T), Judgement and Sentence, 1 December 2003, para. 804; ICTY, Appeals Chamber, *Prosecutor v. Krstić* (IT-98-33-A), Judgement, 19 April 2004, para. 561; ICTR, *Niyitegeka v. Prosecutor* (ICTR-96-14-A), Judgement, 9 July 2004, para. 50.

¹¹⁹³ The structure of specific intent, and its inherent requirement to demonstrate a certain motive, has been recognised as distinct from the general rule that motive is not an element of international crimes: ICTY, *Prosecutor v. Blaškić* (IT-95-14-A), Judgement, 29 July 2004, para. 694: 'Mens rea is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act. The Appeals Chamber has held that, as far as criminal responsibility is concerned, motive is generally irrelevant in international criminal law, but it [becomes relevant during sentencing]. Motive is also to be considered in two further circumstances: first, where it is a required element in crimes such as specific intent crimes [...].'

¹¹⁹⁴ This distinction is well articulated in *Niyitegeka v. Prosecutor* (ICTR-96-14-A), Judgement, 9 July 2004, paras 52 to 53: 'In *Kayishema and Ruzindana*, the Appeals Chamber cautioned that "criminal intent (mens reas) must not be confused with motive" and stated that "in respect of genocide, personal motive does not exclude criminal responsibility" provided that the genocidal acts were committed with the requisite intent. This position was reinforced in [Jelisić], where the ICTY Appeals Chamber observed that "the existence of a personal motive does not preclude the perpetrator from also having specific intent to commit genocide." The words "as such," however, constitute an important element of genocide, [...]. The term "as such" has the effect of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term "as such" clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting "as such" to mean that the proscribed acts were committed against the victims because of their membership in the protected group, but not solely because of such membership.'

¹¹⁹⁵ The Defence for Mr YIM Tith will not be the first to note that the ICP's submissions on this point are extremely unclear (see, also: Case 004/02, *AO An's Response to the Co-Prosecutor's Rule 66 Final Submissions*, 24 October 2017, D351/6, para. 374, in response to Case 004/02, *International Co-Prosecutor's Rule 66 Final Submission*, 21 August 2017, D351/5, para. 489 which is largely incorporated verbatim in the ICP's *Final Submission*, D378/2, para. 934). As the Defence understands the ICP's argument, he submits that if Article 2 were to be interpreted as requiring evidence that members of the protected group were targeted specifically because of his or her membership in the group it would 'render the wording "as such" redundant.' The ICP does not offer an alternative interpretation of the caveat, and does not provide any further explanation or supporting citation as to why imputing the caveat with this (or any) meaning would render it redundant. Further, the ICP attempts to dismiss this

meaning of the Genocide Convention,¹¹⁹⁶ the historical development of the crime,¹¹⁹⁷ and relevant jurisprudence.¹¹⁹⁸

637. In the absence of direct evidence, specific intent may be inferred from relevant facts and circumstances.¹¹⁹⁹ In such circumstances, the conclusion drawn must be ‘the *only* reasonable inference available on the evidence.’¹²⁰⁰ Therefore, where the relevant facts and circumstances plausibly suggest two or more reasonable inferences specific intent cannot be inferred.¹²⁰¹ This allowance further demonstrates the importance that the protected group is accurately and precisely defined before an assessment of specific intent is embarked upon, as noted by the Appeals Chamber in *Stakić*:

Because evidence of specific intent to destroy may be inferred from an accused’s actions of utterances *vis-à-vis* the targeted group, it is impossible to establish with certainty whether the [accused] possessed the necessary intent to destroy if the target group itself has not been defined.¹²⁰²

638. In his Final Submission, the ICP primarily seeks to establish an alleged plan to ‘eliminate the Vietnamese from Cambodia.’¹²⁰³ To the extent that intent towards the Khmer Krom is directly addressed herein, the ICP at best demonstrates that the Khmer Krom were periodically viewed by the Khmer Rouge regime as politically-aligned with the Vietnamese.¹²⁰⁴ On this point, it must be emphasised that specific intent cannot be inferred across politically-aligned groups. To be a considered a victim of genocide, it must be established that said victim was a member of a protected group that the perpetrator intended to destroy and targeted as such.¹²⁰⁵ This principle was considered by

interpretation by stating that it has been found only ‘in some cases in *obiter*.’ This is misleading. A judicial body articulating the intent requirement for crimes charged against individuals before them is not considered ‘*obiter*.’

¹¹⁹⁶ In interpreting Article 2 of the Genocide Convention, the preferred construction is that which gives the caveat ‘as such’ effect. Interpreting Article 2 to require solely ‘intent to destroy’ a protected group, with no higher burden to show discriminatory intent towards this group, renders the ‘as such’ caveat redundant as it serves no additional function.

¹¹⁹⁷ For a detailed articulation of the drafting history, see: Schabas, W., *Genocide in International Law*, Cambridge, 2009, pp. 294-302.

¹¹⁹⁸ Cited herein.

¹¹⁹⁹ See, for example: ICTR, *Gacumbitsi v. Prosecutor* (ICTR-2001-64A), Judgement, 7 July 2006, para. 41; ICTY, *Prosecutor v. Krstić* (IT-98-33-A), Judgement, 19 April 2004, para. 34; ICTR, *Prosecutor v. Akayesu* (ICTR-96-4-T), Judgement, 2 September 1998, para. 523.

¹²⁰⁰ ICTY, *Prosecutor v. Krstić* (IT-98-33-A), Judgement, 19 April 2004, para. 41. See, also: ICTY, *Prosecutor v. Brđanin* (IT-99-36-T), Judgement, 1 September 2004, para. 970.

¹²⁰¹ ICTY, *Prosecutor v. Krstić* (IT-98-33-A), Judgement, 19 April 2004, para. 41.

¹²⁰² ICTY, *Prosecutor v. Stakić* (IT-97-24-A), Judgement, 22 March 2006, para. 18.

¹²⁰³ ICP’s Final Submission, D378/2, para. 828.

¹²⁰⁴ ICP’s Final Submission, D378/2, paras 824 and 826.

¹²⁰⁵ ICTR, *Nahimana, Barayagwiza and Ngeze v. Prosecutor* (ICTR-99-52-A), Judgement, 28 November 2007, para. 496; *Prosecutor v. Nchamihigo* (ICTR-01-63-T) Judgement and Sentence, 12 November 2009, para. 338; *Prosecutor v. Akayesu* (ICTR-96-4-T), Judgement, 2 September 1998, paras 720-721.

the ICTR Appeals Chamber in *Nahimana*. In this case, the Trial Chamber judgement appeared to conclude that acts committed against ethnically Hutu victims constituted genocide because these victims were targeted due to their political support for, and in furtherance of destroying, the Tutsi ethnic group.¹²⁰⁶ This was subsequently overturned by the Appeals Chamber, which found that:

The presence of these findings by the Trial Chamber in the section of the Judgement dealing with the crime of genocide poses a problem. Indeed, the acts committed against Hutu political opponents cannot be perceived as acts of genocide, because the victim of an act of genocide must have been targeted by reason of the fact that he or she belonged to a protected group. In the instant case, only the Tutsi ethnic group may be regarded as a protected group [...] since the group of “Hutu political opponents” or the group of “Tutsi individuals and Hutu political opponents” does not constitute a “national, ethnical, racial or religious group” [...]. Even if the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide.¹²⁰⁷

639. This judgement was followed in *Nchamihigo*, in which the ICTR Trial Chamber found that the defendant’s indictment erroneously included ‘Hutu political opponents’ as victims of genocide.¹²⁰⁸ Similarly, in *Akayesu*, the ICTR Trial Chamber found that serious bodily and mental harm was inflicted against a Hutu woman by the Defendant when she refused under interrogation to disclose the location of a Tutsi family; however, it was noted that as this act was committed against a Hutu woman, it consequently could not constitute an act of genocide against the Tutsi group.¹²⁰⁹ Where an individual is the victim of an act committed with specific intent to destroy a protected group to which they do not belong, the act cannot constitute genocide. This principle applies equally to the present situation regarding the Vietnamese and the Khmer Krom.

¹²⁰⁶ ICTR, *Prosecutor v. Nahimana, Barayagwiza and Ngeze* (ICTR-99-52-T), Judgement and Sentence, 3 December 2003, para. 948.

¹²⁰⁷ ICTR, *Nahimana, Barayagwiza and Ngeze v. Prosecutor* (ICTR-99-52-A), Judgement, 28 November 2007, para. 496.

¹²⁰⁸ ICTR, *Prosecutor v. Nchamihigo* (ICTR-01-63-T), Judgement and Sentence, 12 November 2009, para. 338: ‘Where the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide. [...] The charges of killing Hutu political opponents in the present case could result in convictions for crimes against humanity, but not for genocide.’

¹²⁰⁹ ICTR, *Prosecutor v. Akayesu* (ICTR-96-4-T), Judgement, 2 September 1998, paras 720-721.

iii. Conclusion

640. Mr YIM Tith has been charged with ‘genocide against the Khmer Krom,’¹²¹⁰ not with the ‘the crime of genocide with intent to destroy the Vietnamese as a national group (particularly the Khmer Krom) in Cambodia.’¹²¹¹ In an attempt to shoehorn his case theory into the charges, the ICP erroneously suggests ‘that for the purposes of the definition of protected groups in the Genocide Convention and jurisprudence defining these terms, the Khmer Krom were part of the Vietnamese national group in Cambodia.’¹²¹² As set out above, the suggestion that the Khmer Krom were subsumed by the Vietnamese national group in Cambodia has no basis in law or in fact. Contrary to the ICP’s submissions,¹²¹³ evidence of specific intent to destroy the Vietnamese cannot be subsumed in order to indict for the crime of genocide against the Khmer Krom.

G. EVIDENCE REGARDING MR YIM TITH’S ALLEGED POSITIONS, ACTS AND CONDUCTS

641. The ICP’s primary factual claim is that Mr YIM Tith played ‘a critical role’ in the implementation of the CPK’s criminal policies across ‘vast territories of the country’ throughout the entire jurisdictional period of the ECCC from 17 April 1975 to 6 January 1979.¹²¹⁴ According to the ICP’s far-reaching narrative, Mr YIM Tith ‘rose from the position of deputy secretary of Kirivong District to eventually attain the post of deputy secretary of the Northwest Zone.’¹²¹⁵

642. The ICP’s claim is so detached from any evidentiary basis in Case File 004 that, in the context of the serious criminal allegations in Case 004, it can only be described as frivolous. In short, the ICP does not present sufficient direct evidence, documentary evidence, or witness testimony collected under judicial supervision, to remotely substantiate his arguments that Mr YIM Tith held the alleged positions in the DK hierarchy, nor that his acts and conduct amounted to participation in the alleged common criminal plan.

¹²¹⁰ *Notification of Amended Charges*, D350.1, para. 7.

¹²¹¹ *ICP’s Final Submission*, D378/2, para. 822.

¹²¹² *ICP’s Final Submission*, D378/2, para. 822.

¹²¹³ *ICP’s Final Submission*, D378/2, paras 76 to 81.

¹²¹⁴ *ICP’s Final Submission*, D378/2, paras 1 and 8.

¹²¹⁵ *ICP’s Final Submission*, D378/2, paras 1 and 8.

643. As the Defence sets out in the detailed analysis that follows, the ICP's case is based on a rumour mill of uncorroborated hearsay that has been irreparably contaminated by more than 30 years of public discussion, including the illegal leaking of the Third Introductory Submission in 2011 that named Mr YIM Tith as a suspect, associated him with Ta Mok, and connected him with many of the factual allegations on which witnesses subsequently gave evidence.¹²¹⁶ From this mass of uncorroborated hearsay, the ICP has been highly selective in cherry-picking evidence that fits his case theory. The ICP disregards the hundreds of witnesses interviewed by the OCIJ who lived and worked in the Southwest and Northwest Zones at relevant times but had never heard of Mr YIM Tith. Furthermore, there is no evidence on Case File 004 that describes the content of any interaction between Mr YIM Tith and any other Khmer Rouge cadre, neither superior nor subordinate to him. There is not a single piece of documentary evidence bearing the name of Mr YIM Tith.
644. The ICP's allegations regarding Mr YIM Tith rely extensively on witnesses who identified a person called 'Ta Tith' based on their recollections of events that occurred more than 30 years ago. As already argued in this Response, recollections of such long-ago events are fallible testimony that involves inherent uncertainties.¹²¹⁷ In relation to witnesses who refer to 'Ta Tith', even based on the Case File evidence alone, there were a number of other individuals in the Southwest and Northwest Zones during the DK period who were known by the first name 'Tith'.¹²¹⁸ The evidence frequently lacks clarity as to the identity of the individual referred to by a witness.

¹²¹⁶ *Supra*, paras 34, 277 and 288.

¹²¹⁷ *Supra*, para. 274.

¹²¹⁸ D219/337, RIEM Dy, WRI, A3-4, EN 01117677, A28, EN 01117682; D219/338, HENG My, WRI, A165-171, EN 01117695; D219/341, NUK Sangav, WRI, A4-5, EN 01116063; D219/343, ROS Maong, A5, EN 01116082, A9, EN 01116083, A26, EN 01116085; D219/586, KHUN Mon, WRI, A148-149, EN 01178717-8; D219/589, CHOEM Bunret, WRI, A135-137, EN 01178793-4; D219/334, SAM Ngak, A6, EN 01118146; D219/63, SAO Sok, A43-44, EN 01053927, A108-111, A113, EN 01053936; D219/677, TO Sem, WRI, A38-41, EN 01213912; D219/261, KHOEUN Sgnoeun, WRI, A12, EN 01095837; D219/278, SEB Ret, WRI, A27-28, EN 01098523; D219/751, VOR Ruom, WRI, A58, EN 01305926.

645. The descriptions of ‘Ta Tith’s’ physical attributes in witnesses’ testimony are inconsistent and do not refer to the same person.¹²¹⁹ Witnesses refer to ‘Ta Tith’ as tall,¹²²⁰ as well as short,¹²²¹ and of medium height.¹²²² They refer to an individual who was well-built,¹²²³ or fat,¹²²⁴ as well as describing him as thin.¹²²⁵ This person was bald according to some witnesses,¹²²⁶ while others said he had curly hair,¹²²⁷ or a receding hairline¹²²⁸ or thin hair.¹²²⁹ His skin was of a dark complexion according to some accounts,¹²³⁰ while others say that he had a light complexion,¹²³¹ an average complexion,¹²³² a fair complexion,¹²³³ or described him as ‘white’.¹²³⁴ None of the witnesses who identified ‘Ta Tith’ using these descriptors knew him. Their evidence is ‘stranger eyewitness identification’ evidence, which as the Defence has already argued in this Response, is amongst the most questionable evidence of all.¹²³⁵

¹²¹⁹ D219/55, HAO Yan, WRI, A41, EN 01053839; D118/108, LIM Tim, A56, EN 00976929; D118/136, CHHEAN Hea, WRI, A12, EN 00969639; D118/271, CHHEAN Hea, WRI, A26, EN 01029421; D118/137, CHHORN Vorn, WRI, A30, EN 00970083; D118/149, HAM Soam, WRI, A62, EN 00975000; D118/151, KHIEU Neou, WRI, A18, EN 00979095; D118/152, POK Touch, WRI, A54, EN 00979108; D118/153, LONG Vun, WRI, A44, EN 00978774; D118/244, PHAR Pet, WRI, A6, EN 01029410; D118/245, CHUON Than, WRI, A19, EN 01029382; D118/274, BUN Thoeun, WRI, A65, EN 01031981; D118/285, NOP Ngim, WRI, A20, EN 01044676; D118/301, KHOEM Sorn, WRI, A51, EN 01045458; D118/305, TOP Phan, WRI, A102, A103, EN 01045530; D118/69, NUON Muon, WRI, A22, EN 00950728; D118/77, NANG Ny, WRI, A24, EN 00970455-6; D118/86, NHOEK Ly, WRI, A4, EN 00976958-9; D118/92, NOP Nan, WRI, A16, EN 00967028; D219/111, MAO Chhorn, WRI, A56, EN 01076909; D219/292, LEK Phiv, A21, EN 01111809; D219/416, LIES Kung, WRI, Q/A1, EN 01135072-3; D219/422.11, TUN Soun, Transcription of hearing, EN 01136989; D219/515, CHHEUN Chhuoy, A37, EN 01156945; D219/521, TOEB Phy, A111, EN 01168003; D219/524, NHEB Noem, WRI, A23, EN 01168032; D219/538, SOEUN Mat, WRI, A14, EN 01173574; D219/571, CHHOENG Yi, WRI, A56, EN 01179793. D219/797, DOS Doeun, WRI, A201, EN 01337079; D219/986, DOS Doeun, WRI, A32, EN 01519573; D219/592, VORNG Nop, WRI, A100, EN 01185751; D219/85, VY Phann, WRI, A11, EN 01061173; D219/884, LOCH Eng, WRI, A17-19, EN 01476050; D219/916, DOEP Y, WRI, A37, EN 01519520; D219/763, SAO Chorp, A55, EN 01337024; D219/121, LOEM Ngen, WRI, A13, EN 01057796; D219/938, TOEM Phan, WRI, A59, EN 01502710; D219/944, VOR Ruom, WRI, A16, EN 01502646; D118/138, TIEP Tith, WRI, A35, EN 00970098; D219/464, TIEP Tith, WRI, A 33, EN 01151249; D118/60, LONG Sokhy, WRI, A41, EN 00943609; D118/94, KEO Phay, WRI, A20, EN 00967050; D219/109, YOU Phnom, A6, EN 01081739; D22, CHUCH Punlork, WRI, EN 00707678; D219/872, TOUCH Mary, WRI, A151, EN 0137568.

¹²²⁰ D219/55, HAO Yan, WRI, A41, EN 01053839; D118/137, CHHORN Vorn, WRI, A30, EN 00970083.

¹²²¹ D118/108, LIM Tim, A56, EN 00976929; D118/285, NOP Ngim, WRI, A20, EN 01044676; D219/944, VOR Ruom, WRI, A16, EN 01502646.

¹²²² D118/92, NOP Nan, WRI, A16, EN 00967028; D219/292, LEK Phiv, A21, EN 01111809.

¹²²³ D219/538, SOEUN Mat, WRI, A14, EN 01173574; D118/136, CHHEAN Hea, WRI, A12, EN 00969639.

¹²²⁴ D118/285, NOP Ngim, WRI, A20, EN 01044676; D118/301, KHOEM Sorn, WRI, A51, EN 01045458.

¹²²⁵ D219/592, VORNG Nop, WRI, A100, EN 01185751; D219/55, HAO Yan, WRI, A41, EN 01053839.

¹²²⁶ D219/515, CHHEUN Chhuoy, A37, EN 01156945; D219/524, NHEB Noem, WRI, A23, EN 01168032.

¹²²⁷ D219/268, Nam Phorn, WRI, A47, EN 01098485.

¹²²⁸ D219/85, VY Phann, WRI, A11, EN 01061173; D219/121, LOEM Ngen, WRI, A13, EN 01057796.

¹²²⁹ D219/55, HAO Yan, WRI, A41, EN 01053839.

¹²³⁰ D219/538, SOEUN Mat, WRI, A14, EN 01173574; D219/797, DOS Doeun, WRI, A201, EN 01337079.

¹²³¹ D219/916, DOEP Y, WRI, A37, EN 01519520; D219/763; D219/109, YOU Phnom, A6, EN 01081739.

¹²³² D219/85, VY Phann, WRI, A11, EN 01061173.

¹²³³ D219/55, HAO Yan, WRI, A41, EN 01053839; D118/108, LIM Tim, A56, EN 00976929.

¹²³⁴ D118/94, KEO Phay, WRI, A20, EN 00967050; D219/109.

¹²³⁵ *Supra*, para. 274.

646. The acute lack of evidence against Mr YIM Tith has forced the ICP to over-reach the evidentiary basis on the Case File. The ICP asserts that the authority, power, status, influence and prominence that Mr YIM Tith ‘wielded’ across the Southwest Zone are indicated by the ‘30 to 40 pigs,’ ‘bananas’ and ‘papayas’ that a witness may have seen at a Kirivong District office and which the ICP describes as ‘an abundant food supply’ over which Mr YIM Tith had access and control.¹²³⁶ The ICP alleges that Mr YIM Tith was omnipresent in the Northwest Zone and Southwest Zone, exercising authority and contributing to the common criminal plan ‘simultaneously’ in both zones based on evidence that he had ‘access to a Jeep.’¹²³⁷ Such submissions trivialize the solemn nature of the ECCC proceedings and, while the Defence does not wish to follow this approach to litigation, the Co-Lawyers are professionally obliged to respond to the ICP’s allegations.

647. Accordingly, the Defence will analyse in detail each of the ICP’s claims and the evidence he cites in support, to assist the CIJs consideration of the totality of each witness’s testimony, and to present to the CIJs the unreliable method of ‘cherry-picking’ that is relied on by the ICP throughout the Final Submission.

i. Mr YIM Tith Did Not Participate in the Alleged Common Criminal Plan in the Southwest Zone

648. The evidence on Case File 004 of Mr YIM Tith’s alleged acts, conduct and positions in the Southwest Zone is not sufficient to find that he participated in a common criminal plan as alleged. Mr YIM Tith did not serve as Secretary, Deputy Secretary or Member of the Sector 13 Committee. The evidence is insufficient to find that he contributed to the implementation of CPK policies at the Sector-level that allegedly resulted in crimes in the Kirivong, Tram Kak and Koh Andet Districts. Furthermore, there is insufficient evidence that Mr YIM Tith was appointed as Secretary or Deputy Secretary of the Kirivong District Committee on any relevant dates when crimes were allegedly committed in Kirivong District as a result of the common criminal plan.

649. Faced with a paucity of reliable evidence regarding Sector 13, the ICP repeatedly cites evidence that can only be considered to be potentially relevant to Kirivong District. In order to assist the CIJs in seeing past the ICP’s conflation of the evidence regarding his

¹²³⁶ *ICP’s Final Submission*, D378/2, paras 39 to 40.

¹²³⁷ *ICP’s Final Submission*, D378/2, para. 12, fn 12.

Sector and District level allegations in the Southwest Zone, the Defence addresses the Sector 13 allegations separately from those pertaining to Kirivong District.

(a) Mr YIM Tith Did Not Hold Any Position on the Sector 13 Committee and did not Participate in the Common Criminal Plan in Sector 13 through his Contribution to the Implementation of the CPK Enemies Policy

650. The ICP claims that through his alleged positions, acts and conduct in Sector 13, Mr YIM Tith participated in the alleged common criminal plan.¹²³⁸ The ICP claims that Mr YIM Tith ‘became a member of the Sector 13 Committee in 1976, subsequently served as deputy secretary and then secretary, and was a key leader in the sector until the end of the DK regime.’¹²³⁹ The brazen allegation that Mr YIM Tith was ‘a key leader’ in Sector 13 and held the positions of Secretary, Deputy Secretary and Member of the Sector 13 Committee at various times during the DK period, rests on the evidence of seven witnesses: PECH Chim, MOENG Vet, DOK Chann, EK (Ul) Hoeun, NUT Nov, NOP Nan, and KHOEM Vai.¹²⁴⁰ The ICP further claims that Mr YIM Tith’s acts and conduct involved actively participating in meetings at the Sector-level and the ICP identifies a ‘ten-day Sector 13 meeting regarding the CIA and KGB’ at which Mr YIM Tith allegedly played an active role.¹²⁴¹ Finally in relation to Sector 13, the ICP claims that Mr YIM Tith exercised authority in Sector 13 and contributed to the common criminal plan in Sector 13 simultaneous to his alleged (enormous) role in the Northwest Zone.¹²⁴²

651. The ICP’s claims are unfounded. There is insufficient evidence that Mr YIM Tith was ever appointed to the alleged positions in Sector 13 or that his acts and conduct amounted to active Sector-level participation in the alleged common criminal plan.

(1) Mr YIM Tith was Never Appointed to the Sector 13 Committee

652. The ICP alleges that Mr YIM Tith was the Member, Deputy Secretary and Secretary of the Sector 13 Committee on non-specific dates during a period that commenced at some time ‘in 1976’ and continued until the end of the DK period.¹²⁴³

¹²³⁸ ICP’s Final Submission, D378/2, paras 10 to 12.

¹²³⁹ ICP’s Final Submission, D378/2, para. 130.

¹²⁴⁰ ICP’s Final Submission, D378/2, para. 10, fn 7, and para. 130, fns 331 and 332.

¹²⁴¹ ICP’s Final Submission, D378/2, paras 23 to 30.

¹²⁴² ICP’s Final Submission, D378/2, para. 12.

¹²⁴³ ICP’s Final Submission, D378/2, para. 130.

653. The ICP's allegations are both unclear and imprecise. The ICP concedes it is 'difficult to establish the precise dates on which Yim Tith held each position'¹²⁴⁴ while simultaneously claiming that 'the evidence as a whole paints a clear picture of Yim Tith's growing power throughout his time in the Southwest Zone.'¹²⁴⁵ The ICP is well-aware that the evidence on Case File 004 is insufficient to paint 'a clear picture.'
654. Furthermore, Mr YIM Tith cannot be indicted on the basis of facts in Sector 13 that are outside the scope of the investigation.¹²⁴⁶ The Introductory and Supplementary Submissions set the temporal scope of the investigation in Sector 13 from 1976 until the end of 1977 or early 1978. Mr YIM Tith cannot therefore be indicted for allegations in Sector 13 prior to 31 December 1975 and after early 1978. As argued already in this Response, Mr YIM Tith cannot be indicted for the positions alleged by the ICP of Secretary and Deputy Secretary of the Sector 13 Committee since these are facts with which he was not charged.¹²⁴⁷
655. The Defence further submits that the ICP's allegations of Mr YIM Tith's appointment to the Sector 13 Committee are 'material facts' within the meaning of Rule 67(2), which provides that the indictment shall be void for procedural defect unless it sets out a description of the material facts.¹²⁴⁸ The ICP's allegations are woefully non-specific about Mr YIM Tith's actual role at the Sector-level. The imprecise nature of the ICP's allegations in Sector 13 means there is no adequate 'description of the material facts' upon which to indict Mr YIM Tith for any role in Sector 13.

PECH Chim's Evidence regarding Mr YIM Tith's Alleged Positions on the Sector 13 Committee

656. The ICP cherry-picks a speculative comment from the totality of PECH Chim's evidence: '[b]ased on my assumption, Ta Tith *may* have become a Sector 13 Secretary.'¹²⁴⁹ Not only is this comment uncertain and non-specific, it is based on PECH Chim's approximate recollection of a radio broadcast that he thought he heard in late 1978:

¹²⁴⁴ ICP's Final Submission, D378/2, para. 10.

¹²⁴⁵ ICP's Final Submission, D378/2, para. 10.

¹²⁴⁶ *Supra*, paras 435 to 446.

¹²⁴⁷ *Supra*, paras 454 to 456.

¹²⁴⁸ Rule 67(2) provides 'The Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.'

¹²⁴⁹ D118/79, PECH Chim, WRI, A18, 20, EN 00947190. [Emphasis added.]

Q: Do you know whether Ta Tith was promoted?

A18: I don't know. But he was already the chief there. Based on my assumption Ta Tith may have become a Sector 13 Secretary because Choeun was removed and sent to Phnom Penh and no senior cadre other than Ta Tith for that position in this district. In late 1978, I listened to a radio broadcast and I heard that Ta Tith was greeting guests at Sector 13 office and that he was an acting Secretary of Sector 13. Sector 13 office was in Takeo provincial town. It was located in Ta Mok's house at the lake. During this period, Ta Mok had gone to Phnom Penh.

Q: Why Choeun was removed and sent to Phnom Penh?

A19: I don't know any reason behind this but he might have had a job at a Ministry in late 1978.

Q: When a guest visited the Sector, who was the one to greet them?

A20: Only the Secretary or deputy Secretary could do that.¹²⁵⁰

657. First and foremost, the evidence of PECH Chim concerns facts about Mr YIM Tith's alleged role on the Sector 13 Committee 'in late 1978' that are outside the temporal scope of the Case 004 investigation. Mr YIM Tith cannot be indicted for allegations in the Southwest Zone that occurred subsequent to early 1978.¹²⁵¹ PECH Chim's evidence must be disregarded.

658. Moreover, PECH Chim later changed his recollection of the 1978 radio broadcast, to give conflicting evidence that he no longer believed he heard the broadcast himself but now recalled that he was told about the broadcast on a subsequent date by his messenger:

Q: In your interview with the Office of the Co-Investigating Judges, Document Number D6.1.650, you seemed to say that "you had radio, and in late 1978 you heard that Ta Tith received guests at the Sector 13 Office, and Ta Tith was the Secretary of Sector 13, located in the provincial town of Takeo Province, near Ta Mok's house." Is that correct?

A136: Yes, that is correct. Later on, my messenger told me about this matter.

Q: What radio [station] did you listen to?

A137: It was the local radio of the Khmer Rouge.¹²⁵²

659. The evidence quoted by the investigator in Q136 does not in fact appear in WRI D6.1.650. The contradictions in his evidence and the uncertainties about the source of his evidence mean that it is unreliable. After being told information about a radio broadcast concerning

¹²⁵⁰ D118/79, PECH Chim, WRI, A18-20, EN 00947190.

¹²⁵¹ *Supra*, paras 436 to 439.

¹²⁵² D118/259, PECH Chim, WRI, A136-137, EN 01000683.

Mr YIM Tith's position of authority in Section 13, the OCIJ investigator did not ask follow-up questions to establish any details of the putative broadcast. There is no corroboration of this evidence from other witnesses, as would be expected if this information were broadcast and widely heard on the radio across DK. There is no record on Case File 004 of any radio transmissions referring to Mr YIM Tith.

660. The investigator's assertion that Mr YIM Tith received guests at the Sector 13 Office does not reflect PECH Chim's evidence (WRI D6.1.650) and therefore lacks credibility. There is no evidence on the Case File that Mr YIM Tith ever held a position that would have required him to welcome external delegations to the Sector-level. To the contrary, PHY Phuon, who stated that he worked in the Foreign Ministry from 1975¹²⁵³ and whose task was 'to bring delegations from various countries to visit different zones' and stated that through his work he knew 'almost all of the people through the zones in Cambodia at the time,'¹²⁵⁴ never mentioned Mr YIM Tith holding any such diplomatic role at the Sector 13 Office.

MOENG Vet's Evidence regarding Mr YIM Tith's Alleged Positions on the Sector 13 Committee

661. The ICP relies on MOENG Vet as a witness that Mr YIM Tith was on the Sector 13 Committee.¹²⁵⁵ The ICP misinterprets, and therefore misrepresents the evidence by ignoring MOENG Vet's statement that he 'did not know much' about Mr YIM Tith joining the Sector 13 Committee.¹²⁵⁶
662. As set out below, MOENG Vet gave differing accounts of Mr YIM Tith holding a position on the Sector 13 Committee, relating to different periods prior to 17 April 1975, in 1976 and in 1978, such that his evidence is not sufficiently clear to support that Mr YIM Tith held a Sector-level role during any period within the temporal scope of the investigation.¹²⁵⁷ In particular, MOENG Vet's evidence in which he stated that his knowledge of Mr YIM Tith's role on the Sector 13 Committee related to the period from

¹²⁵³ D6.1.1074, PHY Phuon, WRI, EN 00223583.

¹²⁵⁴ D119/68, PHY Phuon, WRI, A3-4, EN 00975045-6.

¹²⁵⁵ *ICP's Final Submission*, D378/2, para. 10.

¹²⁵⁶ D119/84, MOENG Vet, WRI, A34, EN 00982707. ('Q: As far as you know, was Ta Tith ever Sector 13 Committee during the Democratic Kampuchea regime? A34: I heard that he became Sector 13 Committee in 1978. I did not know much about that, as I had already left the Southwest Zone. However, I heard that he was in charge of Sector 13 for a while before the Vietnamese arrived.')

¹²⁵⁷ D119/84, MOENG Vet, WRI, A34, EN 00982707; D119/85, MOENG Vet, WRI, A21, EN 00982716; D219/488, MOENG Vet, WRI, A34-37, 40-41, EN 01170586-87.

1973 to September 1975, means that his evidence cannot be considered to fall within the temporal scope of the Case 004 investigation:

Q: Do you know when Ta Tith started working in Sector 13?

A10: I saw Ta Tith in Sector 13 from 1973 when I joined the revolution.

Q: What role did Ta Tith have in Sector 13 from 1973?

A11: I did not know his role. I only saw him work in the Sector 13 Committee and I believed that he was a member of the Sector Standing Committee.¹²⁵⁸

Q: What year did Ta Tith move from Sector 13 to Kirivong District?

A21: In September 1975, when I arrived in Kirivong District, he was already there.¹²⁵⁹

663. The investigator did not clarify with MOENG Vet the exact dates that he referred to in evidence. Furthermore, the source of MOENG Vet's evidence about the Sector 13 Committee is unclear. His evidence was not based on his own observations, except for a single occasion when MOENG Vet recalled a meeting on an unspecified date in 1976 when he thought he saw Mr YIM Tith sitting to the right of the Secretary of Sector 13 on a stage.¹²⁶⁰ As discussed in further detail below, MOENG Vet's evidence of this sighting of Mr YIM Tith's presence on a stage is not reliable.¹²⁶¹

664. The source of MOENG Vet's evidence about Mr YIM Tith provided in his DC-Cam interview on 13 August 2013 is unclear and does not provide any accurate dates.¹²⁶² MOENG Vet gave unclear, conflicting evidence that at some point in the DK period, Mr YIM Tith was 'deputy chief' of Sector 13, and 'in charge of the sector' and 'in charge of Kirivong District.'¹²⁶³ The details of MOENG Vet's account to DC-Cam were not put to him rigorously in subsequent OCIJ interviews and crucially, he was not asked about the source of his knowledge and how it was that he appeared to be so certain about the roles of individuals discussed in his DC-Cam interview:

Q: Where is his hometown?

A: Tit was a former teacher. He is came [sic] from Ta Mok home village.

Q: But at the time?

¹²⁵⁸ D119/85, MOENG Vet, WRI, A10-11, EN 00982714.

¹²⁵⁹ D119/85, MOENG Vet, WRI, A21, EN 00982715.

¹²⁶⁰ D219/488, MOENG Vet, WRI, A34-37, 40-41, EN 01170586-7.

¹²⁶¹ *Infra*, paras 703 to 711.

¹²⁶² *Supra*, paras 507 to 511.

¹²⁶³ D119/84.2, MOENG Vet, DC-Cam Statement, EN 00992987-8.

A: In the past, he was a deputy chief of Sector 13. Tit was in charge of Kiri Vong.

Q: How about Kiri Vong?

A: Ta Tam was a secretary and Tit was in charge of the sector. While Nith was removed, I had gone to Kratie province.

Q: Was he in Kiri Vong too?

A: Yes.

Q: When you were in Kiri Vong, he was in Kiri Vong as well?

A: Yes.

Q: He stayed there with Ta Tem and Ta Tom?

A: Ta Tem and Ta Tom were there.

Q: He was superior to Ta Tem and Ta Tom?

A: No! He was inferior to them. He was Ta Tom's deputy. After Ta Tom was arrested, he was promoted to the sector.¹²⁶⁴

665. In contrast to his earlier DC-Cam interview, when MOENG Vet was interviewed by the OCIJ on 11 February 2014 about Mr YIM Tith and the Sector 13 Committee, he answered that he merely 'heard' that Mr YIM Tith became Sector 13 Committee in 1978 'for a while' and he said that this was 'before the Vietnamese arrived.'¹²⁶⁵ The discrepancies between the accounts given to the OCIJ and to DC-Cam are disregarded by the ICP.

666. MOENG Vet stated that he heard that Mr YIM Tith joined the Sector 13 Committee in 1978 as Secretary.¹²⁶⁶ This account is inconsistent with MOENG Vet's previous evidence and it is multiple anonymous hearsay that originated in a rumour that he heard on a visit to Phnom Penh:

Q: According to your knowledge, in 1978, was *Ta* Tith still a member of Sector 13 Standing Committee in Takeo?

A41: One day in 1978, I transported wounded soldiers by boat from Kratie to Phnom Penh; I heard people in Phnom Penh said that *Ta* Tith had become Sector 13 Secretary.¹²⁶⁷

Again, despite obvious concerns about the source of MOENG Vet's evidence, he was not probed about his knowledge of these events. With regard to MOENG Vet's speculative statement that he believed Mr YIM Tith was a member of the Sector Standing Committee,

¹²⁶⁴ D119/84.2, MOENG Vet, DC-Cam Statement, EN 00992987-8.

¹²⁶⁵ D119/84, MOENG Vet, WRI, A34, EN 00982707.

¹²⁶⁶ D119/85, MOENG Vet, WRI, A41, EN 00982719.

¹²⁶⁷ D119/85, MOENG Vet, WRI, A41, EN 00982719.

this appeared to have been deduced by MOENG Vet on the basis that he ‘saw him work in the Sector 13 Committee,’ yet there is no clear evidence as to where and when MOENG Vet saw this.¹²⁶⁸ The statement that Mr YIM Tith allegedly ‘worked in the committee’ says nothing about Mr YIM Tith’s specific roles and responsibilities and does not exclude the possibility that he held a relatively menial or administrative role in assisting in the Committee’s work. As set out below, much of MOENG Vet’s evidence about Mr YIM Tith was hearsay from his mother.¹²⁶⁹

667. It was only in interview on 1 September 2015, that MOENG Vet changed his evidence to say that Mr YIM Tith was on the Sector 13 Committee in 1976. As set out in detail below, this was MOENG Vet’s assumption based on impressions he appeared to have formed when he thought he saw ‘Ta Tith’ sitting to the right of the Secretary of Sector 13 on stage.¹²⁷⁰ He did not explain further why he felt that this seating position necessarily meant that ‘Ta Tith’ held a sector-level role and it may have been commonplace for cadre from district levels as well as sector levels to sit on the stage at such meetings. MOENG Vet decided that this meant ‘Ta Tith’ was ‘more powerful than the Sector Deputy Secretary’.¹²⁷¹ MOENG Vet was not asked probing questions to find out how he believed that he had identified Mr YIM Tith, nor about how he knew that sitting to the right of stage meant that an individual was on a Sector Committee, this appears to be merely MOENG Vet’s opinion.

668. Although initially MOENG Vet asserted that his evidence about ‘Ta Tith’ being on the Sector 13 Committee was based on multiple ‘meetings and conferences’ at which ‘Ta Tith’ ‘always’ sat in the same position on the stage,¹²⁷² he later accepted that he had been mistaken or had exaggerated his own knowledge of the seating arrangements. At first, MOENG Vet gave evidence that:

According to my observations, during meetings and conferences, *Ta* Tith always sat on the right side of *Ta* Saom who was the Sector 13 Secretary, and *Ta* Phen sat on the left side.¹²⁷³

669. In his subsequent evidence, MOENG Vet accepted that his assumptions about ‘Ta Tith’s’ role were derived from his recollection of seating positions at a meeting in 1976:

¹²⁶⁸ D119/85, MOENG Vet, WRI, A10-11, EN 00982716.

¹²⁶⁹ *Infra*, para. 766. D119/85, MOENG Vet, WRI, A25, 28, 29, 30 EN 00982716-7.

¹²⁷⁰ *Infra*, paras 704 to 708. D219/488, MOENG Vet, WRI, A34-37, 40-41, EN 01170586-7.

¹²⁷¹ *Infra*, para. 705. D219/488, MOENG Vet, WRI, A62, EN 01170589.

¹²⁷² D119/85, MOENG Vet, WRI, A11-12, EN 00982714.

¹²⁷³ D119/85, MOENG Vet, WRI, A11-12, EN 00982714.

Q: When you saw Ta Tith sitting on the right hand side of Ta Saom in the sector meeting, did you think that he was in the position of an assistant or deputy?

A39: To the best of my knowledge, the person who sat on the right hand side was the deputy.

Q: How many times did you see Ta Tith sitting on the right hand side of the Sector Secretary? In what year were those meetings held?

A40: I saw him once in 1976 [...]¹²⁷⁴

670. In sum, MOENG Vet gave conflicting descriptions of when ‘Ta Tith’ was allegedly appointed to the Sector 13 Committee and his mercurial account cannot be regarded as reliable. While MOENG Vet said he was a messenger at the Sector level, it cannot be assumed that he had any real access to the workings or membership of the Sector 13 Committee. MOENG Vet actually knew nothing of substance about the Sector 13 Committee and this is reflected in the lack of any clarity or consistency in his evidence.

671. MOENG Vet’s evidence about Mr YIM Tith’s alleged position on the Sector 13 Committee has no probative value.

DOK Chann’s Evidence regarding Mr YIM Tith’s Alleged Positions on the Sector 13 Committee

672. The source of DOK Chann’s evidence that Mr YIM Tith was ‘promoted to the Sector level’ in 1976 is unreliable hearsay from a source that is unclear.¹²⁷⁵ As set out below, DOK Chann had a personal recollection that Mr YIM Tith visited Wat Pratheat Security Centre of Kirivong District (‘Wat Pratheat’) at some point, but he believed that this alleged visit took place sometime during the period from around 1973 to approximately mid-June 1975. DOK Chann also said that he left Kirivong District in June 1975 and was in Takeo Town of the Southwest Zone until around mid-1977.¹²⁷⁶ It was during this period that DOK Chann said he worked at Wat Pratheat.¹²⁷⁷

673. The evidence of DOK Chann regarding Mr YIM Tith’s alleged positions on the Sector 13 Committee must be given a low probative value due its lack of clear detail and the lack of information about the source of his evidence.

¹²⁷⁴ D219/488, MOENG Vet, WRI, A40, EN 01170587.

¹²⁷⁵ D219/160, DOK Chann, WRI, A7, EN 01067764.

¹²⁷⁶ D219/86, DOK Chann, A2, WRI, EN 01056872.

¹²⁷⁷ D219/86, DOK Chann, A3, WRI, EN 01056873.

EK (UI) Hoeun's Evidence regarding Mr YIM Tith's Alleged Positions on the Sector 13 Committee

674. EK (UI) Hoeun said that Mr YIM Tith was Secretary of Sector 13 for one year in 1975 or 1976.¹²⁷⁸ As set out below, EK (UI) Hoeun repeatedly contradicted himself and was confused about dates.

675. The source of EK (UI) Hoeun's evidence is unclear and he did not express any personal knowledge about Mr YIM Tith's role from seeing him directly. To the contrary, EK (UI) Hoeun said he knew about the alleged position of Mr YIM Tith on the Sector 13 Committee 'because Yim Tith was related to Ta Mok.'¹²⁷⁹ This is a clear example of the risk that evidence implicating Mr YIM Tith in an alleged role on the Sector 13 Committee is based on 'guilt by association' with Ta Mok. EK (UI) Hoeun actually knew nothing first-hand about Mr YIM Tith's positions:

Q: How many positions did Ta Tit hold at that same time?

A71: I did not know how many positions he held. I just knew that he came in and out of Kirivong district because he was related to Ta Mok.¹²⁸⁰

676. EK (UI) Hoeun had no direct knowledge of what was happening at Sector level in the Southwest Zone. In response to a question about who could carry out arrests in Sector 13, EK (UI) Hoeun stated that he was not aware of what was happening at Sector-level:

Q: At question and answer 25, he answered that: "By being part of the commune committee, I am not envious of anyone but I was allowed to report to the higher echelons. That was the only power I had. 'Ta Mok ordered the district and the sector to not carry out arrests or executions.'" At question and answer 7 - rather, at question and answer 9, he said that "Before 1975, during an annual assessment meeting in the jungle, to which the commune committees attended as well as the district and battalion and regiments, after 1975, another meeting was held at the Takeo town, at the provincial seat, with Ta Mok's participation, during which Saom, who was the head of Sector 13 stated that it was forbidden to touch the Lon Nol soldiers from the rank of second lieutenant to colonel." Do you agree with the testimony of this witness who said that the sectors, the districts, and the communes were not allowed to carry out arrests?

¹²⁷⁸ D118/208, EK (UI) Hoeun, WRI, EN 00981819.

¹²⁷⁹ D118/208, EK (UI) Hoeun, WRI, A71, EN 00981819.

¹²⁸⁰ D118/208, EK (UI) Hoeun, WRI, A71, EN 00981819.

A: No, I am not aware of all of this. I only was aware of what was happening at the commune and district levels, so I cannot say anything about this issue.¹²⁸¹

677. In addition to being ‘unaware’ of what was happening at the Sector-level, the source of EK (UI) Hoeun’s so-called ‘awareness’ of what was happening ‘at the commune and district levels’ is itself unclear. EK (UI) Hoeun appears to have lived in his home village in Tram Kak district until September 1978 and it is unclear how he knew about activities in neighbouring communes or about the activities of the Kirivong District Committee.¹²⁸²
678. Although the evidence of his activities during the DK period is unclear, the most credible conclusion regarding EK (UI) Hoeun that can be drawn from his statements is that, in around 1975, he was helping to distribute rice and salt to new people who were being evacuated from the cities.¹²⁸³ He worked in the paddy fields in the form of reciprocal labour and had worked in mobile units when the Khmer Rouge built dams or dug canals.¹²⁸⁴ He first said that he worked as a physical labourer¹²⁸⁵ in Tram Kak District Office until March 1977, after which he left with 200 Southwest Zone cadres to go to the East Zone,¹²⁸⁶ and then he changed his evidence and said that he lived in his village from 1977 until September 1978,¹²⁸⁷ when he fled to the East Zone to live with PECH Chim.¹²⁸⁸ He also stated that he did not work in the Tram Kak District Office, contradicting his DC-Cam interview,¹²⁸⁹ about whether he was on a district committee, so it is unclear whether he was actually in any position to observe activities at a district level:

Q: In your interview with Documentation Center of Cambodia on page six (in Khmer) referring to the official translation in our possession, you claimed that, “In 1974, you became a deputy village chairman. And in 1975, PECH Chim appointed you as district committee.” Is this correct? Did you ever work in the district headquarters?

A19: No.¹²⁹⁰

¹²⁸¹ D315.1.21, EK (UI) Hoeun, Transcript, EN 01097022-3, 10.43.00-10.46.00, p. 27, l. 16 to 25 to p. 28, l. 9.

¹²⁸² D118/209, EK (UI) Hoeun, WRI, A6, EN 00983568.

¹²⁸³ D118/208, EK (UI) Hoeun, WRI, A20, EN 00981813.

¹²⁸⁴ D118/208, EK (UI) Hoeun, WRI, A15, EN 00981813.

¹²⁸⁵ D118/208, EK (UI) Hoeun, WRI, A18-A20, EN 00981813; D219/34, EK (UI) Hoeun, WRI, A5, EN 01053570-1; D315.1.20, EK (UI) Hoeun, Transcript, EN 01096790-1, 09.47.04-09.50.07, p. 17, l. 7-25 to p. 18, l. 1.

¹²⁸⁶ D219/34, EK (UI) Hoeun, WRI, A39, EN 01053576.

¹²⁸⁷ D118/209, EK (UI) Hoeun, WRI, A6, EN 00983568.

¹²⁸⁸ D118/209, EK (UI) Hoeun, WRI, A5, EN 00983568.

¹²⁸⁹ D119/70/4, EK (UI) Hoeun, DC-Cam interview, EN 01050182.

¹²⁹⁰ D118/208, EK (UI) Hoeun, WRI, A19, EN 00981813

679. Furthermore, EK (UI) Hoeun's evidence regarding the Sector 13 Committee is riddled with contradictions and uncertainties, rendering him an unreliable witness.¹²⁹¹ While he said that IM Chaem was in charge of Sector 13 with 'Ta Tith,' and specifically that 'Ta Tith' and Yeay Chaem were both in charge of Sector 13 together,¹²⁹² he also stated that IM Chaem never served as Secretary of Sector 13.¹²⁹³ He contradicted himself about information in his DC-Cam account regarding Yeay Chaem's position and whether she had replaced 'Ta Tith.'¹²⁹⁴ EK (UI) Hoeun was not questioned about the discrepancies and unclear sections of his evidence about the positions on the Sector 13 Committee.
680. EK (UI) Hoeun vacillated about the composition of the Sector 13 Committee and was unsure about the timings or roles of individuals that he recalled being appointed to the Committee. He stated that Ta Saom was Secretary of Sector 13 between 1975 and 1976 and that 'Ta Saom was the Sector Secretary. He died in 1979 when he fled into the forest.'¹²⁹⁵ He also stated that Ta Phen replaced Ta Saom as Sector 13 Secretary in 1976.¹²⁹⁶ He said that Ta Kith was Sector 13 Secretary in 1977 for one year.¹²⁹⁷ Despite listing these individuals by name, EK (UI) Hoeun was unsure about the membership of the Committee and the source of his evidence was unclear. He said about the Sector 13 Committee: '[t]here were so many changes I cannot remember them.'¹²⁹⁸
681. Regarding Mr YIM Tith, EK (UI) Hoeun stated: 'I did not know how many positions he held. I just knew that he came in and out of Kirivong district because he was related to Ta Mok.'¹²⁹⁹ EK (UI) Hoeun stated that 'Ta Tit and Ta Kit served as Sector 13 Secretary for only one year respectively.'¹³⁰⁰ Despite testimony stating that he did not know how many positions Mr YIM Tith held, EK (UI) Hoeun stated that he knew that Mr YIM Tith was Sector 13 Secretary during the years 1975 to 1977 although he did not explain how he knew this.¹³⁰¹ He went on to say that in 1976, 'Ta Tith came to be in charge of the province instead. He worked there for less than a year. Then he was sent to the Northwest

¹²⁹¹ See the further contradictions and uncertainties in EK (UI) Hoeun's evidence regarding Tram Kak District and regarding the Northwest Zone. *Infra*, paras 1044 to 1047, 1210 to 1213, 1261 and 1510.

¹²⁹² D219/34, EK (UI) Hoeun, WRI, A22, EN 01053574.

¹²⁹³ D118/208, EK (UI) Hoeun, WRI, A68, EN 00981818.

¹²⁹⁴ D118/208, EK (UI) Hoeun, WRI, A80, EN 00981819.

¹²⁹⁵ D118/208, EK (UI) Hoeun, WRI, A37-38, EN 00981815-6.

¹²⁹⁶ D118/208, EK (UI) Hoeun, WRI, A40, EN 00981815.

¹²⁹⁷ D118/208, EK (UI) Hoeun, WRI, A44-45, EN 00981816.

¹²⁹⁸ D118/208, EK (UI) Hoeun, WRI, A39, EN 00981815.

¹²⁹⁹ D118/208, EK (UI) Hoeun, WRI, A71, EN 00981819.

¹³⁰⁰ D118/208, EK (UI) Hoeun, WRI, A73, EN 00981819.

¹³⁰¹ D118/208, EK (UI) Hoeun, WRI, A63, EN 00981818-20.

Zone.’¹³⁰² In contradiction to this, he stated that in 1975, ‘Ta Tit’ was already Sector 13 Secretary.¹³⁰³ EK (UI) Houen repeated this information by agreeing with the investigator’s statement that ‘Ta Tit was secretary of Sector 13 in 1975.’¹³⁰⁴ Mr YIM Tith is not mentioned in EK (UI) Hoeun’s Case 002/02 testimony.¹³⁰⁵ EK (UI) Houen constantly changed his mind during interviews, leaving the impression that he was a witness who professed to know something about everything but actually knew nothing at all. The unreliable nature of EK (UI) Hoeun’s evidence about Mr YIM Tith is put into context by his response to the following question, asked in interview shortly after EK (UI) Hoeun had been proclaiming his knowledge about the Sector 13 Committee:

Q: Of which sector was *Ta Tit* Sector Secretary?

A69: I do not know.¹³⁰⁶

682. EK (UI) Hoeun never gave evidence explaining how he knew about the identity of Mr YIM Tith or ‘Ta Tit.’ In one interview, EK (UI) Hoeun talked about a ‘Ta Tit,’ who was Ta Mok’s younger brother-in-law, who was on the committee of Kaoh Andact district and who was already dead.¹³⁰⁷ It is unclear how EK (UI) Hoeun knew information about this ‘Ta Tit.’

683. For unknown reasons, EK (UI) Hoeun spoke at length about ‘Ta Tit’ and the Sector 13 Committee in several interviews despite knowing nothing concrete about him. Ultimately, due to the numerous contradictions and inconsistencies in EK (UI) Hoeun’s evidence – that were not clarified by follow-up questioning – the CIJs have no choice but to regard him as an unreliable witness whose evidence about the Sector 13 Committee has no probative value whatsoever.

NUT Nov’s Evidence regarding Mr YIM Tith’s Alleged Positions on the Sector 13 Committee

684. NUT Nov’s evidence about when he thought Mr YIM Tith was appointed as Secretary of Sector 13 is replete with self-contradiction and inconsistency.¹³⁰⁸ NUT Nov oscillates between different accounts of the timing of Mr YIM Tith’s alleged appointment, as well

¹³⁰² D219/34, EK (UI) Hoeun, WRI, A21, EN 01053573.

¹³⁰³ D118/208, EK (UI) Hoeun, WRI, A60, EN 00981818.

¹³⁰⁴ D118/208, EK (UI) Hoeun, WRI, A73, EN 00981819.

¹³⁰⁵ D315.1.20, EK (UI) Hoeun, Transcript; D315.1.21, EK (UI) Hoeun, Transcript.

¹³⁰⁶ D118/208, EK (UI) Hoeun, WRI, A68, EN 00981818.

¹³⁰⁷ D118/208, EK (UI) Hoeun, WRI, A54, EN 00981817.

¹³⁰⁸ D118/34, NUT Nov, WRI, A9-10, EN 00911440; D219/228, NUT Nov, WRI, A1, EN 01087486-7.

as stating plainly that he did not remember the short time period during which Mr YIM Tith was allegedly appointed:

Q: You said that Ta Tith was replaced by Ta Kit. For how long did Ta Tith serve as the secretary of Sector 13?

A29: I do not recall it, but it was not very long. It was only about one or two months.¹³⁰⁹

685. NUT Nov gave inconsistent evidence about the timing of Mr YIM Tith's alleged appointment as Secretary of the Sector 13 Committee that renders his account unreliable. NUT Nov said in one part of his evidence that 'Ta Tith' became the Secretary of Sector 13 at some unspecified time 'in 1978.'¹³¹⁰ It was unclear whether NUT Nov actually had any information about Mr YIM Tith's alleged appointment or was speculating, since he also stated that the appointment was about 7 to 8 months before the arrival of the Vietnamese soldiers in 1979:

Q: Did you know Ta Tit's function in Sector 13?

A5: Ta Tit became part of the committee of Sector 13 after Ta Ran had had a car accident. Ta Tit came to take charge of this Sector about 7 to 8 months before the arrival of the Vietnamese soldiers in 1979.¹³¹¹

686. In direct contradiction to this evidence, NUT Nov stated that Mr YIM Tith was Secretary of Sector 13 for only 'one or two months' until late 1978.¹³¹² He gave another unclear account of when 'Ta Tit' supposedly replaced Ta Ran:

Q: Did you remember what year Ta Tit came to replace Ta Ran?

A6: It was shortly before the arrival of the Vietnamese soldiers.¹³¹³

687. In addition to these internal contradictions about the timing of Mr YIM Tith's alleged appointment as Secretary of the Sector 13 Committee that relate to some period towards the end of 1978 or in 1979, NUT Nov's evidence about Mr YIM Tith falls in direct self-contradiction to his evidence that it was Ta Kit who held this position at this time:

Q: You said that Ta Kit became the secretary of Sector 13. Do you remember when Ta Kit became the secretary of Sector 13?

A30: Ta Kit became the secretary of Sector 13 in late 1978, and held that position until the fall of the Khmer Rouge regime.¹³¹⁴

¹³⁰⁹ D219/228, NUT Nov, WRI, A29, EN 01087488.

¹³¹⁰ D219/228, NUT Nov, WRI, A1, EN 01087486-7.

¹³¹¹ D118/34, NUT Nov, WRI, A5, EN 00911440.

¹³¹² D219/228, NUT Nov, WRI, A29, EN 01087488.

¹³¹³ D118/34, NUT Nov, WRI, A6, EN 00911440.

¹³¹⁴ D219/228, NUT Nov, WRI, A30, EN 01087488.

688. It is clear from analyzing the source of NUT Nov's evidence that the reason for the numerous self-contradictions and inconsistencies in his account is that in reality he knew nothing substantive about Mr YIM Tith. The only basis for NUT Nov's evidence that Mr YIM Tith was appointed to the Sector 13 Committee is his recollection that in 1978 he personally heard district secretary NEANG Ouch alias Ta San announce Mr YIM Tith's appointment at a district meeting.¹³¹⁵

689. It is therefore crucial to NUT Nov's evidence that when NEANG Ouch alias Ta San gave evidence as a witness in Case 004, he stated that Mr YIM Tith was not Sector 13 Chairman.¹³¹⁶ The following evidence of NEANG Ouch alias Ta San renders NUT Nov's hearsay evidence unreliable:

Q: Was Ta Tit ever Sector 13 Chairman?

A71: No, but I saw him in Kirivong District. I do not know what he was doing there.

Q: Was Ta Tit ever Kirivong District Secretary?

A72: I do not know. I only saw him there in Kirivong District, that's all.¹³¹⁷

690. NUT Nov's account of the meeting suffers from further, serious reliability issues concerning the source of his evidence. In direct contradiction to the ICP's assertion that there was an 'announcement' about Mr YIM Tith's appointment, NUT Nov stated that his information about 'Ta Tith' and the Sector 13 Committee was derived from 'word of mouth' from an anonymous unknown source or sources.¹³¹⁸ In this part of NUT Nov's evidence, he was sure to emphasise that 'it was not done by an announcement' and stressed that he did not attend any meetings at that time:

Q: Upon which occasion were you informed that Ta Tith had become the secretary of Sector 13?

A26: It was not on any particular occasion. I learned about it by word of mouth. There was no announcement.

Q: Did you ever attend any meetings?

A27: Whilst Ta Saom was in charge, I attended two meetings. Whilst Ta Prak, Ta Ran, Ta Tith, and Ta Kit served as the secretaries of Sector 13, I never attended any meetings.

¹³¹⁵ D118/34, NUT Nov, WRI, A5-6, 9-10, EN 00911440, 4; D219/228, NUT Nov, WRI, A1, EN 01087486-7.

¹³¹⁶ D118/172, NEANG Ouch alias Ta San WRI, A71-72, EN 00980876.

¹³¹⁷ D118/172, NEANG Ouch alias Ta San WRI, A71-72, EN 00980876.

¹³¹⁸ D219/228, NUT Nov, WRI, A26, EN 01087488.

Q: You said that you never attended any meetings whilst Ta Prak, Ta Ran, Ta Tith or Ta Kit were sector secretaries. Did the meetings continue to take place and that you did not attend? Or was there no meeting at all?

A28: There might have been some meetings, but they did not call me to attend.¹³¹⁹

691. The unreliability of NUT Nov's evidence was further revealed by his own uncertainty as to the source of his memories, after he stated that he could not remember whether he heard that Mr YIM Tith was becoming Secretary of Sector 13 from an announcement at a meeting or whether someone had told him about it:

Q: Now we move to the last topic. In the same written record, D 118/34 and in regard to your answer to question number 9, I would like to extract it as the following, "How did you know that Ta Tith became the Secretary of Sector 13?" and your answer was, "I came to know that when I attended a meeting at the district. They announced that the new Secretary of the Sector was Ta Tith." Can you recall anything else about that meeting?

A80: I cannot remember this meeting clearly. I do not recall whether someone told me about it. I don't remember attending that meeting myself. However, I know that Ta Tith was on the District Committee, and he was the Secretary of Sector 13.

Q: What else do you know?

A81: I do not know anything else, except that Ta Tith was the Secretary of Sector 13.

Q: Do you have anything else to add?

A82: No, I don't.¹³²⁰

It is striking that in NUT Nov's own words, he '[did] not know anything else, except that Ta Tith was the Secretary of Sector 13.' He was adamant about this single fact about 'Ta Tith,' yet he was unable to give any coherent information about the source of his knowledge.

692. Furthermore, NUT Nov gave no evidence of Mr YIM Tith actively participating in any role on the Sector 13 Committee during the two general assemblies of Sector 13 in Takeo provincial town that NUT Nov said he attended.¹³²¹ NUT Nov never saw Mr YIM Tith at these meetings. He stated that the first assembly was presided over by Ta Prak, who was in the Sector 13 Committee, and that Ta Ran presided over the second assembly.¹³²²

¹³¹⁹ D219/228, NUT Nov, WRI, A25-28, EN 01087488.

¹³²⁰ D219/228, NUT Nov, WRI, A80-82, EN 01087493.

¹³²¹ D118/34, NUT Nov, WRI, A1-A3, EN 00911439-40; D219/228, NUT Nov, WRI, A27, EN 01087488.

¹³²² D118/34, NUT Nov, WRI, A1-A3, EN 00911439-40.

Together with the lack of any serious evidence to establish the source of NUT Nov's recollection of this meeting, and his uncertainty about the dates and other details of the alleged appointment, the only logical finding is to disregard NUT Nov's evidence as having no probative value.

NOP Nan's Evidence regarding Mr YIM Tith's Alleged Positions on the Sector 13 Committee

693. NOP Nan gave uncertain evidence that he heard from some unnamed people in 1975, or 1977, or 1978, that Mr YIM Tith was 'chief of sector,' but he did not know which sector.¹³²³ NOP Nan first said that he heard about 'Ta Tit's' position in 1977 or 1978, when he said that he saw 'Ta Tit' get out of a car.¹³²⁴ NOP Nan also said he heard about 'Ta Tit's' alleged position as chief of sector in 1975 'when the war was over.'¹³²⁵ NOP Nan's account is derived from anonymous hearsay, lacks any accuracy and is self-contradicting. The ICP disregards NOP Nan's contradictory evidence that he 'did not know' information and that only members of the commune committee knew about who was on the Sector Committee:

Q: When you lived in Takeo, besides Ta Tit, did you ever hear of other people who were part of the sector committee?

A30: I did not know about that. Only members of the commune committee knew about it.¹³²⁶

694. The following statement is typical of the type of unclear, rumour-based, anonymous hearsay upon which the ICP asks the CIJs to find Mr YIM Tith criminally responsible:

Q: Did you ever meet Ta Tit?

A16: In 1977 or 1978, when I was doing dry-season rice farming at Kbal Pou Village and being on a boat to fetch fish sauce in Kampong Ampil Village in Treang District, I saw him get out of a car, and I asked people who he was. They told me he was Ta Tit. He was bald then.

Q: At that time, what position did Ta Tit have?

A17: People said he was the chief of sector, but I do know which sector. I do not remember who told me this. I was told that Ta Tit was the younger brother-in-law of Ta Mok.¹³²⁷

¹³²³ D118/92, NOP Nan, WRI, A16, EN 00967028.

¹³²⁴ D118/92, NOP Nan, WRI, A16, EN 00967028.

¹³²⁵ D118/92, A20, EN 00967029. ('Q: You heard that Ta Tit was the chief of sector. Which year did you hear about this? A20: I heard about his position as a chief of sector when the war was over, in 1975.')

¹³²⁶ D118/92, NOP Nan, WRI, A30, EN 00967030.

¹³²⁷ D118/92, NOP Nan, WRI, A16-17, EN 00967028.

NOP Nan's evidence does not contain any details of this alleged sighting of Mr YIM Tith getting out of a car and NOP Nan did not know who was 'Ta Tit's' driver and simply stated that he saw two to three people with him.¹³²⁸

695. In a similarly problematic fashion, the ICP's citation of NOP Nan as a witness to the ICP's serious allegations about the Sector 13 Committee ignores that NOP Nan's only specific evidence about the activities of Mr YIM Tith was based on his speculation that Mr YIM Tith had visited a village in order to view a dry-season rice field:

Q: Did you know what Ta Tit was doing there?

A19: I did not know the purpose for this presence at Kampong Ampil Village. As far as I thought, maybe he had come to view the dry-season rice field.¹³²⁹

696. The discrepancies in NOP Nan's evidence could not be tested or clarified by further questioning since he refused to be re-interviewed or to cooperate further with the OCIJ, despite repeated requests for an interview after the investigator had been informed by a family member that NOP Nan had been 'very ill.'¹³³⁰ NOP Nan did not wish to give an interview because, in the words of the investigative report, 'he wants to let bygones be bygones.'¹³³¹ The failure to clarify NOP Nan's account and the source of his evidence leaves the strong possibility that everything he said was based on unreliable anonymous hearsay. In this regard, NOP Nan stated that '[e]veryone knows what happened' in the DK regime, and revealingly, NOP Nan stated that he '[did] not know much except about the leadership.'¹³³² He did not want to talk about it any more and he wanted the Khmer Rouge Court to end it, stating the he had 'almost forgotten everything':

Q1: We are wondering if you might reconsider speaking with us and provide us with a short statement?

A1: I don't seem to have anything else to say. Everybody knows the regime was not good and it mistreated people. It has been more than 30 years, and, as it happened a long time ago, I have almost forgotten everything. Everyone knows what happened. My relatives were first demoted and then they all disappeared. I lost my uncle and a few cousins. I want you to end this as my health is not good. I am currently taking Khmer traditional medicine and praying to the ancestors to help me recover. I am also taking regular medicine. I have liver, stomach, intestine, gall bladder problems. I spent so much money on medical treatment. That

¹³²⁸ D118/92, NOP Nan, WRI, A18, EN 00967029.

¹³²⁹ D118/92, NOP Nan, WRI, A19, EN 00967029.

¹³³⁰ D219/688, WRIA, EN 01204332.

¹³³¹ D219/688, WRIA, EN 01204332.

¹³³² D219/688, WRIA, A1, EN 01204332.

is why I want this questioning ended. I don't know much except about the leadership. I don't seem to have anything else to say. Everybody knows the regime was not good and it mistreated people. It has been more than 30 years, and, as it happened a long time ago, I have almost forgotten everything. Everyone knows what happened.¹³³³

697. NOP Nan's evidence about Mr YIM Tith's alleged positions on the Sector 13 has no probative value.

KHOEM Vai's Evidence regarding Mr YIM Tith's Alleged Positions on the Sector 13 Committee

698. KHOEM Vai 'heard from other people' that Mr YIM Tith was in some position on the Sector 13 Committee for one or two months in 1976. In the WRI with document number D219/636, KHOEM Vai revealed that his evidence that Mr YIM Tith was on the Sector 13 Committee was hearsay, and probably multiple hearsay, which he had heard from anonymous sources when he was in the Northwest Zone, far away from Sector 13 in the Southwest Zone:

Q: How did you know YIM Tith had been promoted to the Sector 13 Committee, since you had already left by then?

A45: I heard about this from other people.¹³³⁴

KHOEM Vai's testimony does not support that Mr YIM Tith was in any particular position on the Sector 13 Committee. KHOEM Vai expressed uncertainty about the time period when he thought Mr YIM Tith was on the Sector 13 Committee: 'It was probably in 1976, early 1976' he said.¹³³⁵ He also stated that Mr YIM Tith 'was on the sector committee for just a short time.'¹³³⁶ KHOEM Vai never met Mr YIM Tith.¹³³⁷

699. The WRI of KHOEM Vai with document number D219/636 is furthermore unreliable as it reflects an interview originally conducted in Case 003 before being placed onto Case File 004 on the basis that KHOEM Vai was 'possibly in a position to also give evidence relevant to Case 004.'¹³³⁸ The ICP relies on this Case 003 evidence because KHOEM Vai

¹³³³ D219/688, WRIA, A1-2, EN 01204332.

¹³³⁴ D219/636, KHOEM Vai, WRI, A45, EN 01207673.

¹³³⁵ D219/636, KHOEM Vai, WRI, A40, EN 01207672.

¹³³⁶ D219/636, KHOEM Vai, WRI, A42, EN 01207673.

¹³³⁷ D219/636, KHOEM Vai, WRI, A50, EN 01207673. ('Q: Did you ever meet Ta Tith in Kiri Vong District? A50: No, I did not. Kiri Vong District was called District 109, Treang District was called District 107, Tram Kak District was called District 105, Angkor Chey District was called District 106 and Kaoh Andaet District was called District 108.')

¹³³⁸ D219/637, KHOEM Vai, WRIA, EN 01184442.

did not provide the anticipated ‘evidence relevant to Case 004.’ The investigator in Case 003 did not clarify KHOEM Vai’s evidence in relation to Mr YIM Tith; the interviewer did not ask questions or clarify information about Mr YIM Tith’s position or ask about potentially exculpatory evidence relevant to the scope of the Case 004 investigation. The need for careful questioning on these matters pertaining to Case 004 was heightened by the fact that in the Case 003 interview, the investigator tainted KHOEM Vai’s evidence by repeatedly seeking to suggest an association between Ta Mok and ‘Ta Tith.’¹³³⁹ This included asking KHOEM Vai for his opinion evidence, rather than his observations of fact:

Q: For the 10 minutes that you saw YIM Tith and Ta Mok having lunch together, what was your impression of the relationship between YIM Tith and Ta Mok? Did one of them seem to hold a higher position than another one or do you think they were on the same level?

A114: I saw them having lunch with each other as usual. I did not get an impression of a higher or lower level. They seemed to have known each other for a long time.¹³⁴⁰

700. KHOEM Vai’s evidence about Mr YIM Tith’s alleged positions on the Sector 13 has no probative value.

(2) Mr YIM Tith Did Not ‘Actively Participate’ in Sector 13 Meetings

701. The ICP makes sweeping claims about Mr YIM Tith’s active participation in meetings at the Sector 13 level involving an unspecified number of meetings on unspecified dates ‘in the Southwest Zone.’¹³⁴¹ The ICP further claims that ‘meetings between Sector 13 leaders and district-level cadres were held two to three times per month.’¹³⁴² Despite his over-reaching claims about these unidentified meetings, the ICP is unable to point to any evidence of Mr YIM Tith’s ‘active participation’ in such meetings – there is no evidence of him doing or saying things at meetings at Sector 13 level, no evidence of particular acts and conduct.

¹³³⁹ D219/636, KHOEM Vai, WRI, EN 01207681-5 (‘Q99: Did you ever see YIM Tith with Ta Mok? [...] Q100: Where did you see YIM Tith with Ta Mok? [...] Q105: We would like to repeat our question. Where did you see YIM Tith together with Ta Mok? [...] Q106: When you arrived at Ta Mok’s house, were only Ta Mok and Ta Tith there or were other cadres there as well? [...] Q114: For the 10 minutes that you saw YIM Tith and Ta Mok having lunch together, what was your impression of the relationship between YIM Tith and Ta Mok? Did one of them seem to hold a higher position than another one or do you think they were on the same level?’)

¹³⁴⁰ D219/636, KHOEM Vai, WRI, A114, EN 01207684-5.

¹³⁴¹ *ICP’s Final Submission*, D378/2, para. 14.

¹³⁴² *ICP’s Final Submission*, D378/2, para. 132.

702. NUT Nov's evidence about the alleged meeting in 1978 is unreliable and he provided no evidence that Mr YIM Tith participated in the meeting.¹³⁴³ The only remaining evidence of such meetings cited by the ICP is MOENG Vet's recollection of a Sector-level meeting that the ICP describes as the 'Ten-day Sector 13 Meeting Regarding the CIA and KGB.'¹³⁴⁴ Once again, a reading of the evidence quickly reveals the ICP's allegations to be unfounded, exaggerated, and misrepresentative.

MOENG Vet's Evidence of Mr YIM Tith's alleged attendance at the 'Ten-day Sector 13 Meeting'

703. The evidence of Mr YIM Tith's participation in the 'Ten-day Sector 13 Meeting' is far from clear. The ICP contends that Mr YIM Tith's responsibility at the Sector 13 level should be inferred from his mere alleged presence at the 'Ten-day Sector 13 Meeting.'¹³⁴⁵ MOENG Vet stated explicitly that although 'Ta Tith' allegedly attended the whole of this ten-day meeting, he never gave any speech. This evidence conflicts with the ICP's allegations about Mr YIM Tith being on the Sector 13 Committee, and has been entirely disregarded by the ICP:

Q: So it meant the meeting to report about the yearly work result lasted for 10 days. Is that correct?

A46: Yes, it is.

Q: So the three-day, the five-day, and two-day meetings were attended by the same members such as the sector committee and the district committee. Is that correct?

A47: Yes, it is. Maybe each commune secretary also attended.

Q: Did Ta Saom attend the whole ten-day meeting?

A48: Yes, he did.

Q: What did Ta Saom say?

A49: Ta Saom gave a speech. He presented documents and the result of work to the Party. After this other people to spoke about the three flags of the Party; the three flags included loyalty toward the Party, the commitment to serve the Party, and the self-devotion to the Party. This reminded us that when we made a mistake, the Party could do anything to us. The three flags were put one on top of another and each flag represented the point that I mentioned earlier.

Q: Just now, you said that other people also gave speeches. Did Ta Tith give a speech?

¹³⁴³ *Infra*, paras 688 to 692.

¹³⁴⁴ *ICP's Final Submission*, D378/2, paras 23 to 26.

¹³⁴⁵ *ICP's Final Submission*, D378/2, para. 23.

A50: No, he didn't. But Ta Choeun read out documents. Ta Choeun was well educated and he was Angkor Chey District Secretary.

Q: Did Ta Tith attend the whole ten-day meeting?

A51: Yes, he did. Everyone stayed for the whole of the meeting.¹³⁴⁶

704. During these 10 days, 'Ta Tith' did nothing that would be consistent with a cadre in a Sector-level position. Furthermore, the ICP does not explain how 'Ta Tith's' mute 'presence on stage' would amount to encouragement of subordinate cadres to carry out the alleged criminal plan.¹³⁴⁷

705. MOENG Vet gave no reliable evidence that Mr YIM Tith attended this meeting in any capacity on the Sector 13 Committee. As the ICP accepts, MOENG Vet was 'unsure of Yim Tith's precise position at this time.'¹³⁴⁸ The ICP ignores MOENG Vet's unclear and unspecific evidence of the date of the alleged meeting: MOENG Vet says '1976' or 'maybe in late 1976.'¹³⁴⁹ In fact, MOENG Vet's only evidence on this point, namely that Mr YIM Tith was *de facto* 'more powerful than the Sector Deputy Secretary,' is speculation.¹³⁵⁰ MOENG Vet's view about Mr YIM Tith's role at the meeting was derived from his personal suppositions about the 'seating arrangements' and his highly subjective opinion about which cadre 'looked' more powerful than others based primarily on MOENG Vet's assessment of the relative age of the cadres:

Q: To your knowledge, what was the difference between Ta Phen's and Ta Tith's positions?

A62: Ta Phen was the Sector Deputy Secretary. In fact Ta Tith's official position was in Kirivong District. However from their seating arrangement during the Sector meetings it was obvious that he looked more powerful than Ta Phen. That's because first he was more senior in his age. Second he was related to Ta.¹³⁵¹

706. The ICP misinterprets, and consequently misrepresents, MOENG Vet's evidence about the seating position. The evidence does not support the contention that 'the district secretaries were seated in the front row of the audience, facing Mr YIM Tith and Ta Saom on stage, "as if [they] were watching a movie" - an indication that Yim Tith was senior

¹³⁴⁶ D219/488, MOENG Vet, WRI, A46-51, EN 01170588.

¹³⁴⁷ ICP's Final Submission, D378/2, para. 26.

¹³⁴⁸ ICP's Final Submission, D378/2, para. 23.

¹³⁴⁹ D219/488, MOENG Vet, WRI, A40, EN 01170587-89.

¹³⁵⁰ D219/488, MOENG Vet, WRI, A62, EN 01170589.

¹³⁵¹ D219/488, MOENG Vet, WRI, A62, EN 01170589.

to the assembled district secretaries at the time of this meeting.’¹³⁵² The evidence does not support that Mr YIM Tith was seated ‘in the place usually reserved for the deputy secretary of the sector.’¹³⁵³ MOENG Vet’s hypothesis about the meaning of an individual’s seating position, under the secretive conditions of DK, cannot be relied upon as conclusive evidence of an individual’s actual position, authority and control. The ICP refers to nothing aside from MOENG Vet’s opinion evidence to support that there was a Cambodian cultural convention regarding the correlation between seating positions and actual power. The ceremonial positions of individuals acting during the DK era, including King Sihanouk, would suggest otherwise.

707. MOENG Vet gave no precise position for where Mr YIM Tith was sitting and did not state that Ta Saom and Mr YIM Tith were seated facing the district secretaries. MOENG Vet actually stated that Mr YIM Tith was sitting ‘at the same place’ as Ta Tom, which was ‘maybe’ with the members of the district committees:

Q: Where did *Ta Tom* sit?

A56: I do not know, maybe he sat in the front row because all of the district committee sat in the front row.

Q: During the whole ten-day meeting, where did *Ta Tith* sit?

A57: *Ta Tith* sat at the same place, on the stage at the right hand side.¹³⁵⁴

708. The mere details of Mr YIM Tith’s alleged positioning on a stage at a meeting is insufficient to support the ICP’s allegations of Mr YIM Tith’s active participation at Sector level. MOENG Vet’s evidence regarding Mr YIM Tith’s role in the ‘Ten-day meeting’ is speculative and the investigator failed to ask him about the source of his evidence. When pressed about the source of some information during a 2014 OCIJ interview, MOENG Vet admitted that his testimony was in fact hearsay that he had heard after 1979,¹³⁵⁵ demonstrating that he was susceptible to muddling his own first-hand eyewitness evidence with rumours that he heard years later.

¹³⁵² ICP’s Final Submission, D378/2, para. 23.

¹³⁵³ ICP’s Final Submission, D378/2, para. 23.

¹³⁵⁴ D219/488, MOENG Vet, WRI, A56-A57, EN 01170588-9.

¹³⁵⁵ D119/86, MOENG Vet, WRI, A38-39, EN 00982731. (‘Q: Did you know what happened to the 11 people who were sent to Phnom Penh by plane? A38: I did not know what happened to them at that time; but later, I knew that all eleven of them were sent to the Office S-21. Q: How could you know that they were sent to S-21? A39: I heard this from Nhan (deceased) after 1979.’)

MOENG Vet's Evidence of Ta Saom's speech at the 'Ten-day Sector 13 Meeting'

709. The evidence of Ta Saom's speech at the 'Ten-day Sector 13 Meeting' is unreliable. Based only on MOENG Vet's recollection, the ICP states that '(Ta Saom) told the attendees that the enemies were the KGB and the CIA, and that "[t]he CIA network was affiliated with the United States of America and the KGB was affiliated with Vietnam.'"¹³⁵⁶
710. A careful analysis of MOENG Vet's account of Ta Saom's speech demonstrates that it must be treated as unreliable rumour.¹³⁵⁷ In his Case 002/02 testimony, MOENG Vet was questioned by the ICP about the 'Ten-day Meeting' and he revealed under oath that he 'heard about' what Ta Saom was supposed to have said regarding the KGB and the CIA from an anonymous source and MOENG Vet revealed that he had been called to the meeting not as a participant in the meeting but as a waiter and food server: 'I heard about that statement, and we, as chiefs of messenger, groups, were instructed to attend the meetings. We waited on the tables and served the food to them after the meeting.'¹³⁵⁸ MOENG Vet's evidence suggests that his participation in the meeting was menial and confirms that he was not in a position to hear Ta Saom's speech first-hand.
711. As a low-level commune messenger, it is not credible that MOENG Vet would have been invited to a meeting with Ta Saom. In fact, MOENG Vet was a low-level cadre who tended to exaggerate his own importance, stating: 'Based on my participation in the meetings with those senior people, in general, for senior cadres, this topic was raised rather often.'¹³⁵⁹ MOENG Vet's self-important impressions of the activities of Ta Saom must be disregarded as unreliable, leaving no sufficient evidentiary basis on which to make findings about the content of the 'Ten-day Sector 13 Meeting' or of Mr YIM Tith's active participation therein.
712. MOENG Vet's evidence about Mr YIM Tith's alleged 'active participation' in Sector 13 meetings has no probative value.

¹³⁵⁶ ICP's Final Submission, D378/2, para. 24.

¹³⁵⁷ D219/488, MOENG Vet, WRI, A45, 64, EN 01170588-9.

¹³⁵⁸ D219/899.1.4, MOENG Vet, Transcript, EN 01346505-6, 11.12.05-11.16.10, p. 41, 1.5-p. 42, 1.22.

¹³⁵⁹ D219/899.1.4, MOENG Vet, Transcript, EN 01346505-6, 11.12.05-11.16.10, p. 41, 1.5-p. 42, 1.22.

(3) Evidence of Witnesses from Sector 13 Who Had Never Heard of Mr YIM Tith

713. In addition to the insufficiencies in the Case File evidence identified by the ICP and referred to above, the ICP fails to account for the large number of Sector 13 witnesses who never heard of Mr YIM Tith. In spite of the ICP's sweeping claims that 'Mr YIM Tith was involved in every phase of the implementation of the common criminal plan in the Southwest Zone,'¹³⁶⁰ that Mr YIM Tith was a leading member of the alleged JCE, that Mr YIM Tith underwent a 'dramatic rise' from his alleged role as deputy secretary of Kirivong District, and that Mr YIM Tith played 'a critical role in the implementation of [the CPK's] criminal policies throughout vast territories of the country,'¹³⁶¹ a large number of witnesses had never heard of Mr YIM Tith.

714. The OCIJ interviewed 36 witnesses who lived and worked in Sector 13 during the period of the temporal scope of the investigation and stated that they had never heard of Mr YIM Tith. The 36 witnesses are OUK Sokunthea, BAV Nem, CHEAV Rann, DOEK Pet, HANG Sien, HUN Kimseng, ING Den alias SACH Den, KHAN Kim, KHIN Suo, KONG Samnang, LACH Sem, MAO Ngov, MOM Pholla, POL Nhan, SAM Kun, SAM Touch, SAN Touch, SAUT Saing, SEM Suon, SEN Soem, SET Yem, SREI Than, SUO Lorn, TEM Bunly, THANN Thim, TOB Nget, TOEM Hy, UK Him, VAN Soeun, YANG Nhoem, YIN Teng, HUN Ret, TOCH Phoeun, CHHOENG Choeun, VONG San, and OUK Heung.¹³⁶² The ICP ignores that this witness evidence, taken together, severely undermines the his contention regarding Mr YIM Tith's alleged 'critical' role in Sector

¹³⁶⁰ ICP's Final Submission, D378/2, para. 36.

¹³⁶¹ ICP's Final Submission, D378/2, paras 1, 3, and 10.

¹³⁶² D219/229, OUK Sokunthea, WRI, A51, EN 01089991; D119/63, BAV Nem, WRI, A11, EN00966771; D219/724, CHEAV Rann, WRI, A61-A62, EN 01218617; D118/203, DOEK Pet, WRI, A165, EN 00985607; D219/942, HANG Sien, WRI, A13, EN 01523938; D219/522, HUN Kimseng, WRI, A89, EN 01168020; D219/100, ING Den alias SACH Den, WRI, A41, EN 01074525; D118/47, KHAN Kim, WRI, A9, EN 00934546; D118/291, KHIN Suo, WRI, A180, EN 01031857; D118/253, KONG Samnang, WRI, A72, EN 01031949; D118/233, LACH Sem, WRI, A134, EN 01055594; D219/316, MAO Ngov, WRI, A174, EN 01111996; D219/568, MOM Pholla, WRI, A124, EN 01182737; D118/62, POL Nhan, WRI, A15-A16, EN 00945846; D219/591, SAM Kun, WRI, A92, EN 01178851; D219/604, SAM Touch, WRI, A109, EN 01184879; D118/131, SAN Touch, WRI, A82, EN 00970051; D134/8, SAUT Saing, WRI, A116, EN 00970128; D119/142, SEM Suon, WRI, A58, EN 01044820; D219/610, SEN Soem, WRI, A40, EN 01184920-1; D219/2, SET Yem, WRI, A75, EN 01044905; D118/134, SREI Than, WRI, A52, EN 00970074; D118/293, SUO Lorn, WRI, A62, A63, EN 01031997; D118/300, TEM Bunly, WRI, A260, EN 01045446; D118/269, THANN Thim, WRI, A117, EN 01035023; D219/49, TOB Nget, WRI, A149, A158, EN 01053700, 01053701; D118/166, TOEM Hy, WRI, A, EN 00980274; D118/276, UK Him, WRI, A86, EN 01031775; D118/167, VAN Soeun, WRI, A108, EN 00980291; D118/284, YANG Nhoem, WRI, A38, EN 01031831; D219/135, YIN Teng, WRI, A536, EN 01067099; D219/926, HUN Ret, WRI, A10, EN 01451492; D118/84, TOCH Phoeun, WRI, A19, EN 00976937; D119/156, CHHOENG Choeun, WRI, A15, EN 01044843; D219/919, VONG San, WRI, A62, EN 01476072; D219/6, OUK Heung, WRI, A137, EN 01047758. See also Annex V.

13. This list does not include individuals whom the OCIJ contacted in the course of the Case 004 judicial investigation, who lived in Sector 13 during the period of the temporal scope of the investigation, but who had never heard of Mr YIM Tith.

715. The ICP refers to a passage of EK (UI) Hoeun's evidence as a singular instance of evidence that is '*contra*' to the other cited evidence in relation to Kirivong District.¹³⁶³ When seen in the context of the real quantity of Case File evidence that runs '*contra*' to the ICP's assertions about Mr YIM Tith's appointment to the Kirivong District Committee, the citation of only one '*contra*' witness statement is revealed to be a misrepresentative gesture. The ICP's disingenuous approach to conflicting evidence belies the substantial number of witnesses who should – if the ICP's claims about Mr YIM Tith's influence in the Southwest Zone are to be believed – have at least heard of Mr YIM Tith. The ICP is obliged to look at the evidence in its totality and has failed to do so.

(4) Conclusion Regarding Sector 13

716. The ICP does not present sufficient evidence to support his claim that Mr YIM Tith held positions of Member, Deputy Secretary or Secretary of the Sector 13 Committee at any time period within the temporal scope of the investigation.¹³⁶⁴ As set out in the analysis above, the evidence relied upon by the ICP amounts to unreliable accounts of seven witnesses that have no probative value and do not place Mr YIM Tith in the alleged positions at any time within the temporal scope of the investigation. Moreover, when compared to the 36 witnesses who never heard of Mr YIM Tith despite living and working in the Southwest Zone at relevant times, this evidence is insufficient.

(b) Mr YIM Tith Did Not Hold the Alleged Positions in Kirivong District and Did Not Participate in the Common Criminal Plan in Kirivong District through his Contribution to the Implementation of the CPK Enemies Policy

717. As set out below, there is insufficient evidence of Mr YIM Tith's acts, conduct and positions on the Kirivong District Committee at any time that would amount to participation in the common criminal plan that resulted in the commission of charged

¹³⁶³ ICP's Final Submission, D378/2, para. 10, fn 6. (The ICP states: '*See contra* D119/70/4 EK (UI) Hoeun DC-Cam Statement, EN 01050192 [*'Q: Was Ta Tith not in charge of Kirivong district? A: No, he wasn't. He was in charge of Angkor Chey district.'*])

¹³⁶⁴ ICP's Final Submission, D378/2, para. 130.

crimes. More specifically, the evidence is insufficient to find that Mr YIM Tith participated in a common criminal plan through his individual conduct at meetings in Kirivong District, through the monitoring and investigation of enemies in Kirivong District by his direct and indirect subordinates, or by his active participation in the imprisonment, interrogation and killing of enemies in Kirivong District.

(1) Mr YIM Tith Did Not Hold the Alleged Positions on the Kirivong District Committee

718. There is insufficient evidence that Mr YIM Tith held a position on the Kirivong District Committee during any time period that could render him responsible for crimes allegedly committed in Kirivong District pursuant to the common criminal plan. The ICP alleges that ‘from at least 1975,’ Mr YIM Tith was ‘the Kirivong District Secretary or Deputy Secretary and continued to hold these positions through April to May 1978.’¹³⁶⁵ The evidence is not sufficient to find that Mr YIM Tith held specific roles and responsibilities on the Kirivong District Committee throughout the alleged time period.

719. As submitted above, Mr YIM Tith cannot be indicted on the basis of facts outside the scope of the investigation.¹³⁶⁶ In accordance with the Introductory and Supplementary Submissions, the temporal scope for facts in the Southwest Zone is ‘from 1976 until the end of 1977 or early 1978.’¹³⁶⁷ Mr YIM Tith cannot therefore be indicted for allegations in Kirivong District from 17 April 1975 until 31 December 1975 nor from early 1978 until 6 January 1979. In addition, Mr YIM Tith cannot be indicted for the position of Deputy Secretary at any time period since he was charged only in the specific positions of Member and Secretary of the Kirivong District Committee.¹³⁶⁸

720. The alleged facts concerning Mr YIM Tith’s roles and responsibilities on the Committee and the timing of his appointment to the Committee are ‘material facts’ within the meaning of the Rule 67(2) provision that ‘[t]he Indictment shall be void for procedural defect unless it sets out [...] a description of the material facts.’¹³⁶⁹ The ICP’s allegations

¹³⁶⁵ ICP’s Final Submission, D378/2, paras 10 and 137.

¹³⁶⁶ *Supra*, paras 435 to 446.

¹³⁶⁷ ICP’s Third Introductory Submission, November 2008, D1, para. 93.

¹³⁶⁸ *Supra*, para. 456. (The ICIJ did not charge Mr YIM Tith in the specific position of Deputy Secretary of the Kirivong District. The ICIJ charged Mr YIM Tith for responsibility on the Kirivong District Committee ‘as the member and later Secretary.’)

¹³⁶⁹ Rule 67(2) provides ‘The Indictment shall be void for procedural defect unless it sets out the identity of the

are woefully non-specific with regard to Mr YIM Tith's alleged position on the Kirivong District Committee.¹³⁷⁰ The degree of imprecision in the ICP's Final Submissions does not provide an adequate 'description' of these material facts, such that these allegations do not provide a sound basis for an indictment against Mr YIM Tith in relation to Kirivong District.

721. The 21 witnesses and Ben Kiernan's book that are cited by the ICP paint an inconsistent picture of Mr YIM's alleged work on the District Committee.¹³⁷¹ The evidence cited by the ICP contains differing and unclear accounts, and in the absence of more specific evidence about the Kirivong District Committee and its various permutations at different stages of DK, and in compliance with the principle *in dubio pro reo*, Mr YIM Tith cannot be found to have contributed to the common criminal plan in any capacity at the District-level.

TOP Phan's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

722. The ICP misinterprets, and consequently misrepresents, the evidence of TOP Phan by citing him in support of the allegation that Mr YIM Tith was Deputy Secretary and Secretary of Kirivong District.¹³⁷² In direct contradiction to the ICP's allegation, TOP Phan actually said explicitly that he did not know Mr YIM Tith's position:

Q: How about Ta Tith? Have you ever heard of him?

A27: Yes, I met him. But he stayed alone, not with others.

Q: What position did he hold?

A28: I did not know his position. He did not get involved with other people. I was afraid and I dared not ask.¹³⁷³

It is patently misleading for the ICP to omit evidence that obviously contradicts his cited evidence.

723. When asked about the hierarchy in Kirivong District, TOP Phan said that Ta Nem was responsible for military and security in Kirivong District and he did not refer to Mr YIM

Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.'

¹³⁷⁰ ICP's Final Submission, D378/2, para. 10.

¹³⁷¹ ICP's Final Submission, D378/2, para. 10, fn 6.

¹³⁷² ICP's Final Submission, D378/2, para. 10, fn 6.

¹³⁷³ D118/305, TOP Phan, WRI, A27-28, EN 01045521.

Tith as holding any such responsibilities.¹³⁷⁴ When asked who was in the organisational structure of the District, TOP Phan described the roles of Ta Nem and Ta Net but did not describe Mr YIM Tith holding any role.¹³⁷⁵ TOP Phan said he worked for Ta Net at Wat Chambak in the district office of Kirivong District for three years,¹³⁷⁶ yet his evidence that Mr YIM Tith held a role on the Kirivong District Committee is unclear and confused.¹³⁷⁷

724. The ICP cherry-picks from TOP Phan's witness statements to present a misleading picture of his testimony to the CIJs. This perspective on TOP Phan's evidence obscures its true nature and, when assessed in its totality, his evidence does not support the ICP's allegations.

LOEM Ngen's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

725. The ICP misinterprets, and therefore misrepresents, LOEM Ngen's testimony by relying on the following evidence that LOEM Ngen did not know Mr YIM Tith's position, in support of his claim that Mr YIM Tith was Deputy Secretary and Secretary of Kirivong District:

Q: Did you know Yim Tith, alias Ta Tith?

A13: Yes, I knew *Ta* Tith, but I did not know his position.¹³⁷⁸

726. LOEM Ngen stated plainly that he did not know 'Ta Tith's' position. Furthermore, LOEM Ngen's statement that he 'knew Ta Tith' is of questionable credibility, since he did not describe any precise circumstances in which he met 'Ta Tith.'¹³⁷⁹ LOEM Ngen was not asked any follow-up questions that elicited further clarification or details about these circumstances. The source of his evidence about Mr YIM Tith is unclear and LOEM Ngen

¹³⁷⁴ D118/305, TOP Phan, WRI, A32, EN 01045521. ('Q: Who was responsible for security in Kiri Vong District? A32: Kiri Vong District Security was under the responsibility of the military. The chief was *Ta* Nem. I do not know his surname.')

¹³⁷⁵ D118/305, TOP Phan, WRI, A33-36, EN 01045521-2. ('Q: How many people worked under Ta Nem? A33: I did not know, but I only knew that Ta Nem held a senior position. Q: Do you know whether Ta Nem also supervised the militia? A34: Yes, he did control the militia. Q: What was the organisational structure of Kiri Vong District? A35: To my knowledge, there were only two sections: Economics (rice farming and transportation) and Security. Q: Who was responsible for the economy? A36: Ta Net was responsible for the economy, while Ta Nem was responsible for security. Sometimes they had me assist the transportation section.')

¹³⁷⁶ D118/305, TOP Phan, WRI, D118/305, EN 01045520.

¹³⁷⁷ D118/305, TOP Phan, WRI, D118/305, 01045521.

¹³⁷⁸ D219/121, LOEM Ngen, WRI, A13, EN 01057796.

¹³⁷⁹ D219/121, LOEM Ngen, WRI, A13-15, EN 01057796.

stated that his evidence that ‘Ta Tith’ was going to meetings at the Sector level was heard from a person that he referred to in evidence as ‘Ben.’¹³⁸⁰ LOEM Ngen recalled that Ben told him that ‘Ta Tith’ said to him at Phnum Chhhmal bridge that he was ‘going to join a meeting at the Sector.’¹³⁸¹ LOEM Ngen’s evidence in this regard must be accorded no probative value since it is based on unsubstantiated rumours and the source of those rumours was left unverified in the witness’s evidence.¹³⁸²

TUN Soun’s Evidence Regarding Mr YIM Tith’s Alleged Positions on the Kirivong District Committee

727. The ICP misinterprets, and consequently misrepresents, TUN Soun’s testimony with respect to Mr YIM Tith’s alleged roles and responsibilities in Kirivong District by wilfully ignoring the evidence of TUN Soun that obviously contradicts the parts of his evidence cited by the ICP. In an OCIJ interview conducted on 6 May 2011, in response to questions about Mr YIM Tith from Judge Siegfried Blunk and an ‘unidentified man,’ TUN Soun stated that he knew nothing about Mr YIM Tith:¹³⁸³

Q: In one of the interviews you stated that Ta Tith had left the district when the Vietnamese attacked.

A: I guess there must have been a mistake in writing the account. It was Ta Tom who had left. I don’t know anything about Ta Tith.¹³⁸⁴

728. The ICP fails to refer to TUN Soun’s further clear evidence, provided in a subsequent interview, that he did not know who was the Secretary of Kirivong District:

Q: Do you know who the secretary of this district was?

A8: I do not know.¹³⁸⁵

¹³⁸⁰ D219/121, LOEM Ngen, WRI, A14-15, EN 01057796. (‘Ta Tith always stopped at the bridge and told the workers there he was going to attend a meeting at the Sector, and the workers there told me this. [...] Q: Do you know the names of the people with whom Ta Tith always chatted at that bridge? A15: He talked with Ben, the chairman of my fishing unit.’)

¹³⁸¹ D219/121, LOEM Ngen, WRI, A14-15, EN 01057796.

¹³⁸² LOEM Ngen could not be sure that people who referred to rumours of his activities were not confusing him with Ta Tom. He said about Mr YIM Tith and Ta Tom: ‘people called the two men as a pair.’ D219/121, LOEM Ngen, WRI, A13, EN 01057796.

¹³⁸³ D219/422.10, TUN Soun, Transcription of Audio File D13R, EN 01136973-74. The questions attributed to the ‘unidentified man’ in the partial audio recording do not match those that were stated in WRI as having been put to the witness by Judge Blunk: D13, TUN Soun, WRI, EN 00698809-10.

¹³⁸⁴ D13, TUN Soun, WRI, EN 00698809-10.

¹³⁸⁵ D118/22, TUN Soun, WRI, A8, EN 00976605. Despite being lead by the investigator, TUN Soun insisted that he did not know what was Mr YIM Tith’s position and he was confused about individuals holding the position of ‘Secretary’ on District Committees: D118/22, TUN Soun, WRI, A4-6, EN 00976605. (‘Q: What was the position of Ta Tit in Kiri Vong District? A6: I do not know what his position was; I only knew that in the district, Ta Tom, Ta Nem, Yeay Bau and Ta Tit were the secretaries.’)

729. When asked about the timing of Mr YIM Tith's alleged role on the Kirivong District Committee, TUN Soun said that 'Tith' was appointed in 1969 and gave no precise dates for any subsequent period.¹³⁸⁶ There is therefore a significant risk that TUN Soun's evidence about Mr YIM Tith concerns a period that falls prior to the temporal scope of the investigation in Kirivong District. In the absence of clear evidence to the contrary it must be disregarded.¹³⁸⁷
730. The source of TUN Soun's evidence is not sufficiently clear. It is unclear from his evidence on Case File 004 how, in any case, he could have known about Mr YIM Tith's roles and responsibilities on the Kirivong District Committee. He said he was a Lon Nol soldier and returned to Kbal Damrey Village of the Southwest Zone in 1973 and that he was later imprisoned at Wat Pratheat, but the investigators failed to elicit from TUN Soun information about how he knew about the Kirivong District Committee.¹³⁸⁸
731. As set out in extensive detail below, there are grave inconsistencies in TUN Soun's evidence as to Mr YIM Tith's alleged personal participation as a member of the Kirivong District Committee in interrogations at Wat Pratheat that render his testimony unreliable.¹³⁸⁹

TIM Phuon's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

732. The ICP misinterprets, and consequently misrepresents, TIM Phuon's testimony. TIM Phuon stated unambiguously that he did not know that Mr YIM Tith was on the Kirivong District Committee; he stated this in spite of Judge Blunk's strongly leading questions:
- Q: Did you know that in Kirivong, Ta Tith was the District Committee and had the right to order people arrests and executions?
- A: No, I didn't. I was only 17 years old back then.¹³⁹⁰
733. The ICP misinterprets, and consequently misrepresents, TIM Phuon's evidence by failing to refer to his contrary evidence regarding Mr YIM Tith's alleged position on the

¹³⁸⁶ D219/346, TUN Soun, WRI, A26, 40-42, EN 01116111-2. ('Tith was declared as the District Secretary in 1969.')

¹³⁸⁷ *Supra*, paras 436 to 439.

¹³⁸⁸ *Infra*, paras 863, 866 to 899.

¹³⁸⁹ *Infra*, paras 866 to 899.

¹³⁹⁰ D11, TIM Phuon, WRI, EN 00698806.

Kirivong District Committee. TIM Phuon stated plainly that he did not know what position Mr YIM Tith was:

Q: What role did Ta Tit have?

A7: I did not know. Because they sent me from a different village to that location, I did not know about his role.

Q: Did you know if Ta Tit was a high-ranking cadre?

A8: I did not know about that either.¹³⁹¹

734. TIM Phuon further stated that he did not know what position Mr YIM Tith held when TIM Phuon was at Wat Soben (Pagoda) of the Southwest Zone in '1976 or 1977':

Q: When you were at Wat Soben Pagoda, did ever communicate with your parents?

A99: No, I did not.

Q: Did you ever contact *Ta* Tith?

A100: No, I did not.

Q: How far from Wat Soben Pagoda did Uncle Tith live?

A101: I do not know how many kilometres it was from Pechsa to Wat Soben Pagoda.

Q: Where did *Ta* Tith work at that time?

A102: I do not know where he worked, but when I arrived there, he was in Pechsa. I do not know where he went to work.

Q: What did *Ta* Tith do at that time?

A103: I do not know what position he held.¹³⁹²

735. Similarly, the ICP ignores TIM Phuon's contradictory evidence about Mr YIM Tith's role:

Q: When you said that Ta Tith was the one who controlled that location, on what did you base your statement?

A9: At the time I was less interested in his role. I just learned that he was my uncle, and he had me transplant rice seedlings there.¹³⁹³

736. TIM Phuon is Mr YIM Tith's nephew and he was too young during the DK era to remember accurate details from this period. He could not accurately remember his date

¹³⁹¹ D118/20, TIM Phuon, WRI, A7-10, EN 00911425. There is a translation error in the English version of TIM Phuon's statement: 'I learned that he had a top role [KH version: 'a big role'].'

¹³⁹² D219/466, TIM Phuon WRI, A93, 103, EN 01152280-1.

¹³⁹³ D118/20, TIM Phuon, WRI, A9, EN 00911425.

of birth and could not remember that he was aged 11 years old in 1975.¹³⁹⁴ It is unclear what was the source of his evidence about Mr YIM Tith and there is no clear evidence that he directly observed Mr YIM Tith's functioning on the Kirivong District Committee. TIM Phuon says he spent very limited time with Mr YIM Tith, stating 'I was with him for three or four days [at Pech Sar Commune near Phsar Tunloab Market] just before he sent me to work at [Wat Soben (Pagoda) of the Southwest Zone].'¹³⁹⁵

737. In accordance with the analysis above regarding DC-Cam statements, the Defence submits that the DC-Cam note from the 'Promoting Accountability' project enjoys no presumption of relevance and reliability and has no probative value.¹³⁹⁶ Not only was the note about TIM Phuon 'generated without the judicial guarantees and formality that characterise WRIs,'¹³⁹⁷ it also suffers from lying in direct contradiction to the opposing evidence of TIM Phuon set out above.

PECH Chim's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

738. The evidence of PECH Chim cited by the ICP is unclear and uncertain about the details of Mr YIM Tith's alleged appointment(s) to the Kirivong District Committee.¹³⁹⁸ PECH Chim gave evidence that he was a member of the Tram Kak District Committee in Sector 13 and it is striking that despite his position he was unable to give sufficient detail about Mr YIM Tith's alleged appointment.¹³⁹⁹
739. PECH Chim gave no start date for Mr YIM Tith's alleged appointment as Secretary of Kirivong District. As to the end date of Mr YIM Tith's alleged appointment, PECH Chim's evidence is highly contradictory and cannot be relied upon. PECH Chim stated earlier in his interviews that Mr YIM Tith was Secretary of Kirivong District 'until the collapse of the Khmer Rouge regime' and stated that his views about Mr YIM Tith were

¹³⁹⁴ D11, TIM Phuon, WRI, EN 00698806. The date of birth of 18 August 1963 stated in Tim Phoun's ID card in means that he was still 11 years old by April 1975. D118/20, TIM Phuon, WRI, EN 00911425. He was confused about these dates in his DC-Cam evidence, stating that he was 17 in 1977 as well as stating that his year of birth was 1962: D65.1.55, TIM Phuon, EN 00644107.

¹³⁹⁵ D11, TIM Phuon, WRI, EN 00698806.

¹³⁹⁶ *Supra*, paras 507 to 511.

¹³⁹⁷ Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 124.

¹³⁹⁸ *ICP's Final Submission*, D378/2, para. 10. The ICP cites PECH Chim in support of his allegation that Mr YIM Tith 'served first as deputy secretary and then secretary of Kirivong District.'

¹³⁹⁹ D6.1.650, PECH Chim, WRI, EN 00379171.

based ‘on his assumption.’¹⁴⁰⁰ In later interviews, PECH Chim stated that Mr YIM Tith remained as the Secretary of Kirivong District until he left for Battambang, but he was unable to remember when this was.¹⁴⁰¹ Yet it is striking that PECH Chim also stated, in direct conflict with his other evidence, that he did not know where Mr YIM Tith had worked prior to moving to Battambang.¹⁴⁰²

740. PECH Chim does not state the source of his knowledge that Mr YIM Tith was Secretary of Kirivong District. Without clear evidence as to how PECH Chim could be able to provide reliable information regarding the structure of Kirivong District despite being in Tram Kak district, his evidence cannot be considered sufficiently probative.¹⁴⁰³

LUON Mol’s Evidence Regarding Mr YIM Tith’s Alleged Positions on the Kirivong District Committee

741. LUON Mol’s evidence regarding Mr YIM Tith’s role in Kirivong District is relevant only to the period ‘in 1974’ and ‘until 1975’ and is therefore outside the temporal scope of the Case 004 investigation.¹⁴⁰⁴ Since LUON Mol gives no end date for Mr YIM Tith’s alleged position, there is a significant risk that his evidence relates only to a period prior to 17 April 1975 and is therefore outside the temporal scope of the allegations in the Southwest Zone.¹⁴⁰⁵ Mr YIM Tith cannot be indicted for allegations in Kirivong District prior to 31 December 1975.¹⁴⁰⁶
742. In addition, the reliability of LUON Mol’s evidence is called into doubt due to the passage of time and his inability to remember details. He specifically said during interview: ‘I do not know it because it was long time ago.’¹⁴⁰⁷

TOEM Phal’s Evidence Regarding Mr YIM Tith’s Alleged Positions on the Kirivong District Committee

¹⁴⁰⁰ D118/79, PECH Chim, A17-18, WRI, EN 00947190.

¹⁴⁰¹ D118/259, PECH Chim, WRI, A129, EN 01000682 - 01000683. (‘A129: *Ta Tith* remained as the Secretary of Kirivong District until he left for Battambang, but I do not recall the date.’)

¹⁴⁰² D118/259, PECH Chim, WRI, A130, EN 01000682 - 01000683. (‘Q: Did *Ta Tith*’s transfer occur at the same time with Im Chaem’s transfer? A130: I am not sure where *Ta Tith* had worked before his transfer to Battambang.’)

¹⁴⁰³ D6.1.650, PECH Chim, WRI, EN 00379171.

¹⁴⁰⁴ The ICP refers to LUON Mol’s evidence using two names ‘LUON Mol’ and ‘Luon Mul.’

¹⁴⁰⁵ D219/358, LUON Mol, WRI, A10, 13-14, 81, EN 01116344, 01116350.

¹⁴⁰⁶ *Supra*, paras 436 to 439.

¹⁴⁰⁷ D219/358, LUON Mol, WRI, A14, EN 01116344. (‘Q: Do you remember in which month it was? A14: I do not know it because it was long time ago.’)

743. The ICP misinterprets, and consequently misrepresents, TOEM Phal's evidence by masking the uncertainties and contradictions in her testimony regarding Mr YIM Tith's alleged role as Secretary of Kirivong District. TOEM Phal gave no evidence that Mr YIM Tith was Secretary of Kirivong District; to the contrary, she stated that Ta Sieng served as Secretary of Kirivong District after [Ta Tom] was accused of being disloyal.¹⁴⁰⁸ The ICP ignores TOEM Phal's evidence that she was 'not sure' whether Mr YIM Tith or Ta Sieng was the Secretary of Kirivong District.¹⁴⁰⁹ TOEM Phal was unable to give accurate dates for when Mr YIM Tith was allegedly Deputy Secretary of Kirivong District.¹⁴¹⁰ Given this patent uncertainty in TOEM Phal's testimony, it cannot be relied upon as evidence that Mr YIM Tith was Secretary of Kirivong District.

744. Furthermore, the ICP ignores TOEM Phal's self-contradictory evidence which reveals doubts over her reliability as a witness. TOEM Phal said she never met 'Ta Tit,'¹⁴¹¹ yet subsequently stated that she used to meet 'Ta Tit.'¹⁴¹² The investigator failed to follow-up with TOEM Phal about these discrepancies or about the source of his knowledge about the Kirivong District Committee of the Southwest Zone structure, especially in relation to Mr YIM Tith. Furthermore, TOEM Phal's evidence about Mr YIM Tith must be treated with caution due to the frequent use of leading questions in her interview, often by stating information from an unknown source before asking TOEM Phal to confirm it:

Q: Had Ta Tit replaced Ta Tom?¹⁴¹³

Q: Was Ta Tit appointed [then] District Secretary?¹⁴¹⁴

Q: We have information which indicates that Ta Tit was transferred to the Northwest Zone in 1977 or 1978. Do you know [about] it?¹⁴¹⁵

Q: Did Ta Born work closely with Ta Tit?¹⁴¹⁶

745. It cannot be established whether TOEM Phal's answers stemmed from her own knowledge or were influenced by the information provided in her questioning. In

¹⁴⁰⁸ D118/23, TOEM Phal, WRI, A11-14, EN 00967018.

¹⁴⁰⁹ D118/23, TOEM Phal, WRI, A13-14, EN 00967018. ('Q: Was Ta Tit appointed [then] District Secretary? A14: I am not sure whether Ta Tit or Ta Sieng was the Secretary of Kiri Vong District.')

¹⁴¹⁰ D118/23, TOEM Phal, WRI, A11-14, EN 00967018; D219/471, TOEM Phal, WRI, A9-12, EN 01154805-6.

¹⁴¹¹ D118/23, TOEM Phal, WRI, A19, EN 00967019. ('Q: Did you ever attend any meetings with Ta Tit? A19: I only met with Ta Sieng and Ta Yorn, not Ta Tit.')

¹⁴¹² D118/23, TOEM Phal, WRI, A24, EN 00967019. ('Q: Did you ever meet Ta Tith? A24: I used to meet him at meetings.')

¹⁴¹³ D118/23, TOEM Phal, WRI, A12, EN 00967018.

¹⁴¹⁴ D118/23, TOEM Phal, WRI, A14, EN 00967018.

¹⁴¹⁵ D118/23, TOEM Phal, WRI, A16, EN 00967018.

¹⁴¹⁶ D118/23, TOEM Phal, WRI, A37, EN 00967021.

accordance with the PTC's approach, the circumstances in which TOEM Phal's evidence was elicited and the nature of the questions asked of her, mean that her evidence has a low probative value.¹⁴¹⁷

DOK Chann's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

746. DOK Chann's evidence about Mr YIM Tith being Kirivong District Secretary concerns only a short period from around 1974 until 'around' 1976.¹⁴¹⁸ There is therefore a significant risk that it does not fall within the temporal scope of the investigation in Kirivong District.¹⁴¹⁹

747. DOK Chann's evidence about Mr YIM Tith's position is anonymous hearsay gathered only after he left Kirivong District.¹⁴²⁰ It is therefore inherently unreliable. DOK Chann's only potentially relevant direct personal evidence about Mr YIM Tith relates to him visiting Wat Pratheath sometime during the short period from around 1973 to approximately mid-June 1975. DOK Chann gave evidence that this was the period when he worked at Wat Pratheath and his evidence in this regard is not within the period of temporal scope of the investigation:

Q: When did you start working at Wat Pratheath Security Office?

A3: I probably started in 1973. At that time, the security office was located in Kouk Prech Village, Kouk Prech Commune, and in early 1975 we relocated that office from Kouk Prech to inside Wat Pratheath Pagoda for a short period of time before the liberation of Phnom Penh in 1975. At that time, all the staff of the security office and the prisoners were relocated to Wat Pratheath Pagoda; however, there were only four or five prisoners.¹⁴²¹

¹⁴¹⁷ *Decision on Yim Tith's Application to Annul the Investigative Material Produced by Paolo Stocchi*, 25 August 2017, D351/1/4, para. 45.

¹⁴¹⁸ D219/160, DOK Chann, WRI, A7, EN 01067764.

¹⁴¹⁹ *Supra*, paras 436 to 439.

¹⁴²⁰ D219/86, DOK Chann, A2, WRI, EN 01056872-3. DOK Chann stated that he was in Takeo Town of the Southwest Zone until around mid-1977.

¹⁴²¹ D219/86, DOK Chann, A3, WRI, EN 01056873.

TIM Phy's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

748. TIM Phy was unable to provide dates for when Mr YIM Tith was alleged to have been Secretary of Kirivong District. She stated that she could not remember even the year.¹⁴²² Contradictorily, in another interview, TIM Phy stated that Mr YIM Tith's appointment on the Kirivong District Committee was when the Khmer Rouge came to power.¹⁴²³
749. The source of TIM Phy's evidence about Mr YIM Tith was not clear and TIM Phy named Mr YIM Tith as Secretary of Kirivong District only in response to a leading question.¹⁴²⁴

NGET Ngay's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

750. NGET Ngay's evidence that Mr YIM Tith was Secretary of Kirivong District is hearsay that NGET Ngay gathered from two unidentified people stated to be commune chiefs. It is unreliable. It is also clear that NGET Ngay knew nothing of substance from his own direct experience:

Q: How did you know that Ta Tit and Ta Tom were chiefs of Kiri Vong district?

A9: I asked Chhorn and Nen who were commune chiefs. I also learned that Wat Preah Theat was a prison where hundreds of people were detained and executed there.¹⁴²⁵

These commune chiefs were not interviewed with respect to these assertions and it is impossible to verify NGET Ngay's hearsay evidence.

751. NGET Ngay provided no clear dates for when Mr YIM Tith was Secretary of Kirivong District and was only able to say that he had known about it sometime before 1977.¹⁴²⁶ NGET Ngay did not know whether Mr YIM Tith was in charge of Kirivong District through the Vietnamese arrival or had changed to work elsewhere because he had already fled to Vietnam.¹⁴²⁷ NGET Ngay's evidence must be accorded a low probative value.

¹⁴²² D118/21, TIM Phy, WRI, A12, EN 00967010. ('Q: So Ta Tit became the Secretary of Kiri Vong District? A12: Yes, but I cannot recall which year he assumed the role.')

¹⁴²³ D219/521, TIM Phy, WRI, A16, EN 01167991.

¹⁴²⁴ D118/21, TIM Phy, WRI, A12, EN 00967010.

¹⁴²⁵ D118/44, NGET Ngay, WRI, A9, EN 00920579.

¹⁴²⁶ D118/44, NGET Ngay, WRI, A4-5, 9, EN 00920579.

¹⁴²⁷ D118/44, NGET Ngay, WRI, A6, EN 00920579.

HEM Chhuon's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

752. HEM Chhuon mentions that he knew 'Ta Tit' was 'chief' of Kirivong District sometime before 1977, but his evidence lacks any reliable detail.¹⁴²⁸ The ICP neglects to point out that HEM Chhuon's evidence about Mr YIM Tith was based on anonymous hearsay that he heard from 'villagers' after 1979:

Q: Do you know where Ta Tit lived after 1977?

A11: I am not sure of that as I had already been transferred from Kiri Vong district; however, I've heard that Ta Tit was promoted to a more superior position.¹⁴²⁹

Q: From whom were you told that Ta Tit had been promoted to a more superior position?

A13: The villagers talked about the issue after 1979.¹⁴³⁰

753. HEM Chhuon appeared to be confused about the identity of individuals that he heard about during the Khmer Rouge era, stating that Ta Mok held the position of Secretary of Sector 13 simultaneously with 'Ta Tit' holding the position of 'Chief' of Kirivong District and Ta San holding the position of 'Chief' of Tram Kak District, as well as giving no evidence as to how he was able to verify information he heard about Mr YIM Tith's alleged positions.¹⁴³¹ HEM Chhuon was not asked about the identity of Mr YIM Tith. Nor was he asked to clarify whether he was confused between Ta Tom and Mr YIM Tith, or his brief evidence mentioning a meeting at which 'Ta Tit' was allegedly present.¹⁴³² As stated below, HEM Chhuon's evidence regarding meetings is of low probative value.¹⁴³³

754. In the absence of further evidence, HEM Chhuon's evidence about Mr YIM Tith's role in Kirivong District is nothing more than an unsubstantiated and vague rumour that circulated after the DK period from unknown sources. Taken together, HEM Chhuon's evidence can be accorded no probative value.

¹⁴²⁸ D118/45, HEM Chhuon, WRI, A7, EN 00923039.

¹⁴²⁹ D118/45, HEM Chhuon, WRI, A11, EN 00923040.

¹⁴³⁰ D118/45, HEM Chhuon, WRI, EN 00923040.

¹⁴³¹ D118/45, HEM Chhuon, WRI, A7-9, EN 00923039.

¹⁴³² D118/45, HEM Chhuon, WRI, A14, 19, EN 00923040.

¹⁴³³ *Infra*, paras 791 to 796.

LACH Sambath's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

755. LACH Sambath's evidence that Mr YIM Tith was Secretary of Kirivong District is unclear and confused. He says he never saw Mr YIM Tith¹⁴³⁴ and he stated 'I never heard about him because he was at district level.'¹⁴³⁵ LACH Sambath also stated that he 'did not know anything about the district.'¹⁴³⁶ The ICP seeks to rely on LACH Sambath as a witness to Mr YIM Tith's alleged membership of the Kirivong District Committee, ignoring the following parts of LACH Sambath's evidence in which he repeatedly stated that he knew nothing about the Kirivong District level:

Q: I would like to ask you about Kiri Vong District from 1975 to 1979. Do you know who were on the Kiri Vong District Committee from 1975-1979?

A3: During the Khmer Rouge regime, Kiri Vong District was not called Kiri Vong District. It was called District 109. At that time, I was a member of the 17 April people, so I did not know who was on the District 109 Committee. However, I knew the members at commune and village levels. At that time, I knew that *Ta Mok* was on the zone committee in Takeo. My job was to do rice farming and dig canals, so I did not know who the district committee were. At that time, I never met my parents. I would like to emphasize that I was one of the 17 April people. As such, I did not know anything related to the district. I slept in the rice fields. It was really different then from the situation now. Now we have the media, radios and televisions, and we can know who does what.¹⁴³⁷

756. The inherent contradictions in LACH Sambath's evidence render him an unreliable witness with respect to Mr YIM Tith's role in Kirivong District.¹⁴³⁸ LACH Sambath did not provide any convincing evidence regarding Mr YIM Tith's role and appears to have known nothing about the dates or activities of Mr YIM Tith. His evidence in this regard is given in response to leading questions such that the witness's answer is of reduced reliability since it is impossible to establish if the witness gave this answer from his own knowledge or whether it was contaminated by information from the 'media, radios and

¹⁴³⁴ D219/379, LACH Sambath, WRI, A13, EN 01132635.

¹⁴³⁵ D219/379, LACH Sambath, WRI, A14, EN 01132635.

¹⁴³⁶ D219/379, LACH Sambath, WRI, A3, EN 01132633-4.

¹⁴³⁷ D219/379, LACH Sambath, WRI, A3, EN 01132633-4.

¹⁴³⁸ D219/379, LACH Sambath, WRI, A13, EN 01132635.

televisions' by which LACH Sambath said he was able to 'know who does what.' Accordingly, LACH Sambath's evidence has no probative value.

AM Kun's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

757. AM Kun's statement that Mr YIM Tith was in some position on the Kirivong District Committee lacks accurate dates and lacks any serious specificity. AM Kun gave ambiguous and contradictory responses including that he did not know what 'Ta Tit's' real function was:

Q: What was Ta Tit's function at the time he visited your work at the artisan unit?

A14: At that time I did not know what Ta Tit's real function was. But when he came to see my work, he asked me how many pots I was able to produce each day.¹⁴³⁹

758. AM Kun stated without reservation that he 'did not know who the district secretary was.'¹⁴⁴⁰ The Defence notes that AM Kun's evidence is mistranslated in the English version of his Khmer witness statement, such that it does not accurately reflect his evidence in the crucial details of the names of members of the district committee. In the following section of evidence relied upon by the ICP, the Khmer original does not include the names 'Tit, Tom and Bo':

Q: Did you know what was Ta Tit's function at the time you worked at the artisan unit?

A19: At that time I knew that those three persons [Tit, Tom and Bo] were the district committee, but I did not know who the district secretary was.¹⁴⁴¹

759. Ultimately, AM Kun gave no reliable information about Mr YIM Tith and the Kirivong District Committee. The investigator failed to ask follow-up questions about the lack of information about Mr YIM Tith's alleged appointment(s). These answers suggest that AM Kun knew nothing of substance about Mr YIM Tith.

¹⁴³⁹ D118/33, AM Kun, WRI, A14, EN 00911433.

¹⁴⁴⁰ D118/33, AM Kun, WRI, A19, EN 00911434.

¹⁴⁴¹ D118/33, AM Kun, WRI, A19, EN 00911434.

BUN Thoeun's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

760. The ICP ignores the evidence of BUN Thoeun that directly conflicts with his statement that Mr YIM Tith was the Secretary of Kirivong District.¹⁴⁴² BUN Thoeun stated explicitly that he did not know who the district secretaries were:

Q: Do you recall who those district secretaries were?

A24: During that time, there were many changes, so I am not clear.¹⁴⁴³

With such uncertainties in his evidence, BUN Thoeun cannot be relied upon as a witness to the ICP's claims about Mr YIM Tith being on the Kirivong District Committee.

761. BUN Thoeun's evidence about Mr YIM Tith does not state how he knew about him or was able to identify him. BUN Thoen appears confused about Mr YIM Tith's identity, stating that he heard that Mr YIM Tith was 'arrested and detained' at Sanlong Security Center.¹⁴⁴⁴ BUN Thoeun said:

'I heard of Ta Tith after he had been arrested.'¹⁴⁴⁵

When questioned about the alleged arrest of 'Ta Tith,' BUN Thoeun gave no other information about Mr YIM Tith and insisted that he heard about his arrest, although his evidence on this point was uncertain:

Q: You said that Ta Tith was arrested. Did you know when he was arrested?

A60: I am not sure about it. I just heard of his arrest, but I did not know which month he was arrested.¹⁴⁴⁶

The logical explanation for this confusing evidence is either that BUN Thoeun was entirely mistaken about this information or he was confusing Mr YIM Tith with somebody else.

762. To add to the confusion in BUN Thoeun's evidence, he claimed to have met Mr YIM Tith in December 1976, but remembered none of the details of this encounter and said that at

¹⁴⁴² D118/274, BUN Thoeun, WRI, A58, EN 01031980.

¹⁴⁴³ D118/274, BUN Thoeun, WRI, A24, EN 01031974.

¹⁴⁴⁴ D118/274, BUN Thoeun, WRI, A59, 60, EN 01031980.

¹⁴⁴⁵ D118/274, BUN Thoeun, WRI, A59, 60, EN 01031980.

¹⁴⁴⁶ D118/274, BUN Thoeun, WRI, A60, EN 01031980.

this time ‘Ta Tith’ was ‘old and bald.’¹⁴⁴⁷ When BUN Thoeun was asked what he remembered of meeting ‘Ta Tith,’ he was able to remember nothing whatsoever:

Q: What do you remember about that meeting? What did they discuss and who attended that meeting?

A67: I do not remember the details.¹⁴⁴⁸

763. Again, the logical explanation for this confused evidence is either that BUN Thoeun was entirely mistaken about this information or that he was confused about Mr YIM Tith’s identity. The description of ‘Ta Tith’ as ‘old and bald’¹⁴⁴⁹ does not plausibly refer to Mr YIM Tith’s physical appearance in December 1976, when he was aged 39.¹⁴⁵⁰ There is insufficient evidence that BUN Thoeun saw Mr YIM Tith during the Khmer Rouge era and his evidence may have been contaminated by seeing more recent photographs of Mr YIM Tith, including those obtained by DC-Cam, that have not been formally identified in evidence on the Case File.¹⁴⁵¹
764. It is unclear in what capacity BUN Thoeun thought he had met Mr YIM Tith. BUN Thoeun said he was the Member of the Commune Committee of Sanlong Commune from 1974 until mid-1977. Then, BUN Thoeun said he was Deputy Chairman of Prambei Mom Commune until December 1978.¹⁴⁵² He was confused about details of his own appointments including about the names of districts that were in Sector 13 where he was himself working.¹⁴⁵³
765. The meaning of the words recorded in BUN Thoeun’s statement that ‘Ta Tith’ was the Secretary of Kirivong District ‘between 1975 and 1977/1978?’ is unclear.¹⁴⁵⁴ The statement does not contain the literal words of BUN Thoeun and states only ‘1977/1978?’

¹⁴⁴⁷ D118/274, BUN Thoeun, WRI, A65-66, EN 01031981. (‘Q: Did you ever meet Ta Tith? A65: I met him once, but I am not sure if it was during a meeting in Takeo Province. During that time, he was old and bald. Q: Do you recall which month and year you met Ta Tith in Takeo Province? A66: In late 1976, in December.’)

¹⁴⁴⁸ D118/274, BUN Thoeun, WRI, A67, EN 01031981.

¹⁴⁴⁹ D118/274, BUN Thoeun, WRI, A65, EN 01031981.

¹⁴⁵⁰ *Written Record of Initial Appearance*, 9 December 2015, D281, p. 2: Mr YIM Tith was born on 30 December 1936.

¹⁴⁵¹ *Supra*, para. 292.

¹⁴⁵² D118/274, BUN Thoeun, WRI, A2-4, 7, EN 01031971.

¹⁴⁵³ D118/274, BUN Thoeun, WRI, A23, EN 01031974. (‘A23: In Sector 13, there were five districts: District 109 (Kiri Vong District); District 108 (Kaoh Andaet); District 107 (Treang); District 106 (Angkor Chey) and District 105 (Tram Kak). D6.1.688, BUN Thoeun, WRI, EN 00384407. (Q: How many districts were there in Sector 13? A: There were Kiri Vong district, Koh Andet district, Angkor Chey district, Treang district, Prey Kabbas district, Samroang district, and Tram Kak district.’)

¹⁴⁵⁴ D118/274, BUN Thoeun, WRI, A58, EN 01031980.

This ambiguity renders BUN Thoeun's evidence of the dates of Mr YIM Tith's alleged appointment unreliable.

MOENG Vet's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

766. MOENG Vet's evidence regarding Mr YIM Tith's alleged position on the Kirivong District Committee is unreliable, based on rumour, and does not relate to anything more than a short period from an unknown date 'maybe in late 1976', after the 'Ten-day meeting', that was until, at the latest, January 1977, by which time MOENG Vet said Ta Saom had left for Phnom Penh.¹⁴⁵⁵ Much of his evidence is anonymous second-hand hearsay that MOENG Vet heard from his mother, who in turn had heard about it from 'her relatives and friends' in 'different places,' or so MOENG Vet thought.¹⁴⁵⁶ The source or sources of MOENG Vet's evidence render it uncertain and unreliable:

Q: How did you know this information?

A25: I learned this from my mother.¹⁴⁵⁷

Q: How did your mother know this?

A29: I think my mother got the information from her relatives and friends.¹⁴⁵⁸

767. Furthermore, MOENG Vet's evidence about Mr YIM Tith as Secretary of Kirivong District is speculation given in response to a leading question.¹⁴⁵⁹ He stated ambiguously that 'Ta Tith did not do the district work directly' and gave no further explanation as to what this meant.¹⁴⁶⁰ Lastly, the dates of Mr YIM Tith's alleged role were not clarified with MOENG Vet.¹⁴⁶¹ MOENG Vet's evidence has no probative value.

¹⁴⁵⁵ D119/85, MOENG Vet, WRI, A7, EN 00982713; D219/488, MOENG Vet, WRI, A41, 46, 93-95, 103, 106, EN 01170587, 92-4

¹⁴⁵⁶ D119/85, MOENG Vet, WRI, A25, 28, 29, 30 EN 00982716-7. ('Q: How did you know this information? A25: I learned this from my mother. [...] Q: As far as you know, how was Ta Tom arrested? A28: My mother told me [...] Q: How did your mother know this? A29: I think my mother got the information from her relatives and friends [...] Q: How was Ta Tom arrested? A30: No, I do not know. I only got the information of his arrest from my mother.'))

¹⁴⁵⁷ D119/85, MOENG Vet, WRI, A25 EN 00982716.

¹⁴⁵⁸ D119/85, MOENG Vet, WRI, A29 EN 00982717.

¹⁴⁵⁹ D119/85, MOENG Vet, WRI, A26, EN 00982716. ('Q: Information we have received from other sources indicates that Ta Tith was Secretary of Kirivong District when he went to attend a meeting at Sector 13 Office. Is this correct? A26: This may have happened after Ta Tom had been arrested. Q: How did you know that Ta Tith replaced Ta Tom after he was arrested? A27: To my understanding, if Ta Tom had been arrested, only Ta Tith could replace him.'))

¹⁴⁶⁰ D119/85, MOENG Vet, WRI, A23-24, EN 00982715-6.

¹⁴⁶¹ D219/488, MOENG Vet, WRI, A3, EN 01170583-4; D119/84.2, MOENG Vet, DC-Cam Statement, EN 00992988.

YOU Phnom's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

768. Contrary to the ICP's assertion, YOU Phnom said he was not sure who was in charge of Kirivong District.¹⁴⁶² YOU Phnom's evidence lacks any precise dates for Mr YIM Tith's alleged appointments in the district.
769. The source of YOU Phnom's evidence is unknown and he appears to have speculated that Mr YIM Tith was on the Kirivong District Committee of the Southwest Zone based on information he heard. He was unable to give details of any dates or role on the Kirivong District Committee and, acknowledging his lack of knowledge, he told investigators that he believed that 'there may be some survivors who would know more about Kirivong District administrative structure than I.'¹⁴⁶³ These features of his evidence cast significant doubt over its reliability.

HOR Yan's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

770. The ICP selectively ignores HOR Yan's conflicting evidence about his knowledge of Mr YIM Tith's alleged role in Kirivong District. HOR Yan was asked directly 'Do you remember what role Ta Tit had in Kirivong District?' He answered 'I did not know because I did not join them.'¹⁴⁶⁴
771. The source of the information that HOR Yan does provide is unclear. It is, for example, unclear how HOR Yan knew about the structure of the Kirivong District Committee or could state with confidence that 'the District Committee comprised [...].'¹⁴⁶⁵ HOR Yan gave evidence that he was in Wat Pratheat Security Centre from 1976 until early 1977¹⁴⁶⁶ and it is impossible to verify the exact period of events described by the witness as no dates were elicited by the SOAS interviewer.¹⁴⁶⁷ No clear dates are given in HOR Yan's evidence to support the ICP's assertions regarding Mr YIM Tith's role.¹⁴⁶⁸

¹⁴⁶² D219/109 YOU Phnom WRI, A15, EN 01081741. ('Q: Who was in charge of Kiri Vong District during those killings? A15: I am not sure, but *Ta* Tith was Kiri Vong District Committee, and *Ta* Chort and *Yeay* Khoeun were together there at the time.')

¹⁴⁶³ D219/108, YOU Phnom, WRI, A7, EN 01076892.

¹⁴⁶⁴ D105/6, HOR Yan, WRI, A12, EN 00841977.

¹⁴⁶⁵ D1.3.11.18, HOR Yan, SOAS Interview, EN 00217607.

¹⁴⁶⁶ D1.3.11.18, HOR Yan, SOAS Interview, EN 00217607. *Infra*, paras 851 to 853.

¹⁴⁶⁷ D1.3.11.18, HOR Yan, SOAS Interview, EN 00217607.

¹⁴⁶⁸ D1.3.11.18, HOR Yan, SOAS Interview, EN 00217607.

ORK Chan's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

772. ORK Chan's evidence about Mr YIM Tith's position is inherently contradictory. The ICP disregards the clear evidence that ORK Chan did not know who the Secretary or Deputy Secretary of Kirivong District was:

Q: Who was the Kiri Vong District Secretary?

A4: I do not know who the Secretary or the Deputy Secretary of that District was.¹⁴⁶⁹

773. The ICP disregards ORK Chan's statement that he 'did not know much' about the Kirivong District Office:

Q: In your interview with the Office of the Co-Investigating Judges, numbered 00803448, you said, "I worked in the Agricultural Office, near the Kirivong District Office." Where was the Kirivong District Office?

A57: I do not know much about the Kirivong District Office because sometimes I worked here and there.¹⁴⁷⁰

774. ORK Chan's evidence about Mr YIM Tith's role is relevant only to the period before late 1976 and ORK Chan stated that after late 1976, he did not hear of Mr YIM Tith.¹⁴⁷¹ The whole of ORK Chan's account lacks clear detail and, aside from the reference to 'late 1976,' it contains no specific dates and refers in general terms to the period '1975-1979.'¹⁴⁷²

775. The source of ORK Chan's evidence is unknown and his statement that 'Ta Tith' was part of the Kirivong District Committee of the Southwest Zone in charge of economics is based on unreliable gossip, vaguely said to have been 'relayed from one person to another.'¹⁴⁷³ As discussed below, there are concerns over how ORK Chan could have observed anything about Mr YIM Tith when he said he was imprisoned in Wat Pratheat Security Centre.¹⁴⁷⁴ ORK Chan's evidence was inconsistent regarding his sightings of 'Ta

¹⁴⁶⁹ D219/369, ORK Chan, WRI, A4, EN 01128255.

¹⁴⁷⁰ D118/156, ORK Chan, WRI, A57, EN 00980472.

¹⁴⁷¹ D219/369, ORK Chan, WRI, A21, A22, EN 01128256. ('Q: When did you last meet Ta Tith? A21: I first met him in 1974. I last met him in late 1976 Q: After late 1976 did you still hear of Ta Tith and Ta Tom? A22: No I did not.')

¹⁴⁷² D219/369, ORK Chan, WRI, A3, EN 01128255.

¹⁴⁷³ D118/156, ORK Chan, WRI, A72, EN 00980473.

¹⁴⁷⁴ *Infra*, paras 854 to 856.

Tith,' first stating that after late 1976, he did not hear of 'Ta Tith,' and then stating that he saw him whilst shackled in Wat Pratheat.¹⁴⁷⁵ His evidence lacks credibility.

776. ORK Chan was unable to remember the source of information 'because that was so long ago.'¹⁴⁷⁶ Notably, in this particular interview, repeated questions were asked about the source of the witness's evidence. Revealingly, the witness's answers fatally undermine the credibility of the information he was seeking to relay:

Q: In your previous interview numbered ERN 00803442, you said "*Ta* Nam was in charge of the military, and *Ta* Tit was in charge of economics." How did you know this?

A72: I knew this because it was relayed from one person to another.

Q: You heard that *Ta* Nam was in charge of the military and *Ta* Tit was in charge of the economy. Do you remember who said this?

A73: I have forgotten because that was so long ago.¹⁴⁷⁷

777. ORK Chan's evidence about Mr YIM Tith being on the Kirivong District Committee is unreliable because he was unsure about 'Ta Tit's' role, stating: 'as far as I know.'¹⁴⁷⁸ Moreover, the investigator elicited the evidence with leading, closed questions, rendering this evidence unsound:

Q: Do you mean that Ta Tit was in the district's committee at that time, don't you?

A41: Yes.

Q: And he contacted the commune echelon, didn't he?

A42: Yes.¹⁴⁷⁹

778. ORK Chan's identification of Mr YIM Tith is unreliable. The investigator failed to clarify how ORK Chan was able to identify Mr YIM Tith. In the statement cited by the ICP, ORK Chan referred to 'Kong Tit' and, when asked if he remembered anyone else, ORK Chan stated that the 'other persons' [besides Kong Nam and Kong Tit] included 'Ta

¹⁴⁷⁵ *Infra*, para. 855.

¹⁴⁷⁶ D118/156, ORK Chan, WRI, A72, EN 00980473.

¹⁴⁷⁷ D118/156, ORK Chan, WRI, A72, EN 00980473.

¹⁴⁷⁸ D219/369, ORK Chan, WRI, A3, EN 01128256. ('Q: Do you recall people who were on the District Committee or District Secretaries and District Deputy Secretaries in Kiri Vong District from 1975 to 1979? A3: As far as I know Ta Tith, Ta Tom and Ta Nam were on the Kiri Vong District Committee. However, I do not remember the women who were also on the Committee.')

¹⁴⁷⁹ D105/5, ORK Chan, WRI, A41, 42, EN 00803445.

Tith.¹⁴⁸⁰ Although ORK Chan claimed to have seen ‘Ta Tith’ often (in meetings),¹⁴⁸¹ he was not able to recognise him in a photograph purporting to show Mr YIM Tith:

Q: Do you know the man in this picture? (The interrogator showed a photograph of Suspect YIM Tit alias *Ta* Tit provided by the Documentation Center of Cambodia)

A104: The figure looks like KHIEU Samphan.¹⁴⁸²

EK (UI) Hoeun’s Evidence Regarding Mr YIM Tith’s Alleged Positions on the Kirivong District Committee

779. The ICP cites EK (UI) Hoeun’s evidence that Mr YIM Tith was Secretary of Kirivong District, as well as his contrary evidence that Mr YIM Tith ‘was not in charge of Kirivong District,’ yet the ICP fails to draw any sensible conclusion from this obvious contradiction in the witness’s evidence.¹⁴⁸³ EK (UI) Hoeun gave no clear dates for when Mr YIM Tith was Secretary of Kirivong District and said that Saom Choeun was also the Secretary of Kirivong District.¹⁴⁸⁴ The flat contradictions in EK (UI) Hoeun’s evidence, on which EK (UI) Hoeun was asked no follow-up questions, renders it unreliable and should have caused the ICP to disregard rather than to rely upon his evidence in support of this point.

780. The source of EK (UI) Hoeun’s evidence was not stated. He did not say that he knew about Mr YIM Tith from seeing him directly and he knew nothing first-hand about Mr YIM Tith’s positions:

Q: How many positions did *Ta* Tit hold at that same time?

A71: I did not know how many positions he held. I just knew that he came in and out of Kirivong district because he was related to *Ta* Mok.¹⁴⁸⁵

781. As stated above, EK (UI) Hoeun never described the source of his evidence and did not explain how, as a low-level physical labourer who appeared to spend most of the DK

¹⁴⁸⁰ D105/5, ORK Chan, WRI, A17, 21, EN 00803442. (‘A17: Those responsible for this district included *Kong* Nam and *Kong* Tit.’ Q: Were there any other persons whom you remember? A21: ‘They included *Ta* Nam, *Ta* Tit and *Ta* Tum.’)

¹⁴⁸¹ D1.3.11.2, ORK Chan, ICP Interview, EN 00219252.

¹⁴⁸² D105/5, ORK Chan, WRI, A104, EN 00803451. In addition to the fact that ORK Chan identified the photograph as depicting KHIEU Samphan, it is not possible to accurately verify whether the photograph was in fact Mr YIM Tith. The ERN number of the picture is not stated in the interview and it is not annexed to the WRI.

¹⁴⁸³ The ICP cites: D118/208, EK (UI) Hoeun, WRI, A70, EN 00981818. (‘Q: Did *Ta* Tit ever serve as District 109 Secretary? A70: *Ta* Tit as well as SAOM Choeun used to serve as secretaries of District 109.’) D119/70/4 EK (UI) Hoeun DC-Cam Statement, EN 01050192. (‘Q: Was *Ta* Tith not in charge of Kirivong district? A: No, he wasn’t. He was in charge of Angkor Chey district.’)

¹⁴⁸⁴ D118/208, EK (UI) Hoeun, WRI, A70, EN 00981819.

¹⁴⁸⁵ D118/208, EK (UI) Hoeun, WRI, A71, EN 00981818.

period working in Tram Kak District, he could have known about Ta Mok's alleged Sector-level work or about the Kirivong District Committee.¹⁴⁸⁶

782. The reality is that EK (UI) Hoeun never saw or heard anything reliable about Mr YIM Tith. In his testimony in Case 002/02, he said nothing about Mr YIM Tith.¹⁴⁸⁷ The reliability of EK (UI) Hoeun is further diminished by his evidence that he was 'seriously ill at a certain point' and had 'forgotten everything.'¹⁴⁸⁸ The questioning in the Case 002/02 hearing did not elucidate what EK (UI) Hoeun meant by being 'seriously ill at a certain point' or what he meant by having 'forgotten everything,' presenting a serious challenge to the reliability of the entirety of his testimony.¹⁴⁸⁹

SIENG Haom's Evidence Regarding Mr YIM Tith's Alleged Positions on the Kirivong District Committee

783. The ICP ignores SIENG Haom's evidence that the chief of Kirivong District was Brother Soeun at the time that SIENG Haom knew about it:

Q: Do you know who the chief of Kiri Vong District was?

A4: It was Soeun who was known as Brother Soeun at that time; however, I do not know his family name. As a matter of fact, I dared not even look at his face. By the time I came to live in Tram Kok district, I do not know if Soeun was still the district chief.¹⁴⁹⁰

784. In direct contrast to the ICP's reliance on SIENG Haom's evidence for his assertion that Mr YIM Tith was on the Kirivong District Committee, he stated that he had 'only heard of his name, not the role he had':

Q: Did you ever hear of Ta Tit?

A7: I heard of Ta Tit, but I did not know where he lived. At that time, we were never allowed to have an assembly consisting of over three members.¹⁴⁹¹

Q: From what you heard of him, what role did Ta Tith have?

A10: I only heard of his name, not the role he had.¹⁴⁹²

¹⁴⁸⁶ *Supra*, paras 674 to 683.

¹⁴⁸⁷ D315.1.20, EK (UI) Hoeun, Transcript; D315.1.21, EK (UI) Hoeun, Transcript.

¹⁴⁸⁸ D315.1.20, EK (UI) Hoeun, Transcript, EN 01096860, p. 87, l.13-15.

¹⁴⁸⁹ D315.1.20, EK (UI) Hoeun, Transcript, EN 01096860, p. 87, l.13-15.

¹⁴⁹⁰ D118/43, SIENG Haom, WRI, A4, EN 00920573.

¹⁴⁹¹ D118/43, SIENG Haom, WRI, A7, EN 00920573.

¹⁴⁹² D118/43, SIENG Haom, WRI, A10, EN 00920574.

The ICP ignores evidence that directly contradicts his allegations. This renders his allegation spurious.

785. The SOAS statement of SIENG Haom relied upon by the ICP states that: ‘Tom was the last big chief, governor of the district, but he is dead’ [...] ‘Before that, it was: Teut, Tom, Ball and Nam.’¹⁴⁹³ It is not possible conclusively to identify the person to whom SIENG Haom referred as ‘Teut.’ The SOAS statement does not indicate the source of SIENG Haom’s knowledge about ‘Teut.’ The SOAS statement is unreliable as it contains none of the questioning used to elicit evidence from SIENG Haom about Mr YIM Tith. Moreover, since it was collected without judicial supervision, it enjoys ‘no presumption of relevance and reliability.’¹⁴⁹⁴ The information therein may therefore be relied on by the CIJs only when corroborated by other sources,¹⁴⁹⁵ as set out above.¹⁴⁹⁶

Ben Kiernan’s Evidence Regarding Mr YIM Tith’s Alleged Positions on the Kirivong District Committee

786. Lastly, the ICP cites Ben Kiernan’s book ‘the Pol Pot regime’ as evidence that Mr YIM Tith replaced the former Secretary of Kirivong District in 1975. Kiernan says his evidence is based on an interview with an unnamed ‘CPK subdistrict chief.’ It is impossible to establish the manner in which the information about Mr YIM Tith was elicited from the CPK subdistrict chief.¹⁴⁹⁷
787. There are serious issues regarding Ben Kiernan’s status as an American academic author who inevitably lacks the impartiality of a judicial body in his interview methods, therefore impeding the general reliability of his book.¹⁴⁹⁸ The interviews collected by Kiernan were taken outside a judicial setting and the CIJs have held that such evidence enjoys ‘no

¹⁴⁹³ D1.3.11.48, SIENG Haom, SOAS statement, EN 00217750.

¹⁴⁹⁴ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104 (footnotes omitted). Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 124. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 486.

¹⁴⁹⁵ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 108. Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 127. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 489.

¹⁴⁹⁶ *Supra*, paras 512 to 513.

¹⁴⁹⁷ D6.1.1105, Ben Kiernan, *The Pol Pot Regime*, EN 00678589.

¹⁴⁹⁸ *Supra*, paras 512 to 513.

presumption of relevance and reliability.’¹⁴⁹⁹ The information therein may therefore be relied on by the CIJs only when corroborated by other sources,¹⁵⁰⁰ as set out above.¹⁵⁰¹

(2) Mr YIM Tith Did Not Actively Participate in Meetings in Kirivong District

788. The ICP sweepingly claims that Mr YIM Tith contributed to the common criminal plan through his attendance at, and participation in, meetings in Kirivong District of the Southwest Zone.¹⁵⁰² The ICP further alleges that ‘District-wide’ meetings were a basis for communication between the Kirivong District Committee and commune officials.¹⁵⁰³

789. The ICP’s claims are unfounded. For the reasons set out below, the evidence on Case File 004 is insufficient to support his assertions concerning meetings in Kirivong District regarding former Lon Nol officials, a meeting of the Kirivong District Artisan Unit, the so-called ‘other meetings’ of Kirivong District workers, and meetings of the Commune Committees in Kirivong District.

790. The ICP’s assertion that there is evidence of Mr YIM Tith’s ‘participation in meetings in the Southwest Zone’ is almost exclusively premised on evidence concerned with Kirivong District, rather than the Sector or Zone levels, as he seeks to imply.

Evidence of Meetings regarding former Lon Nol Officials

791. On the basis of a single uncorroborated WRI of HEM Chhuon,¹⁵⁰⁴ the ICP alleges that Mr YIM Tith actively participated in various meetings during which former Lon Nol Officials were denounced.¹⁵⁰⁵ HEM Chhuon’s evidence speaks to events at a meeting where a cadre called UY Sim was allegedly denounced and another meeting during which Mr YIM Tith allegedly said something about enemies.¹⁵⁰⁶

¹⁴⁹⁹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104 (footnotes omitted). Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 124. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 486.

¹⁵⁰⁰ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 108. Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 127. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 489.

¹⁵⁰¹ *Supra*, paras 512 to 513.

¹⁵⁰² *ICP’s Final Submission*, D378/2, paras 14 to 27.

¹⁵⁰³ *ICP’s Final Submission*, D378/2, para. 137.

¹⁵⁰⁴ D118/45, HEM Chhuon, WRI.

¹⁵⁰⁵ *ICP’s Final Submission*, D378/2, para. 14.

¹⁵⁰⁶ *ICP’s Final Submission*, D378/2, para. 14.

792. The ICP misinterprets, and consequently misrepresents, HEM Chhuon's evidence by overlooking his contradictory statements. First, the ICP ignores HEM Chhuon's clear evidence that he knew nothing significant about the purging of cadres in Kirivong District:

Q: Were you aware of the purge against cadres within Kiri Vong district?

A28: I was not interested in the issue.¹⁵⁰⁷

Furthermore, HEM Chhuon stated about the alleged meetings: 'At that time, I did not pay much attention as I was full of fear.'¹⁵⁰⁸ This undermines the reliability of HEM Chhuon's evidence and in any event he provided insufficient evidence about the details of the meetings. Regarding alleged orders given at meetings, HEM Chhuon stated: 'I do not know who actually issued the order as they did not speak loud enough.'¹⁵⁰⁹

793. HEM Chhuon's account of these meetings does not contain accurate detail to identify Mr YIM Tith and to the contrary HEM Chhuon stated that although 'Ta Tit' was seated on the stage, nobody dared look at 'Ta Tit's' face.¹⁵¹⁰ HEM Chhuon claimed to have attended a meeting in person, yet he gave no specific date for the meeting other than it was in late 1976 or early 1977.¹⁵¹¹ The investigator did not seek to clarify the inherent lacunae and weaknesses in HEM Chhuon's evidence and his evidence does not describe what the exact actions of 'Ta Tit' were alleged to have been, or whether and how HEM Chhuon could be sure of his recollection of these events and of Mr YIM Tith's identity.

794. The ICP claims on the basis of HEM Chhuon's evidence that: 'Yim Tith, who was seated on stage, denounced the former official as a traitor and enemy. The former official was then ordered to walk around the meeting to identify others who had previously served in the Lon Nol administration.'¹⁵¹² Again, the ICP misinterprets, and consequently misrepresents, HEM Chhuon's evidence by ignoring his statement that it was not 'Ta Tit' who arrested a former Lon Nol official Uy Sim and paraded him around but 'the militia.'¹⁵¹³ HEM Chhuon insisted this was not 'Ta Tith,' despite the investigator's

¹⁵⁰⁷ D118/45, HEM Chhuon, WRI, A28, EN 00923041.

¹⁵⁰⁸ D118/45, HEM Chhuon, WRI, A16, EN 00923040.

¹⁵⁰⁹ D118/45, HEM Chhuon, WRI, A17, EN 00923040.

¹⁵¹⁰ D118/45, HEM Chhuon, WRI, A16, A18, EN 00923040.

¹⁵¹¹ D118/45, HEM Chhuon, WRI, A21, EN 00923040.

¹⁵¹² *ICP's Final Submission*, D378/2, para. 15.

¹⁵¹³ D118/45, HEM Chhuon, WRI, A15, A18, EN 00923040. ('Q: Was UY Sim arrested and walked by Ta Tit himself? A15: Ta Tit was not the one who arrested and walked UY Sim, but it was the militia members who walked UY Sim.')

attempts to lead the witness by asking him: ‘Was UY Sim arrested and walked by Ta Tit himself?’ and ‘What did Ta Tit instruct his militia members to treat UY Sim?’¹⁵¹⁴ HEM Chhuon withstood such questioning and answered in the negative and when asked for more information about the denouncement of the Lon Nol official he said that ‘Ta Tit’ sat on the stage but gave no information about his role in the meeting.¹⁵¹⁵

795. HEM Chhuon speculates about what he heard ‘Ta Tit’ say about enemies at a meeting and although he claimed to have heard ‘Ta Tit’ say something about enemies’ activities, his evidence that ‘[t]hose enemies referred to those people evacuated from Phnom Penh or those whose relatives had worked in the Lon Nol administration’ was a speculative opinion.¹⁵¹⁶ HEM Chhuon tended to speculate during his interviews and was asked for his opinion on matters instead of his direct evidence, with questions such as ‘Q: Why did they take the Khmer Krom?’¹⁵¹⁷ With regard to this meeting, HEM Chhuon was asked ‘to whom did Ta Tit refer as enemies?’¹⁵¹⁸ This questioning asked HEM Chhuon for his opinion about the meaning of Mr YIM Tith’s alleged words, instead of asking for information about what HEM Chhuon personally heard or saw at the meeting.¹⁵¹⁹

796. Lastly, HEM Chhuon was an unreliable insider witness with a potential motive to seek vengeance over the CPK’s treatment of former Lon Nol cadre. HEM Chhuon himself was a former Lon Nol cadre who said he was categorised as a ‘17 April person’ or a ‘new person’ and felt that ‘[b]eing categorized as a 17 April person, they treated me as trash.’¹⁵²⁰

¹⁵¹⁴ D118/45, HEM Chhuon, WRI, A15, A18, EN 00923040. [Sic].

¹⁵¹⁵ D118/45, HEM Chhuon, WRI, A14-A18, EN 00923040. (‘Q: What did Ta Tit do when UY Sim was being walked by those militia members at the meeting place? A18: Ta Tit was sitting on the stage; and nobody dared look at his face. He was a district chief; and it was a senior position.’)

¹⁵¹⁶ D118/45, HEM Chhuon, WRI, A20, EN 00923040.

¹⁵¹⁷ See D118/45, HEM Chhuon, WRI, A31-32, EN 00923042. (‘Q: Why did they take the Khmer Krom? A31: In my view, it was the Khmer Rouge’s policy. Q: Why did the Khmer Rouge take the Khmer Krom from Prey Rumdeng village? A32: From my understanding, they wanted to exterminate all the Khmer Krom.’)

¹⁵¹⁸ D118/45, HEM Chhuon, WRI, A20, EN 00923040. (‘Q: At the worksite when Ta Tit talked of enemies, to whom did he refer as enemies? A20: Those enemies referred to those people evacuated from Phnom Penh or those whose relatives had worked in the Lon Nol administration.’)

¹⁵¹⁹ *Supra*, para. 522.

¹⁵²⁰ D118/45, HEM Chhuon, WRI, A1, A2, A12, EN 00923039-40.

Evidence of A Meeting of the Kirivong District Artisan Unit

797. All of the ICP's allegations regarding a meeting of the Artisan Unit are based on a single uncorroborated witness statement of AM Kun.¹⁵²¹
798. AM Kun's evidence is not sufficiently specific. The ICP alleges that Mr YIM Tith spoke to assembled workers 'at a meeting' of the Kirivong District Artisan Unit, yet AM Kun gave no evidence of the location, time, date or attendees of the alleged meeting.¹⁵²² In an interview with DC-Cam, AM Kun never mentioned this alleged meeting of the Artisan Unit with respect to Mr YIM Tith.¹⁵²³ This further undermines the clarity of his already very weak evidence.
799. The ICP misinterprets, and consequently misrepresents, AM Kun's evidence by claiming on the basis of his evidence that Mr YIM Tith 'indicated that enemies would be subject to harsh arbitrary punishment' and that 'any person could be disappeared at any time.'¹⁵²⁴ To the contrary, AM Kun stated that Mr YIM Tith gave a 'warning' about this, which is not the type of threat described by the ICP.¹⁵²⁵ AM Kun stated that 'no one was disappeared' at the Kirivong District Artisan Unit, and that he never saw any killings between 1975 and 1979.¹⁵²⁶ When asked what would happen if he was unable to complete his workplan at the Artisan Unit, AM Kun said he would 'just report it to [his] supervisor, and nothing would happen.'¹⁵²⁷
800. The ICP further misrepresents AM Kun's evidence by alleging that Mr YIM Tith said the words 'be careful and work hard because there were many enemy hiding among us' and that Mr YIM Tith gave a warning with the words 'any person could be disappeared at any time.'¹⁵²⁸ The ICP refers to this evidence as an accurate 'statement' attributable to Mr YIM Tith.¹⁵²⁹ Yet this does not reflect AM Kun's evidence – he did not state these were Mr YIM Tith's words and he was clearly unable to provide any verbatim quotation of what Mr YIM Tith may have said at the alleged meeting.¹⁵³⁰ Moreover, while the ICP

¹⁵²¹ ICP's Final Submission, D378/2, para. 18, citing D118/33, AM Kun, WRI.

¹⁵²² D118/33, AM Kun, WRI, A28-A31, EN 00911434-5.

¹⁵²³ D123/2/1.19a, AM Kun, DC-Cam Interview, EN 01507763-812.

¹⁵²⁴ ICP's Final Submission, D378/2, para. 18.

¹⁵²⁵ D118/33, AM Kun, WRI, A14, EN 00911433, A37, EN 00911435.

¹⁵²⁶ D118/33, AM Kun, WRI, A14, EN 00911433, A37, EN 00911435.

¹⁵²⁷ D118/33, AM Kun, WRI, A15, EN 00911433.

¹⁵²⁸ ICP's Final Submission, D378/2, para. 18

¹⁵²⁹ ICP's Final Submission, D378/2, para. 19.

¹⁵³⁰ D118/33, AM Kun, WRI, A37, EN 00911434-5.

claims that ‘In the context of the meeting,’ AM Kun ‘understood that the word enemy referred to those workers [...]’¹⁵³¹ this is merely AM Kun’s opinion evidence and his subjective interpretation of what the speakers at the meeting intended to communicate.¹⁵³² AM Kun did not give particular details about the context in which Mr YIM Tith was alleged to have talked about this at a meeting.¹⁵³³

801. These problems with AM Kun’s evidence are compounded by the fact that he could not remember dates given the passage of time since the events. He stated elsewhere in evidence that ‘I could not recall what year I was transferred from one place to another. I forget about that completely.’¹⁵³⁴ This renders his evidence unhelpfully vague.

Evidence of ‘Other Meetings’ of Workers in Kirivong District

802. The ICP describes an unknown number of ‘other’ meetings of workers in Kirivong District at which Mr YIM Tith allegedly spoke about the Vietnamese threat, citing a single uncorroborated statement of YOU Phnom (D219/406).¹⁵³⁵ As set out below, YOU Phnom’s evidence contains no specific details about when and where these meetings took place, nor how many meetings there were, nor what Mr YIM Tith said, if anything.¹⁵³⁶
803. The ICP makes a number of assertions about what YOU Phnom heard Mr YIM Tith ‘discussing,’ ‘stating,’ ‘indicating,’ ‘commenting’ and ‘instructing’ at these meetings in relation to the Vietnamese threat.¹⁵³⁷ Fundamentally, although YOU Phnom describes a meeting of workers that was attended by Mr YIM Tith, he never heard anything that Mr YIM Tith said.¹⁵³⁸ The following section of YOU Phnom’s evidence is ignored by the ICP:

Q: You saw Ta Tith twice at Wat Preah Theat Pagoda. Did he [*sic*] hear him say anything?

A167: I did not hear what he said. However, I saw him speaking.¹⁵³⁹

¹⁵³¹ ICP’s Final Submission, D378/2, para. 18.

¹⁵³² AM Kun speculated in another part of his interview he was asked about a report and although he did not see it he said that its content was about numbers of production. D118/33, AM Kun, WRI, A49, EN 00911436. (‘The report was about the production quantity. I never saw their report.’)

¹⁵³³ D118/33, AM Kun, WRI, A37-38, EN 00911435.

¹⁵³⁴ D118/33, AM Kun, WRI, A11, EN 00911433.

¹⁵³⁵ ICP’s Final Submission, D378/2, para. 20.

¹⁵³⁶ *Infra*, paras 921, 925, 1481 to 1483.

¹⁵³⁷ ICP’s Final Submission, D378/2, paras 20 to 22.

¹⁵³⁸ D219/406, YOU Phnom, WRI, A167, EN 01139571.

¹⁵³⁹ D219/406, YOU Phnom, WRI, A167, EN 01139571.

804. In another part of YOU Phnom's evidence that is disregarded by the ICP, YOU Phnom further emphasised that he had no direct knowledge of 'Ta Tith's' words and actions because he did not dare to go near him:

Q: What did he say?

A168: He was talking to his staff, and I dared not go near them.¹⁵⁴⁰

As such, YOU Phnom's evidence does not speak to the ICP's assertions about Mr YIM Tith's 'discussions,' 'statements,' 'indications,' 'comments' and 'instructions' and must therefore be disregarded.¹⁵⁴¹ In the absence of any further evidence about these alleged meetings, the ICP's assertions must be dismissed.

805. YOU Phnom's evidence is also unreliable as regards the ICP's claims about the 'Yuong Khmer' who 'embedded their agents inside the cadre networks,'¹⁵⁴² since his evidence regarding 'embedded Vietnamese' was undoubtedly tainted by the investigator's leading questions. YOU Phnom was asked: 'Did *Ta Tith* state that we had to take measures to counter the embedded Vietnamese?'¹⁵⁴³ and then 'Did he say that the people had to help watch and track them down?'¹⁵⁴⁴ Nowhere in YOU Phnom's statement does he offer unprompted evidence about 'Ta Tith' talking about Vietnamese spies.¹⁵⁴⁵ Putting words into a witness's mouth taints the resultant evidence and strongly impairs its reliability. As noted below, YOU Phnom's evidence in general suffers from concerns that it is unreliable and self-contradictory.¹⁵⁴⁶

806. In addition to the foregoing issues with YOU Phnom's evidence, there is a significant doubt as to whether YOU Phnom was referring to Vietnamese agents spying on the Khmer Rouge cadre, or rather to internal monitoring carried out by the CPK Centre. When YOU Phnom's evidence is read closely, it is better understood as saying that the *CPK Centre* 'spied on us and embedded their agents inside the cadre networks.'¹⁵⁴⁷ YOU Phnom did not refer to the 'Yuong Khmer' in the manner represented by the ICP. This is

¹⁵⁴⁰ D219/406, YOU Phnom, WRI, A168, EN 01139571.

¹⁵⁴¹ *ICP's Final Submission*, D378/2, paras 20 to 22.

¹⁵⁴² *ICP's Final Submission*, D378/2, para. 20.

¹⁵⁴³ D219/406, YOU Phnom, WRI, A185, EN 01139573.

¹⁵⁴⁴ D219/406, YOU Phnom, WRI, A186, EN 01139573.

¹⁵⁴⁵ *ICP's Final Submission*, D378/2, para. 20.

¹⁵⁴⁶ YOU Phnom showed himself to be an unreliable witness when he repeatedly contradicted himself about whether and when he was at Wat Pratheat Security Centre in Kirivong District, whilst maintaining that he did not go near the Security Office. *Infra*, para. 860 and footnote 1684.

¹⁵⁴⁷ D219/406, YOU Phnom, WRI, A176-180, EN 01139572.

clear from reading the full litany of pertinent interview questions and answers without the ICP's editing:

Q: What did he say about the Yuon?

A176: He said the 'Yuon' violated our territory.

Q: Did he mention any measures in response to this issue?

A177: The spied on us and embedded their agents inside the cadre networks from commune level district level all the way up to the Center.

Q: Did they say how they monitored and surveilled the Yuon?

A178: They observed that through their networks.

Q: As for looking for their networks did Ta Tith mention anything that?

A179: They collected information from networks at the village and commune level and reported to the district. The district reported to the province. The province reported to the Centre.

Q: Did the order to have those networks come directly from Ta Tith?

A180: That was an upper level plan.¹⁵⁴⁸

807. The evidence speaks for itself. The ICP has carefully cherry-picked YOU Phnom's WRI in order to present a coherent, though entirely misleading, assertion. Moreover, the ICP has acknowledged the lack of clarity in YOU Phnom's evidence by providing his own clarification that 'Yim Tith was referring not to Vietnamese government forces operating inside Cambodia, but rather to members of the CPK's own ranks.' It is, therefore, clear that the ICP is fully aware of the lack of clarity as to whom the evidence relates and that his assertions are wilfully misleading.¹⁵⁴⁹

808. YOU Phnom's first answer when questioned about the 'Yuon Khmer' reveals that his evidence about 'Ta Tith' concerned the threat of external Vietnamese invasion, rather than a threat of internal Vietnamese spies: 'Q: What did Ta Tith say about the Yuon? He said the 'Yuon' violated our territory.'¹⁵⁵⁰ YOU Phnom also said: 'Yes, he did. He talked about the "Yuon aka Vietnamese."¹⁵⁵¹

¹⁵⁴⁸ D219/406, YOU Phnom, WRI, A176-180, EN 01139572. [Sic.] In citing this evidence, the ICP alters small details of the evidence in order to hide the uncertainties in the witness's statement and to make the testimony fit into his misleading representation of the evidence regarding 'Yuon Khmer networks.' The ICP changes: 'The spied on us and embedded their agents inside the cadre networks.' [sic.] to: 'The[y] spied on us and embedded their agents inside the cadre networks.' D219/406, YOU Phnom, WRI, A177, EN 01139572.

¹⁵⁴⁹ *ICP's Final Submission*, D378/2, para. 21.

¹⁵⁵⁰ D219/406, YOU Phnom, WRI, A175, A176, EN 01139572.

¹⁵⁵¹ D219/406, YOU Phnom, WRI, A175, A176, EN 01139572.

809. Lastly, even if Mr YIM Tith made comments as alleged by the ICP (a conclusion that is impossible to reach on YOU Phnom's evidence), the ICP does not explain how the alleged comment made by Mr YIM Tith 'constitute[d] a contribution to the common criminal plan: as an authority figure in Kirivong District and Sector 13.'¹⁵⁵² The ICP fails to demonstrate that the alleged comment of 'Ta Tith' to 'monitor and be vigilant' had the meaning that the ICP suggests.¹⁵⁵³ Instructing cadre to 'monitor and be vigilant' could have many other meanings and would be neither out of place nor criminal in a regime that feared external invasion by the Vietnamese.

Evidence of 'Regular Meetings with All Commune Committees in Kirivong District'

810. There is insufficient evidence about Mr YIM Tith's active participation in the undated various 'meetings,' which, according to the ICP, occurred on a 'regular' basis with representatives from all nine communes in Kirivong District.¹⁵⁵⁴ There is insufficient evidence on Case File 004 of 'regular' communication between the Kirivong District Committee and commune officials.¹⁵⁵⁵ Even if it is established that Mr YIM Tith was a member of the Committee at some time during the jurisdictional period (which the evidence does not substantiate), there is insufficient evidence that the District Committee was in regular contact with the commune level at all times.

811. The ICP's citation of TOEM Phal's testimony about Mr YIM Tith 'regularly participating' in meetings with the commune officials is misrepresentative of TOEM Phal's evidence read as a whole.¹⁵⁵⁶ In direct contradiction to the ICP's description of the evidence, TOEM Phal literally stated that any such meetings were 'irregular':

Q: Were the meetings held often?

A37: The meetings were held irregularly.¹⁵⁵⁷

812. TOEM Phal was unable to give dates for when the 'meetings about the enemy' took place, she said that she attended meetings infrequently, and she could not remember when she

¹⁵⁵² ICP's Final Submission, D378/2, para. 22.

¹⁵⁵³ ICP's Final Submission, D378/2, para. 22.

¹⁵⁵⁴ ICP's Final Submission, D378/2, para. 27.

¹⁵⁵⁵ ICP's Final Submission, D378/2, para. 137. ('The district committee communicated regularly with commune officials through district-wide meetings and written communications.')

¹⁵⁵⁶ ICP's Final Submission, D378/2, para. 27.

¹⁵⁵⁷ D219/471, TOEM Phal, WRI, A37, EN 01154810.

had attended these meetings.¹⁵⁵⁸ TOEM Phal further stated that she did not attend frequently due to her position on the Kampeaeng Commune Committee and that, amongst the members of the Committee, she was not the most regular participant at any such meetings.¹⁵⁵⁹ This evidence lacks any serious degree of accuracy about when and how many times Mr YIM Tith allegedly spoke about the enemy. Since TOEM Phal lived in Kirivong District throughout the DK period, there is also a significant possibility that her evidence of these meetings relates to a period that is outside the temporal scope of the Case 004 investigation.¹⁵⁶⁰

813. Aside from the timing of these meetings, the ICP misinterprets, and consequently misrepresents, the WRIs regarding the content of the meetings. TOEM Phal stated in interview on 20 February 2013 that Mr YIM Tith did not speak about enemies at meetings and that the ‘content of the meetings’ was about ‘doing dry season rice farming, fertilizer production and digging canals.’¹⁵⁶¹ This statement stands in direct contradiction to the ICP’s representation of the evidence and (as in many other parts of the ICP’s Final Submission) the ICP did not cite this interview of TOEM Phal despite its clear relevance to his claims.

814. Moreover, TOEM Phal gave no evidence about specific words or statements spoken by ‘Ta Tit’ at these meetings. TOEM Phal’s evidence is limited to a vague and ambiguous statement about ‘speaking about the enemy.’¹⁵⁶² TOEM Phal did not attribute a specific speech about the enemy to ‘Ta Tit.’ She stated: ‘They all spoke about all issues including

¹⁵⁵⁸ D219/471, TOEM Phal, WRI, A35-A37, EN 01154809-10. (‘A37: The meetings were held irregularly. Sometimes they occurred once every fortnight or every week or every ten days, subject to the work that needed to be done such as canal digging. The commune secretary was called to the meetings more frequently than the others.’ [...] ‘Q: Did you attend the meetings only from time to time? A38: Yes. [...]’)

¹⁵⁵⁹ D219/471, TOEM Phal, WRI, A38, EN 01154810. (‘The most frequent meeting participant was the commune secretary, followed by the commune deputy secretary.’ TOEM Phal further stated ‘I was a permanent member. The commune committee was comprised of the commune secretary, deputy secretary, and permanent member.’)

¹⁵⁶⁰ In 1975, TOEM Phal lived in Kampeaeng Commune, in Kirivong District, where she was assigned to be a Member of the Commune Standing Committee. She never worked outside Kirivong District. In 1977, she was transferred to work as a fertilizer producer in Prey Ampok in Kirivong District. D118/23, TOEM Phal, WRI, A3, A10, A18, EN 00967017-9. (‘Q: What did you do between 1975 and 1978? A3: In 1975, I lived in Kampeaeng Commune, in Kirivong District.’ ‘Q: Did you ever invade Vietnamese territory? A10: No, I never did.’ [...] Q: Did you ever work outside the Kiri Vong? A18: I have never worked outside this District. In 1977, I was transferred to work as a fertilizer producer in Prey Ampok.’)

¹⁵⁶¹ D118/23, TOEM Phal, WRI, A28, EN 00967020. (Q: What was the content of those meetings? A28: They were about doing dry season rice farming, fertilizer production and digging canals.’)

¹⁵⁶² D219/471, TOEM Phal, WRI, A49, A50, EN 01154812 (‘Q: Do you remember what Ta Tith said regarding the enemy during the meetings? A49: They all spoke about all issues including enemy.’ [...] ‘Q: Did Ta Tith speak about the issues of “Vietnam, the Khmer Krom, and the Yuon” during the meetings? A50: The topics relevant to Yuon, Vietnam and the Khmer Krom were not mentioned. At the time I learnt that there was fighting between the Khmer Rouge soldiers and the Vietnam, perhaps because I had nothing to do with this subject.’)

enemy.¹⁵⁶³ This nebulous evidence is not sufficient to make findings about alleged orders or instructions given by Mr YIM Tith.

815. The ICP wrongly alleges that TOEM Phal's evidence supports the existence of a strict system of ordering and reporting between all of the communes in Kirivong District and the district levels.¹⁵⁶⁴ TOEM Phal did not know whether communes were reporting to the district level and she did not know which communes were receiving letters from the district level.¹⁵⁶⁵
816. The ICP's assertion that TOEM Phal indicated that these regular meetings were held with 'representatives from all nine communes in Kirivong District' is misleading.¹⁵⁶⁶ Directly contradicting the ICP's assertion, TOEM Phal stated that she was unable to remember which commune representatives attended these meetings.¹⁵⁶⁷ She said: 'I do not remember which people from which communes attended the meetings because that happened many years ago.'¹⁵⁶⁸ The ICP inaccurately describes TOEM Phal's evidence. In the absence of any other relevant evidence on Case File 004, there is insufficient evidence as to which individuals attended the alleged meetings.
817. Lastly, the inconsistency of TOEM Phal's evidence raises significant doubt about whether she in fact ever met Mr YIM Tith. In an interview conducted on 20 February 2013, TOEM Phal initially said that she did not meet 'Ta Tit': 'I only met with Ta Sieng and Ta Yorn, not Ta Tit,' stating that Ta Yorn was on the District Committee with Ta Sieng.¹⁵⁶⁹ She later confirmed that she had no memory of ever meeting 'Ta Tith':

Q: Did you ever meet Ta Tit during the period of 1976 to 1978?

A17: I do not have a good recollection. I met Ta Tit's wife, who was a medic, when I got sick in 1976.¹⁵⁷⁰

¹⁵⁶³ D219/471, TOEM Phal, WRI, A49, EN 01154812. ('Q: Do you remember what Ta Tith said regarding the enemy during the meetings? A49: They all spoke about all issues including enemy.')

¹⁵⁶⁴ *ICP's Final Submission*, D378/2, para. 27. ('After the communes reported to the district, the district echelon sent letters instructing that "enemies" be either educated or sent to the district.')

¹⁵⁶⁵ D219/471, TOEM Phal, WRI, A35, A36, EN 01154809-10.

¹⁵⁶⁶ *ICP's Final Submission*, D378/2, para. 27.

¹⁵⁶⁷ D219/471, TOEM Phal, WRI, A35, A36, EN 01154809-10. (A35: 'Kiri Vong District consisted of the following communes [ToemPhal lists nine communes] [...] A36: 'I do not remember which people from which communes attended the meetings because that happened many years ago.')

¹⁵⁶⁸ D219/471, TOEM Phal, WRI, A36, EN 01154810.

¹⁵⁶⁹ D118/23, TOEM Phal, WRI, A19-20, EN 00967019.

¹⁵⁷⁰ D118/23, TOEM Phal, WRI, A17, EN 00967019.

It was only following the questions of the investigator that TOEM Phal changed her evidence. She then stated:

Q: How often did you meet him?

A27: I met him frequently during meetings. The meetings were not held regularly. Sometimes, one was held every half a month. Other times, once every month.¹⁵⁷¹

TOEM Phal's evidence regarding Mr YIM Tith at meetings is self-contradictory and changes suddenly in response to investigator questioning.¹⁵⁷² The reliability of her interviews in light of the nature of the questions asked to her, fatally undermines her testimony.

818. Despite his oppressive questioning, the investigator failed to elicit any specific details about the times, locations or content of purported meetings at which TOEM Phal met 'Ta Tit.' This casts doubt over the reliability of the entirety of TOEM Phal's evidence regarding Mr YIM Tith and her evidence on this point must be disregarded.
819. The ICP's allegation that 'killings' were mentioned at some meetings is built on one imprecise and general answer of TOEM Phal.¹⁵⁷³ The investigator failed to establish any specific details about TOEM Phal's reference to 'killings.' The only evidence for the ICP assertion is that 'the meeting mentioned killings.'¹⁵⁷⁴ Notably, this evidence was given in response to the investigator's leading question: 'Q: During any district-level meeting did they ever speak about the issue of taking people to be killed?'¹⁵⁷⁵ TOEM Phal's interview lacks any information about the time and location of this meeting and the source of her evidence is unknown and may be unreliable anonymous hearsay.¹⁵⁷⁶ The investigator failed to ask questions such as: Who said this? In what context exactly? At what date in the DK period? Were killings mentioned in relation to a specific area or location? Was Mr YIM Tith present when this was said? TOEM Phal's evidence speaks to none of these basic issues. In the absence of greater context, TOEM Phal's evidence that 'meetings

¹⁵⁷¹ D118/23, TOEM Phal, WRI, A27, EN 00967019-20.

¹⁵⁷² D118/23, TOEM Phal, WRI, A17, 19-20, 27, EN 00967019-20. *Decision on Yim Tith's Application to Annul the Investigative Material Produced by Paolo Stocchi*, 25 August 2017, D351/1/4, para. 45: Though the PTC did not consider these questions to amount to procedural defects, the PTC nonetheless considered them relevant to the assessment of the reliability of the evidence: 'The circumstances in which evidence is obtained including the reliability of the interviews in light of the nature of the questions asked to the witnesses and civil parties will be fully assessed at the closing order stage.'

¹⁵⁷³ *ICP's Final Submission*, D378/2, para. 27.

¹⁵⁷⁴ D219/471, TOEM Phal, WRI, A60, EN 01154813.

¹⁵⁷⁵ D219/471, TOEM Phal, WRI, A60, EN 01154813.

¹⁵⁷⁶ D219/471, TOEM Phal, WRI, A60, EN 01154813.

mentioned killings' can only be considered as irrelevant and it must be disregarded. These shortcomings in the investigation must be taken into account when assessing the evidence.¹⁵⁷⁷

820. The ICP asserts that the CPK authority structure and communication in the Southwest Zone involved 'regular' communication between the District Committee and commune officials.¹⁵⁷⁸ As set out above and below, the witnesses TIM Phy,¹⁵⁷⁹ ORK Chan,¹⁵⁸⁰ YOU Phnom,¹⁵⁸¹ TOP Phan,¹⁵⁸² and MOENG Vet¹⁵⁸³ do not provide sufficient evidence that there was two-way communication relevant to the allegations against Mr YIM Tith taking place 'regularly' throughout the period of the temporal scope of the investigation.¹⁵⁸⁴
821. The ICP cites LUON Mol's evidence that '[t]hey held a meeting once a month to talk about any plans to improve the district.'¹⁵⁸⁵ The assertion ignores that LUON Mol's evidence regarding Mr YIM Tith's alleged role in Kirivong District concerns the period 'in 1974' and 'until 1975,' as discussed above.¹⁵⁸⁶ The significant risk that LUON Mol's evidence lies outside the temporal scope of the allegations in Kirivong District prior to 31 December 1975 – for which Mr YIM Tith cannot be indicted¹⁵⁸⁷ – means that LUON Mol's evidence must be disregarded.¹⁵⁸⁸
822. The evidence of SOEUM Chhoeun cited by the ICP does not concern 'regular' meetings between the Kirivong District Committee and Communes.¹⁵⁸⁹ He in fact speculates that Ta Ngaol 'may' have met with Mr YIM Tith 'because he was a commune chief.' SOEUM

¹⁵⁷⁷ *Decision on Yim Tith's Application to Annul the Investigative Material Produced by Paolo Stocchi*, 25 August 2017, D351/1/4, para. 45.

¹⁵⁷⁸ *ICP's Final Submission*, D378/2, para. 137. ('The district committee communicated regularly with commune officials through district-wide meetings and written communications.')

¹⁵⁷⁹ *Supra* and *infra*, paras 748 to 749, 942. D118/21, TIM Phy, WRI, A22, EN 00967011. The ICP asserts that TIM Phy is a different witness to 'Tim (Toeb) Phy,' citing D219/521 Tim (Toeb) Phy WRI, A38-42, 48, EN 01167994-5.

¹⁵⁸⁰ *Supra* and *infra*, paras 772 to 778, 854 to 856, 1511 to 1513; D219/369, ORK Chan, WRI, A32, EN 01128257.

¹⁵⁸¹ *Supra* and *infra*, paras 802 to 808, 834 to 840, 860, 918 to 925. D219/406, YOU Phnom, WRI, A175-186, 195, EN 01139572-4.

¹⁵⁸² *Supra*, paras 722 to 724. D118/305, TOP Phan, WRI, A59, EN 01045525.

¹⁵⁸³ *Supra* and *infra*, paras 661 to 671, 703 to 708, 766 to 767, 1497 to 1498. D219/488, MOENG Vet, WRI, A40-47, EN 01170587-8.

¹⁵⁸⁴ *Supra*, paras 436 to 439.

¹⁵⁸⁵ *ICP's Final Submission*, D378/2, para. 137.

¹⁵⁸⁶ *Supra*, paras 741 to 742, 821, 843, 929 to 934. D219/358, LUON Mol, WRI, A58, 96, EN 01116348, 51.

¹⁵⁸⁷ D219/358, LUON Mol, WRI, A10, 13-14, 81, EN 01116344, 01116350.

¹⁵⁸⁸ *Supra*, paras 436 to 439.

¹⁵⁸⁹ D219/189, SOEUM Chhoeun, WRI, A19, EN 01079817.

Chhoeun was, however, in no position to find out, since his contact was with the militia-level, not the commune level:

Q: When you worked with *Ta Ngaol*, did you know if *Ta Ngaol* ever met with *Ta Tith*?

A19: I am not sure; he may have met with *Ta Tith* because he was a commune chief. He might have been called to attend meetings at district level to receive plans.

Q: Did you ever witness *Ta Ngaol* meeting with *Ta Tith*? Did you know if *Ta Ngaol* received plans from *Ta Tith*?

A20: I did not know. I was a militiaman, so I received orders from militia chairman, not from the commune chairperson. The militia chairman was Pril, but he has died.¹⁵⁹⁰

823. In support of the ICP's claims regarding Kirivong District Committee meetings, he relies upon the following passage of the witness statement of KUNG Chhom:¹⁵⁹¹

Q: Why didn't they invite you to the meeting?

A57: Because I did not have any position: I was only responsible for typing Morse code. At that time, they called only the Sector Committees, District Committees, and Cooperative Committees to the meeting.¹⁵⁹²

824. KUNG Chhom stated that this meeting was 'at the university close to Battambang Airport' (i.e. in the Northwest Zone).¹⁵⁹³ It did not take place in Kirivong District in the Southwest Zone as alleged by the ICP.¹⁵⁹⁴ Furthermore, KUNG Chhom stated that this was a Zone-level meeting: 'they called the cadres in the Northwest Zone to attend a meeting at the Zone' and KUNG Chhom states that the meeting invitees included the 'Sector Committees.'¹⁵⁹⁵ It was not a District-level meeting as alleged by the ICP.¹⁵⁹⁶ The citation of KUNG Chhom's evidence is yet another instance of the ICP misinterpreting, and therefore seriously misrepresenting, Case File evidence before the CIJs.

825. Although, in the Defence's submission, KUNG Chhom's evidence is irrelevant to the ICP's submissions about Kirivong District meetings. KUNG Chhom did not attend the

¹⁵⁹⁰ D219/189, SOEUM Chhoeun, WRI, A19-20, EN 01079817.

¹⁵⁹¹ ICP's Final Submission, D378/2, para. 137.

¹⁵⁹² D219/66, KUNG Chhom, WRI, A57, EN 01053986.

¹⁵⁹³ D219/66, KUNG Chhom, WRI, A56, EN 01053986.

¹⁵⁹⁴ ICP's Final Submission, D378/2, para. 137.

Despite the ICP's confusing allusion to the Northwest Zone in this paragraph, there is no question that his submissions therein, under the sub-section 'Kirivong District' in the section 'Southwest Zone,' concern the Kirivong District Committee and its communication with communes in Kirivong District.

¹⁵⁹⁵ D219/66, KUNG Chhom, WRI, A55-57, EN 01053986.

¹⁵⁹⁶ ICP's Final Submission, D378/2, para. 137.

meeting, knew nothing about the content of the meeting, and the source of his evidence was unclear.

826. Regarding his attendance at the meeting, KUNG Chhom stated:

A55: [...] I did not join that meeting.¹⁵⁹⁷

Q: Why didn't they invite you to the meeting?

A57: Because I did not have any position [...].¹⁵⁹⁸

827. In response to repeated questioning, KUNG Chhom made clear that he did not himself know about the content of the meeting and that he had not heard about the meeting from anyone else:

Q: Did you know about the content of that meeting?

A60: No, I did not.¹⁵⁹⁹

Q: Did anyone tell you about the content of that meeting?

A63: No. In that regime, they did not permit us to ask questions.¹⁶⁰⁰

828. The source of KUNG Chhom's evidence was simply from seeing a small number of banners about the CIA outside of a university near Battambang:

Q: Did you know about the content of that meeting?

A60: No, I did not. I only saw the banners placed outside.

Q: Were you far from the meeting site?

A61: I was not close to the meeting site. The banners were placed along the road, so I could see them.

Q: Were there a lot of banners?

A62: Not many. The banners were hung outside that university.¹⁶⁰¹

(3) Mr YIM Tith Did Not Contribute to the Monitoring and Investigation of Enemies in Kirivong District

829. The ICP alleges that Mr YIM Tith's responsibility is demonstrated by the actions of his 'direct and indirect subordinates' in Kirivong District, who 'actively monitored and investigated the population to identify perceived enemies.'¹⁶⁰² Once again, the ICP puts

¹⁵⁹⁷ D219/66, KUNG Chhom, WRI, A56-57, EN 01053986.

¹⁵⁹⁸ D219/66, KUNG Chhom, WRI, A56-57, EN 01053986.

¹⁵⁹⁹ D219/66, KUNG Chhom, WRI, A56-57, EN 01053986.

¹⁶⁰⁰ D219/66, KUNG Chhom, WRI, A56-57, EN 01053986.

¹⁶⁰¹ D219/66, KUNG Chhom, WRI, A60-62, EN 01053986-7.

¹⁶⁰² *ICP's Final Submission*, D378/2, paras 28 to 30.

forward a confusingly vague claim drawn from a few utterances of witnesses, whose bearing on the criminality of Mr YIM Tith's individual conduct is not clear.

830. The cited evidence of YOU Phnom and NOP Ngim must be disregarded as outside the temporal scope of the investigation. YOU Phnom was assigned as a militiaman in Kouk Prech Commune 'from 1977 to 1978,' meaning that the evidence cited by the ICP, that YOU Phnom 'listened to the situation of the people in the commune' and passed information to the commune chief relates to this period only.¹⁶⁰³ Mr YIM Tith cannot be indicted for allegations in Kirivong District that concern after early 1978.¹⁶⁰⁴ The exact timing of YOU Phnom's activities within the period '1977 to 1978' is unclear, leaving a risk that this evidence is not pertinent to the temporal scope of the investigation. This evidence must therefore be disregarded.
831. NOP Ngim's evidence about orders to monitor the population is outside the scope of the investigation in Kirivong District. Her evidence relates to workers at the Srae Ambel Salt Production Worksite of the Southwest Zone that was located in Sector 35 (Kampot) of the Southwest Zone.¹⁶⁰⁵ The Srae Ambel Salt Production Worksite is not within the geographical scope of the investigation into Mr YIM Tith's role in Kirivong District of Sector 13.¹⁶⁰⁶
832. NOP Ngim's evidence does not support the ICP's misleading assertion that NOP Ngim 'was instructed by Ta Mok to monitor which workers at the [Srae Ambel Salt Production Worksite] worked hard and which did not [...].'¹⁶⁰⁷ NOP Ngim's in fact stated, unambiguously: 'Ta Mok did not give me specific instructions.'¹⁶⁰⁸ The ICP misinterprets, and therefore misrepresents, the evidence of NOP Ngim.

¹⁶⁰³ D219/108, YOU Phnom, WRI, A2, EN 01076890-1. ('Q: After Khmer Rouge took power on 17 April 1975 and between 1975 and 1979, where did you live and what was your occupation? A2: I was a monk until the rainy season of 1976. After 17 April 1975, they defrocked all monks across the country. After I was defrocked, I was assigned to a children's unit. They assigned me as an education representative in Kouk Kruos Village, Kouk Prech Commune. About a year later, I was sent to a youth unit. I worked in Kouk Prech Commune and also in other communes in Kiri Vong District, including Kaoh Cheung Damrei Village, Toul Svay Village and Tonloab Village, in Kiri Vong District. From 1977 to 1978, I was assigned as a militiaman in Kouk Prech Commune and then as district soldier for less than a year before the Vietnamese arrived.')

¹⁶⁰⁴ *Supra*, paras 436 to 439.

¹⁶⁰⁵ D118/285, NOP Ngim, WRI, A5-7, EN 01044674-5.

¹⁶⁰⁶ *Supra*, paras 435 to 446.

¹⁶⁰⁷ *ICP's Final Submission*, D378/2, fn 42.

¹⁶⁰⁸ D118/285, NOP Ngim, WRI, A4-7, EN 01044674-5.

833. The cited evidence of YOU Phnom and NOP Ngim is insufficiently clear and specific about the transfer of information at the commune level in Kirivong District. The ICP refers to ‘orders to monitor’ the population to identify perceived enemies, yet the ICP is unable to cite any evidence of specifically when and what was ordered or who gave such orders.¹⁶⁰⁹ The ICP asserts that ‘monitoring was ordered,’ using the passive voice, because he is unable to identify any individual who gave the alleged orders.¹⁶¹⁰
834. The evidence of YOU Phnom concerns the transfer of information from militiamen to the Chief of Kouk Prech Commune and the reports of the local echelon to the commune committee.¹⁶¹¹ YOU Phnom did not state that this information reached the Kirivong District Committee¹⁶¹² and the ICP’s presumption that this information was passed to the Committee of Kirivong District has no basis in the evidence.¹⁶¹³
835. Likewise, YOU Phnom did not give evidence about the origin of the orders. The ICP cites YOU Phnom as evidence about orders to monitor enemies in Kirivong District, but YOU Phnom stated that he did not know where such orders came from:
- Q: It is your understanding that the district committee had the people follow a policy of making couples have sexual intercourse. Were those orders their own or did they have orders from someone else?
- A69: During that regime it was all about chain of command. However, I do not know.¹⁶¹⁴
836. The ICP ignores the following passage of YOU Phnom’s evidence:
- Q: Do you know whether it was the commune chief or anyone else who had ordered the newlyweds to sleep together?
- A27: I was unable to learn that.¹⁶¹⁵
837. Despite YOU Phnom telling the investigator that he ‘did not know’ and he was ‘unable to learn’ who had ordered newlyweds to sleep together, the investigator did not ask YOU

¹⁶⁰⁹ ICP’s Final Submission, D378/2, paras 28 to 30.

¹⁶¹⁰ ICP’s Final Submission, D378/2, para. 29.

¹⁶¹¹ D219/406, YOU Phnom, WRI, A14-16, EN 01139550. (‘Q To whom did you report? A14. I reported to the commune or sangkat chief. Q What was his name? A15. I do not know his surname but his first name was Nai. Q Was he the Kouk Prech commune chief? A16 Yes.’) D219/406, YOU Phnom, WRI, A26, EN 01139552.

¹⁶¹² D219/406, YOU Phnom, WRI, A14-16, EN 01139550.

¹⁶¹³ *Supra*, paras 436 to 439.

¹⁶¹⁴ D219/406, YOU Phnom, WRI, A69, EN 01139558.

¹⁶¹⁵ D219/406, YOU Phnom, WRI, A27, EN 01139552.

- Phnom what he meant and did not ask follow-up questions about YOU Phnom's lack of knowledge and its implications for the source of YOU Phnom's evidence more generally.
838. Lastly, the account of YOU Phnom relates to only one commune (Kouk Prech Commune), which is an insufficient evidential basis from which to extrapolate that the same lines of communication existed for all communes in Kirivong District.¹⁶¹⁶
839. The reliability of YOU Phnom's evidence about 'spying on newlywed couples' is severely undermined by the OCIJ investigator's approach to interviewing the witness, which sought to place evidence into the witness's mouth. The ICP ignores the leading and closed questioning through which this evidence was elicited: 'Q19: You stated that they had you spy on the people. Did they have you spy on newlywed couples? A19: Everyone.'¹⁶¹⁷ Another leading question: 'Q21: 'Was the commune chief the person who ordered you to investigate the newlyweds?''¹⁶¹⁸ When questioning YOU Phnom about his activities, the investigator led him by mischaracterising his prior evidence and telling him: 'You stated that they had you spy on the people.'¹⁶¹⁹ YOU Phnom had in fact stated that he 'listened to the situation of the people in the commune.'¹⁶²⁰ This is reflective of the investigative practice throughout the interview of asking leading or closed questions or failing to ask clarifying questions. The investigator's questions were frequently closed and teleological, seeking to elicit particular facts from the witness and failing to allow for alternatives.
840. YOU Phnom had a motivation to distance himself from responsibility for crimes by blaming his commune-level superiors. HOR Yan says that YOU Phnom was a militiaman who participated in killings.¹⁶²¹
841. There is insufficient evidence on Case File 004 regarding the flow of information between the commune militia and the members of the Kirivong District Committee including a lack of evidence of Mr YIM Tith's attendance at, let alone active participation in, meetings between the Kirivong District and representatives of its Communes.¹⁶²² There is also insufficient evidence of the nature and content of any specific written

¹⁶¹⁶ D219/108, YOU Phnom, WRI, A2, EN 01076890-1.

¹⁶¹⁷ D219/406, YOU Phnom, WRI, A19, EN 01139551.

¹⁶¹⁸ D219/406, YOU Phnom, WRI, A21, EN 01139551.

¹⁶¹⁹ D219/406, YOU Phnom, WRI, A18, EN 01139551.

¹⁶²⁰ D219/406, YOU Phnom, WRI, A12, EN 01139550.

¹⁶²¹ D105/6, HOR Yan, WRI, A76-81, EN 00841984.

¹⁶²² *Supra*, para. 820.

communications between the commune militia and the members of the Kirivong District Committee to which Mr YIM Tith was privy.

842. The ICP relies on a few short passages of a single witness statement of TOEM Phal that information about ‘espionage and bad actors’ was sent from the commune militia to the Secretary of the Kirivong District Committee.¹⁶²³ TOEM Phal’s reference to ‘espionage and bad actors’ is imprecise and lacks context TOEM Phal gave non-specific evidence about letters ‘from the district echelon’ about enemies, containing no specific details about the nature or content of these letters.¹⁶²⁴ The source of TOEM Phal’s evidence is unclear and lacks sufficiently serious detail about how and when the information about espionage, bad actors and enemies was sent. TOEM Phal stated that orders were given by the district echelon to the commune militias ‘sometimes’ and he did not give an accurate time period during which he knew that information was passed between these two levels.¹⁶²⁵ As set out above, TOEM Phal is generally an unreliable witness.¹⁶²⁶
843. LUON Mol referred briefly to ‘letters from the communes to the district’ and in his own words, he could describe them only ‘in general’ terms.¹⁶²⁷ He did not state when exactly such letters were sent, nor who were the individually-named senders and recipients of such letters, nor did he describe the wording of the information in the letters regarding enemies.¹⁶²⁸ Furthermore, LUON Mol’s evidence regarding Mr YIM Tith’s alleged role in Kirivong District concerns the period ‘in 1974’ and ‘until 1975.’¹⁶²⁹ The significant risk that his evidence lies outside the temporal scope of the allegations in Kirivong District prior to 31 December 1975 – for which Mr YIM Tith cannot be indicted¹⁶³⁰ –

¹⁶²³ ICP’s Final Submission, D378/2, para. 28.

¹⁶²⁴ D219/471, TOEM Phal, WRI, A45, EN 01154811.

¹⁶²⁵ D219/471, TOEM Phal, WRI, A16, EN 01154806.

¹⁶²⁶ *Supra*, paras 743 to 745 and 811 to 819.

¹⁶²⁷ D219/358, LUON Mol, WRI, A31, EN 01116346. (‘In general, the letters from the communes to the districts were about the arrests of people.’ [...])

¹⁶²⁸ D219/358, LUON Mol, WRI, A31, EN 01116346. (‘When the letters sent from the districts to the communes they would be about asking for consideration and decision to take action whether someone had to be killed. For example, if a commune person made a report about who was an enemy and at that time, a district could response back after finding that he was really the enemy. The accused person then had to be killed.’)

¹⁶²⁹ *Supra*, para. 741. D219/358, LUON Mol, WRI, A58, 96, EN 01116348, 51 (‘They held a meeting once a month to talk about any plans to improve the district. Village and commune chiefs would be summoned to attend the meetings [...] The meeting attendees to be educated were the commune level, commune deputy, commune members, village chiefs, village deputies and village members.’)

¹⁶³⁰ *Supra*, paras 436 to 439. D219/358, LUON Mol, WRI, A10, 13-14, 81, EN 01116344, 50.

means that it must be disregarded. As set out above and below, LUON Mol is generally an unreliable witness.¹⁶³¹

844. The ICP cites the evidence of PANN Sarou regarding reports that were ‘sent from the village to the commune, and the commune chief ordered the militia to arrest the people.’¹⁶³² PANN Sarou’s evidence lacks sufficient detail and it is unclear which individuals or committees he is referring to in particular. The ICP ignores the evidence of PANN Sarou that undermines the ICP’s fanciful claim that there a ‘regular’ flow of written communication between the commune and district levels:

Q: To arrest someone whose name was in a report, did the commune level need to report to the district level, or did the commune level not need to report?

A90: Sometimes the commune level discussed it with the district level, but sometimes the commune level did not report to the district level.¹⁶³³

845. The investigator did not establish the dates of PANN Sarou’s account, when putting to PANN Sarou his evidence regarding when he was located in Kampeaeng Commune, the investigator referred simply to ‘the late period of the Khmer Rouge regime.’¹⁶³⁴ This is a vague description and does not allow inferences to be drawn about the timing of PANN Sarou’s knowledge of the communications from Kampeaeng Commune to Kirivong District.

846. The ICP makes confused and unclear submissions about Mr YIM Tith’s ‘direct and indirect subordinates’ actively monitoring and investigating the population to identify perceived enemies.¹⁶³⁵ The ICP’s submissions are about the activities of commune-level militia, and do not refer to the ‘acts and conduct’ of Mr YIM Tith as asserted in the heading of this section of the ICP’s Final Submissions. These allegations do not identify which individuals were the ‘direct and indirect subordinates’ of Mr YIM Tith during his alleged tenure on the Committee and who the ICP claims actively monitored and investigated the population.

¹⁶³¹ *Supra* and *infra*, paras 741 to 742, 821, 929 to 934.

¹⁶³² *ICP’s Final Submission*, D378/2, para. 137. D118/302, PANN Sarou, WRI, A87-91, EN 01045481-2.

¹⁶³³ D118/302, PANN Sarou, WRI, A90, EN 01045482.

¹⁶³⁴ D118/302, PANN Sarou, WRI, A80, EN 01045480.

¹⁶³⁵ *ICP’s Final Submission*, D378/2, paras 28 to 30.

(4) Mr YIM Tith Did Not Share or Contribute to the Common Criminal Plan through Active Participation in the Imprisonment, Interrogation and Killing of Enemies at Wat Pratheat in Kirivong District

847. The ICP's claim of Mr YIM Tith's 'active participation in the imprisonment, interrogation and killing of suspected enemies' in Kirivong District, which purports to relate to the District as a whole, can be boiled-down to four factual assertions concerning only Wat Pratheat crime site: (i) Wat Pratheat was a 'tool' under Mr YIM Tith's control;¹⁶³⁶ (ii) Mr YIM Tith visited Wat Pratheat 'on multiple occasions';¹⁶³⁷ (iii) Mr YIM Tith personally interrogated prisoners at Wat Pratheat;¹⁶³⁸ and (iv) Mr YIM Tith ordered extrajudicial killings at Wat Pratheat.¹⁶³⁹ For the following reasons, these assertions are unsubstantiated by sufficient evidence.

The Wat Pratheat Security Centre was not a 'tool' under Mr YIM Tith's control

848. The ICP claims that Wat Pratheat was a personal 'tool' used by Mr YIM Tith 'for implementing the CPK's enemies policy in the Southwest Zone.'¹⁶⁴⁰ The ICP cites the statements of DOK Chann, HOR Yan and ORK Chan as evidence that '[b]y virtue of his position on the Kirivong District Committee,' Mr YIM Tith was the superior of Ta Pring, the Wat Pratheat Chairman, and Ta Pring reported to Mr YIM Tith.¹⁶⁴¹ The ICP asserts that 'members of the Kirivong District Committee' oversaw the operation of Wat Pratheat and that on this basis Mr YIM Tith should be found to have exercised control over Wat Pratheat.¹⁶⁴² Although the ICP makes sweeping claims about Mr YIM Tith's control over Wat Pratheat throughout the DK period, by reason of his alleged position on the Kirivong District Committee, the majority of the evidence identified by the ICP makes no mention of Mr YIM Tith in connection with Wat Pratheat.¹⁶⁴³ For the following reasons the evidence is insufficient to support the ICP's allegations regarding this alleged crime site.

¹⁶³⁶ ICP's Final Submission, D378/2, paras 31 to 32.

¹⁶³⁷ ICP's Final Submission, D378/2, para. 32.

¹⁶³⁸ ICP's Final Submission, D378/2, paras 32 and 190.

¹⁶³⁹ ICP's Final Submission, D378/2, paras 33 to 34, and 190.

¹⁶⁴⁰ ICP's Final Submission, D378/2, paras 31 to 32.

¹⁶⁴¹ ICP's Final Submission, D378/2, para. 32.

¹⁶⁴² ICP's Final Submission, D378/2, paras 31 to 32, and 194 to 195.

¹⁶⁴³ ICP's Final Submission, D378/2, paras 31 to 34, and 190 to 208.

DOK Chann's evidence about Wat Pratheat

849. DOK Chann's evidence is outside of the temporal scope of the investigation in Case 004, since it relates to the period from 1973 to approximately June 1975 when DOK Chann said he was located at Wat Pratheat.¹⁶⁴⁴ His evidence cannot be taken into consideration in assessing whether Mr YIM Tith controlled Wat Pratheat during the period under investigation in Kirivong District between 1976 and early 1978.¹⁶⁴⁵ DOK Chann did not come back to Wat Pratheat after approximately June 1975, and he stated that although his name was still listed as a staff member of Wat Pratheat from around June 1975 to mid-1977, he was no longer in Kirivong District during this time.¹⁶⁴⁶ He said that he did not see any district leaders coming to check Wat Pratheat in mid-1977 when he returned to Kirivong District to work in a production unit.¹⁶⁴⁷
850. As well as being outside the temporal scope, DOK Chann's evidence about Mr YIM Tith's role at Wat Pratheat from 1973 to approximately June 1975 is unclear and devoid of detail. The investigator did not clarify with DOK Chann his complicated answer to the question: 'To whom did Ta Pring report in Kirivong District?'.¹⁶⁴⁸ Even though DOK Chann gave no specific details about the role of Mr YIM Tith, the investigator did not ask any follow-up questions about the nature of Ta Pring's reports, their timing and frequency, whether the reports were in written format, the content of the reports, or the matters on which Ta Pring was required to report to the Kirivong District Committee.¹⁶⁴⁹ There is no detailed evidence as to how DOK Chann could have known of the specific reporting structure of Wat Pratheat, given the secretive nature of the DK regime.

¹⁶⁴⁴ D219/86, DOK Chann, WRI, A3, EN 01056873. ('Q: When did you start working at Wat Pratheat Security Office? A3: I probably started in 1973. At that time, the security office was located in Kouk Prech Village, Kouk Prech Commune, and in early 1975 we relocated that office from Kouk Prech to inside Wat Pratheat Pagoda for a short period of time before the liberation of Phnom Penh in 1975. At that time, all the staff of the security office and the prisoners were relocated to Wat Pratheat Pagoda; however, there were only four or five prisoners.') See also DOK Chann's statement that 'all that probably began in 1974.' D219/86 DOK Chann, A7, EN 01056874.

¹⁶⁴⁵ *Supra*, paras 436 to 439. *ICP's Third Introductory Submission*, para. 93: 'TA Tith was Secretary of the Kirivong District (District 109) of Takeo province, part of Sector 13 of the Southwest Zone, from 1976 until the end of 1977 or early 1978.'

¹⁶⁴⁶ D219/86, DOK Chann, WRI, A2, EN 01056872-3.

¹⁶⁴⁷ D219/86, DOK Chann, WRI, A11-12, EN 01056875.

¹⁶⁴⁸ D219/86, DOK Chann, WRI, A7, EN 01056873-4. ('Q: To whom did Pring report in District 109? A7: The first District Chairman was [Ta Tom], and Yeay Bau was [Ta Tom]'s deputy. Then Yeay Bau was promoted to the Zone. After [Ta Tom] and Yeay Bau transferred away, Ta Tith became District Committee and Yeay Khoeun was his deputy. All that probably began in 1974, because when Phnom Penh was liberated, Ta Tith and Yeay Khoeun were already in charge of the district. Around 1976 when Ta Tith was promoted to the Sector, Yeay Khoeun replaced him in the district post.')

¹⁶⁴⁹ D219/86, DOK Chann, WRI, A7, EN 01056873-4.

HOR Yan's evidence about Wat Pratheat

851. The evidence of HOR Yan about Wat Pratheat must also be disregarded as outside the temporal scope of the investigation in Kirivong District between 1976 and early 1978.¹⁶⁵⁰ Misleadingly, the ICP cites only HOR Yan's SOAS interview, in which he said he was in full detention from around the middle of 1976 until around July 1977.¹⁶⁵¹ This misrepresents HOR Yan's evidence by failing to refer the CIJs to his subsequent interview with the OCIJ, in which HOR Yan was asked to clarify his evidence on the timing of his detention:

Q: In your previous interview document, ERN 00841987 (English version) on page 13 (Khmer version). The investigator asked you, "In what year were you jailed for 8 months?" You said, "Probably at the end of 1978." Could you confirm this?

A10: I was jailed in 1973 not in 1978; there might be confusion between 1973 and 1978.¹⁶⁵²

HOR Yan subsequently repeated again in evidence that the correct date of his eight-month imprisonment was in 1973.¹⁶⁵³

852. Furthermore, the SOAS statement of HOR Yan (that refers to 1978) has less probative value than the subsequent OCIJ written record of interview (referring to 1973). The SOAS summary is not an original interview transcript, it is a summary of short-hand notes whose chain of custody is unclear.¹⁶⁵⁴ It is unclear who was the author of the document purporting to record HOR Yan's 'SOAS interview,' how many edited versions were produced, or whether any documents were shown to him.¹⁶⁵⁵ There is no mention of the interview being audio recorded, nor are there any original notes of the interview on the Case File. It is impossible to know the nature of the questioning put to HOR Yan and whether he was strongly led by the interviewers' questioning. Importantly, it is unclear if HOR Yan ever saw this document; there is no record of him agreeing to its contents and it does not contain his signature: the fact that HOR Yan subsequently disavowed the 1978

¹⁶⁵⁰ *Supra*, paras 436 to 439. ICP's Third Introductory Submission, para. 93: 'TA Tith was Secretary of the Kirivong District (District 109) of Takeo province, part of Sector 13 of the Southwest Zone, from 1976 until the end of 1977 or early 1978.'

¹⁶⁵¹ D1.3.11.18, HOR Yan, SOAS Interview, EN 00217607.

¹⁶⁵² D1.3.11.18, HOR Yan, SOAS Interview, EN 00217607, referring to D118/155, HOR Yan, WRI, A6, EN 00978587.

¹⁶⁵³ D118/155, HOR Yan, WRI, A12, EN 00978588. ('Q: How long after you were released from the prison did the Khmer Rouge Regime collapse? A12: I was in prison in 1973 for about eight months.')

¹⁶⁵⁴ D1.3.11.18, HOR Yan, SOAS Interview, EN 00217606-7.

¹⁶⁵⁵ D1.3.11.18, HOR Yan, SOAS Interview, EN 00217606-7.

date printed in the SOAS document must be assessed in this light. The SOAS statement of HOR Yan was taken outside a judicial setting and the CIJs have held that statements collected without judicial supervision enjoy no presumption of relevance and reliability¹⁶⁵⁶ and the information contained therein will be relied upon by the CIJs only when corroborated by other sources,¹⁶⁵⁷ as set out above.¹⁶⁵⁸ No such corroborative source exists.

853. It is therefore incontrovertible that HOR Yan's evidence about Mr YIM Tith's role at Wat Pratheat is outside the temporal scope of the investigation. In any event, in accordance with the principle of *in dubio pro reo*, the CIJs must resolve any doubts they have over the dates of HOR Yan's evidence in favour of the Defence.¹⁶⁵⁹

ORK Chan's evidence about Wat Pratheat

854. The evidence of ORK Chan does not refer to Mr YIM Tith personally and is unreliable due to its confusing and contradictory nature. While the ICP refers to ORK Chan's evidence that the district committee was superior to the prison chief, the ICP avoids reference to ORK Chan's statements that, personally, he 'did not know much' about the Kirivong District Office,¹⁶⁶⁰ and that the District level could not issue an order to kill prisoners.¹⁶⁶¹ ORK Chan never said that Mr YIM Tith gave orders to the prison chief. To the contrary, he stated that 'Ta Tith' did not give orders.¹⁶⁶² ORK Chan stated that it was not 'Ta Tith' who was in a more senior position, but Ta Tom.¹⁶⁶³

¹⁶⁵⁶ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104 (footnotes omitted). Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 124. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 486.

¹⁶⁵⁷ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 108. Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 127. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 489.

¹⁶⁵⁸ *Supra*, paras 512 to 513.

¹⁶⁵⁹ See 34. Consolidated Decision on Meas Muth's Requests on Personal Jurisdiction, 1 February 2016, D298.1, para. 33.

¹⁶⁶⁰ *Supra*, para. 773. D118/156, ORK Chan, WRI, A57, EN 00980472. ('Q: In your interview with the Office of the Co-Investigating Judges, numbered 00803448, you said, "I worked in the Agricultural Office, near the Kirivong District Office." Where was the Kirivong District Office? A57: I do not know much about the Kirivong District Office because sometimes I worked here and there.')

¹⁶⁶¹ D118/156, ORK Chan, WRI, A59, EN 00980472.

¹⁶⁶² D219/369, ORK Chan, WRI, A110, EN 01128261. ('Q: Besides the order to release you did he give any other orders. A110: No he did not.')

¹⁶⁶³ D219/369, ORK Chan, WRI, A17, EN 01128256. See also LOEM Ngen's evidence that confused the identity of Mr YIM Tith and Ta Tom: 'people called the two men as a pair.' D219/121, LOEM Ngen, WRI, A13, EN 01057796.

855. ORK Chan's evidence is unreliable since he was confused about the occasions on which he thought he saw 'Ta Tith' at Wat Pratheat. Although ORK Chan said he saw 'Ta Tith' on a single occasion when detained at Wat Pratheat in April 1977,¹⁶⁶⁴ this was contradicted by his evidence that after 1976 he never saw 'Ta Tith',¹⁶⁶⁵ that 'Ta Tith' came to the prison every week,¹⁶⁶⁶ and that he saw 'Ta Tith' twice during three months' of detention.¹⁶⁶⁷ At the same time, ORK Chan stated that he was shackled inside Wat Pratheat in a room with no windows and it was unclear how he could have known whether 'Ta Tith' was walking about the prison or giving orders.¹⁶⁶⁸ Ultimately, ORK Chan accepted that he 'did not know if Ta Tith often came here or not because I was still in prison cell.'¹⁶⁶⁹ ORK Chan did not give any reliable evidence regarding Mr YIM Tith. He was unable to identify Mr YIM Tith even when shown a photograph, stating that the figure in the photograph looked like KHIEU Samphan, and this photograph was not in any case formally proven in evidence to be an accurate depiction of Mr YIM Tith.¹⁶⁷⁰
856. ORK Chan's recollection of the prison or prisons referred to as Wat Pratheat Security Centre is unclear and inherently contradictory. ORK Chan originally stated that there was an underground prison in Wat Slaeng Pagoda built in 1975 which was relocated in 1976 to Wat Pratheat Pagoda.¹⁶⁷¹ ORK Chan then stated confusingly that he did not know when the prison was relocated from Wat Slaeng to Wat Pratheat Pagoda as the prisons were in different communes.¹⁶⁷² In further confusion, ORK Chan stated that he did not know 'if they built an underground prison in Wat Slaeng.'¹⁶⁷³
857. Taken together, the evidence of DOK Chann, HOR Yan and ORK Chan is insufficient to establish any real picture of Mr YIM Tith's alleged oversight of Wat Pratheat or the

¹⁶⁶⁴ D219/369, ORK Chan, WRI, A80, EN 01128260.

¹⁶⁶⁵ D219/369, ORK Chan, WRI, A22, EN 01128256. ('Q: After late 1976 did you still hear of Ta Tith and Ta Tom. A22: No I did not.')

¹⁶⁶⁶ D1.3.11.2, ORK Chan, ICP Interview, EN 00219254.

¹⁶⁶⁷ D118/156, ORK Chan, A75, WRI, EN 00980474.

¹⁶⁶⁸ D118/156, ORK Chan, A76, WRI, EN 00980474. ('Q: You said that there were no windows in the prison cells, so how did you know that the one who came to look at the prisoners was Ta Tit? A76: I already knew him back then because I had worked in the District Production Unit. The cells were dark only at night.')

¹⁶⁶⁹ D105/5, ORK Chan, WRI, A98, EN 00803451.

¹⁶⁷⁰ D105/5, ORK Chan, WRI, A104, WRI, EN 0080351.

¹⁶⁷¹ D219/369, ORK Chan, WRI, A52, EN 01128258. ('Q: When did they build that underground prison. A52: It was built in 1975. However, it was relocated in 1976.')

¹⁶⁷² D219/369, ORK Chan, WRI, A65, EN 01128259. ('Q: When was the prison relocated from Wat Slaeng to Wat Pratheat. A65: I do not know because they were in different communes.')

¹⁶⁷³ D219/369, ORK Chan, WRI, A67, EN 01128259. ('Q: Did you know if they built an underground prison in Wat Slaeng. A67: No I didn't. I only knew that there was a prison.')

operational structure through which Wat Pratheat was allegedly governed between 1976 and early 1978. YOU Phnom, who said he was a Kirivong District militiaman, stated that he did not work at Wat Pratheat but he visited occasionally from 1976 and 1977. In his evidence regarding these visits, YOU Phnom did not mention HOR Yan or ORK Chan as former prisoners of Wat Pratheat.¹⁶⁷⁴ The uncertainty over the extra-jurisdictional timing of DOK Chann and HOR Yan's evidence about Wat Pratheat is particularly important in light of the evidence that Wat Pratheat was relocated in 1975 and was later combined with another 'underground prison' in 1976 and completely ceased operation in 1977.¹⁶⁷⁵

858. There is insufficient evidence to conclude that Wat Pratheat remained in the same location, and under the same authority and communication structure, throughout the scope of the investigation in Kirivong District and there is insufficient evidence that one of the prisons referred to as 'Wat Pratheat' had not completely ceased operation in 1977.¹⁶⁷⁶ There is insufficient evidence that individuals on the Kirivong District Committee held authority over Wat Pratheat at different stages in the temporal scope of the investigation.

- Mr YIM Tith did not Visit Wat Pratheat on Multiple Occasions as Alleged

859. The ICP alleges that Mr YIM Tith's active participation in the common criminal plan is demonstrated by his alleged visits to Wat Pratheat 'on multiple occasions.'¹⁶⁷⁷ There is insufficient evidence on the Case File of Mr YIM Tith's presence at Wat Pratheat, including speaking with staff and prisoners. The witnesses cited by the ICP were unable reliably to identify Mr YIM Tith's presence at Wat Pratheat at any specific time or to describe what he said or did when visiting.

860. YOU Phnom explicitly stated that he 'did not know what [Ta Tom and Yim Tith] did' at Wat Pratheat.¹⁶⁷⁸ The reliability of YOU Phnom's evidence is clouded by a lack of clarity

¹⁶⁷⁴ D219/406, YOU Phnom, WRI, A154-161, 01139569-70; D219/109, YOU Phnom, WRI, A10, 01081740. The alias name of YOU Phnom is referred to as Dok Chan (ធុន ចាន់), which is phonetically similar to DOK Chann (ធុន ចាន់), another witness who provides evidence in relation to Wat Pratheat.

¹⁶⁷⁵ D219/369, ORK Chan, WRI, A52, EN 01128258.

¹⁶⁷⁶ ORK Chan said that the Khmer Rouge stopped using Voat Preah Theat Pagoda as the detention office in 1977. D118/156, ORK Chan, WRI, A20, EN 00980468.

¹⁶⁷⁷ ICP's Final Submission, D378/2, para. 32.

¹⁶⁷⁸ D219/108, YOU Phnom, WRI, A8, EN 01076892-3. YOU Phnom said that he saw Yeay Bo and Yeay Khoeun at the security office.

as to whether he had an opportunity to observe 'Ta Tith' at Wat Pratheat since his evidence was unclear about whether he actually ever went to the Security Centre.¹⁶⁷⁹ YOU Phnom's evidence is also unreliable because he said he was unable to remember dates and this is reflected in his evidence providing no accurate timeframe for the alleged events surrounding Wat Pratheat and could not remember details of the Security Centre.¹⁶⁸⁰ In addition, there is a substantive translation error in the English version of YOU Phnom's statement which masks the strongly leading nature of the question that was asked by the OCIJ investigator. The English version cited by the ICP reads:

Q8: Did you ever see Ta Tith or Ta Tom come to inspect Wat Pratheat Security Office?

The question actually asked by the OCIJ investigator, as recorded in the Khmer version, was:

Q8: Did you ever see Ta Tith come to inspect Wat Pratheat Security Office?¹⁶⁸¹

861. The evidence of DOK Chann and HOR Yan does not include reliable, specific, information about the alleged visits of Mr YIM Tith to Wat Pratheat. DOK Chann's evidence included no specific details about Mr YIM Tith's visits to Wat Pratheat and stated that '[Ta Tith's group] did not enter the detention rooms to speak to the prisoners.'¹⁶⁸² HOR Yan's evidence was not only outside the temporal scope of the judicial investigation, but also unreliable since he gave contradictory evidence about the number of times he saw 'Teut' at Wat Pratheat.¹⁶⁸³ The reliability of HOR Yan's apparent

¹⁶⁷⁹ D219/108, YOU Phnom, WRI, A3, EN 01076891. ('I never worked at Wat Preah Thea Pagoda, but my older brother, DOK Chann, was a prisoner supervisor at Wat Preah Thea Pagoda. I used to visit him there, so I knew the security office administrative structure [N.B. 'administrative' not mentioned in the Khmer version]. I visited my older brother at [Wat Pratheat] from the time I was in the children's unit until Khmer Rouge regime collapsed.[...]' C.f. D219/109, YOU Phnom, WRI, A9, EN 01081739. ('I cannot estimate the number because I did not dare go near the Security Office.')

¹⁶⁸⁰ D219/108, YOU Phnom, WRI, A4, EN 01076891.

¹⁶⁸¹ D219/108, YOU Phnom, WRI, A8, EN 01076892-3.

¹⁶⁸² D219/86, DOK Chann, WRI, A9-10, EN 01058674-5.

¹⁶⁸³ D1.3.11.18, HOR Yan, WRI, EN 00217607. ('The gall bladders were removed from those executed. [Ta Tom] and Bau came to get the gall bladders, hundreds of them. Teut came only occasionally.') D105/6, HOR Yan, WRI, A22, EN 00841978. ('Q: How often did you see Ta Tit come to this prison? A22: I saw him come here about more than 10 times because it was in the phase of mass killings.') D219/55, HOR Yan, WRI, A10, EN 01053831-32. ('When you were imprisoned at Wat Preah Thea Pagoda Prison, how many times did you see Ta Tith come there when they took prisoners to be killed to get gallbladders? A10: Ta Tith came only once, when they cut open 30 prisoners' abdomens to take the gallbladders'). D219/55, HOR Yan, WRI, A20, EN 01053833-4. ('Q: In question 48, they asked you, "How many times did you see Ta Tith when you were at Wat Preah Thea Pagoda Prison?" You answered, "I saw him twice. Ta Tith came to Wat Preah Thea Pagoda Prison every three or four months, and the next year he would come again." Can you further clarify this? A20: I want to clarify that Ta Tith came to take

sighting(s) of Mr YIM Tith is lowered further by his inability to identify Mr YIM Tith accurately when shown a photograph, mistaking Mr YIM Tith for Ta Nam.¹⁶⁸⁴ The interview record states '[t]he investigator showed a photograph of Suspect YIM Tit alias Ta Tit provided by the Documentation Center of Cambodia,' as if the fact that it was provided by DC-Cam assures its reliability.¹⁶⁸⁵ It is unclear when, or by whom, this photograph was taken. Furthermore, there is no indication on Case File 004 that the photograph, which was not identified by any reference number, has ever been formally verified as identifying Mr YIM Tith.¹⁶⁸⁶

862. HOR Yan also stated explicitly that he 'did not know' what role 'Tit' had in Kirivong District.¹⁶⁸⁷ HOR Yan merely said that 'Teut, Tom, Bau (f), and Nam were above the Voat Pratheat' without giving any further detail.¹⁶⁸⁸ 'Teut' was named as only one of several individuals and this evidence of being one of the individuals 'above the Security Office' provides no information regarding Mr YIM Tith's personal role or individual conduct in relation to Wat Pratheat.

863. The ICP cites TUN Soun's evidence in support of Mr YIM Tith's alleged visits to Wat Pratheat 'on multiple occasions' during the Khmer Rouge era,¹⁶⁸⁹ yet the ICP fails to take into account TUN Soun's evidence that he was at Wat Pratheat for only a short period of four days 'in late 1975 or early 1976.'¹⁶⁹⁰ The ICP thus erroneously extrapolates assertions about Mr YIM Tith's attendance at Wat Pratheat in relation to the entire Khmer Rouge era on the basis of one witness's evidence of a four-day period.

gallbladders from that prison only once. I also saw him again in Kbal Damrey Village, which was located near Wat Preah Theat Pagoda.')

¹⁶⁸⁴ D105/6, HOR Yan, WRI, A20, EN 00841978. ('Q: Does this look like Ta Tit? A20: It does not. It is more likely to be Ta Nam [...].')

¹⁶⁸⁵ D105/6, HOR Yan, WRI, A20, EN 00841978. ('Q: Does this look like Ta Tit? A20: It does not. It is more likely to be Ta Nam [...].')

¹⁶⁸⁶ D105/6, HOR Yan, WRI, A20, EN 00841978. ('Q: Does this look like Ta Tit? A20: It does not. It is more likely to be Ta Nam [...].')

¹⁶⁸⁷ D105/6, HOR Yan, WRI, A12, EN 00841977. ('Do you remember what role Ta Tit had in Kirivong District? A12: 'I did not know because I did not join them [...].')

¹⁶⁸⁸ D1.3.11.18, HOR Yan, SOAS Interview, EN 00217606-7.

¹⁶⁸⁹ *ICP's Final Submission*, D378/2, para. 31.

¹⁶⁹⁰ D219/346, TUN Soun, WRI, A48-49, A60, EN 01116113-4.

864. For the reasons above, ORK Chan's evidence about seeing Mr YIM Tith at Wat Pratheat is unreliable since he was confused about the occasions when he thought he saw Mr YIM Tith.¹⁶⁹¹

865. There is insufficient evidence that Mr YIM Tith was ever seen at Wat Pratheat speaking with staff and prisoners.

- Mr YIM Tith did not Personally Interrogate Prisoners at Wat Pratheat

866. The allegation that Mr YIM Tith 'personally conducted interrogations' in Kirivong District is based on TUN Soun's recollection of a conversation that he overheard. It is concerned only with the charged crime site at Wat Pratheat.¹⁶⁹² On the sole basis of TUN Soun's recollection of a conversation that he overheard, the ICP asserts that, 'obviously,' Mr YIM Tith's questioning of prisoners shows that Mr YIM Tith was 'further[ing] the criminal plan's goal of identifying enemies to be detained and/or executed without judicial process.'¹⁶⁹³ As set out below, there are serious evidential issues with TUN Soun's account, undermining the ICP's fatuous claim that his evidence of Mr YIM Tith's personal involvement in interrogations is 'obviously' probative as to him furthering a common criminal plan.

867. As already noted herein,¹⁶⁹⁴ TUN Soun was at Wat Pratheat for only a short period of four days and he stated that his recollection of Mr YIM Tith interrogating prisoners concerned some point 'in late 1975 or early 1976.'¹⁶⁹⁵ There is therefore a substantial risk that TUN Soun's evidence is relevant only to late 1975, outside any period with which Mr YIM Tith has been charged.¹⁶⁹⁶ This is compounded by the fact that TUN Soun stated that the chief of Wat Pratheat was Aun at the time TUN Soun knew about Wat Pratheat.¹⁶⁹⁷ This is inconsistent with the ICP's allegation that Mr YIM Tith was responsible for crimes at Wat Pratheat when Ta Pring was in charge there.¹⁶⁹⁸ The CIJs must therefore disregard TUN Soun's evidence about alleged interrogations at Wat

¹⁶⁹¹ See *supra* paras 854 to 856.

¹⁶⁹² ICP's Final Submission, D378/2, para. 32.

¹⁶⁹³ ICP's Final Submission, D378/2, paras 32 and 203. TUN Soun is the only witness relied upon by the ICP with regard to Mr YIM Tith's direct involvement in interrogations.

¹⁶⁹⁴ See *supra* paras 866 to 899.

¹⁶⁹⁵ D219/346, TUN Soun, WRI, A60, EN 01116113-4.

¹⁶⁹⁶ *Supra*, paras 436 to 439.

¹⁶⁹⁷ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

¹⁶⁹⁸ ICP's Final Submission, D378/2, para. 32.

Pratheat, on the grounds that there is insufficient evidence to be sure that his evidence is relevant to Mr YIM Tith's responsibility in Kirivong District during the temporal scope of the investigation between 1976 and early 1978.¹⁶⁹⁹

868. TUN Soun's evidence that he saw Mr YIM Tith personally interrogate prisoners at Wat Pratheat is unreliable. It is highly probable that his evidence was contaminated during the period from 15 August 2008 to 14 December 2014, during which TUN Soun communicated with the ICP, the OCIJ, and at least two different NGO organisations. In addition, the ICP's Third Introductory Submission was publicly disclosed – illegally - in 2011 and became widely accessible.¹⁷⁰⁰ It was not until the OCIJ interviewed TUN Soun on 14 December 2014 that he gave a detailed account of personally observing Mr YIM Tith interrogating prisoners at Wat Pratheat.

869. The only evidence cited by the ICP in which TUN Soun says he saw Mr YIM Tith interrogating prisoners are his two most recent statements.¹⁷⁰¹ In order to assist the CIJs in seeing past the ICP's selective citation of TUN Soun's evidence, and given his significance as the sole unsupported witness to Mr YIM Tith's alleged personal involvement in interrogations in Kirivong District, the Defence analyses the following evidence of TUN Soun:

TUN Soun's interview with the ICP

870. In TUN Soun's first interview with the ICP (D1.3.11.56 on 15 August 2008), he did not mention Mr YIM Tith in connection with Wat Pratheat. He gave no evidence that he saw Mr YIM Tith interrogate prisoners at Wat Pratheat.¹⁷⁰²

871. He did not mention that he was imprisoned in Wat Pratheat. According to the ICP interview notes, TUN Soun 'stated that no one was sent for re-education. Those found guilt[y] were taken away. They were taken to Wat Pratheat prison [...] people were kept

¹⁶⁹⁹ *Supra*, paras 436 to 439. ICP's Third Introductory Submission, para. 93: 'TA Tith was Secretary of the Kirivong District (District 109) of Takeo province, part of Sector 13 of the Southwest Zone, from 1976 until the end of 1977 or early 1978.'

¹⁷⁰⁰ *Supra*, paras 11 and 34.

¹⁷⁰¹ ICP's Final Submission, D378/2, para. 32, citing D219/110, TUN Soun, WRI, A6, EN 01076898 (dated 14 December 2014); D219/346, TUN Soun, WRI, A54-56, A62, EN 01116113-14 (dated 29 May 2015). The ICP also cites D118/22, TUN Soun, WRI, A16, EN 00976607 yet this refers only to TUN Soun's evidence of hearing Mr YIM Tith: 'I knew this through hearing militiamen and Ta Tit interrogating the prisoners.'

¹⁷⁰² D1.3.11.56, TUN Soun, ICP Interview.

for four (4) days or so before being killed.’¹⁷⁰³ With regard to the CPK authority structure and communication for Wat Pratheat, TUN Soun stated that the chief of Wat Pratheat was Ta Oun.¹⁷⁰⁴

872. TUN Soun appeared to be confused in his recollection about Prison 204 in Kampong Speu Province. He said that his unit was overrun by the Khmer Rouge when the area was liberated in 1973. He said he spent 4 months in Prison 204.¹⁷⁰⁵ He unclear as to *when* he was imprisoned: in his ICP interview, he described being in Prison 204 in 1973,¹⁷⁰⁶ whilst in his Victim Information Form he stated that he was sent to Prison 204 for 100 days from late 1976.¹⁷⁰⁷ It is reasonable, despite the long passage of time, to expect an individual’s evidence to be clear as to where he was imprisoned and whether it was significantly before or significantly after the Khmer Rouge took control of Cambodia.

873. The source of TUN Soun’s evidence about Wat Pratheat was unclear but he did state unambiguously that he had no personal knowledge of Wat Pratheat. He said the prison was a ‘restricted area’ and ‘they were not allowed to approach the place.’¹⁷⁰⁸ Entering Wat Pratheat was prohibited and to do so could lead to arrest.¹⁷⁰⁹ He said that the Wat Pratheat walls were made of wood and it was not possible to see through them.¹⁷¹⁰

TUN Soun’s Civil Party application

874. In his Civil Party application (D5/122, dated 29 July 2009), TUN Soun still did not mention Mr YIM Tith at all. TUN Soun made several comments about Wat Pratheat including providing a detailed account of allegedly seeing long lines of prisoners at Wat Pratheat.¹⁷¹¹ He revealed in this application that his knowledge about Wat Pratheat and the conditions inside was derived from anonymous hearsay: ‘The prisoners told me as I was eager to know, how they were kept in the prison.’¹⁷¹² TUN Soun did not state, even at this point, that he was detained at Wat Pratheat.

¹⁷⁰³ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

¹⁷⁰⁴ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

¹⁷⁰⁵ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

¹⁷⁰⁶ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

¹⁷⁰⁷ D5/122, TUN Soun, Victim Information Form, EN 00426757.

¹⁷⁰⁸ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

¹⁷⁰⁹ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

¹⁷¹⁰ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

¹⁷¹¹ D5/122, TUN Soun, Civil Party Application.

¹⁷¹² D5/122, TUN Soun, Civil Party Application, EN 00426758.

875. With regard to what he understood about the CPK authority and communication structure for Wat Pratheat, TUN Soun stated: 'The one of higher authority who gave orders was Ta Oun.'¹⁷¹³

TUN Soun's First ICIJ interview

876. In his first interview with the ICIJ (D3/8 on 29 September 2010). TUN Soun gave further evidence about Wat Pratheat,¹⁷¹⁴ but, again, he made no mention of Mr YIM Tith in connection with Wat Pratheat, nor of being imprisoned there.

877. Despite being asked to confirm his previous evidence regarding Wat Pratheat, TUN Soun did not say anything about having seen Mr YIM Tith interrogate prisoners there.¹⁷¹⁵

TUN Soun's Second ICIJ interview

878. The OCIJ interviewed TUN Soun again on 6 May 2011.¹⁷¹⁶ In the face of pressing questions from Judge Blunk, TUN Soun insisted that he 'didn't know anything about [Wat Pratheat].'¹⁷¹⁷ This was the first time TUN Soun stated that he had been to Wat Pratheat. He reported that he went to Wat Pratheat 'to attend training' but did not provide any dates. When asked about Mr YIM Tith, TUN Soun gave no evidence about him in connection with Wat Pratheat. His statement could not be plainer:

Q: Do you know anything else about Ta Tith?

A: No, I don't.¹⁷¹⁸

879. In the First Supplementary Submission, dated 18 July 2011, the ICP cited TUN Soun as a witness to alleged crimes at Wat Pratheat, but not as a witness to the ICP's allegations of Mr YIM Tith's alleged responsibility for crimes at Wat Pratheat.¹⁷¹⁹

¹⁷¹³ D5/122, TUN Soun, Civil Party Application, EN 00426754, 57.

¹⁷¹⁴ D3/8, TUN Soun, WRI, A3, EN 00622285. TUN Soun referred to the size of the restricted area at Wat Pratheat being about 100 metres by 100 metres.

¹⁷¹⁵ D3/8, TUN Soun, WRI, A2, EN 00622284.

¹⁷¹⁶ D13, TUN Soun, WRI.

¹⁷¹⁷ D13, TUN Soun, WRI, (Q Do you know who, in this district committee especially the one at Preah Theath pagoda security centre, had the power to arrest and execute people? A: I don't know. They would not let us know about this during that regime. I don't know anything about the Preah Theath pagoda security centre either. I was sent to attend training there for only three or four days. I was sent to Prison 204 also known as Trapeang Korng prison where I had been detained for four months. When people were arrested, I saw Yeay Bo who was receiving the captives and taken them away. It was she who also ordered the shooting to kill people at Kauk Prech.)

¹⁷¹⁸ D13, TUN Soun, WRI, EN 00698809.

¹⁷¹⁹ ICP's First Supplementary Submission, 18 July 2011, D65, paras 12 to 13, fns 26 and 30.

TUN Soun's Third ICIJ interview

880. TUN Soun was interviewed again by the ICIJ on 20 February 2013 and provided evidence that he was re-educated at Wat Pratheat for two to three days.¹⁷²⁰ However, TUN Soun specifically stated that he was not allowed to enter the Wat Pratheat detention site for prisoners.¹⁷²¹

881. When asked for his personal account of what happened at Wat Pratheat, TUN Soun made no mention of Mr YIM Tith. TUN Soun knew only the most basic details about the prison, consistent with an individual who had never in fact been imprisoned there:

Q: What did you see at Voat Preah Thiet Pagoda?

A13: I knew that there were both male and female prisoners, but I do not know how many prisoners there were.¹⁷²²

882. TUN Soun then mentioned 'Ta Tit' only in response to a direct question where the Investigator first raised 'Ta Tit': 'Did you see *Ta* Tit at [Wat Pratheat]?'¹⁷²³ TUN Soun responded that 'only Ta Tit, or Ta Tom or Yeay Bau, came to inspect the prisoners,' yet the source of TUN Soun's view was unclear.¹⁷²⁴ The questioning did not establish if TUN Soun knew this from his direct experience during the DK period or had arrived at this view subsequent to 1979, following his interactions with investigators, public discussions, and NGO organisations.

TUN Soun's interviews and discussions with unnamed individuals

883. When TUN Soun was asked by an ICIJ investigator '[h]as anyone else ever asked you about these events?' he said 'Yes, other people have.'¹⁷²⁵ There are uncertainties as to which people may have influenced TUN Soun's evidence and what factors led him

¹⁷²⁰ D118/22, TUN Soun, WRI, A12, EN 00976606.

¹⁷²¹ D118/22, TUN Soun, WRI, A15 00976607. (Q: Were the prisoners mistreated? A15: They did not let me see that, because I was not allowed to enter the prisoner detention site. I could only enter the pagoda compound.)

¹⁷²² D118/22, TUN Soun, WRI A13, EN 00976606.

¹⁷²³ D118/22, TUN Soun, WRI, A16-18, EN 00976607. (Q: Did you see Ta Tit at Voat Preah Thiet Pagoda? A16: Generally, only Ta Tit, or Ta Tom or Yeay Bau, came to inspect the prisoners after prisoners had been arrested and sent to Voat Preah Thiet Pagoda. I knew this through hearing militiamen and Ta Tit interrogating the prisoners. Q: Can you remember in which year it was? A17: Probably at the end of 1975 or early 1976.

Q: Did you see the prisoners being mistreated during the interrogations? A18: The prisoners there were not tortured in my presence.)

¹⁷²⁴ D118/22, TUN Soun, WRI, A16-18, EN 00976607.

¹⁷²⁵ D3/8, TUN Soun, WRI, A4, EN 00622285.

suddenly to change his evidence about ‘Ta Tit.’ It is significant that TUN Soun revealed in evidence that he was previously interviewed by at least two NGO organisations.

884. TUN Soun said he had been interviewed by a group of unnamed Cambodian individuals from an NGO called the Transcultural Psychosocial Organization.¹⁷²⁶ There is no written statement on Case File 004 recording this interview and it is impossible to determine what was said, in what context it was said, or what effect this had on the witness. Instead of seeking any clarification from TUN Soun, for instance by asking on what matters exactly the Transcultural Psychosocial Organization had questioned him, the investigator simply stated: ‘Thank you for the information.’¹⁷²⁷
885. TUN Soun also revealed that he was interviewed on an unknown date by unnamed individuals - ‘a Japanese person, an American and an Indian.’¹⁷²⁸ These individuals specifically questioned TUN Soun on his account about Wat Pratheath.¹⁷²⁹ The individual or organisations referred to by TUN Soun were identified in the interview and there is a strong possibility that his evidence regarding Wat Pratheath was contaminated by his discussions with these unnamed individuals.
886. TUN Soun was asked in another interview by ICIJ investigators whether ‘anyone had influenced his answers,’ to which he responded that they had not.¹⁷³⁰ This is an insufficient probing of the source of a witness’s evidence in a criminal investigation, several decades after the occurrence of events. The investigators did not establish what matters TUN Soun knew about from his own experience and which had been influenced by his interactions with others.

Investigative Report regarding TUN Soun

887. An investigative report records that ICIJ investigators met TUN Soun on 3 December 2014 (D219/122 for 1-5 December 2014) and conducted informal discussions and off-the-record questioning with him.¹⁷³¹ It was only in subsequent interviews, following this

¹⁷²⁶ D3/8, TUN Soun, WRI, A4, EN 00622285.

¹⁷²⁷ D3/8, TUN Soun, WRI, A4, EN 00622285. TUN Soun stated that he was previously interviewed about his time ‘in prison.’

¹⁷²⁸ D3/8, TUN Soun, WRI, A4, EN 00622285.

¹⁷²⁹ D3/8, TUN Soun, WRI, A4, EN 00622285.

¹⁷³⁰ D219/110, TUN Soun, WRI, A9-10, EN 01076899.

¹⁷³¹ D219/122, WRIA, EN 01047275.

investigative report, that TUN Soun suddenly professed to have directly witnessed 'Ta Tit' personally interrogating prisoners on specific dates at Wat Pratheath.

888. The investigative report summarises the OCIJ investigations on 3 December 2014, stating that the OCIJ sought to interview TUN Soun:

[in order] to clarify testimony he gave to OCIJ Investigator [in TUN Soun's OCIJ interview on 20 February 2013] wherein the witness stated that Ta Tith interrogated prisoners and it was unclear whether this was hearsay information. [...] The interview also sought to clarify his testimony in a P.V. given to Judge Siegfried BLUNK in which he indicates he did not know much about Ta Tith. [...] He provided a Civil Party p.v. in which he provided details of two incidents in late 1976 where Ta Tith attended [Wat Pratheath] and interrogated detainees. [...] TUN Soun did not remember the short interview he gave to Judge Siegfried BLUNK.¹⁷³²

889. The ICIJ Investigator states that before his D219/110 interview on 14 December 2014, TUN Soun 'was de-briefed and finding that he had useful information to offer, agreed to be formally interviewed the following day.' From the ICIJ investigator's statement, it is clear that information was exchanged off-the-record between the investigator and TUN Soun before a formal interview was given. The exchanged information is unavailable on Case File 004.

890. Since the matters on which the ICIJ sought to re-interview TUN Soun were central to his evidence regarding Mr YIM Tith's responsibility, it is unclear why the informal discussions and off-the record questioning conducted on 3 December 2014 and summarised in the investigative report was not conducted pursuant to Rule 57 under interview conditions.¹⁷³³ The summary in the investigative report is insufficiently detailed to ascertain what was said to TUN Soun during the discussion and questioning. The lack of clear information of the unrecorded discussions and off-the-record interview(s) with TUN Soun means that his subsequent OCIJ witness statements may have been contaminated and must be disregarded as unreliable. The Defence respectfully submits that the rebuttable presumption of regularity that normally pertains to acts of the OCIJ should no longer be applied to the interviews of TUN Soun that were conducted subsequent to the informal discussions and off-the record questioning of 3 December 2014.¹⁷³⁴

¹⁷³² D219/122, WRIA, EN 01047275.

¹⁷³³ D219/122, WRIA, EN 01047275.

¹⁷³⁴ Case 002, *Decision on Nuon Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews*, 13 March 2012 (corrected version notified on 30 May 2012), E142/3, para. 10.

TUN Soun's Fourth and Fifth ICIJ interviews

891. In the two most recent interviews cited by the ICP (D219/110 on 14 December 2014 and D219/346 on 29 May 2015), TUN Soun stated for the first time to have personally seen 'Ta Tith' interrogating prisoners at Wat Pratheat on two occasions. In his 14 December 2014 interview with the ICIJ, TUN Soun suddenly claimed to have seen 'Ta Tith' interrogating prisoners in late 1976.¹⁷³⁵ When interviewed by the ICIJ on 29 May 2015, TUN Soun was suddenly able to give an account of 'Ta Tith' and the other 'Chiefs' of Kirivong District, Ta Tom and Yeay Bo, interrogating prisoners at Wat Pratheat.¹⁷³⁶
892. By the time of these two ICIJ interviews, TUN Soun's account is utterly confused: He was unsure as to if he saw 'Ta Tith' speaking to Wat Pratheat prison staff or prisoners.¹⁷³⁷ He said he was not permitted to enter the Wat Pratheat detention site itself; he could only enter the pagoda compound.¹⁷³⁸ He said he was detained in the monk's monastery, rather than in the Wat Pratheat detention centre.¹⁷³⁹ He also stated that, rather than being in the monk's monastery, he was in a wood sawing warehouse.¹⁷⁴⁰ Despite this evidence that he was not located inside the prisoners' area of Wat Pratheat, TUN Soun nonetheless claimed to have heard the specific wording of questions asked by 'Ta Tith' to prisoners during interrogation: 'How many of you are there? Where do you come from?'.¹⁷⁴¹ Meanwhile, in other parts of his evidence, TUN Soun had said that 'Ta Tith's' interrogation of prisoners consisted only of 'Ta Tith' talking to them.¹⁷⁴² TUN Soun was not questioned to determine what information, if any, he learned first-hand and what he heard after 1979.¹⁷⁴³
893. The details of TUN Soun's memory of this interrogation are striking, given that four years earlier, TUN Soun had been unable to remember anything about Mr YIM Tith of this nature, had previously denied any knowledge of Mr YIM Tith's personal involvement in

¹⁷³⁵ D219/110, TUN Soun, WRI, A1, 3-4, 8, EN 01076896-8.

¹⁷³⁶ D219/346, TUN Soun, WRI, A26, 47-9, 54-56, 62, EN 01116111, 13-4.

¹⁷³⁷ D219/346, TUN Soun, WRI, A46, 52, EN 01116113.

¹⁷³⁸ D118/22, TUN Soun, WRI, A15, EN 00976607.

¹⁷³⁹ D219/346, TUN Soun, WRI, A10, EN 01116110.

¹⁷⁴⁰ D219/346, TUN Soun, WRI, A53, EN 01116113.

¹⁷⁴¹ D219/346, TUN Soun, WRI, A56, EN 01116113.

¹⁷⁴² D219/110, TUN Soun, WRI, A1, 3-4, 8, EN 01076896-8.

¹⁷⁴³ D219/346, TUN Soun, WRI, A23, EN 01116111.

Wat Pratheat and had given unclear evidence about his own time in detention at Wat Pratheat.¹⁷⁴⁴

894. The dates on which TUN Soun allegedly saw 'Ta Tith' interrogating prisoners were also unclear. He said he was arrested in late 1976 and was sent to Prison 204.¹⁷⁴⁵ After that, he said he was sent for re-education at Wat Pratheat for two-to-three days¹⁷⁴⁶ and that he saw 'Ta Tith' attend Wat Pratheat twice, for about 10 minutes each time, in the four days he was detained there.¹⁷⁴⁷ He said he was detained at Wat Pratheat for four days 'between 1975 and 1979.'¹⁷⁴⁸ It remains unclear when exactly TUN Soun was detained or how he identified Mr YIM Tith.

895. In further contradiction, despite claiming in this interview that he was sent to Wat Pratheat 'for re-education,' TUN Soun stated that no one was sent for re-education.¹⁷⁴⁹ He said those found guilty were taken to Wat Pratheat, kept for four '(4) days or so' and then killed.¹⁷⁵⁰ Despite TUN Soun's inability to give any precise dates for his imprisonment during the period 'between 1975 and 1979,' he told investigators that he was released in early 1978.¹⁷⁵¹ At the same time, TUN Soun contradicted himself by saying that he heard 'Ta Tith's' interrogation in late 1975 or early 1976.¹⁷⁵² Even if, despite all of the contradictions in his evidence, TUN Soun is believed to have been imprisoned in Wat Pratheat for four days, there is insufficient evidence that he saw Mr YIM Tith interrogating prisoners, 'probably' in 1975 or early 1976¹⁷⁵³ or late 1976¹⁷⁵⁴ or 1977 as he said in his earlier interviews.

896. Significantly, the discrepancies in TUN Soun's evidence were not put to him in the 2014 and 2015 interviews. TUN Soun was not asked to clarify in interview his cryptic and evasive statement that he 'remembered what he said in the past' about Mr YIM Tith:

Q: Do you remember him speaking like that?

¹⁷⁴⁴ *Supra*, paras 870 to 890.

¹⁷⁴⁵ D5/122, TUN Soun, WRI, EN 00426757.

¹⁷⁴⁶ D118/22, TUN Soun, WRI, A12, EN 00976606.

¹⁷⁴⁷ D219/346, TUN Soun, WRI, A50, EN 01116113.

¹⁷⁴⁸ D219/346, TUN Soun, WRI, A3-12, 48, EN 01116109-10, 13.

¹⁷⁴⁹ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

¹⁷⁵⁰ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

¹⁷⁵¹ D5/122, TUN Soun, WRI, EN 00426757.

¹⁷⁵² D219/346, TUN Soun, WRI, A60-63, EN 01116114.

¹⁷⁵³ D118/22, TUN Soun, WRI, A17, EN 00976607.

¹⁷⁵⁴ D219/346, TUN Soun, WRI, A60, EN 01116114.

A54: I remember what I said in the past. [...] ¹⁷⁵⁵

897. In fact, TUN Soun had never ‘in the past’ given such evidence about seeing Mr YIM Tith interrogating prisoners at Wat Pratheat. Faced with potentially incriminating evidence regarding Mr YIM Tith’s personal conduct, the OCIJ investigators made no attempt to find out why TUN Soun did not mention on 6 May 2011 all of these, obviously important, details about Mr YIM Tith interrogation of prisoners. TUN Soun was briefly asked in interview ‘whether anyone influenced his answers,’ ¹⁷⁵⁶ but the investigators failed to ask TUN Soun specifically about the changes in his evidence and did not ask him how he had come to know about Mr YIM Tith’s alleged role on the Kirivong District Committee and the 2014 and 2015 interviews occurred subsequent to the illegal leak of the Third Introductory Submission into the public domain in 2011. ¹⁷⁵⁷
898. The contradictions between TUN Soun’s previous inconsistent statements and his new account of Mr YIM Tith personally interrogating prisoners at Wat Pratheat were not rigorously put to the witness. TUN Soun was not able to clarify whether Mr YIM Tith or other alleged members of the Kirivong District Committee were present at Wat Pratheat on every occasion when TUN Soun allegedly saw prisoners disappear from Wat Pratheat. ¹⁷⁵⁸ The interviews failed to clarify whether TUN Soun may have been confused about which of the district-level cadre carried out particular actions at Wat Pratheat. ¹⁷⁵⁹
899. For the reasons set out above, the evidence of TUN Soun is insufficient to find that Mr YIM Tith ‘personally conducted interrogations of prisoners at Wat Pratheat.’ ¹⁷⁶⁰ It is impossible to deny that TUN Soun’s account changes dramatically over time, and changes specifically in relation to the personal role of Mr YIM Tith. Given the chronology of TUN Soun’s contact with various Cambodian and international investigators, some operating under the strictures of judicial investigation, others not, there is a real risk that TUN Soun’s self-contradictory evidence about Mr YIM Tith was contaminated. TUN Soun’s evidence that Mr YIM Tith personally interrogated prisoners at Wat Pratheat is

¹⁷⁵⁵ D219/346, TUN Soun, WRI, A54-56, EN 01116113. The ICP ignores the question and first sentence of TUN Soun’s evidence, citing the statement thus: ‘A54: [...] On the first occasion, Ta Tith came with his messengers.’

¹⁷⁵⁶ D219/110, TUN Soun, WRI, A10, EN 01076899.

¹⁷⁵⁷ *Supra*, paras 11 and 34.

¹⁷⁵⁸ D219/346, TUN Soun, WRI, A63, EN 01116114.

¹⁷⁵⁹ D219/346, TUN Soun, WRI, A47, EN 01116113.

¹⁷⁶⁰ *ICP’s Final Submission*, D378/2, para. 32.

contradicted by DOK Chann who stated that he worked at Wat Pratheath and that Mr YIM Tith did not speak to the prisoners during his alleged visits.¹⁷⁶¹

900. Although the ICP's Final Submission subsumes the allegations of inhumane acts (rape) under the part of the submission that alleges Mr YIM Tith's personal involvement in interrogations, there is no evidence whatsoever of Mr YIM Tith's presence or involvement in any alleged instances of sexual violence and rape at Wat Pratheath.¹⁷⁶² Similarly, while the ICP refers in the same breath to TUN Soun's evidence of Mr YIM Tith's personally interrogating prisoners at Wat Pratheath and the alleged interrogation and subsequent execution of a group of approximately 70 Khmer Krom members of the 'White Scarves' at Wat Pratheath, there is no evidence of Mr YIM Tith's personal involvement in this alleged incident.¹⁷⁶³

- Mr YIM Tith did not Order Extrajudicial Killings at Wat Pratheath

901. The ICP's claim that Mr YIM Tith brought orders to Wat Pratheath to kill prisoners and take away gallbladders is pure speculation, drawn from the evidence of ORK Chan and HOR Yan.¹⁷⁶⁴ Both were detainee witnesses, unable to personally know details about the identity of Khmer Rouge cadre outside of Wat Pratheath, the functioning of the security centre, or about putative orders given to execute or remove gallbladders. As set out above and below, the reliability of ORK Chan and HOR Yan's evidence is strongly limited by uncertainties over the source of their knowledge about Mr YIM Tith's position and activities, coupled with their uncertain and contradictory memories over events.¹⁷⁶⁵
902. The ICP further asserts that Mr YIM Tith 'ordered Ngaol to kill 200 people' in Kirivong District.¹⁷⁶⁶ The ICP's assertion is based on views expressed by the author Ben Kiernan in his book *'The Pol Pot Regime'* over which there are serious concerns of reliability and

¹⁷⁶¹ D219/86, DOK Chann, WRI, A10, EN 01056875 ('Q: When they came to check the Security Office, did they speak to the prisoners or the staff? A10: They did not enter the detention rooms to speak to the prisoners, but sometimes they spoke to us, the staff. Generally, they mostly asked us about the food rations of the prisoners. For example, they asked if we correctly provided five cans of rice to ten prisoners. Food rations were set by the upper echelon, the district. We did not have authority over food rations. For some prisoners who had been released, we kept them to live with the staff for about a month before sending them back to the cooperatives. Those prisoners received the same food rations as staff like us so that they could recover their strength before they were sent back.')

¹⁷⁶² ICP's Final Submission, D378/2, para. 206.

¹⁷⁶³ ICP's Final Submission, D378/2, para. 205.

¹⁷⁶⁴ ICP's Final Submission, D378/2, paras 33 and 208.

¹⁷⁶⁵ *Supra*, paras 770 to 778, 851 to 856, and *infra*, paras 1511 to 1513.

¹⁷⁶⁶ ICP's Final Submission, D378/2, para. 34.

impartiality.¹⁷⁶⁷ The assertion is completely devoid of detail and context, in particular it does not speak to the location and timing of the alleged order to kill.

903. Kiernan's original interview notes with Ngaol do not support the story he tells in *'The Pol Pot Regime'*, namely that 'directives always came from district chief Tith.'¹⁷⁶⁸ According to Kiernan's original notes, when Ngaol spoke of killings, he said that '[t]hey ordered me to kill 200 people.'¹⁷⁶⁹ Ngaol did not state that Mr YIM Tith gave this order. It is impossible to discern whether Ngaol identified the specific individual who gave an order to kill or whether Kiernan's attribution of this act to Mr YIM Tith was Kiernan's own invention. The interviews or discussions that Kiernan says he relied upon were taken outside a judicial setting - the CIJs have held that statements collected without judicial supervision enjoy no presumption of relevance and reliability¹⁷⁷⁰ and the information contained therein has been relied on by the CIJs only when corroborated by other sources,¹⁷⁷¹ as set out above.¹⁷⁷²
904. Further analysis of Kiernan's original notes of interviewing Ngaol demonstrates that Kiernan was willing to fill-in missing parts of his desired narrative with his own presumptions. The ICP cites – as if it is the evidence of Ngaol himself – Kiernan's writings in *'The Pol Pot Regime'* as evidence that 'Yim Tith considered it treason' to flee to Vietnam.¹⁷⁷³ In addition to not being the evidence of Ngaol himself, the assertion of Kiernan in his book does not reflect what is stated in his own notes. His notes read: 'the two had planned to flee to VN at a time when K + VN were in conflict; traitors, komtech caol.'¹⁷⁷⁴ This lacks sufficient clarity. The inconsistency between Kiernan's notes and his account in *'The Pol Pot Regime'* suggest that he elaborated an approximate story based

¹⁷⁶⁷ *Supra*, para. 787.

¹⁷⁶⁸ D6.1.1105, Ben Kiernan, *The Pol Pot Regime*, EN 00678590 ('Ngaol was ordered to kill two hundred people. These directives always came from district chief Tith who instructed Ngaol to arrest people and hand them over to district security forces.')

¹⁷⁶⁹ D219/726.1.1 Ben Kiernan's notes from interview with Ngaol, EN 01312562.

¹⁷⁷⁰ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104 (footnotes omitted). Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 124. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 486.

¹⁷⁷¹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 108. Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 127. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 489.

¹⁷⁷² *Supra*, paras 512 to 513.

¹⁷⁷³ ICP's *Final Submission*, D378/2, para. 34, citing: 'D6.1.1105, Ben Kiernan, *The Pol Pot Regime*, EN 00678590 ["[Ngaol] also [admitted] executing two people who planned to flee to Vietnam. Tith considered this 'treason,' and told Ngaol to 'kill them off.' 'The district chief came to make sure I did it.'"]. See also D219/726.1.1 Ben Kiernan's notes from interview with Ngaol, EN 01312560, 62-3.

¹⁷⁷⁴ D219/726.1.1, Ben Kiernan's notes from interview with Ngaol, EN 01312562-3.

on his interview notes. Kiernan shows himself as an author willing to read-in additional facts to fill gaps in his notes where it makes for a more cohesive and seemingly authoritative story.

905. Ngaol was unable to be interviewed by the CIJs as he is deceased.¹⁷⁷⁵ His evidence has not been tested in interview conditions. Ngaol had reasons to avoid blame falling on himself. According to other evidence, Ngaol held a district position that he did not disclose to Kiernan during their interview: NGET Ngay stated that Ngaol was ‘higher than the king’ and oversaw all of the work in Kirivong District.¹⁷⁷⁶ As Kiernan notes, Ngaol denied his involvement in further killings, despite being accused by his contemporaries.¹⁷⁷⁷ NHEB Noem described Ngaol thus: ‘He was illiterate, and he was very quick to kill people [...] When anyone made a small mistake, he beat them with a bamboo club.’¹⁷⁷⁸
906. The ICP, without any explanation, submits that reliance on Ben Kiernan’s evidence ‘is reasonable’ due to the unavailability of Ngaol and the existence of notes of Ben Kiernan’s conversation with Ngaol.¹⁷⁷⁹ The ICP’s inventive approach to the evidence, that lacks any principled legal basis, would have been more comprehensible if it had spoken to the probative value of Ben Kiernan’s evidence, rather than simply asserting that reliance on his evidence was ‘reasonable’ enough. The ICP ignores out of hand the considered position of the CIJs regarding the non-applicability of the presumption of relevance and reliability to statements collected without judicial supervision.¹⁷⁸⁰ The CIJs have stated that the information contained in such statements may be relied upon by the CIJs only where there is corroborative evidence.¹⁷⁸¹ The ICP is aware that there is no corroborative evidence for Ben Kiernan’s assertions about Ngaol and it is entirely disingenuous of him to suggest that it is ‘reasonable’ for the CIJs to rely on the uncorroborated views of an

¹⁷⁷⁵ D219/48, WRIA, EN 01032580-1.

¹⁷⁷⁶ D1.3.11.33, NGET Ngay, EN 00219268.

¹⁷⁷⁷ D6.1.1105, Ben Kiernan, The Pol Pot Regime, EN 00678590 (‘Sarun accused Ngaol of killing fifty people [...] But Ngaol denied his involvement in such killings.’)

¹⁷⁷⁸ D219/524, NHEB Noem, A28, EN 01168030-2.

¹⁷⁷⁹ ICP’s Final Submission, D378/2, para. 34, fn 63.

¹⁷⁸⁰ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104 (footnotes omitted). Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 124. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 486. *Supra*, paras 512 to 513..

¹⁷⁸¹ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 108. Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 127. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 489. *Supra*, paras 512 to 513.

academic author regarding his unrecorded conversation with an unavailable witness. Such evidence can be accorded no probative value whatsoever.

907. The ICP cites SOEUM Chhoeun's witness statement together with Kiernan's evidence, to misleadingly suggest that this 'corroborates' Kiernan's account of Ngaol's evidence that Mr YIM Tith ordered extrajudicial killings.¹⁷⁸² In fact, SOEUM Chhoeun's evidence merely corroborates Kiernan's evidence that Ta Ngaol was allegedly a commune chief; it corroborates nothing about Kiernan's account of Mr YIM Tith.¹⁷⁸³ The rest of the cited evidence is the witness's speculation, prompted by the investigator's suggestive questions.¹⁷⁸⁴

908. The evidence on Case File 004 is insufficient to find that Mr YIM Tith issued orders to kill in Kirivong District.¹⁷⁸⁵

- Conclusion regarding Mr YIM Tith Alleged Involvement in Wat Pratheat

909. The evidence on Case File 004 is completely lacking in detail as to Mr YIM Tith's specific responsibilities, at specific times, in relation to the Wat Pratheat allegations. The ICP alleges that Ta Pring was subordinate to the Kirivong District Committee yet there is no clarity as to the particular stages of the DK era when this relationship of authority with Wat Pratheat was said to exist. The evidence does not show: what matters were reported by Ta Pring to the District Committee; what matters were under the control of the District Committee; how frequently information was communicated between the Kirivong District Committee and the incumbent chief of Wat Pratheat; what Mr YIM Tith's specific duties and responsibilities on the District Committee were vis-à-vis Wat Pratheat, if any. The ICP does not identify which individuals on the Kirivong District Committee had personal oversight of Wat Pratheat or whether Mr YIM Tith personally received specific information from Ta Pring or gave specific instructions to Ta Pring and does not present any further evidence with respect to the functioning of the District Committee in relation to security centres.¹⁷⁸⁶

¹⁷⁸² ICP's Final Submission, D378/2, para. 33.

¹⁷⁸³ D219/189, SOEUM Chhoeun, WRI, A18, EN 01079817. Indeed, it is in dispute whether Kiernan and SOEUM Chhoeun's evidence is sufficiently consistent to find that Ta Ngaol was in fact the commune chief, since other witnesses said that Ngaol was on the Kirivong District Committee. *Supra*, paras 822 and 905.

¹⁷⁸⁴ D219/189, SOEUM Chhoeun, WRI, A19-20, EN 01079817.

¹⁷⁸⁵ ICP's Final Submission, D378/2, para. 34.

¹⁷⁸⁶ ICP's Final Submission, D378/2, para. 34.

910. There is insufficient evidence that Mr YIM Tith was in a position of control over Ta Pring. The evidence of YOU Phnom, DOK Chann, HOR Yan and ORK Chan is unreliable and it is not sufficient to claim that Wat Pratheat was a personal ‘tool’ at the disposal of Mr YIM Tith which he used ‘for implementing the CPK’s enemies policy in the Southwest Zone’ or that Mr YIM Tith exercised such control over Wat Pratheat in his alleged visits there.¹⁷⁸⁷
911. Evidence on Case File 004 indicates that other Khmer Rouge cadre visited Wat Pratheat, including Ta Tom,¹⁷⁸⁸ Yeay Bo,¹⁷⁸⁹ Yeay Khoeun,¹⁷⁹⁰ and Ta Nam¹⁷⁹¹ and their roles relative to that of Mr YIM Tith are unknown. There is evidence that Wat Pratheat was under the control of the commune committee, rather than the exclusive control of the District Committee.¹⁷⁹² In the absence of clearer evidence about the relative roles of members of the commune and district committees in administering Wat Pratheat, the evidence is insufficient to make findings about the alleged individual role of Mr YIM Tith at Wat Pratheat.
912. There is insufficient evidence about Mr YIM Tith’s alleged role and responsibilities at Wat Pratheat. DOK Chann’s stated that Mr YIM Tith’s role during the period from 1973 to approximately June 1975 was in ensuring that food rations were adequate:

Generally, [Ta Tith’s group] mostly asked [the staff] about the food rations of the prisoners. For example, they asked if we correctly provided five cans of rice to ten prisoners. Food rations were set by the upper echelon, the district. We did not have authority over food rations. For some prisoners who had been released, we kept them to live with the staff for about a month before sending them back to the cooperatives. Those prisoners received the same food rations as staff like us so that they could recover their strength before they were sent back.¹⁷⁹³

¹⁷⁸⁷ *ICP’s Final Submission*, D378/2, paras 31 to 32.

¹⁷⁸⁸ D219/108, YOU Phnom, WRI, A8, EN 01076892-3; D118/22, TUN Soun, WRI, A16, EN 00976607.

¹⁷⁸⁹ D118/22, TUN Soun, WRI, A16, EN 00976607; D118/22, TUN Soun, WRI, A16, EN 00976607.

¹⁷⁹⁰ D219/108, YOU Phnom, WRI, A8, EN 01076892-3; D219/86, DOK Chann, WRI, A9, EN 01056874.

¹⁷⁹¹ D219/326, HOR Yan, WRI, A22, EN 01112036. (Did you ever hear of Ta Naim or Ta Tith? Do you remember? A22: Yes, I did. They were in charge of that prison.) Note that this is a substantive translation error. The correct translation states: ‘A22: Yes, they went to inspect the detention center.’ See D219/326, HOR Yan, WRI, A22, KH 01099688.

¹⁷⁹² D118/303, LY Chhuon, WRI, A53, EN 01045498. (Wat Preah Theat Pagoda was under the control of both the commune and district levels [...]).

¹⁷⁹³ D219/86, DOK Chann, WRI, A9-10, EN 01058674-5.

913. The ICP did not provide sufficient evidence to support his claim that Mr YIM Tith actively participated in the imprisonment, interrogation and killing of suspected enemies, and that he shared the common criminal plan and contributed to its execution.

(5) Conclusion Regarding Kirivong District

914. The ICP claims that there is ‘abundant evidence’ that Mr YIM Tith continued to be present and exercise authority in Kirivong District and Sector 13 ‘well after’ the point at which he was allegedly appointed to an active leadership role in the Northwest Zone.¹⁷⁹⁴ Instead of ‘abundant evidence,’ the ICP cites evidence that Mr YIM Tith ‘had access to a jeep.’¹⁷⁹⁵ Instead of ‘abundant evidence,’ the ICP speculates about the journey times for jeeps and trains to reach the Northwest Zone and Southwest Zone.¹⁷⁹⁶

915. The ICP did not present sufficient evidence for his claims that from at least 1975, Mr YIM Tith was the Kirivong District Secretary or Deputy Secretary and continued to hold these positions through April to May 1978, nor that he participated in the common criminal plan in Kirivong District through his contribution to the implementation of the CPK enemies policy. Faced with a lack of evidence, the ICP makes the vague and legally meaningless claim that ‘the evidence as a whole paints a clear picture of Yim Tith’s growing power.’¹⁷⁹⁷

916. The ICP does not present sufficient evidence of Mr YIM Tith’s specific positions alleged on the Committee, despite the ICP’s own view that Committee positions were rigidly structured (the ICP states: ‘[a] three-person committee consisting of a secretary, deputy secretary, and member governed each echelon in the CPK organisational hierarchy’)¹⁷⁹⁸ and had strictly defined responsibilities (the ICP states: ‘the secretary was responsible for appointing and removing members of the committee, the deputy secretary was responsible for security, and the member was responsible for economics’).¹⁷⁹⁹ The ICP

¹⁷⁹⁴ *ICP’s Final Submission*, D378/2, para. 12. (Traveling between the Northwest and Southwest Zones would not have proved a major obstacle to Ta Mok and Yim Tith carrying out functions in both zones., NOP Ngim, stated that a large group of low-level cadres traveling by train was able to complete the journey in under 24 hours. With access to individual vehicles, Ta Mok and Yim Tith would have been able to make the journey in significantly less time.)

¹⁷⁹⁵ *ICP’s Final Submission*, D378/2, para. 12, citing D123/2/2.17a, NOP Ngim, DC-Cam Statement, EN 01155619; D219/85 VY Phann WRI, A10, EN 01061173. The time periods and geographical locations of Mr YIM Tith’s ‘access to a jeep’ are unclear in, NOP Ngim, and VY Phann’s evidence.

¹⁷⁹⁶ *ICP’s Final Submission*, D378/2, para. 12.

¹⁷⁹⁷ *ICP’s Final Submission*, D378/2, para. 10.

¹⁷⁹⁸ *ICP’s Final Submission*, D378/2, para. 117.

¹⁷⁹⁹ *ICP’s Final Submission*, D378/2, para. 120.

fails to meet his own test, since the evidence that he cites does not sufficiently specify Mr YIM Tith's alleged positions on the committees (secretary, deputy secretary, or member) or his alleged responsibilities (making appointments on the committee, security, or economics).

(c) Mr YIM Tith did not Contribute to a CPK Forced Marriage Policy in the Southwest Zone

917. There is insufficient evidence to support the ICP's claim that Mr YIM Tith gave 'mandatory orders' regarding forced marriage or the sweeping claim that Mr YIM Tith contributed to the CPK's forced marriage policy across the entire Southwest Zone.¹⁸⁰⁰ Even a cursory analysis of the ICP's allegations about Mr YIM Tith's role in forced marriage in the Southwest Zone reveals its lack of evidentiary basis. Since the ICP gives no dates as to when he believes Mr YIM Tith contributed to the CPK's forced marriage policy across the entire Southwest Zone, the ICP's claim presumably relates to the entire DK period from 17 April 1975 to 6 January 1979, yet the ICP offers no explanation for this nor any supporting evidence for his claim.
918. The ICP's relies on a single witness to support this enormous claim. In fact, his assertion about Mr YIM Tith's role in forced marriages across the entire Southwest Zone throughout the entire Democratic Kampuchea period rests on a single line of a witness statement of YOU Phnom, who 'recall[ed] that [Ta Tith] told people to get married, have children, create new families, and create new soldiers.'¹⁸⁰¹ The ICP, finding no evidence on Case File 004, makes the wholly unsubstantiated claim that Mr YIM Tith's role in forced marriages is further demonstrated by his 'other statements, acts, and conduct,' an assertion that is so unspecific as to be incomprehensible.¹⁸⁰² The ICP ignores any evidence to demonstrate what are these 'other statements, acts, and conduct.'¹⁸⁰³
919. The ICP asserts that Mr YIM Tith's words, as remembered by YOU Phnom, constitute 'mandatory orders' or 'instructions to the population under [Ta Tith's] control that they were required to marry and have children.'¹⁸⁰⁴ YOU Phnom's evidence cannot be regarded as a verbatim record of what Mr YIM Tith said and it is implausible that Mr

¹⁸⁰⁰ ICP's Final Submission, D378/2, para. 37.

¹⁸⁰¹ D219/406, YOU Phnom, WRI, A188, EN 01139573.

¹⁸⁰² ICP's Final Submission, D378/2, para. 38.

¹⁸⁰³ ICP's Final Submission, D378/2, para. 38.

¹⁸⁰⁴ ICP's Final Submission, D378/2, paras 37 to 38.

YIM Tith repeated these exact words every single year. Even if YOU Phnom's evidence was an accurate representation of what Mr YIM Tith said, the ICP presents no evidence that these words were 'mandatory orders' that Mr YIM Tith knew would be 'enforced via the commission of horrific crimes.'¹⁸⁰⁵ The ICP simply invents a desired narrative without any basis in evidence.

920. Indeed, in direct contradiction to the ICP's claim that that Mr YIM Tith gave 'mandatory orders' about forced marriage, YOU Phnom repeatedly stated that he did not know where orders about forced marriage came from:

Q: [...] Were those orders [the district committee], or did they have orders from someone else?

A69: During that regime it was all about chain of command. However I do not know.¹⁸⁰⁶

Q: Do you know whether it was the commune chief or anyone else who had ordered the newlyweds to sleep together?

A27: I was unable to learn that.¹⁸⁰⁷

921. The reliability of YOU Phnom's evidence is further diminished by the manner in which it was elicited by the investigator. Instead of asking open questions such as 'What did Mr YIM Tith say at the meetings' that would have allowed the witness to respond freely according to his memory of personally-observed events, the investigator adopted a check-box approach in order to elicit desired inculpatory evidence by using a series of closed questions about forced marriage:

Q183: During the meetings, did *Ta Tith* say what we had to do to counter Vietnamese violations of our territory?

Q184: During the meeting, did he talk about embedded persons?

Q185: Did *Ta Tith* state that we had to take measures to counter the embedded Vietnamese?

Q186: Did he say that the people had to help watch and track them down?

Q187: Did *Ta Tith* know of the arranged marriage policy we talked about earlier?¹⁸⁰⁸

922. The ICP ignores these preceding questions during which YOU Phnom did not mention forced marriage and said that the subject of the meetings was 'to educate the people about

¹⁸⁰⁵ ICP's Final Submission, D378/2, para. 38.

¹⁸⁰⁶ D219/406, YOU Phnom, WRI, A69, EN 01139558.

¹⁸⁰⁷ D219/406, YOU Phnom, WRI, A27, EN 01139552.

¹⁸⁰⁸ D219/406, YOU Phnom, WRI, A183-187, EN 01139573.

digging canals, putting up dams, and producing crops.’¹⁸⁰⁹ It is significant to note that the ICP cites only the evidence about forced marriage that YOU Phnom gave after an unrecorded break in the interview.¹⁸¹⁰

923. Lastly, the reliability of YOU Phnom’s statement cited by the ICP is further limited by the investigator repeatedly asking YOU Phnom, a fact witness, for his opinion:

Q33: In your opinion, why did *Angkar* force people to take each other as husband and wife and sleep together?¹⁸¹¹

Q44: To your knowledge, do you believe that the members of the commune committee were aware that people did not dare refuse arranged marriages?¹⁸¹²

Q108: To your knowledge, why did people from similar classes marry each other?¹⁸¹³

Q146: To your knowledge, did the district- and commune-level cadres select their own wives, or did *Angkar* make the selections for them?¹⁸¹⁴

924. This questioning failed to observe a cardinal principle of sound investigatory practice that fact witnesses should give evidence about facts personally known to them, rather than speculate about their opinions and personally-held views.¹⁸¹⁵ The investigators must have known that they should have observed this principle, and in fact this is clear from another interview:

Investigator’s note: The witness wishes to delete this part of his answer because he does not want to raise any assumption as this part of the answer is solely his personal opinion. The investigator informs him that he has been requested to tell the truth as a witness, so he should not provide any assumption. Therefore, except the answer provided is untrue, the recorded answer cannot be tapered. In addition, the written record must be consistent with the audio record.¹⁸¹⁶

925. There is a significant risk that YOU Phnom understood that he was being asked to give his opinions about Mr YIM Tith’s appearance at meetings, rather than his personal observations of fact. After he was pressed, YOU Phnom began speculating that it must have ‘meant’ that orders were given:

¹⁸⁰⁹ D219/406, YOU Phnom, WRI, A174, EN 01139572.

¹⁸¹⁰ D219/406, YOU Phnom, WRI, EN 01139564.

¹⁸¹¹ D219/406, YOU Phnom, WRI, EN 01139553.

¹⁸¹² D219/406, YOU Phnom, WRI, EN 01139554.

¹⁸¹³ D219/406, YOU Phnom, WRI, EN 01139563.

¹⁸¹⁴ D219/406, YOU Phnom, WRI, EN 01139568.

¹⁸¹⁵ *Supra*, para. 522.

¹⁸¹⁶ D219/737, DIM Kimheat, WRI, A91, EN 01300135.

Q: Do you know whether it was the commune chief or anyone else who had ordered the newlyweds to sleep together?

A27: I was unable to learn that. [01139552]

Q: I am not asking you who. I am asking you if they had objectives or if there were any orders? Did they require that newlyweds sleep together?

A28: That's exactly what they put in place, meaning they put in place orders requiring them to sleep together.¹⁸¹⁷

926. The ICP does not present sufficient evidence that Mr YIM Tith participated in the alleged common criminal plan through a contribution to the CPK's alleged forced marriage policy.

(d) Mr YIM Tith Did Not Participate in the Common Criminal Plan Through 'Other Acts and Conduct in the Southwest Zone'

927. In a section of the ICP's Final Submission entitled 'Other Acts and Conduct in The Southwest Zone,' the ICP seeks to inflate Mr YIM Tith's role to an extraordinary degree, portraying him as omniscient and powerful across the Southwest Zone for the entire jurisdictional period.¹⁸¹⁸ The ICP has an insufficient evidential basis to make these broad-ranging claims.

928. The ICP's allegation that Mr YIM Tith held a diverse range of non-specific responsibilities, 'related to politics, logistics, economics, food distribution, and propaganda,' is so imprecise as to be meaningless. While the ICP makes these assertions about 'the Southwest Zone' as a whole, the cited evidence to support the ICP's allegations of 'Other Acts and Conduct in the Southwest Zone' are related only to the Kirivong District-level.¹⁸¹⁹

LUON Mol's evidence of 'responsibilities related to politics, logistics, economics, food distribution, and propaganda'

929. LUON Mol's very limited evidence about Mr YIM Tith's responsibilities is not within the temporal scope of the investigation. The period when LUON Mol said she was a messenger in Kirivong District was from 1973 'for about a year,' until 1975, since she

¹⁸¹⁷ D219/406, YOU Phnom, WRI, A27, EN 01139552.

¹⁸¹⁸ ICP's Final Submission, D378/2, paras 39 to 40.

¹⁸¹⁹ ICP's Final Submission, D378/2, paras 39 to 40.

lost her position after the liberation of Phnom Penh.¹⁸²⁰ She was thenceforth assigned to make pots and no longer knew about the District Committee.¹⁸²¹ LUON Mol specifically said she did not know about positions on the Kirivong District Committee after the liberation of Phnom Penh since she was no longer a messenger.¹⁸²² With regard to Mr YIM Tith, LUON Mol stated that he held his position before the liberation of Phnom Penh.¹⁸²³ Accordingly, LUON Mol's evidence of Mr YIM Tith's alleged role at one moment in the history of the Khmer Rouge cannot be relied upon as evidence of his responsibilities in relation to the temporal scope of the investigation in Kirivong District.¹⁸²⁴

930. LUON Mol did not, in any case, know anything of significance about Mr YIM Tith's responsibilities. She had no direct knowledge of Mr YIM Tith's responsibilities and the ICP ignores her evidence that she never communicated with 'Ta Tith' while she was a messenger and could not have known about his responsibilities.

Q: Did you ever have any communication with Ta Tith at any time in the past?

A129: No, I didn't.

Q: Did you ever hear Ta Tith giving a speech at any time in the past?

A130: No, I didn't.

Q: Do you remember if you had ever taken any letter addressed to Ta Tith?

A131: Yes, I do.

Q: Do you know the message of the letter?

A132: No, I don't. It was ceased and marked on the envelope as confidential.¹⁸²⁵

931. It is evident from LUON Mol's interviews that she not only knew nothing significant about Mr YIM Tith's roles and responsibilities of relevance to the Case 004 investigation, but she was not in any position to have known anything about it. She said: 'I just delivered the letters, but I do not know the messages of the letters.'¹⁸²⁶

932. What LUON Mol did state was that Mr YIM Tith's role at a district level was in political education and that he was specifically tasked with organizing training courses, rather than

¹⁸²⁰ D219/358, LUON Mol, WRI, A149, EN 01116355. LUON Mol also said it was 'half a year after the liberation of Phnom Penh,' D219/358, LUON Mol, WRI, A24, EN 01116345.

¹⁸²¹ D219/358, LUON Mol, WRI, A22, EN 01116345.

¹⁸²² D219/358, LUON Mol, WRI, A14, 78, EN 01116344, 50.

¹⁸²³ D219/358, LUON Mol, WRI, A81, EN 01116350.

¹⁸²⁴ *Supra*, paras 436 to 439.

¹⁸²⁵ D219/358, LUON Mol, WRI, A129-132, EN 01116354.

¹⁸²⁶ D219/358, LUON Mol, WRI, A54, EN 01116347.

having an economic or military role.¹⁸²⁷ LUON Mol said that 'Ta Tith' 'was the person who reinforced the political section, by which she meant 'the calling of the low-echelon cadres to be educated in order to be more aware of their roles.'¹⁸²⁸ If anything, this evidence tends to undermine the ICP's sweeping assertion that Mr YIM Tith responsibilities spanned every aspect of the DK administration in 'politics, logistics, economics, food distribution, and propaganda.'¹⁸²⁹

933. LUON Mol's own evidence that she did not know about 'Ta Tith' is consistent with the evidence of the witness AM Kun, who stated that LUON Mol was not 'Ta Tith's messenger and she was only a messenger for Yeay Bau and Ta Tom.¹⁸³⁰

934. Furthermore, and as noted above, LUON Mol's evidence suffers from general reliability issues.¹⁸³¹ Lacking any useful information about Mr YIM Tith's responsibilities, LUON Mol's evidence should be accorded no probative value on this point.

MAO Chhorm's evidence of 'responsibilities related to politics, logistics, economics, food distribution, and propaganda'

935. As evidence of the responsibilities allegedly held by Mr YIM Tith, the ICP cites MAO Chhorm's uncertain and non-specific comment that 'perhaps Ta Tith was in charge of logistics.'¹⁸³² This is not an adequate basis on which to draw inferences about Mr YIM Tith's roles and responsibilities and his criminal responsibility. The reliability of this evidence is further diminished by MAO Chhorm's self-contradictory statement that 'Ta Tith' was in charge of economics.¹⁸³³ MAO Chhorm also said that 'Ta Tith' was allegedly in charge of security, yet he provided no consistent and detailed evidence about Mr YIM Tith's responsibilities.¹⁸³⁴

¹⁸²⁷ D219/358, LUON Mol, WRI, A81, EN 01116350.

¹⁸²⁸ D219/358, LUON Mol, WRI, A94-A95, EN 01116351.

¹⁸²⁹ ICP's Final Submission, D378/2, para. 39.

¹⁸³⁰ D118/33, AM Kun, WRI, A53, EN 00911437.

¹⁸³¹ *Supra*, paras 741 to 742, 821 and 843.

¹⁸³² D219/111, MAO Chhorm, WRI, A49, EN 01076908. ('Q: Who was Ta Tith? When did you hear Ta Tith's name? A49: Ta Tith worked at Kirivong District level. Perhaps he was in charge of logistics.')

¹⁸³³ D219/111, MAO Chhorm, WRI, A49, EN 01076908.

¹⁸³⁴ D219/111, MAO Chhorm, WRI, A69, EN 01076911. ('Q: Who was Ta Tith's superior? A69: I do not know who Ta Tith's superior was. I heard that Ta Tith was in charge of District Economics and the rest were in charge of security.')

936. To call upon the CIJs to consider such absurd submissions about MAO Chhorm's evidence is to insult the professional obligations of the CIJs in the investigation. The Defence does not wish to add to the ICP's cheapening of the solemn nature of the Case 004 proceedings but is professionally obliged by due diligence obligations to respond. MAO Chhorm clearly knew nothing about Mr YIM Tith's alleged role and was speculating vaguely. In fact, the only evidence of MAO Chhorm that contained any information about the specific responsibilities and tasks allegedly assigned to Mr YIM Tith was that 'Ta Tith' oversaw MAO Chhorm's day-to-day agricultural activities. MAO Chhorm stated: 'Yes, 'Ta Tith' used to have me do small tasks like walking the oxen.'¹⁸³⁵ This was also MAO Chhorm's only evidence about Mr YIM Tith's responsibilities that was allegedly based on his own observations.

937. Furthermore, the ICP misinterprets, and consequently misrepresents, the evidence of MAO Chhorm by excluding citation of dates that show that this evidence is not within the temporal scope of the investigation in Case 004:

Q: When did Ta Tith work at Kiri Vong District?

A50: Maybe in 1973 or 1974.

Q: After that, where did Ta Tith work?

A51: After that, the Vietnamese came and they fled.¹⁸³⁶

ORK Chan's evidence of 'responsibilities related to politics, logistics, economics, food distribution, and propaganda'

938. ORK Chan did not provide evidence relevant to the ICP's claim. He said that 'Ta Tith' had a role in 'propaganda' at the district level, in relation to sometime prior to 1975 and therefore earlier than the start of the temporal jurisdiction of the investigation in Kirivong District.¹⁸³⁷ ORK Chan said he learned about this role because; Ta Tith' visited his place in 1975.¹⁸³⁸

¹⁸³⁵ D219/111, MAO Chhorm, WRI, A55, EN 01076909.

¹⁸³⁶ D219/111, MAO Chhorm, WRI, A49-51, EN 01076908-9.

¹⁸³⁷ D219/369, ORK Chan, WRI, A5-7, EN 01128256.

¹⁸³⁸ D219/369, ORK Chan, WRI, A8-10, EN 01128256.

LACH Sambath's evidence of 'responsibilities related to politics, logistics, economics, food distribution, and propaganda'

939. The ICP misstates LACH Sambath's evidence since he did not state that Mr YIM Tith was personally responsible for 'passing orders' to unit chiefs.¹⁸³⁹ To the contrary, LACH Sambath said he 'never saw Ta Tith' and 'only heard his name' and 'never heard about him because he was at district level.'¹⁸⁴⁰ A fair-minded prosecutor would be unable to make allegations about Mr YIM Tith's responsibilities on the Kirivong District Committee without at least acknowledging the existence of LACH Sambath's evidence: 'I did not know who was on the Kirivong District [during the Khmer Rouge regime from 1975-1979].'¹⁸⁴¹
940. The investigator did not establish how LACH Sambath knew that Mr YIM Tith was one of the Kirivong District. LACH Sambath speculated that, since he heard from a youth unit chief that orders came from the district, orders must have come from 'Ta Tith.'¹⁸⁴²
941. The dates of LACH Sambath's evidence in this regard are undefined and relate to the entire period of the Khmer Rouge regime from 1975-1979.¹⁸⁴³

TIM Phy's evidence of 'responsibilities related to politics, logistics, economics, food distribution, and propaganda'

942. The ICP misleadingly cites TIM Phy's evidence and ignores her evidence that obviously contradicts the evidence cited by the ICP. She said about 'Ta Tit': 'I do not know what kinds of work he did.'¹⁸⁴⁴ TIM Phy said she worked at a Mobile Unit in Kouk Prech Commune throughout the DK regime and her evidence lacks any specific dates of meetings she said she attended at the district level.

¹⁸³⁹ D219/379, LACH Sambath, WRI, A15, EN 01132635-6.

¹⁸⁴⁰ D219/379, LACH Sambath, WRI, A13-14, EN 01132635.

¹⁸⁴¹ D219/379, LACH Sambath, WRI, A3, EN 01132633-4.

¹⁸⁴² D219/379, LACH Sambath, WRI, A15, EN 01132635.

¹⁸⁴³ D219/379, LACH Sambath, WRI, A3, EN 01132633-4.

¹⁸⁴⁴ D118/21, TIM Phy, WRI, A39, EN 00967013.

TOEM Phal's evidence of 'responsibilities related to politics, logistics, economics, food distribution, and propaganda'

943. The ICP misinterprets, and consequently misrepresents, TOEM Phal's evidence, which does not refer to Mr YIM Tith's personal responsibilities. TOEM Phal's cited evidence simply states that the Kampeaeng Commune Committee in Kampeaeng Commune received orders from the Kiriving District Committee, 'such as instructions to erect a dam and dig a canal.'¹⁸⁴⁵
944. In attributing these instructions to Mr YIM Tith, the ICP misrepresents TOEM Phal's evidence, which stated to the contrary that she could not be sure who sent orders from the the District Committee to the commune committee at planning meetings, stating: 'That varied. Sometimes [the planning meetings] were attended by the district secretary only, some other times by the district deputy secretary only. Sometimes they were also attended by the district member. Sometimes all of them attended the meetings.'¹⁸⁴⁶ The investigator did not elicit sufficiently precise dates from TOEM Phal about when these planning meetings were held.¹⁸⁴⁷

The ICP's allegations that Mr YIM Tith had an 'abundant food supply' are Absurd and Meaningless

945. The ICP's assertion that Mr YIM Tith's degree of responsibility should be based on conjectural evidence that an 'abundance of food' was observed at an office where Mr YIM Tith was said to have worked (comprising '30 to 40 pigs,' 'bananas' and 'papayas') enters into the realm of the absurd.¹⁸⁴⁸ While the Defence does not wish to reinforce any degradation of the solemnity of the CIJs' duties that is implied by these submissions, the Defence is nonetheless professionally obliged to respond.
946. MOENG Vet did not say that there was 'abundant' food. MOENG Vet gave evidence that there were 'vegetables and meat [...] to give to the soldiers.'¹⁸⁴⁹ It is an unsustainable stretch of logic to suggest that MOENG Vet's comments about the presence of animals and fruit trees at an office says anything meaningful about the serious allegations against

¹⁸⁴⁵ D219/471, TOEM Phal, WRI, A32-35, 39, EN 01154809-10.

¹⁸⁴⁶ D219/471, TOEM Phal, WRI, A39, EN 01154810.

¹⁸⁴⁷ *Supra*, paras 743 to 745, 811 to 819.

¹⁸⁴⁸ *ICP's Final Submission*, D378/2, para. 40.

¹⁸⁴⁹ D219/488, MOENG Vet, WRI, A5, EN 01170584.

Mr YIM Tith. Especially in the context of the agrarian DK regime whose policies aimed at increasing food production to feed the Cambodian population, the presence of animals and fruit trees does not provide a factual basis on which to base any findings. To the contrary, MOENG Vet said that the military unit's requests for food exceeded what was available in the office, such that 'when we requested vegetables or meat, we would be given as much as was in the office and nothing from elsewhere.'¹⁸⁵⁰

947. There is in any event insufficient evidence that Mr YIM Tith exercised personal control over these food supplies. MOENG Vet did not personally see Mr YIM Tith give orders about food distribution and MOENG Vet said he waited outside the office and another messenger brought him a letter.¹⁸⁵¹ MOENG Vet said he observed the animals and the fruit at an office of Ta Tom and 'Ta Tith' and he originally said in evidence that he 'sent letters to Ta Tith's and Ta Tom's office' and reconfirmed in interview that this was 'their place.'¹⁸⁵²
948. Furthermore, the timing of MOENG Vet's alleged sighting of these food supplies is unclear. He said '[o]nce in a long while, I delivered letters to Ta Tith and Ta Tom to request for food supplies such as meat, and food to supply the soldiers.'¹⁸⁵³ MOENG Vet could not remember when he delivered letters. He said '[i]t might have been between early 1976 and late 1976.'¹⁸⁵⁴ These unknown dates were not after March 1977 since MOENG Vet left Kirivong District to go to Phnom Penh for Kratie Province.¹⁸⁵⁵
949. Mr YIM Tith's alleged role in food distribution at the district level at some point in the Khmer Rouge regime does not support the ICP's allegations of his participation in a common criminal plan. It does not 'illustrate the degree of Mr YIM Tith's authority and the power and influence he wielded' as the ICP puts it.¹⁸⁵⁶ To the extent that MOENG Vet's evidence about '30 to 40 pigs,' 'bananas' and 'papayas' says anything at all about Mr YIM Tith's authority, power and influence in the Southwest Zone, it speaks only to his oversight of relatively menial tasks appropriate to lower-level cadre.

¹⁸⁵⁰ D219/488, MOENG Vet, WRI, A121, EN 01170595-6.

¹⁸⁵¹ D219/488, MOENG Vet, WRI, A11, EN 01170584.

¹⁸⁵² D219/488, MOENG Vet, WRI, A5, EN 01170584.

¹⁸⁵³ D119/85, MOENG Vet, WRI, A5, EN 00982713.

¹⁸⁵⁴ D219/488, MOENG Vet, WRI, A7, EN 01170584.

¹⁸⁵⁵ D219/488, MOENG Vet, WRI, A125, EN 01170596.

¹⁸⁵⁶ ICP's Final Submission, D378/2, para. 40.

950. In view of the massive disjunct between the Case File evidence and the ICP's overblown case about Mr YIM Tith, it is fitting that the ICP's submissions about Mr YIM Tith's acts and conducts in the Southwest Zone conclude with MOENG Vet's evidence that 'Mr YIM Tith was the one who made the decisions regarding the distribution' of 'three pigs, vegetables, bananas, papayas [...].'¹⁸⁵⁷ It is a mockery of the gravity of human suffering of the DK period that, after a lengthy investigation, the ICP presents this evidence as a significant aspect of his case against Mr YIM Tith. It is an appropriate summation of the insufficiency of Case File evidence that Mr YIM Tith participated in a common criminal plan in the Southwest Zone.

(e) Mr YIM Tith was Not Granted Power and Authority by Virtue of his Relationship to Ta Mok

951. According to the ICP's submissions, Mr YIM Tith's individual conduct in the Southwest Zone should be extrapolated from his 'close relationship with Ta Mok,' which 'one Tram Kak District cadre describe[ed] as "like father and son".'¹⁸⁵⁸ On this flimsy basis, the ICP asserts that the 'close relationship meant that Yim Tith's *de facto* power was even greater than his *de jure* authority.'¹⁸⁵⁹

952. In accordance with the below analysis, there is insufficient evidence of the type of 'close relationship' described by the ICP. There is insufficient evidence that Mr YIM Tith's familial relation to Ta Mok granted him the heightened degree of power and authority that the ICP describes.

RIEL Son's evidence about Ta Mok and Mr YIM Tith

953. It is unclear how RIEL Son knew anything about Mr YIM Tith or his relationship to Ta Mok. There are serious doubts about whether RIEL Son was able to identify Mr YIM Tith, especially since he never had any personal contact with Mr YIM Tith during the Khmer Rouge regime and believed that Mr YIM Tith was dead and had worked in Phnom Penh during the Khmer Rouge regime:

Q: In your interview, you stated that you knew a cadre named Ta Tith. Is that correct?

A70: Ta Tith is dead.

¹⁸⁵⁷ ICP's Final Submission, D378/2, para. 40.

¹⁸⁵⁸ ICP's Final Submission, D378/2, para. 11.

¹⁸⁵⁹ ICP's Final Submission, D378/2, para. 11.

Q: His full name was Yim Tith, and his alias was Ta Tith. Is that correct?

A71: Yes, that's right. Ta Tith worked in Phnom Penh during the Khmer Rouge regime.

Q: How did you know Ta Tith then? Did you ever see him in person?

A72: I never had any personal contact with Ta Tith during the Khmer Rouge regime.¹⁸⁶⁰

954. This would have been an appropriate juncture in the interview to ask follow-up questions to probe at the credibility of RIEL Son's recollections about Mr YIM Tith.

955. It cannot be ignored that in the questioning about Mr YIM Tith above, and throughout his earlier interviews, RIEL Son mentioned nothing about Mr YIM Tith's relationship to Ta Mok. He made no mention of Ta Mok and Mr YIM Tith in his interview with the OCIJ¹⁸⁶¹ or in his testimony before the ECCC in Case 002.¹⁸⁶² In his Case 002 testimony, RIEL Son was asked about issues relevant to the structure of Sector 13, such as the alleged arrest of Ta Saom, but this did not prompt RIEL Son to mention anything about Mr YIM Tith's role and his alleged relationship to Ta Mok.¹⁸⁶³ Whether intentionally or not, the ICP obscures these concerns over RIEL Son's reliability by cherry-picking his evidence.¹⁸⁶⁴

956. Disregarding the problematic evidence above, the ICP cherry-picks the phrase 'like father and son,' which appears to spring from nowhere after the questioning of investigator Paolo Pastore Stocchi.¹⁸⁶⁵ The investigator did not seek to clarify what RIEL Son meant by 'like father and son.' The only follow-up question elicited an ambiguous and meaningless answer that begs for further clarification from the witness:

Q: Did you notice *Ta Mok* and *Ta Tith* often travel together?

A89: I saw them once in a while.¹⁸⁶⁶

957. The evidence about Mr YIM Tith elicited by the investigator is based on a DC-Cam interview that is not available on Case File 004.¹⁸⁶⁷ The investigator did not clarify which

¹⁸⁶⁰ D118/181, RIEL Son, WRI, A70-72, EN 00982643-4.

¹⁸⁶¹ D6.1.671, RIEL Son, WRI.

¹⁸⁶² D315.2.6, RIEL Son, Transcript; D315.2.7, RIEL Son, Transcript; D315.2.8, RIEL Son, Transcript.

¹⁸⁶³ D315.1.17, RIEL Son, Transcript, 10.48.42-10.54.07, p. 32, l.16-p. 33, l.16, EN 01076506-7.

¹⁸⁶⁴ *ICP's Final Submission*, D378/2, para. 11, fn 9, citing only D118/181, RIEL Son, WRI, A88, EN 00982645 ('Q: During the Khmer Rouge regime, how close were Ta Mok and Ta Tith to each other? A88: They were close like father and son.')

¹⁸⁶⁵ D118/181, RIEL Son, WRI, A88, EN 00982645 ('Q: During the Khmer Rouge regime, how close were Ta Mok and Ta Tith to each other? A88: They were close like father and son.')

¹⁸⁶⁶ D118/181, RIEL Son, WRI, A89, EN 00982645.

¹⁸⁶⁷ D118/181, RIEL Son, WRI, A70, EN 00982643, referring to document D313/1.2.409.

time period RIEL Son referred to in his evidence about Ta Mok and Mr YIM Tith. RIEL Son states that he joined the revolutionary movement ‘with Ta Mok’ as long ago as 1970, ‘[a]fter the coup d’etat against NORODOM Sihanouk.’ RIEL Son did not give evidence about Mr YIM Tith’s relationship to Ta Mok during a specific period of the DK period from 1975 to 1979:

Q: When did you join the revolutionary movement? What was the reason behind your participation?

A3: After the coup d’etat against NORODOM Sihanouk, *Ta Mok* started his movement to assemble forces. I lived in a village near the one where *Ta Mok* lived then, and, because of that, I joined the movement.

Q: You joined the movement with *Ta Mok*. Is that correct?

A4: I joined *Ta Mok*’s forces, but I was not directly under him.¹⁸⁶⁸

958. In view of the lack of information about timing, RIEL Son’s evidence about Mr YIM Tith’s relationship to Ta Mok has a low probative value.¹⁸⁶⁹ In this interview, RIEL Son was asked what he knew about Mr YIM Tith. In contradiction to the ICP’s claims of Mr YIM Tith’s stratospheric rise in the Southwest Zone, RIEL Son said: ‘*Ta Tith* was not very active’¹⁸⁷⁰ and he stated that Mr YIM Tith ‘was not cruel, because he once was a monk.’¹⁸⁷¹

SAO Chobb’s evidence about Ta Mok and Mr YIM Tith

959. The ICP misleadingly cites SAO Chobb’s evidence in support of his assertions about Ta Mok and Mr YIM Tith. As argued in this Response below, SAO Chobb, who was a soldier in Sector 1 of the Northwest Zone,¹⁸⁷² did not positively identify Mr YIM Tith and Ta Mok.¹⁸⁷³ SAO Chobb’s evidence about Mr YIM Tith and Ta Mok was that they were both ‘Northwest Zone cadres.’¹⁸⁷⁴ The evidence of SAO Chobb, who did not work in the Southwest Zone at any point during the DK period, with regard to the working

¹⁸⁶⁸ D118/181, RIEL Son, WRI, A4, EN 00982635.

¹⁸⁶⁹ *Decision on Yim Tith’s Application to Annul the Investigative Material Produced by Paolo Stocchi*, 25 August 2017, D351/1/4, para. 45. (The circumstances in which evidence is obtained including the reliability of the interviews in light of the nature of the questions asked to the witnesses and civil parties will be fully assessed at the closing order stage.)

¹⁸⁷⁰ D118/181, RIEL Son, WRI, A81, EN 00982644.

¹⁸⁷¹ D118/181, RIEL Son, WRI, A81, EN 00982644.

¹⁸⁷² *Infra*, para. 1072.

¹⁸⁷³ *Infra*, paras 1088 to 1091, 1098 to 1104, 1107 to 1113, 1115, 1120, 1125.

¹⁸⁷⁴ *Infra*, paras 1088 to 1091, 1098 to 1104, 1107 to 1113, 1115, 1120, 1125.

relationship of Mr YIM Tith to Ta Mok in the Southwest Zone emerged only after information was fed to him in interview.

960. Furthermore, SAO Chobb in fact stated that he did not know about Ta Mok clearly and that he ‘only heard his name’:

Q: To your knowledge, who was Ta Mok?

A37: I did not know about him clearly. I only heard his name. He was in the military.¹⁸⁷⁵

961. More specifically, SAO Chobb knew nothing of significance about Ta Mok’s relationship with Mr YIM Tith. While the ICP asserts that SAO Chobb gave evidence of a ‘close relationship’ between Mr YIM Tith and Ta Mok, he in fact stated: ‘I do not know what they did. I only know that they worked with each other.’¹⁸⁷⁶ It is unclear where SAO Chobb obtained his view that ‘Ta Tith’ escorted Ta Mok and without further information the claim that SAO Chobb knew what Ta Mok was doing ‘everywhere he went’ must be discarded as non-credible and in contradiction to SAO Chobb’s evidence that he ‘did not know about Ta Mok clearly.’¹⁸⁷⁷

962. The ICP quotes SAO Chobb’s evidence out of context. The ICP avoids citing the investigator’s leading question:

Q: How did you know that he went everywhere with Ta Mok and that he was related to Ta Mok?

A16: At that time, cadres from all sectors came to take a study session at Kang Hort Dam.¹⁸⁷⁸

SAO Chobb’s answer is unclear and the investigator fails to establish the source of his evidence. Moreover, there is a substantial error of translation from Khmer to English, with the word ‘cadres’ missing from the Khmer version, rendering the source of SAO Chobb’s evidence even less clear.¹⁸⁷⁹

¹⁸⁷⁵ D219/956, SAO Chobb, WRI, A37, EN 01456267.

¹⁸⁷⁶ D219/956, SAO Chobb, WRI, A38, EN 01456267. (‘A38: Truly speaking, Ta Mok was the commander of the military; he was the chief of the division. Ta Tith escorted him everywhere he went. I do not know what they did. I only know that they worked with each other.’)

¹⁸⁷⁷ D219/956, SAO Chobb, WRI, A37, EN 01456267. (‘A37: I did not know about him clearly. I only heard his name. He was in the military.’)

¹⁸⁷⁸ D219/956, SAO Chobb, WRI, A16, EN 01456265.

¹⁸⁷⁹ D219/956, SAO Chobb, WRI, A16, EN 01456265. (‘A16: At that time, cadres [not mentioned in Khmer version] from all sectors came to take a study session at Kang Hort Dam.’)

963. SAO Chobb did not know who Mr YIM Tith was and he lacked any real knowledge of Ta Mok's relationship to Mr YIM Tith. He did not know whether Mr YIM Tith was a Northwest Zone or Southwest Zone cadre.¹⁸⁸⁰ He was confused between two different people called 'Tith' and the investigator failed to confirm with SAO Chobb to which individual he was referring in his previous interview.¹⁸⁸¹ The confusion over which 'Tith' is being referred to in SAO Chobb's interviews is exacerbated by a leading question that contains a substantial translation error:

Q: [...] The Northwest Zone [The Khmer version reads: "To avoid confusing with Mr YIM Tith of Northwest"] Mr YIM Tith we are going to refer to here is from Trapeang Thom Village, Tram Kak District, Takeo Province, Sector 13 of the Southwest Zone. He's Ta Mok's younger brother-in-law. Are there two Ta Tith?¹⁸⁸²

964. There is no evidence that SAO Chobb's evidence was from a reliable source. He was a low-ranking cadre who did not have any access to information about the nature of Ta Mok and Mr YIM Tith's relationship and he stated 'I did not know all the cadres because I was a low ranking person.'¹⁸⁸³

965. The dates of SAO Chobb's purported knowledge about Mr YIM Tith's relationship to Ta Mok are unknown. There is no evidence that SAO Chobb was present in the Southwest Zone at a relevant time. As set out above, there is no clear evidence that SAO Chobb was in fact referring to Mr YIM Tith and for this reason all of his evidence referring to 'Tith' must be disregarded.

SANN Lorn's evidence about Ta Mok and Mr YIM Tith

966. The ICP fails to cite SANN Lorn's repeated and insistent answers that he did not know anything about Ta Mok's relationship to Mr YIM Tith.¹⁸⁸⁴ The ICP's citation of SANN

¹⁸⁸⁰ D219/956, SAO Chobb, WRI, A23, EN 01456266. ('Q: Was Ta Tith, who you talked about, a Northwest Zone or Southwest Zone person? A23: I am not sure about this. It is confusing to me as well. We went to take a study session together. I do not know where he came from. At that time, we were not allowed to know about whether others were from the Southwest Zone or NorthwestZone.') D219/956, A34, EN 01456267. ('Q: In the previous interview, at Question and Answer 54, the investigator asked you if Ta Tith was a NorthwestZone or Southwest Zone cadre. At that time you said that Ta Tith was a Northwest Zone cadre. But now at Question and Answer 23, we asked if Ta Tith was a Northwest Zone or Southwest Zone cadre, you said that you do not know. A34: I am not so sure whether they were Northwest Zone or Southwest Zone cadres [...].')

¹⁸⁸¹ The previous interview was D219/763.

¹⁸⁸² D219/956, SAO Chobb, WRI, A2, EN 01456264.

¹⁸⁸³ D219/956, SAO Chobb, WRI, A34, EN 01456267.

¹⁸⁸⁴ D219/19, SANN Lorn, WRI, A188, A192, A195, A196. 01050357-8.

Lorn on this point amounts to a gross and unconscionable misstatement, and therefore misrepresentation, of his evidence. SANN Lorn said:

Q: Did Ta Tit have a close relationship with Ta Mok?

A188: Like I said, I do not know anything. I was just an ordinary person.¹⁸⁸⁵

967. Following a break in the interview, the investigators repeatedly pressed SANN Lorn with the same, strongly leading question about a ‘close relationship’:

Q: Did Ta Tit have a close relationship with Ta Mok?

A192: I did not know.¹⁸⁸⁶

Soon afterwards, SANN Lorn was pressed with the same question:

Q: Our question is: To your knowledge, did Ta Tit have a close relationship with Ta Mok?

A195: I cannot answer this question.¹⁸⁸⁷

He confirms, once again, that he cannot provide the information sought by the investigator:

Q: Once again, we would like you to answer whether you remember or do not remember. Before we had lunch, I asked you whether you knew that Ta Tit had a close relationship with Ta Mok?

A196: I do not remember.¹⁸⁸⁸

968. There can be no doubt, after the investigator’s repeated questioning, that SANN Lorn knew nothing about Ta Mok’s so-called ‘close relationship’ to Mr YIM Tith, SANN Lorn knew nothing about Mr YIM Tith – he just heard his name:

Q: Do you know a man named YIM Tit alias Ta Tit?

A165: Yes, I do.

Q: What do you know about him?

A166: No, I do not know anything about him. I just heard of his name.¹⁸⁸⁹

Q: Did you know where Ta Tit lived during the KhmerRouge regime?

A187: No, I did not.¹⁸⁹⁰

¹⁸⁸⁵ D219/19, SANN Lorn, WRI, A188, EN 01050357.

¹⁸⁸⁶ D219/19, SANN Lorn, WRI, A192, EN 01050357.

¹⁸⁸⁷ D219/19, SANN Lorn, WRI, A195, EN 01050358. The English translation is in error and SANN Lorn actually answered in Khmer: ‘I don’t know this question.’

¹⁸⁸⁸ D219/19, SANN Lorn, WRI, A196, EN 01050358.

¹⁸⁸⁹ D219/19, SANN Lorn, WRI, A165-166, EN 01050354-5.

¹⁸⁹⁰ D219/19, SANN Lorn, WRI, A187, EN 01050357.

969. The investigator did not follow-up with SANN Lorn to clarify from where he heard about Mr YIM Tith's name. This is of particular concern since this interview began on 29 September 2014 and therefore occurred after the date of the illegal public release of the ICP's Third Introductory Submission with its serious allegations against Mr YIM Tith.¹⁸⁹¹
970. The evidence of SANN Lorn cited by the ICP was based on a leading question that was intended to elicit information about a 'close relationship' between Mr YIM Tith and Ta Mok: 'Q: Did Ta Tit have a close relationship with *Ta Mok*?'.¹⁸⁹² A more correct form of questioning would have been: 'what was Mr YIM Tith's relationship to Ta Mok?' The investigator asked 'Q: Did you know if Ta Tit reported to Ta Mok?'.¹⁸⁹³ A more proper form of questioning (particularly in light of SANN Lorn knowing nothing about Mr YIM Tith) would have been: 'To whom did Mr YIM Tith report.' The citations above speak for themselves. After being vigorously questioned by the investigator in this manner, the reliability of SANN Lorn's evidence about Mr YIM Tith and Ta Mok is severely prejudiced.

NOP Ngim's evidence about Ta Mok and Mr YIM Tith

971. The ICP relies on NOP Ngim's statement that Ta Mok and 'Ta Tith' 'got along well with each other',¹⁸⁹⁴ a statement so vague as to be meaningless in any context, particularly so in a criminal investigation. It does not support the ICP's submission that Mr YIM Tith's relationship to Ta Mok granted him a higher degree of authority and control. As stated above, the ICP misinterprets, and consequently misrepresents, NOP Ngim's evidence about receiving instructions from Ta Mok.¹⁸⁹⁵ NOP Ngim's evidence about Ta Mok and Mr YIM Tith's positions was confused and self-contradictory.¹⁸⁹⁶
972. NOP Ngim was born in Phnum Phneak Village, Trapeang Thum Commune, Tram Kak District, Takeo Province,¹⁸⁹⁷ next to the village where Ta Mok lived.¹⁸⁹⁸ She never attended school and is illiterate.¹⁸⁹⁹ She was a Khmer Rouge soldier before 1975, during

¹⁸⁹¹ *Supra*, paras 11 and 34.

¹⁸⁹² D219/19, SANN Lorn, WRI, A188, EN 01050357.

¹⁸⁹³ D219/19, SANN Lorn, WRI, A983, EN 01050457.

¹⁸⁹⁴ D118/285, NOP Ngim, WRI, A16, EN 01044676.

¹⁸⁹⁵ *Supra*, paras 971 to 973.

¹⁸⁹⁶ D219/835, NOP Ngim, WRI, A44, 47, 91, EN 01432953, 59.

¹⁸⁹⁷ D118/285, NOP Ngim, WRI, EN 01044672.

¹⁸⁹⁸ D118/285, NOP Ngim, WRI, A2, EN 01044673.

¹⁸⁹⁹ D118/285, NOP Ngim, WRI, A36.

which time Ta Mok was her commander.¹⁹⁰⁰ During the Khmer Rouge regime, she worked in Srae Ambel salt field situated in Kampot Province, Sector 35, Southwest Zone,¹⁹⁰¹ until 1978 when Ta Mok sent her to the Northwest Zone.¹⁹⁰² NOP Ngim stated that she did not know Ta Tith's position in the Southwest Zone,¹⁹⁰³ nor did she know the structure of the Southwest Zone from April 1975 to August 1978, except that Ta Mok was Southwest Zone Secretary.¹⁹⁰⁴ She was assigned to be the Deputy Secretary of Samlaut District of Sector 1¹⁹⁰⁵ after she got married in August 1978.¹⁹⁰⁶ She was sent to Samlaut District in September 1978.¹⁹⁰⁷ NOP Ngim's work in the District was to inspect work in communes, and because she was illiterate, they did not give her other work.¹⁹⁰⁸

973. NOP Ngim did not give evidence about Mr YIM Tith performing functions together with Ta Mok and to the contrary she alleged that at her wedding, while Ta Mok presided over the ceremony, Mr YIM Tith did not attend the wedding and he spoke to the married couples only after the wedding.¹⁹⁰⁹

MOENG Vet's evidence about Ta Mok and Mr YIM Tith

974. The statement of MOENG Vet cited by the ICP merely states that Mr YIM Tith was Ta Mok's younger brother in-law.¹⁹¹⁰ It gives no information about a working relationship between Ta Mok and Mr YIM Tith and does not support the ICP's assertion that this relationship gave Mr YIM Tith a greater degree of power.¹⁹¹¹
975. It appears that the ICP is forced to advance hollow assertions based on guilt by association, in order to compensate for the lack of evidence of Mr YIM Tith's acts and conduct in the Southwest Zone.

¹⁹⁰⁰ D219/974.1.2, NOP Ngim, T. 5 Sep 2016, EN 01382703-4.

¹⁹⁰¹ D118/285, NOP Ngim, WRI, A2, EN 01044673-4, D219/298, NOP Ngim, WRI, A2, EN 01111858; D219/835, WRI, A4-A9, EN 01432947. Also see Maps D347/2.1.55 and D1.3.27.1.

¹⁹⁰² D118/285, NOP Ngim, WRI, A8, EN 01044674; A28, EN 01044678; D219/835, NOP Ngim, WRI, A50-A53, EN 01432954.

¹⁹⁰³ D118/285, NOP Ngim, WRI, A9-A12, EN 01044675; A18-A19, EN 01044676.

¹⁹⁰⁴ D118/285, NOP Ngim, WRI, A14-A15, EN 01044675-6.

¹⁹⁰⁵ D219/298, NOP Ngim, WRI, A6, EN 01111859.

¹⁹⁰⁶ D123/2/2.17a, NOP Ngim, DC-Cam Statement, EN 01155597; D118/285, NOP Ngim, WRI, A68, EN 01044685-6.

¹⁹⁰⁷ D219/835, NOP Ngim, WRI, A72-A76, EN 01432957.

¹⁹⁰⁸ D118/285, NOP Ngim, WRI, A36, EN 01044679.

¹⁹⁰⁹ D219/835, NOP Ngim, WRI, A149, EN 01432970.

¹⁹¹⁰ D219/488, MOENG Vet, WRI, A62-63, EN 01170589.

¹⁹¹¹ ICP's Final Submission, D378/2, para. 12.

Conclusion regarding the alleged working relationship between Ta Mok and Mr YIM Tith

976. The above analysis of witness evidence concerning Ta Mok's relationship to Mr YIM Tith shows that despite being persistently encouraged by investigators to give evidence about a 'close relationship' between Mr YIM Tith and Ta Mok, witnesses gave insufficient evidence of any such relationship. The ICP spends a good deal of his Final Submissions accusing Mr YIM Tith of guilt by association with Ta Mok, repeatedly using the phrase 'Ta Mok and Yim Tith' without presenting any evidence to justify his use of this phrase. This is revealing of the lacunae of evidence of Mr YIM Tith's individual conduct, which has led the ICP to conflate his case theory about Mr YIM Tith with assertions about Ta Mok.
977. So intent is the ICP to pin his case theory about Mr YIM Tith onto the role of Ta Mok, that he fails to provide evidence of any details of their alleged working relationship. He does not provide evidence of the specific roles and responsibilities that he says Mr YIM Tith was granted by virtue of his relationship to Ta Mok.¹⁹¹² The ICP presumes these facts to be established, resorting to vague assertions about 'trust placed in Mr YIM Tith by Ta Mok,'¹⁹¹³ on 'Ta Mok's support and protection,'¹⁹¹⁴ and on the fact that 'Ta Mok had many other responsibilities outside the Northwest Zone and was frequently away.'¹⁹¹⁵ There is insufficient evidence of Mr YIM Tith receiving Ta Mok's trust, support and protection, or about Mr YIM Tith's responsibilities when Ta Mok was absent from the Northwest Zone. There is insufficient evidence on Case File 004 of Mr YIM Tith's alleged working relationship to Ta Mok and the witnesses cited by the ICP simply give their personal impressions of this relationship seen or heard about from afar.¹⁹¹⁶
978. The ICP submits that Mr YIM Tith's relationship to Ta Mok was a 'close relationship [that] meant that Mr YIM Tith's *de facto* power was even greater than his *de jure* authority.'¹⁹¹⁷ The ICP's allegations are unfounded. The evidence cited by the ICP that Mr YIM Tith was Ta Mok's brother-in-law and was allegedly seen with Ta Mok in the

¹⁹¹² ICP's Final Submission, D378/2, paras 11 to 12.

¹⁹¹³ ICP's Final Submission, D378/2, para. 1.

¹⁹¹⁴ ICP's Final Submission, D378/2, para. 8.

¹⁹¹⁵ ICP's Final Submission, D378/2, paras 8 and 45.

¹⁹¹⁶ See also: ICP's Final Submission, D378/2, paras 48 to 49. See *infra*, paras 1597 to 1628.

¹⁹¹⁷ ICP's Final Submission, D378/2, para. 11.

Southwest Zone is not a basis to find that Mr YIM Tith participated in the common criminal plan.¹⁹¹⁸

979. The ICP submits that ‘like Ta Mok, Yim Tith exercised authority and contributed to the common criminal plan in the Northwest Zone and Southwest Zone simultaneously.’¹⁹¹⁹ The ICP does not present sufficient evidence to support his portrayal of an omnipresent pair who together exercised simultaneous control over the entirety of the Northwest Zone and Southwest Zone. The ICP speculates that this omnipresence was enabled by Mr YIM Tith’s access to a jeep that allegedly permitted him to travel rapidly across DK.¹⁹²⁰
980. The ICP wilfully ignores evidence on the Case File that suggest that individuals other than Mr YIM Tith were in *de facto* or *de jure* positions of control in the Southwest Zone, apparently in an effort to shield his preferred narrative about the Southwest Zone from any conflicting evidence. The ICP ignores, for instance, the Case File evidence regarding Ranh Bith, a Southwest Zone cadre who, in the words of Timothy Carney, ‘probably ran day-to-day operations in the Southwest Zone.’¹⁹²¹
981. The evidence suggests that Ranh Bith, also known as Bith, held a senior position in the Southwest Zone and exercised considerable control, yet his name appears nowhere in the ICP’s imprecise account of the Southwest Zone allegations. Ranh Bith (alias Bith) was referred to as the Deputy Secretary of Ta Mok in the Southwest Zone and he held this position at the same time as Chong alias Prasith. At some later date, probably in 1978, Ranh Bith (alias Bith) became a member of the State Presidium ‘in the wake of purges.’¹⁹²² This was said to have been around the same time that Chong alias Prasith was in charge of Sector 11 of the West Zone.¹⁹²³ The ICP does not engage with evidence on Case File 004 that suggests that other individuals may have held competing responsibilities with those alleged by the ICP as pertaining to Mr YIM Tith

¹⁹¹⁸ *Supra*, paras 953 to 975.

¹⁹¹⁹ *ICP’s Final Submission*, D378/2, para. 12.

¹⁹²⁰ *ICP’s Final Submission*, D378/2, para. 12, citing D123/2/2.17a, NOP Ngim, DC-Cam Statement, EN 01155619; D219/85 VY Phann WRI, A10, EN 01061173. The time periods and geographical locations of Mr YIM Tith’s ‘access to a jeep’ are unclear in NOP Ngim and VY Phann’s evidence.

¹⁹²¹ D1.3.15.2, 404. Carney, T., ‘The Organisation of Power,’ Cambodia 1975-1978: Rendezvous with Death, ed Karl Jackson, 1989, Princeton University Press. EN 00105142 to 00105143.

¹⁹²² D1.3.15.2, 404. Carney, T., ‘The Organisation of Power,’ Cambodia 1975-1978: Rendezvous with Death, ed Karl Jackson, 1989, Princeton University Press. EN 00105142 to 00105143.

¹⁹²³ D1.3.15.2, 404. Carney, T., ‘The Organisation of Power,’ Cambodia 1975-1978: Rendezvous with Death, ed Karl Jackson, 1989, Princeton University Press. EN 00105152.

(f) Conclusion regarding the JCE in the Southwest Zone

982. On the basis of the foregoing analysis, the Defence respectfully submits that the evidence on Case File 004 is not sufficient to support the ICP's claim that Mr YIM Tith participated in the alleged common criminal plan in the Southwest Zone.

(g) Mr YIM Tith was Not Involved in Crimes in the Southwest Zone

(1) Mr YIM Tith was Not Involved in Crimes at the Wat Pratheat Crime Site in Kirivong District

983. The ICP claims that, in his alleged capacity on the Kirivong District Committee, Mr YIM Tith was involved in decisions on arrests and food rations at Wat Pratheat, and that he ordered interrogations and executions at Wat Pratheat and personally conducted the interrogation of some prisoners held at the site.¹⁹²⁴

984. As already argued in this Response, the ICP did not present sufficient evidence regarding Mr YIM Tith's alleged active participation in the imprisonment, interrogation and killing of enemies at Wat Pratheat to support his claim that Mr YIM Tith was involved in crimes in Wat Pratheat Security Centre,¹⁹²⁵ nor did the ICP present sufficient evidence that 'from at least 1975,' Mr YIM Tith was 'the Kirivong District Secretary or Deputy Secretary and continued to hold these positions through April to May 1978.'¹⁹²⁶

985. The ICP did not present sufficient evidence that Mr YIM Tith had any special intent to commit Genocide against the Khmer Krom, nor that he received any orders from higher echelons, or disseminated or implemented such orders in Kirivong District and to Wat Pratheat officials, concerning genocide against the Khmer Krom by killing members of the group.

986. The ICP did not present sufficient evidence that Mr YIM Tith received any orders from higher echelons, or disseminated or implemented such orders in Kirivong District and to Wat Pratheat officials, regarding murder, extermination, enslavement, imprisonment, torture, persecution against '17 April people' and Khmer Krom through murder,

¹⁹²⁴ ICP's Final Submission, D378/2, para. 190.

¹⁹²⁵ *Supra*, paras 847 to 912.

¹⁹²⁶ ICP's Final Submission, D378/2, paras 10 and 137.

extermination, enslavement, imprisonment, torture and confinement/working in inhumane conditions.

987. The ICP did not present sufficient evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Kirivong District and Wat Pratheath at any time relevant to the alleged events at Wat Pratheath Security Centre¹⁹²⁷ that is within the temporal scope of the investigation.¹⁹²⁸

988. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Kirivong District Committee and Wat Pratheath Security Centre officials and that he planned, ordered, instigated and committed charged crimes at Wat Pratheath Security Centre.¹⁹²⁹

(2) Mr YIM Tith was not Involved in Crimes at Wat Angkun Execution Site in Kirivong District

989. In relation to the alleged crimes at Wat Angkun execution site ('Wat Angkun'), the ICP is unable to identify any evidence on Case File 004 of Mr YIM Tith's acts and conduct in relation to this site.¹⁹³⁰ The ICP bases his sweeping assertion that Mr YIM Tith 'exercised authority over Wat Angkun' throughout the temporal scope of the investigation, on the positions allegedly held by Mr YIM Tith on the Kirivong District Committee and the Sector 13 Committee.¹⁹³¹ The ICP does not offer any explanation as to why, if the ICP's submissions about Mr YIM Tith's lengthy period of 'authority' over Wat Angkun are to be seen as remotely credible, he is unable to identify a shred of evidence on the Case File that even mentions Mr YIM Tith's acts and conduct in connection with Wat Angkun.

990. As already argued in this Response, the ICP did not present sufficient evidence to support his claim that Mr YIM Tith was Member, Deputy Secretary and Secretary of the Sector

¹⁹²⁷ ICP's Final Submission, D378/2, paras 192 to 193.

¹⁹²⁸ *Supra*, paras 436 to 439.

¹⁹²⁹ Notification of Amended Charges, D350.1, p. 4, para. 9, Crime Site 1: Wat Pratheath security centre; p. 6, para. 9, Crime Site 1: Wat Pratheath security centre.

¹⁹³⁰ ICP's Final Submission, D378/2, paras 213 to 236.

¹⁹³¹ ICP's Final Submission, D378/2, para. 214. (Yim Tith exercised authority over Wat Angkun as deputy secretary and subsequently secretary of the Kirivong District Committee and, later, as a leading member of the Sector 13 Committee (at least by early 1978) and of the JCE.) and para. 219 (Wat Angkun was under the authority of the Kirivong District Committee. Yim Tith was a member of this committee and implemented the JCE enemy and enslavement policy in the district [...])

13 Committee ‘in 1976’ until the end of the DK period,¹⁹³² nor that ‘from at least 1975,’ Mr YIM Tith was ‘the Kirivong District Secretary or Deputy Secretary and continued to hold these positions through April to May 1978.’¹⁹³³

991. There is no Case File evidence to state that Mr YIM Tith had ‘authority’ over Wat Angkun, no evidence that Mr YIM Tith ever visited Wat Angkun, no evidence of instructions or orders issued by Mr YIM Tith regarding Wat Angkun, and no evidence that he otherwise participated in a common criminal plan that resulted in crimes at Wat Angkun. The ICP’s case, taken at its highest, amounts to non-specific and tangential submissions about alleged meetings in the commune in which Wat Angkun was located.¹⁹³⁴
992. The ICP relies on a short comment in the evidence of PANN Sarou, who believed he saw Mr YIM Tith attend unspecified ‘meetings’ in Kampeang Commune.¹⁹³⁵ PANN Sarou’s evidence is devoid of detail about the location and date of these alleged meetings, their content, or Mr YIM Tith’s alleged participation therein.¹⁹³⁶ As stated above, it is unclear which period PANN Sarou was speaking about and his evidence appeared to concerned with ‘the late period of the Khmer Rouge regime.’¹⁹³⁷ PANN Sarou’s evidence regarding Kampeang Commune meetings is not sufficient to find that Mr YIM Tith ‘exercised authority over Wat Angkun’ throughout the temporal scope of the investigation.¹⁹³⁸
993. The ICP refers to the evidence of MOENG Vet and Tim (Toeb) Phy about other meetings in Kirivong District, but these witnesses did not speak about Kampeang Commune specifically.¹⁹³⁹ The ICP fancifully submits that the CIJs should indict Mr YIM Tith for crimes at Wat Angkun on the basis of nebulous assertions about unspecified ‘CPK meetings’ at Wat Angkun that the ICP says were attended by ‘people from various locations in the area.’¹⁹⁴⁰

¹⁹³² *Supra*, paras 652 to 700. ICP’s Final Submission, D378/2, para. 130.

¹⁹³³ ICP’s Final Submission, D378/2, paras 10 and 137.

¹⁹³⁴ ICP’s Final Submission, D378/2, para. 758.

¹⁹³⁵ ICP’s Final Submission, D378/2, para. 758, citing D118/302, PANN Sarou, WRI, A36-37, EN 01045474.

¹⁹³⁶ ICP’s Final Submission, D378/2, para. 758, citing D118/302, PANN Sarou, WRI, A36-37, EN 01045474.

¹⁹³⁷ *Supra*, para. 845.

¹⁹³⁸ ICP’s Final Submission, D378/2, paras 214 and 219.

¹⁹³⁹ ICP’s Final Submission, D378/2, para. 758, citing D219/521 Tim (Toeb) Phy WRI, A38-39, EN 01167994; D219/488, MOENG Vet, WRI, A37, EN 01170587.

¹⁹⁴⁰ ICP’s Final Submission, D378/2, para. 222.

994. The ICP further seeks to extend the allegations regarding Wat Angkun beyond the geographical scope and temporal scope of the investigation, by submitting that Mr YIM Tith 'is responsible for the crimes occurring at, in the vicinity of, and arising out of Wat Angkun throughout the DK regime.'¹⁹⁴¹ The ICP refers to 'grave sites in the vicinity of Wat Angkun' and his allegations concern not only the Wat Angkun site but also other sites 'more broadly, within Kampeaeng Commune,' yet the ICP does not point to sufficient evidence to support that these alleged sites were part of the Wat Angkun site and were under the control of Mr YIM Tith.¹⁹⁴² Mr YIM Tith cannot be indicted for allegations outside the scope of the investigation.

Conclusion regarding Wat Angkun

995. The ICP did not present sufficient evidence that Mr YIM Tith had special intent to commit Genocide against the Khmer Krom, nor that he received any orders from higher echelons, nor disseminated or implemented these orders to Kirivong District officials in connection with Wat Angkun execution site concerning genocide against the Khmer Krom by killing members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
996. The ICP did not present any evidence that Mr YIM Tith received any orders from higher echelons, nor that he disseminated or implemented those orders in Kirivong District in connection with Wat Angkun execution site through murder, extermination, and persecution against the Khmer Krom through murder, and extermination.
997. The ICP did not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Kirivong District at any time relevant to the alleged events at Wat Angkun execution site¹⁹⁴³ that is within the temporal scope of the investigation.¹⁹⁴⁴

¹⁹⁴¹ *ICP's Final Submission*, D378/2, para. 214. *Supra*, paras 435 to 446.

¹⁹⁴² *ICP's Final Submission*, D378/2, paras 217 and 234. *Supra*, paras 435 to 446.

¹⁹⁴³ *ICP's Final Submission*, D378/2, paras 216 to 218.

¹⁹⁴⁴ *Supra*, paras 436 to 439.

998. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Kirivong District officials and Wat Pratheath execution site, that he planned, ordered, instigated and committed charged crimes at Wat Angkun execution site.¹⁹⁴⁵

(3) Mr YIM Tith was Not Involved in Crimes at the Slaeng Village site in Kirivong District

999. In relation to the the alleged crimes at Slaeng Village forest execution site, the ICP is unable to identify any evidence on Case File 004 of Mr YIM Tith's acts and conduct in relation to this site.¹⁹⁴⁶ The ICP's allegations depend entirely on the positions allegedly held by Mr YIM Tith on the Kirivong District Committee and the Sector 13 Committee.¹⁹⁴⁷ The ICP is unable to identify any evidence that Mr YIM Tith contributed to alleged crimes at the Slaeng Village forest execution site and so the ICP resorts to suppositions about the location of 'Slaeng Village and the adjoining forest' being 'within the geographic areas under the direct authority of Mr YIM Tith.'¹⁹⁴⁸

1000. As already argued in this Response, the ICP has not presented sufficient evidence to support his claim that Mr YIM Tith was Member, Deputy Secretary and Secretary of the Sector 13 Committee 'in 1976' until the end of the DK period,¹⁹⁴⁹ nor that, 'from at least 1975,' Mr YIM Tith was 'the Kirivong District Secretary or Deputy Secretary and continued to hold these positions through April to May 1978.'¹⁹⁵⁰

1001. There is no Case File evidence to state that Mr YIM Tith had 'direct authority' over the Slaeng Village site, no evidence that Mr YIM Tith ever visited the Slaeng Village site, no evidence of instructions or orders issued by Mr YIM Tith regarding the Slaeng Village site, and no evidence that he otherwise participated in a common criminal plan that resulted in crimes at the Slaeng Village site. Although the ICP asserts that there was an authority structure and communication system through which the Kirivong District Committee exercised authority over the Slaeng Village and surrounding Kouk Prech

¹⁹⁴⁵ *Notification of Amended Charges*, D350.1, p. 4, para. 9, Crime Site 4: Wat Angkun security centre; p. 6, para. 9, Crime Site 1: Wat Angkun security centre.

¹⁹⁴⁶ *ICP's Final Submission*, D378/2, paras 237 to 254.

¹⁹⁴⁷ *ICP's Final Submission*, D378/2, para. 238.

¹⁹⁴⁸ *ICP's Final Submission*, D378/2, para. 238. ('Slaeng Village and the adjoining forest fell within the geographic areas under the direct authority of Yim Tith in his roles as deputy secretary and then secretary of the Kirivong District Committee as well as a member of the Sector 13 Committee. Yim Tith was a leading member of the JCE and contributed to the crimes in the Slaeng Village area.')

¹⁹⁴⁹ *Supra*, paras 652 to 700. *ICP's Final Submission*, D378/2, para. 130.

¹⁹⁵⁰ *ICP's Final Submission*, D378/2, paras 10 and 137.

Commune, the ICP is unable to point to evidence of the specific individuals who exercised this alleged authority, nor does the ICP refer to specific communications, orders or instructions issued by the Kirivong District Committee to individuals at Slaeng Village.¹⁹⁵¹ There is insufficient evidence to support the ICP's claims about Mr YIM Tith's 'direct authority.'

1002. The ICP's allegations at Slaeng Village regarding the crimes of deportation and other inhumane acts (forced transfer) are outside the geographical scope of the investigation. The ICP submits that in 'early 1978, CPK military units crossed the border into Vietnam and forcibly transferred Khmer Krom residents from Vietnam's An Giang Province to various locations in Sector 13, including Kirivong District.'¹⁹⁵² There is insufficient evidence that the commission of these alleged crimes occurred at the Slaeng Village crime site. The ICP's allegations regarding the deportation of Khmer Krom individuals 'from Vietnam's An Giang Province to various locations in Sector 13' cannot be shoe-horned into the geographical scope of the investigation into the limited confines of the Slaeng Village site.

1003. There is insufficient evidence to support the ICP's claim that Mr YIM Tith knew about the deportation of the Khmer Krom to Kirivong District as alleged by the ICP in relation to the Slaeng Village site.¹⁹⁵³ The ICP cites the speculative evidence of LACH Sambath that 'the district committee knew about this and partook in the evacuation of the Khmer Krom from Vietnam,' based on the witness's suppositions about the access that District- and Commune-level cadres had to trucks.¹⁹⁵⁴ As stated above, LACH Sambath's evidence regarding Mr YIM Tith and the Kirivong District Committee suffers from reliability issues and has low probative value.¹⁹⁵⁵

Conclusion regarding Slaeng Village

1004. The ICP did not present sufficient evidence that Mr YIM Tith had special intent to commit genocide against the Khmer Krom, nor that he received any orders from higher echelons, that he disseminated or implemented these orders to Kirivong District officials in

¹⁹⁵¹ *ICP's Final Submission*, D378/2, paras 241 to 242.

¹⁹⁵² *ICP's Final Submission*, D378/2, para. 243.

¹⁹⁵³ *ICP's Final Submission*, D378/2, para. 245.

¹⁹⁵⁴ D219/379, LACH Sambath, WRI, A80-81, EN 01132643. The Defence notes that as of the date of filing the WRI of LACH Sambath has not been corrected to reflect the wording relied upon by the ICP in fn 806 of the *ICP's Final Submission*, D378/2.

¹⁹⁵⁵ *Supra* paras 755 to 756.

connection with Slaeng Village forest execution site concerning genocide against the Khmer Krom by killing members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

1005. The ICP did not present any evidence that Mr YIM Tith received any orders from higher echelons, nor that he disseminated or implemented such orders in Kirivong District in connection with the Slaeng Village forest execution site through murder, deportation and persecution against the Khmer Krom through murder, deportation and forcible transfer.

1006. The ICP did not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Kirivong District at any time relevant to the alleged events at Slaeng Village forest execution site¹⁹⁵⁶ that is within the temporal scope of the investigation.¹⁹⁵⁷

1007. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Kirivong District Committee and officials at Wat Pratheath execution site, nor that he planned, ordered, instigated and committed charged crimes at Slaeng Village forest execution site.¹⁹⁵⁸

(4) Mr YIM Tith was Not Involved in Crimes at the Preal Village Site in Kirivong District

1008. In relation to the alleged crimes at the Preal Village site, the ICP is unable to identify any evidence regarding the acts and conduct of Mr YIM Tith's in relation to this site.¹⁹⁵⁹ The ICP's allegations regarding the Preal Village site depend entirely on the positions allegedly held by Mr YIM Tith on the Kirivong District Committee and the Sector 13 Committee.¹⁹⁶⁰

1009. As already argued in this Response, ICP did not present sufficient evidence to support his claim that Mr YIM Tith was Member, Deputy Secretary and Secretary of the Sector 13 Committee 'in 1976' until the end of the DK period,¹⁹⁶¹ nor that 'from at least 1975,' Mr

¹⁹⁵⁶ ICP's Final Submission, D378/2, para. 240.

¹⁹⁵⁷ *Supra*, paras 436 to 439.

¹⁹⁵⁸ Notification of Amended Charges, D350.1, p. 4, para. 9, Crime Site 5: Slaeng Village forest execution site; p. 7, para. 9, Crime Site 1: Slaeng Village forest execution site.

¹⁹⁵⁹ ICP's Final Submission, D378/2, paras 255 to 268.

¹⁹⁶⁰ ICP's Final Submission, D378/2, para. 256.

¹⁹⁶¹ *Supra*, paras 652 to 700. ICP's Final Submission, D378/2, para. 130.

YIM Tith was ‘the Kirivong District Secretary or Deputy Secretary and continued to hold these positions through April to May 1978.’¹⁹⁶²

1010. The ICP asserts that the Preal Village site ‘was under the authority of the Kirivong District Committee.’¹⁹⁶³ There is no evidence on Case File 004 stating that Mr YIM Tith personally held authority over the Preal Village site, no evidence that Mr YIM Tith ever visited the Preal Village site, no evidence of instructions or orders issued by Mr YIM Tith regarding the Preal Village site, and no evidence that he otherwise participated in a common criminal plan that resulted in crimes at the Preal Village site. The ICP asserts that there was an authority structure and communication system through which the Kirivong District Committee exercised authority over the Preal Village site, but the ICP is unable to point to evidence of the specific individuals who exercised this alleged authority, nor does the ICP refer to specific communications, orders or instructions issued by the Kirivong District Committee to individuals at the Prael Village.¹⁹⁶⁴ There is insufficient evidence to support the ICP’s claims about Mr YIM Tith’s participation in the common criminal plan with respect to this site.

1011. The ICP’s allegations at the Preal Village site regarding the crimes of deportation and other inhumane acts (forced transfer) are outside the geographical scope of the investigation. The ICP submits that in ‘late 1977 to early 1978, CPK military units attacked across the border into Vietnam and forcibly deported hundreds of Khmer Krom (ethnic Khmer who were Vietnamese nationals living in Vietnam) residing in An Giang Province to various locations in Sector 13, including Kirivong District.’¹⁹⁶⁵ There is insufficient evidence that the commission of these alleged crimes occurred at the Preal Village crime site.

1012. The ICP makes no allegations concerning Mr YIM Tith’s personal acts and conduct in relation to the Preal Village site.¹⁹⁶⁶

¹⁹⁶² ICP’s Final Submission, D378/2, paras 10 and 137.

¹⁹⁶³ ICP’s Final Submission, D378/2, para. 259.

¹⁹⁶⁴ ICP’s Final Submission, D378/2, para. 259.

¹⁹⁶⁵ ICP’s Final Submission, D378/2, para. 260.

¹⁹⁶⁶ ICP’s Final Submission, D378/2, paras 255 to 268.

Conclusion regarding Preal Village

1013. The ICP did not present sufficient evidence that Mr YIM Tith had special intent to commit genocide against the Khmer Krom, nor that he received any orders from higher echelons, nor disseminated or implemented such orders to Kirivong District officials in connection with Preal Village execution site concerning genocide against the Khmer Krom by killing members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

1014. The ICP did not present any evidence that Mr YIM Tith received any orders from higher echelons, nor that he disseminated or implemented such orders in Kirivong District in connection with Preal Village through murder, extermination, deportation and persecution against the Khmer Krom through murder, extermination deportation and forcible transfer.

1015. The ICP did not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Kirivong District at any time that is relevant to the events at Preal Village execution site¹⁹⁶⁷ that is within the temporal scope of the investigation.¹⁹⁶⁸

1016. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Kirivong District officials and Preal Village, nor that he planned, ordered, instigated and committed charged crimes at Preal Village.¹⁹⁶⁹

(5) Mr YIM Tith was not Involved in Crimes at Kraing Ta Chan Security Centre in Tram Kak District of Sector 13

1017. The ICP's allegations of Mr YIM Tith's responsibility for alleged crimes at Kraing Ta Chan Security Centre ('Kraing Ta Chan') in Tram Kak District of Sector 13 are based solely on the ICP's assertion that Mr YIM Tith held the roles of Deputy Secretary and

¹⁹⁶⁷ ICP's Final Submission, D378/2, para. 258.

¹⁹⁶⁸ *Supra*, paras 436 to 439.

¹⁹⁶⁹ *Notification of Amended Charges*, D350.1, p. 4, para. 9, Crime Site 3: Preil Village forest execution site; p. 6, para. 9, Crime Site 3: Preil Village execution site.

then Secretary of the Sector 13 Committee.¹⁹⁷⁰ The ICP does not allege that Mr YIM Tith played any District-level role in Tram Kak District.

1018. As already argued in this Response, ICP did not present sufficient evidence to support his claim that Mr YIM Tith was Member, Deputy Secretary and Secretary of the Sector 13 Committee ‘in 1976’ until the end of the DK period,¹⁹⁷¹ nor that ‘from at least 1975,’ Mr YIM Tith was ‘the Kirivong District Secretary or Deputy Secretary and continued to hold these positions through April to May 1978.’¹⁹⁷²

1019. There is insufficient evidence of the Sector 13 Committee’s oversight of Kraing Ta Chan, at any time when Mr YIM Tith was alleged to have held a Sector-level position on the Committee. There is insufficient evidence that each permutation of the Tram Kak District Committee was consistent in its working methods throughout all stages of the DK period. As the ICP accepts, ‘the Tram Kak District Committee changed several times during the regime.’¹⁹⁷³

1020. The ICP alleges that crimes were committed at Kraing Ta Chan pursuant to a ‘regimented system’ of communication from the Party and zone level to the ‘lower levels’ in Tram Kak District, which according to the ICP, was made possible by the existence of a ‘highly organised hierarchical chain of command.’¹⁹⁷⁴ The ICP’s claim is unfounded. As set out below, there is insufficient evidence to support the existence of such a chain of command between the Sector 13 Committee, the Tram Kak District Committee and the security centre at Kraing Ta Chan.

1021. The ICP alleges that Mr YIM Tith’s responsibility for all alleged crimes at Kraing Ta Chan should be derived from the vague allegation that Mr YIM Tith ‘at one point’ headed the Sector 13 Committee.¹⁹⁷⁵ The ICP alleges that Ta An was

¹⁹⁷⁰ *ICP’s Final Submission*, D378/2, paras 269, 271 to 272. (‘Southwest Zone cadres committed these crimes at Kraing Ta Chan in furtherance of the joint criminal enterprise of which Yim Tith was a leading member. [...] Kraing Ta Chan was a district prison overseen by the Tram Kak District Committee, which reported to the Sector 13 Committee that at one point was headed by Yim Tith. [...] Sector 13 and Tram Kak District officials regularly communicated with the prison chairman at Kraing Ta Chan.) *ICP’s Final Submission*, D378/2, para. 307 (The deputy and subsequently secretary of the Sector 13 Committee and a leading JCE member, Yim Tith was responsible for and had authority over events at Wat Ang Srei and Prey Sokhon throughout the DK regime.)

¹⁹⁷¹ *Supra*, paras 652 to 700. *ICP’s Final Submission*, D378/2, para. 130.

¹⁹⁷² *ICP’s Final Submission*, D378/2, paras 10 and 137.

¹⁹⁷³ *ICP’s Final Submission*, D378/2, paras 138 to 139.

¹⁹⁷⁴ *ICP’s Final Submission*, D378/2, para. 140.

¹⁹⁷⁵ *ICP’s Final Submission*, D378/2, para. 272.

the head of Kraing Ta Chan throughout the temporal scope of the investigation¹⁹⁷⁶ and that the Sector 13 Committee sent orders to Ta An and received reports from Ta An ‘regularly’ throughout this period.¹⁹⁷⁷ The ICP does not present any evidence for this claim.

1022. The ICP’s submissions regarding the CPK’s authority structure and communication in Tram Kak District relates to allegedly the ‘Party and zone levels’ and their alleged transfer of orders, instructions and reports to the lower ranks in Tram Kak District.¹⁹⁷⁸ The ICP does not address in this part of his filing the role of the Sector levels in the CPK’s authority structure or communications *vis-à-vis* Tram Kak District.¹⁹⁷⁹ While these submissions might hold significance for allegations against Khieu Samphan and Nuon Chea, they do not bear on the responsibility of Mr YIM Tith in his alleged capacity on the Sector 13 Committee for crimes at Kraing Ta Chan. The Defence considers it necessary to comment on several aspects of this evidence hereunder.

1023. The documents that the ICP asserts as establishing the Sector 13 Committee’s oversight of Kraing Ta Chan do not include Mr YIM Tith’s name. The ICP submits that at Kraing Ta Chan, ‘[f]ollowing interrogation and torture sessions, prison officials sent reports detailing the prisoners’ confessions to the district, which the committee reviewed and forwarded to the sector.’¹⁹⁸⁰ The ICP cites evidence referring to the alleged reporting of confession material from Kraing Ta Chan that refers by name to Kit at the District level, Ta Saom at the Sector 13 level, Prak at the Sector 13 level, and Ta Ran, ‘who was chairman of Sector 13.’¹⁹⁸¹ Yet none of this evidence mentions Mr YIM Tith at all. The evidence lacks detail about the source of orders and, as the ICP points out, witnesses gave conflicting accounts as to whether orders came from the District level, Sector level, or had always to be approved by the Zone level.¹⁹⁸² The evidence is not sufficient to support the existence of a ‘highly organised hierarchical chain of command’ from Sector 13 to Kraing Ta Chan, as alleged by the ICP.¹⁹⁸³

¹⁹⁷⁶ ICP’s Final Submission, D378/2, para. 273.

¹⁹⁷⁷ ICP’s Final Submission, D378/2, paras 273, 287, and 293.

¹⁹⁷⁸ ICP’s Final Submission, D378/2, para. 140.

¹⁹⁷⁹ ICP’s Final Submission, D378/2, para. 140.

¹⁹⁸⁰ ICP’s Final Submission, D378/2, para. 293.

¹⁹⁸¹ ICP’s Final Submission, D378/2, para. 293; D315.1.14, NEANG Ouch alias Ta San, Transcript, 09.10.50-09.13.01, p. 4, 1.3-19.

¹⁹⁸² ICP’s Final Submission, D378/2, para. 293, fn 957.

¹⁹⁸³ ICP’s Final Submission, D378/2, para. 140.

PHAN Chhen's evidence regarding Tram Kak District authority and communication

1024. The ICP misinterprets, and consequently misrepresents, PHAN Chhen's evidence about Kraing Ta Chan. The ICP alleges that – at the time of the allegations concerning Mr YIM Tith's responsibility in Sector 13 – there was a system of transfer of progress reports from the lower ranks in Tram Kak District up through a 'highly organised hierarchical chain of command' to the Party and Zone levels.¹⁹⁸⁴ The ICP's reliance on this evidence is highly misleading since PHAN Chhen spoke about the period upto 'mid-1975,' after which, according to other witnesses, PHAN Chhen stopped working at Kraing Ta Chan and left Tram Kak District.¹⁹⁸⁵ There is unclear evidence that PHAN Chhen may have worked at Kraing Ta Chan in 1973¹⁹⁸⁶ and the date of PHAN Chhen's transfer away from the Security Centre may have been as early as 1974.¹⁹⁸⁷

1025. PHAN Chhen himself denied having ever held the position of chief of Kraing Ta Chan Security Centre and stated in Case 002 testimony that he left the area in 1974 for Kampong Speu Province.¹⁹⁸⁸ Even if PHAN Chhen worked at Kraing Ta Chaing in approximately 1974, it is misleading to suggest that the CPK authority structure over a security centre in Tram Kak District, and the communication of security matters to and from Tram Kak District, would have remained constant and unchanged throughout the period from 1974 to 6 January 1979. Evidence of CPK 'chain of command' at one point

¹⁹⁸⁴ D315.1.8, PHAN Chhen, Transcript, 10.08.45-10.10.23, p. 25, l.13-p. 26, l.2. (The report was in – through the chain of command; for example, the unit to the village, the village to the commune, the commune to the district, the district to the sector, and the sector to the zone. As for me, when I made a direct contact with Ta Mok, it was not through the regular chain of command, because that was my own personal business, and I sought his intervention in it.). The ICP misquotes PHAN Chhen to support his interpretation that there was a 'regular chain of command,' the ICP quoting as follows: 'The report [went] through the chain of command; for example, the unit to the village, the village to the commune, the commune to the district, the district to the sector, and the sector to the zone. *This was a regular chain of command.*' [Emphasis added].

¹⁹⁸⁵ D219/972.2.2, SAY (Sory) Sen, Transcript, 14.29.43-14.31.28, p. 73, l.15-p. 74, l.5. (The first chief was Ta Chhen, and then Ta An came in -- I forget the year -- but he came after the liberation of Phnom Penh by DK.); D6.1.652, PECH Chim, WRI, EN 00380136-37 ('Chhen was transferred to another position as prison chief in about mid-1975'); D6.1.690, PECH Chim, WRI, A32, EN 00422342; D134/8, SAUT Saing, WRI, A42, EN 00970119; D6.1.669, KEV Chandara, WRI, A2, 13, EN 00411483, 85. The ICP accepts that PHAN Chhen had stopped working at Kraing Ta Chan and left Tram Kak District, *see: ICP's Final Submission*, D378/2, fn 876.

¹⁹⁸⁶ D6.1.692, PHAN Chhen, WRI, A43, EN 00426287. PHAN Chhen himself stated that in 1973 he released a group of individuals, possibly from Kraing Ta Chan Security Centre although it is unclear. ('A43: I released those 40 persons in late 1973').

¹⁹⁸⁷ D6.1.669, KEV Chandara, WRI, A2, 13, EN 00411483, 85. PHAN Chhen also testified in Case 002/2, he maintained that he never served as the prison chief, and that he left the area in 1974.

¹⁹⁸⁸ D315.1.7, PHAN Chhen, Transcript, 13.59.59-14.01.48, p. 58, l.5 - 12, 14.12.09 - 14.14.13, p. 62, l.7-19, 14.36.06-14.37.40, p. 69, l.12-p. 70, l.1; D315.1.8, PHAN Chhen, Transcript, 14.15.13-14.18.10, p. 67, l.17-p. 68, l.20; D6.1.692, PHAN Chhen, WRI, A40-41, EN 00426286-7.

in the CPK's history is not relevant to all periods in its history.¹⁹⁸⁹ PHAN Chhen's evidence must be disregarded on this point.

1026. In asserting the Sector 13 Committee's authority over Kraing Ta Chan, the ICP relies heavily on a single witness statement of the witness PHANN Chenn, which the ICP claims is sufficient to establish that '[i]nterrogations at Kraing Ta Chan were ordered by sector- and district-level authorities,'¹⁹⁹⁰ and that '[e]xecutions at Kraing Ta Chan were explicitly ordered by the upper echelons' and Kraing Ta Chan prison officials 'sent reports detailing the prisoners' confessions to the district, which the committee reviewed and forwarded to the sector.'¹⁹⁹¹ The passage of PHANN Chenn's evidence relied upon by the ICP to support these bold assertions about the Sector 13 Committee's strict hierarchical command over Kraing Ta Chan is as follows:

Q: During the interrogations of prisoners, in your assessment, as for the methods of interrogation, did An create the interrogation methods by himself, or were there instructions from above?

A32: Phi was the interrogator and An was the recorder. When Phi questioned and the prisoner did not respond, Phi was the person who used hot or cold methods to get the responses. Phi was the person who received the instructions to interrogate the prisoners.

Q: From whom did Phi receive instructions on interrogation methods?

A33: From the Sector and the District.

Q: How do you know that?

A34: Because that was customary in their work.¹⁹⁹²

1027. PHANN Chenn's opinion evidence about what was customary during the DK period is not a sufficient basis from which to extrapolate the existence of a strictly organised and hierarchical chain of command above Kraing Ta Chan. The source of PHANN Chenn's evidence about the transfer of instructions from the Sector and the District to Kraing Ta Chan is unknown and Phann Chenn was speculating about these issues.

¹⁹⁸⁹ D315.1.8, PHAN Chhen, Transcript, 10.08.45-10.10.23, p. 25, l.13 - p. 26, l.3.

¹⁹⁹⁰ *ICP's Final Submission*, D378/2, para. 287, citing D6.1.695, PHAN Chhen, WRI, A32-34, EN 00426303.

¹⁹⁹¹ *ICP's Final Submission*, D378/2, para. 293, citing *ICP's Final Submission*, D378/2, para. 287, citing D6.1.695, PHAN Chhen, WRI, A32-34, EN 00426303.

¹⁹⁹² D6.1.695, PHAN Chhen, WRI, A32-34, EN 00426303.

PECH Chim's evidence regarding Tram Kak District authority and communication

1028. The ICP cites PECH Chim's evidence relating to the period from approximately mid-1976 until February 1977 when PECH Chim said he was in control of Tram Kak District.¹⁹⁹³

1029. As discussed above, PECH Chim alleged that 'in late 1978' he heard that Mr YIM Tith held a position of authority at the Sector level.¹⁹⁹⁴ As such, any information that PECH Chim gave about the communication between Tram Kak District and Sector 13 did not relate to the period when he heard that Mr YIM Tith held a position at the Sector-level.

CHOU Koemlan's evidence regarding Tram Kak District authority and communication

1030. The evidence of CHOU Koemlan cited by the ICP is concerned with communication between the Tram Kak District Committee and 'the three Khmer Rouge leaders [...] Pol Pot, Khieu Samphan and Nuon Chea,' rather than with the Sector level.¹⁹⁹⁵ It is clear that her evidence does not speak to the roles of Sector-level cadre, and in the report on her civil party application in Case 004, she alleged that the responsible individuals were 'Ta Mok, Khieu Samphan and Nuon Chea.'¹⁹⁹⁶

1031. Consistent with this account, in CHOU Koemlan's Victim Information Form, she did not blame individuals at the Sector-level for killings and she attributed the killing of her husband to local militiamen.¹⁹⁹⁷ It is significant that although the ICP's Final Submission cites CHOU Koemlan's evidence from Case 002 in connection with Mr YIM Tith's alleged responsibility for crimes in Tram Kak District, CHOU Koemlan did not mention Mr YIM Tith at all in the report on her civil party application.¹⁹⁹⁸ It is likewise significant that in her testimony in Case 002, CHOU Koemlan did not give evidence regarding Mr YIM Tith at any point.¹⁹⁹⁹ When she was asked in the Case 002 trial hearing if she 'saw

¹⁹⁹³ ICP's Final Submission, D378/2, paras 139 to 140.

¹⁹⁹⁴ *Supra*, paras 656 to 660.

¹⁹⁹⁵ D315.3.1, CHOU Koemlan, Transcript, 13.35.42-13.42.05, p. 65, 1.20-p. 66, 1.6. (Ta Mok accompanied the three Khmer Rouge leaders who travelled in a vehicle, and they were Pol Pot, Khieu Samphan and Nuon Chea. And Ta Mok was in a separate vehicle. They visited the Ou Chambak canal worksite.)

¹⁹⁹⁶ D5/1219/1, CHOU Koemlan, Report of Victim Support Section on Civil Party Applicant, EN 01119915.

¹⁹⁹⁷ D5/1219, CHOU Koemlan, Civil party application, EN 01186219.

¹⁹⁹⁸ D5/1219/1, CHOU Koemlan, Report of Victim Support Section on Civil Party Applicant, EN 01119915.

¹⁹⁹⁹ D315.3.1 CHOU Koemlan, Transcript; D315.3.2 CHOU Koemlan, Transcript; D315.3.4 CHOU Koemlan, Transcript; D364/2.1.4 CHOU Koemlan, Transcript; D315.1.14 CHOU Koemlan, Transcript; D219/899.1.1 CHOU Koemlan, Transcript.

any other senior leaders accompany Ta Mok,²⁰⁰⁰ she did not mention Mr YIM Tith and she only referred to Pol Pot, Khieu Samphan and Nuon Chea.²⁰⁰¹ The CIJs did not carry out a witness interview with CHOU Koemlan in connection with the allegations against Mr YIM Tith in Case 004.

1032. The Defence notes that the ICP misquotes (and consequently misrepresents) the trial testimony of CHOU Koemlan in Case 002/02, seemingly in an effort to increase the perceived connection between Ta Mok, on one hand, and Pol Pot, Khieu Samphan and Nuon Chea on the other. The ICP quotes CHOU Koemlan's testimony thus: 'Ta Mok accompanied the three Khmer Rouge leaders who travelled in a vehicle, and they were Pol Pot, Khieu Samphan and Nuon Chea. [...] They visited the Ou Chambak canal worksite' and also the "K1 cooperative" in Tram Kak District.²⁰⁰² This is an amalgamation of different parts of CHOU Koemlan's evidence and in fact it was only later in her testimony that she referred to another visit to K1 Cooperative, observed by her brother, in which Khieu Samphan 'and the other two Khmer Rouge leaders' visited the K1 Cooperative.²⁰⁰³ The ICP misinterprets, and consequently misrepresents, CHOU Koemlan's evidence by stating that Ta Mok visited the K1 Cooperative when in fact she did not say mention him in relation to this visit.²⁰⁰⁴ Likewise, in two places of her testimony, the ICP cuts from the citation of CHOU Koemlan's evidence that Ta Mok rode in a vehicle separately from Pol Pot, Khieu Samphan and Nuon Chea.²⁰⁰⁵

OEM Saroeurn's evidence regarding Tram Kak District authority and communication

1033. The evidence of OEM Saroeurn lacks any significant details about the CPK's authority structure and organisation. She referred to an event that she heard about retrospectively, when Ta Mok visited a worksite at Chambak canal, riding in a separate car from Nuon Chea, Khieu Samphan and Pol Pot.²⁰⁰⁶ OEM Saroeurn did not mention Mr YIM Tith in

²⁰⁰⁰ D315.3.1 CHOU Koemlan, Transcript, 13.35.42-13.38.47, p. 63, l.10-p. 64, l.1.

²⁰⁰¹ D315.3.1 CHOU Koemlan, Transcript, 13.35.42-13.38.47, p. 63, l.10-p. 64, l.1. (During the DK regime of Khmer Rouge, Ta Mok accompanied the three Khmer Rouge leaders who travelled in a vehicle, and they were Pol Pot, Khieu Samphan and Nuon Chea. And Ta Mok was in a separate vehicle. They visited the Ou Chambak canal worksite.)

²⁰⁰² *ICP's Final Submission*, D378/2, fn 381.

²⁰⁰³ *ICP's Final Submission*, D378/2, fn 381. C.f. D315.3.1, CHOU Koemlan, Transcript, 13.39.06-13.42.05, p. 64, l.7-23.

²⁰⁰⁴ *ICP's Final Submission*, D378/2, fn 381. C.f. D315.3.1, CHOU Koemlan, Transcript, 13.39.06-13.42.05, p. 64, l.7-23.

²⁰⁰⁵ *ICP's Final Submission*, D378/2, fn 381. D315.3.1, CHOU Koemlan, Transcript, 13.35.42-13.42.05, p. 64, l.7-23.

²⁰⁰⁶ D315.3.4, OEM Saroeurn, Transcript, 09.22.47-09.32.36, p. 8, l.10 to p. 11, l.9, 10.32.11-10.41.11.

her civil party application or the report on her civil party application²⁰⁰⁷ nor in her testimony in Case 002.²⁰⁰⁸ The CIJs did not carry out a witness interview with her in connection with the allegations against Mr YIM Tith in Case 004.

NEANG Ouch alias Ta San's evidence regarding Tram Kak District authority and communication

1034. The ICP relies on NEANG Ouch alias Ta San to support his assertion that '[o]rders and instructions were passed down from the Party and zone levels to the lower ranks, often through meetings or site visits.'²⁰⁰⁹ In view of his clear evidence that Mr YIM Tith was not Sector 13 Chairman,²⁰¹⁰ this assertion of NEANG Ouch alias Ta San cannot be relied upon as evidence that Mr YIM Tith was responsible for crimes in Tram Kak District in his alleged capacity on the Sector 13 Committee.

1035. NUT Nov's evidence is strongly limited by its reliance on NEANG Ouch alias Ta San as the only source of his evidence regarding Mr YIM Tith's alleged role on the Sector 13 Committee.²⁰¹¹ NUT Nov said that he heard NEANG Ouch alias Ta San, in his capacity as district secretary, make an announcement about the appointment of Mr YIM Tith to the Sector 13 Committee. However, there is insufficient evidence that NEANG Ouch alias Ta San was in fact the district secretary at any time when NUT Nov believed that he heard this announcement and furthermore NEANG Ouch alias Ta San himself stated that he was not the District Secretary at any time relevant to NUT Nov's recollection of the announcement.²⁰¹²

1036. This casts doubt on the reliability of NUT Nov's account and his recollection of the announcement about Mr YIM Tith's appointment must be accorded a low probative value. The likelihood that NUT Nov was mistaken about hearing NEANG Ouch alias Ta San speaking about Mr YIM Tith is increased by inconsistencies in his evidence about

²⁰⁰⁷ D5/1816/3, OEM Saroeurn, Report of Victim Support Section on Civil Party Applicant, EN 01363314-01363315; D5/1816, OEM Saroeurn, Civil party application, EN 01225178-85; D5/1816/2.1, OEM Saroeurn, Summary of Supplementary Information, EN 01337592-94.

²⁰⁰⁸ D315.3.4, OEM Saroeurn, Transcript, 09.22.47-09.32.36, 10.32.11-10.41.11, p. 28, 1.19-p. 31, 1.19.

²⁰⁰⁹ D315.1.14, NEANG Ouch alias Ta San, Transcript, 11.11.16-11.13.07, p. 39, 1.12-25.

²⁰¹⁰ D118/172, NEANG Ouch alias Ta San, WRI, A71-72, EN 00980876. (Q: Was Ta Tit ever Sector 13 Chairman? A71: No, but I saw him in Kirivong District. I do not know what he was doing there.).

²⁰¹¹ *Supra*, paras 688 to 689.

²⁰¹² D364/2.1.4, NEANG Ouch alias Ta San, Transcript, 09.45.14-09.46.44, p. 17, 1.3-16, 13.43.34-13.45.02, p. 54, 1.10-24, 15.17.20-15.24.29, p. 81, 1.11-p. 84, 1.7.

the alleged announcement and the source of NEANG Ouch alias Ta San's evidence is not clear.²⁰¹³

RIEL Son's evidence regarding Tram Kak District authority and communication

1037. The ICP cites RIEL Son's evidence regarding a meeting of commune officials, in support of the ICP's claim that 'progress reports were generated that were sent back up the chain.'²⁰¹⁴ RIEL Son's evidence does not describe in detail a particular 'progress report' on a particular date and it is far from clear which individuals attended this meeting. It is not clear from RIEL Son's answers whether he was referring only to a meeting of commune officials.²⁰¹⁵ RIEL Son's evidence, at its highest, pertains to communications between the District and Commune levels at one single meeting. Although the details of this meeting are hazy, it is clear that RIEL Son gave no evidence that the meeting involved attendees from the Sector 13 Committee. Furthermore, as stated above, RIEL Son's evidence is unreliable and he never had any personal contact with Mr YIM Tith during the Khmer Rouge regime and believed that Mr YIM Tith was dead and had worked in Phnom Penh during the Khmer Rouge regime.²⁰¹⁶ RIEL Son did not provide reliable evidence of Mr YIM Tith's responsibility for crimes in Tram Kak District in his alleged role on the Sector 13 Committee.

PHNEU Yav's evidence regarding Tram Kak District authority and communication

1038. The ICP misleadingly cites PHNEU Yav in support of his allegation that '[o]rders and instructions were passed down from the Party and zone levels to the lower ranks, often through meetings or site visits.'²⁰¹⁷ PHNEU Yav's evidence does not concern the communication of information from the Party and zone levels.²⁰¹⁸ In fact it concerns small-scale meetings that were lower than the cooperative-wide level. The meetings were said to be chaired by the commune chief and 'the meetings were held in the cooperative in our respective units. For example, at Unit 1, the meeting was held exclusively for members of Unit 1, and that applies to Unit 2 and Unit 3 respectively.'²⁰¹⁹ There is nothing

²⁰¹³ *Supra*, para. **Error! Reference source not found..**

²⁰¹⁴ *ICP's Final Submission*, D378/2, para. 140.

²⁰¹⁵ D315.2.6, RIEL Son, Transcript, 17 March 2015, EN 01493738, 11.16.05-11.20.21, p. 41, l.13-p. 42, l.2 (there were representatives from the nearby communes attending the meeting).

²⁰¹⁶ *Supra*, paras 953 to 958.

²⁰¹⁷ *ICP's Final Submission*, D378/2, para. 140.

²⁰¹⁸ D315.2.5, PHNEU Yav, Transcript, 10.11.06-10.13.00, p. 25, l. 17-21; D315.2.4, PHNEU Yav, Transcript.

²⁰¹⁹ D315.2.5, PHNEU Yav, Transcript, 10.11.06-10.13.00, p. 25, l. 17-21.

in the cited evidence of PHNEU Yav to indicate that at these meetings orders and instructions were passed down ‘from the Party and zone levels,’ as the ICP alleges.²⁰²⁰ And in any case, there is nothing in his cited evidence to indicate that any such orders and instructions were given or that they were ‘passed down,’ or if they were, when they were passed down.²⁰²¹

1039. The source of PHNEU Yav’s evidence is unclear and it is unknown whether he attended in person all of the meetings he spoke about in evidence or heard about them from unknown sources. He stated (not cited by the ICP) ‘[i]n Unit 1 we seldom attended -- or I seldom attended the meetings,’ referring to criticism meetings.²⁰²² This statement did not receive thorough follow-up questions and it is unclear whether PHNEU Yav’s evidence about meetings was referring to criticism meetings or self-criticism meetings, or as the ICP alleges, to meetings regarding CPK Policy.²⁰²³

1040. Based on PHNEU Yav’s evidence, it is impossible to know whether these meetings concerned the transfer of information from the Party centre to the communes, or whether they were, equally plausibly, meetings of individual Units, at which the commune chief discussed matters that had been conceived at the commune level. In any event, PHNEU Yav’s evidence does not speak to the role of the Sector 13 Committee or to Mr YIM Tith’s alleged capacity thereon.²⁰²⁴

1041. Furthermore, PHNEU Yav stated that the information at these meetings was ‘mainly focused on the work that we were assigned to do, for example, to work faster or to transplant rice seedlings faster.’²⁰²⁵ Even if it was accepted that PHNEU Yav’s evidence regarding information about ‘the work we were assigned to do’²⁰²⁶ was reflective of a centrally-determined CPK Policy, this does not speak to the allegations of criminal

²⁰²⁰ ICP’s Final Submission, D378/2, para. 140.

²⁰²¹ D315.2.5, PHNEU Yav, Transcript, EN 01477049, 10.11.06-10.13.00, p. 26, 1.9-17. (The meeting mainly focused on the work that we were assigned to do, for example, to work faster or to transplant rice seedlings faster. They did not talk anything about the "Yuan".)

²⁰²² D315.2.5, PHNEU Yav, Transcript, EN 01477048, 10.09.48-10.11.06, p. 25, 1.12. (In Unit 1 we seldom attended -- or I seldom attended the meetings.)

²⁰²³ ICP’s Final Submission, D378/2, para. 140.

²⁰²⁴ D315.2.4, PHNEU Yav, Transcript; D315.2.5 PHNEU Yav, Transcript.

²⁰²⁵ D315.2.5, PHNEU Yav, Transcript, EN 01477048, 10.11.06-10.13.00, p. 26, 1.7-14. (The meeting mainly focused on the work, “Great Leap Forward”, that we were assigned to do, for example, to work faster or to transplant rice seedlings faster. They did not talk anything about the "Vietnamese infiltration".)

²⁰²⁶ D315.2.5, PHNEU Yav, Transcript, EN 01477048, 10.11.06-10.13.00, p. 26, 1.7-14. (The meeting mainly focused on the work, “Great Leap Forward”, that we were assigned to do, for example, to work faster or to transplant rice seedlings faster. They did not talk anything about the "Vietnamese infiltration".)

policies implicating Mr YIM Tith. The ICP's over-simplistic description of the DK relies on a fanciful imagination about the degree of structure and hierarchy of the CPK at this time, making the sweeping claims that '[t]he policies of the CPK leadership' were implemented in Tram Kak and that 'CPK policies and orders' were carried out as intended in Tram Kak District.²⁰²⁷

KHOEM Boeun's evidence regarding Tram Kak District authority and communication

1042. KHOEM Boeun's evidence about communication at the District level is insufficient and it is unclear how she had access to significant information about the Sector level.²⁰²⁸ When asked in Case 002/02 about forced marriage allegations, KHOEM Boeun said that plans came from the District level and she did not mention the Sector-level.²⁰²⁹ Consistent with this evidence, KHOEM Boeun said that she forwarded reports to 'the upper level.'²⁰³⁰ When asked what she meant by 'upper level,' KHOEM Boeun said that she meant the District level.²⁰³¹ KHOEM Boeun did not give sufficient evidence regarding her interactions with the Sector-level and when asked about instructions issued by the upper echelon, she said 'I did not know about that.'²⁰³²

1043. The reliability of KHOEM Boeun's evidence about Sector 13 is in doubt due to the changes in her evidence prior to her testimony in Case 002/02 on 4 May 2015. In her two-day interview with the OCIJ in May 2014, she changed her evidence about several issues including her knowledge of the authority structure in the Southwest Zone. She initially stated on the first day that she was unsure what Ta Mok's position was and that he 'might have been Zone.'²⁰³³ On the second day she suddenly gave unambiguous evidence that

²⁰²⁷ ICP's Final Submission, D378/2, para. 140.

²⁰²⁸ D219/899.1.1, KHOEM Boeun, Transcript, EN 01500045, 11.24.18-11.25.48, p. 48, 1.14-p. 49, 1.12. (When there were reports from the village to the commune, the commune would forward those reports to the district.)

²⁰²⁹ D219/899.1.1, KHOEM Boeun, Transcript, EN 0150015-6, 09.48.28, p. 18, 1.25 to p. 19, 1.12.

²⁰³⁰ D219/899.1.1, KHOEM Boeun, Transcript, EN 01500014, p. 17, 1.21-24. (Q: What about security-related issues? What was your measure or action with that regard? A: Whenever I received the report about the security from either a village or militia, I would forward it up the line.)

²⁰³¹ D219/899.1.1, KHOEM Boeun, Transcript, EN 01500014-5, p. 17, 1.25-p. 18, 1.2. (Q: To which level you are referring when you said you forwarded those reports up the line? A: I forwarded them to the district level.)

²⁰³² D219/899.1.1, KHOEM Boeun, Transcript, EN 01500039, p. 42, 1.11-14. (Q: Do you recall whether at any point in time instructions were issued < still > by the upper echelon regarding arrests of former Lon Nol soldiers and officials around 1977, 1978? A: I did not know about that.)

²⁰³³ D118/242, KHOEM Boeun, WRI, A60, EN 01057686.

she was sure that 'since the origin of the Southwest Zone,' Ta Mok was in charge of the Southwest Zone.²⁰³⁴

EK (UI) Hoeun's evidence regarding extrajudicial arrests in Tram Kak District

1044. The ICP alleges that Mr YIM Tith ordered the Tram Kak District security chief to carry out extrajudicial arrests.²⁰³⁵ Although the ICP apparently makes these allegations in relation to the entirety of Tram Kak District, the only charged crime site that they could relate to is Kraing Ta Chan.²⁰³⁶ The ICP cites a single sentence of evidence in which EK (UI) Hoeun speculates that 'according to my understanding,' 'Ta Tith' and Yeay Chaem 'ordered District Security Chairman Ta Soeun to arrest people.'²⁰³⁷

1045. In reality, EK (UI) Hoeun had no reliable information about such orders. The source of his 'understanding' about 'Ta Tith' is unclear. At most, it appears EK (UI) Hoeun derived his understanding from some discarded papers he found in a rubbish bin and which he claimed to be able to understand. EK (UI) Hoeun said '[I was] searching for paper to roll cigarettes. At that time, I saw the reports in a basket in the Tram Kak District Commerce Office.'²⁰³⁸ This statement is in itself not plausible. It is highly improbable that documents explicitly stating orders issued by the Sector 13 Committee would have been left for low-level cadre such as EK (UI) Hoeun to access and read. Furthermore, the ICP ignores EK (UI) Hoeun's contradictory evidence that he 'did not see any documents about sweeping clean enemies when in Tram Kak district.'²⁰³⁹ Even if EK (UI) Hoeun did see some paper orders in a rubbish bin, the contents of the papers is unclear and it is unknown how EK (UI) Hoeun could be sure they were orders actually issued by Mr YIM Tith and IM Chaem.

1046. The source of EK (UI) Hoeun's evidence is unclear. EK (UI) Hoeun did not have access to information about the Sector 13 Committee's orders to Tramkak District. He told the investigators that he was engaged in physical labour and in supply distribution, as set out above.²⁰⁴⁰ Although he claimed to know about matters because he 'worked at the

²⁰³⁴ D118/242, KHOEM Boeun, WRI, A278, EN 01057723.

²⁰³⁵ ICP's Final Submission, D378/2, para. 35.

²⁰³⁶ ICP's Final Submission, D378/2, para. 269.

²⁰³⁷ D219/34, EK (UI) Hoeun, WRI, A33, EN 01053575.

²⁰³⁸ D219/34, EK (UI) Hoeun, WRI, A26, EN 01053574.

²⁰³⁹ D118/209, EK (UI) Hoeun, WRI, A44, EN 00983573. (Q: When you stayed in Kram Kak District, did you ever see any document regarding sweeping clean enemies? A44: No.)

²⁰⁴⁰ *Supra*, para. 1046.

district,²⁰⁴¹ he admitted that in reality he did not work as a Khmer Rouge cadre because his family was accused of having political tendencies and as a result, he was not allowed to hold any position.²⁰⁴² This throws substantial doubt on his knowledge of orders given by the Sector 13 Committee.

1047. Given his lack of access, EK (UI) Hoeun's evidence about Mr YIM Tith may be based on anonymous hearsay. Indeed, he stated in a previous interview that he heard information about Mr YIM Tith from his cousin.²⁰⁴³ He also admitted in interview that some of his earlier evidence about Khmer Rouge cadres' positions and roles had been mistaken. The investigators did not seek to confirm whether his evidence about Mr YIM Tith's orders was correct or not.²⁰⁴⁴ The investigator did not seek to further clarify the source of EK (UI) Hoeun's evidence about Mr YIM Tith.

1048. The ICP's submissions regarding Tram Kak District bear a striking resemblance to arguments made in the Closing Submissions of Case 002/02.²⁰⁴⁵ The Defence does not find it necessary to take a position on whether the verbatim recycling of work product from another ECCC case is, *per se*, prohibited or unethical. However, this practice undermines the ICP's submissions regarding Tram Kak District and Koh Andet in Case 004 and moreover, impugns the credibility of the entire narrative set forth in the Final Submissions.

1049. The use of Case 002 prosecution submissions against Mr YIM Tith in Case 004 illustrates the prejudice to Mr YIM Tith that the Defence was at pains to illustrate in its filings on

²⁰⁴¹ D118/209, EK (UI) Hoeun, WRI, A47, EN 00983573.

²⁰⁴² D118/208, EK (UI) Hoeun, WRI, A16-18, EN 00981813.

²⁰⁴³ D118/209, EK (UI) Hoeun, WRI, A139-143, EN 00983584.

²⁰⁴⁴ D118/209, EK (UI) Hoeun, WRI, EN 00983586.

²⁰⁴⁵ The Defence provides the following non-exhaustive list of identical wording from the two documents: *Closing Brief in Case 002/02*, E457/6/1/1, fn. 3000: 'the witness, Ta Mok's brother-in-law, identified Mok's daughter Khom as chief of Tram Kak District after the 1970 coup.' *ICP's Final Submission*, D378/2, fn. 374: 'the witness, Ta Mok's brother-in-law, identified Mok's daughter Khom as chief of Tram Kak District after the 1970 coup.' *Closing Brief in Case 002/02*, para. 740: '[...] was then succeeded by PECH Chim, who had previously been a district committee member and was also a distant relative of Ta Mok. PECH Chim controlled the district until February 1977 when he was transferred to the Central Zone, and his elder brother, Preab Kith (Kit), then became secretary. After Preab Kith was transferred to Kandal Province, Ta Chay led the district until he, too, was transferred. Ta Mok's younger brother-in-law, NEANG Ouch alias Ta San, then held the position until the regime fell in 1979.' *ICP's Final Submission*, D378/2, para. 139: '[...] was then succeeded by PECH Chim, who had previously been a district committee member and was also a distant relative of Ta Mok. PECH Chim controlled the district until February 1977 when he was transferred to the Central Zone, and his elder brother, Kith (Kit), replaced him as secretary. After Kith was transferred to Kandal Province, Ta Chay led the district until he, too, was transferred. Ta Mok's younger brother-in-law, NEANG Ouch alias Ta San, then held the position until the regime fell in 1979.'

cross-disclosure from Case 002 to Case 004.²⁰⁴⁶ It should be clear from the comparative analysis of the ICP's submissions regarding Tram Kak District and Koh Andet District set out below, that for the former district, the ICP borrowed almost entirely from evidence of hierarchy and structure collected in Case 002/02, whereas for the latter, the ICP did not. This is a result of the ICP preparing evidence in Case 002/02 for use in Case 004, without Mr YIM Tith's interests being adequately represented in Case 002/02.²⁰⁴⁷

Conclusion regarding Kraing Ta Chan

1050. The ICP did not present sufficient evidence that Mr YIM Tith had special intent to commit genocide against the Khmer Krom, nor that he received any orders from higher echelons, nor disseminated or implemented such orders in Tram Kak District and Kraing Ta Chan Security Centre officials concerning genocide against the Khmer Krom by killing members of the group.
1051. The ICP did not present sufficient evidence that Mr YIM Tith received any orders from higher echelons, nor that he disseminated or implemented such orders in Tram Kak District and Kraing Ta Chan Security Centre through murder, extermination, imprisonment, torture, persecution against '17 April people' and Khmer Krom through murder, extermination, imprisonment, torture, forcible transfer and confinement in inhumane conditions.
1052. The ICP did not present sufficient evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Tram Kak District and Kraing Ta Chan Security Centre at any time that is relevant to events at Kraing Ta Chan²⁰⁴⁸ and within the temporal scope of the investigation.²⁰⁴⁹
1053. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Tram Kak District and Kraing Ta Chan Security Centre officials, nor that he planned, ordered, instigated and committed charged crimes at Kraing Ta Chan.²⁰⁵⁰

²⁰⁴⁶ *Supra*, paras 502 to 504.

²⁰⁴⁷ *Supra*, paras 502 to 504.

²⁰⁴⁸ *ICP's Final Submission*, D378/2, para. 271.

²⁰⁴⁹ *Supra*, paras 436 to 439.

²⁰⁵⁰ *Notification of Amended Charges*, D350.1, p. 4, para. 9, Crime Site 2: Kraing Ta Chan security centre; p. 6, para. 9, Crime Site 2: Kraing Ta Chan security centre.

(6) Mr YIM Tith was Not Involved in Crimes in Wat Ang Srei Muny Security Centre and Prey Sokhon Execution Site in Koh Andet District of Sector 13

1054. The ICP's allegations of Mr YIM Tith's responsibility for alleged crimes at Wat Ang Srei Muny Security Centre ('Wat Ang Srei') and Prey Sokhon execution site ('Prey Sokhon') in Koh Andet District of Sector 13 are based on the ICP's assertion that Mr YIM Tith held the roles of Deputy Secretary and then Secretary of the Sector 13 Committee.²⁰⁵¹ The ICP does not allege that Mr YIM Tith played any district-level role Koh Andet District.

1055. As already argued in this Response, the ICP did not present sufficient evidence to support his claim that Mr YIM Tith was Member, Deputy Secretary and Secretary of the Sector 13 Committee 'in 1976' until the end of the DK period,²⁰⁵² nor that 'from at least 1975,' Mr YIM Tith was 'the Kirivong District Secretary or Deputy Secretary and continued to hold these positions through April to May 1978.'²⁰⁵³

1056. There is insufficient evidence of the Sector 13 Committee's oversight of Wat Ang Srei and Prey Sokhon. There is insufficient evidence that each permutation of the District Committee Koh Andet District was consistent in its working methods throughout all stages of the DK period. The composition of the Koh Andet District Committee did not remain static throughout the regime.²⁰⁵⁴

1057. The ICP nonetheless makes the sweeping claim that Mr YIM Tith 'was responsible for and had authority over events at Wat Ang Srei and Prey Sokhon throughout the DK regime.'²⁰⁵⁵ These allegations exceed the temporal scope of the investigation.²⁰⁵⁶ There is insufficient evidence that the timing of the alleged crimes at Wat Ang Srei and Prey Sokhon places them within the temporal scope of the investigation.²⁰⁵⁷ Moreover, in relation to the alleged crimes of murder, extermination, and other inhumane acts (enforced disappearance), the ICP positively asserts that many of the crimes were outside

²⁰⁵¹ ICP's Final Submission, D378/2, para. 307 ('the deputy and subsequently secretary of the Sector 13 Committee and a leading JCE member, Yim Tith was responsible for and had authority over events at Wat Ang Srei and Prey Sokhon throughout the DK regime.')

²⁰⁵² *Supra*, paras 652 to 700. ICP's Final Submission, D378/2, para. 130.

²⁰⁵³ ICP's Final Submission, D378/2, paras 10 and 137.

²⁰⁵⁴ ICP's Final Submission, D378/2, para. 141.

²⁰⁵⁵ ICP's Final Submission, D378/2, para. 307.

²⁰⁵⁶ *Supra*, paras 436 to 439.

²⁰⁵⁷ ICP's Final Submission, D378/2, paras 313 to 323.

of the temporal scope of the investigation, alleging that ‘killings spanned the duration of the DK regime.’²⁰⁵⁸

1058. As pointed-out above, the case for MR YIM Tith’s responsibility for crimes allegedly committed at Wat Ang Srei and Prey Sokhon rests on the allegation that he was Deputy Secretary and Secretary of the Sector 13 Committee.²⁰⁵⁹

1059. The ICP’s assertions are limited to the relationship between the Koh Andet District Committee and the ‘lower echelons.’ The ICP asserts that Koh Andet District militia ‘were involved in’ arresting and detaining people at Wat Ang Srei and killing people at Prey Sokhon, yet the ICP does not identify these individuals or give any particulars of their alleged actions.²⁰⁶⁰ The evidence of VAN Soeun, EK (UI) Hoeun, BUN Thoeun, and KAO Chheng concerns the communication of information between the Koh Andet District-level with the lower echelons and the district committee’s control over security matters within Koh Andet district including the alleged punishment of those who committed moral offences and alleged enemies.²⁰⁶¹ The ICP cites SOK Rum’s evidence that in 1976, a meeting in Koh Andet District discussed the plan to relocate Southwest cadres to the Northwest Zone.²⁰⁶² This evidence does not speak to any linkage with the Sector 13 Committee.

1060. The ICP claims that unnamed individuals in the militia were subordinates of Mr YIM Tith, yet the ICP does not refer to any evidence to establish that these individuals were his subordinates.²⁰⁶³ The evidence of KHOEM Boeun, IM Chaem and NEANG Ouch alias Ta San is concerned with organizational aspects of the cooperatives and communes in Koh Andet District.²⁰⁶⁴

²⁰⁵⁸ ICP’s Final Submission, D378/2, para. 317.

²⁰⁵⁹ *Supra*, paras 1017 to 1018. ICP’s Final Submission, D378/2, para. 307 (‘the deputy and subsequently secretary of the Sector 13 Committee and a leading JCE member, Yim Tith was responsible for and had authority over events at Wat Ang Srei and Prey Sokhon throughout the DK regime.’)

²⁰⁶⁰ ICP’s Final Submission, D378/2, para. 311.

²⁰⁶¹ D118/167, VAN Soeun, WRI, A54-57, 71-72, EN 00980285, 87; D118/209, EK (UI) Hoeun, WRI, A17-18, A32-38, 108, EN 00983569-72; D6.1.688, BUN Thoeun, WRI, EN 00384407-09; D118/274, BUN Thoeun, WRI, A30, 34, EN 01031975-76; D119/16, KAO Chheng, WRI, A10-11, EN 00919149-50.

²⁰⁶² D119/108, SOK Rum, WRI, A47-50, EN 00986255-56.

²⁰⁶³ ICP’s Final Submission, D378/2, para. 311.

²⁰⁶⁴ D118/242, KHOEM Boeun, WRI, A159, EN 01057704; D118/242, KHOEM Boeun, WRI, A87, 91, EN 01057690-91; D123/1/5.1b, IM Chaem, DC-Cam Statement, EN 00951795; D119/82, NEANG Ouch alias Ta San, WRI, A45-46, EN 00981145.

1061. The ICP alleges that Mr YIM Tith held ‘the power to order the Koh Andet District Security Chairperson, Ta Soeun, to make arrests’ and that these orders were implemented by lower-level cadres and reported to the upper echelons.²⁰⁶⁵ There is insufficient evidence to link Mr YIM Tith in an alleged capacity on the Sector 13 Committee with alleged crimes in Koh Andet District. This linkage cannot be imputed from evidence relating to other districts since the operation of districts within DK varied geographically and temporally and was not always in accordance with the principles and rules set out in the CPK Statute.²⁰⁶⁶

Conclusion regarding Wat Ang Srei Muny and Prey Sokhon execution site

1062. The ICP did not present sufficient evidence that Mr YIM Tith had special intent to commit genocide against the Khmer Krom, nor that he received any orders from higher echelons, nor that he disseminated or implemented such orders in Koh Andet District and to Wat Ang Srei Muny Security Centre officials concerning genocide against the Khmer Krom by killing members of the group.

1063. The ICP did not present any evidence that Mr YIM Tith received any orders from higher echelons, nor that he disseminated or implemented those orders in Koh Andet District and to Wat Ang Srei Muny officials connected with Prey Sokhon execution site through murder, extermination, imprisonment, persecution against the Khmer Krom through murder, extermination and imprisonment.

1064. The ICP did not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Koh Andet District and Wat Ang Srei Muny Security Centre or Prey Sokhon execution site at any time that is relevant to events at Wat Ang Srei Muny Security Centre and Prey Sokhon execution site²⁰⁶⁷ that is within the temporal scope of the investigation.²⁰⁶⁸

1065. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Koh Andet District and Wat Ang Srei Muny Security Centre officials, nor that he planned,

²⁰⁶⁵ ICP's Final Submission, D378/2, para. 311.

²⁰⁶⁶ ICP's Final Submission, D378/2, para. 123.

²⁰⁶⁷ ICP's Final Submission, D378/2, paras 309 to 310.

²⁰⁶⁸ *Supra*, paras 436 to 439.

ordered, instigated and committed charged crimes at Wat Ang Srei Muny Security Centre and Prey Sokhon execution site.²⁰⁶⁹

(h) Conclusion regarding Mr YIM Tith's Alleged Positions, Acts and Conducts in the Southwest Zone

1066. As set out above, the ICP routinely cites evidence of low or no probative value to make sweeping assertions about Mr YIM Tith's positions, acts and conduct across the Southwest Zone.

1067. As argued above, the evidence of Mr YIM Tith's alleged positions on the Sector 13 Committee amounts to seven unreliable witnesses who provide no direct evidence of Mr YIM Tith doing anything in any capacity on the Committee.²⁰⁷⁰ For the reasons set out above, these witnesses are unreliable, and moreover, none of them placed Mr YIM Tith on the Sector 13 Committee during the temporal scope of the investigation in Sector 13 from 1976 until the end of 1977 or early 1978.²⁰⁷¹ The Case 003 witness KHOEM Vai said that Mr YIM Tith was in some position on the Sector 13 Committee for 'one of two months' and this was 'probably in early 1976', however, as already argued above, his evidence has no probative value.²⁰⁷²

1068. The only evidence of Mr YIM Tith 'actively participating' in multiple meetings in the Southwest Zone is MOENG Vet's unclear recollection that Mr YIM Tith sat on a stage, doing and saying nothing for ten days, while members of the Sector Committee gave speeches.²⁰⁷³ This is a preposterous basis for the ICP's assertions regarding Mr YIM Tith's Sector-level contribution to the implementation of the CPK enemies policy. There is no evidence of the content of any interaction between Mr YIM Tith in any capacity on the Sector 13 Committee and any other Khmer Rouge cadre, whether his alleged superiors at the CPK centre, or his alleged subordinates at the District and Commune levels. Strikingly, Mr YIM Tith's name does not appear on a single item of documentary evidence in any capacity on the Sector 13 Committee.

²⁰⁶⁹ *Notification of Amended Charges*, D350.1, p. 4, para. 9, Crime Site 6: Wat Ang Srei Muny Security Centre and Prey Sokhon execution site; p. 6, para. 9, Crime Site 6: Wat Ang Srei Muny Security Centre and Prey Sokhon execution site.

²⁰⁷⁰ *Supra*, paras 652 to 700.

²⁰⁷¹ *Supra*, paras 652 to 700.

²⁰⁷² *Supra*, paras 698 to 700.

²⁰⁷³ *Supra*, paras 703 to 708.

1069. As argued above, the quantity of witnesses who refer to Mr YIM Tith holding a position on the Kirivong District Committee must be assessed in light of the quality of their testimony.²⁰⁷⁴ This evidence is all based at least partly on anonymous hearsay evidence and lacks any serious detail regarding the timing of Mr YIM Tith's alleged appointments and regarding Mr YIM Tith's actual roles and responsibilities.²⁰⁷⁵ It has all the hallmarks of recycled rumour, accumulated over decades of public discussion, whose original source is now unknown. The ICP methodically misinterprets, and consequently misrepresents, the Kirivong District evidence by failing to refer to testimony that conflicts with, or places uncertainty over, his case theory about the dates of alleged events. There is insufficient evidence that Mr YIM Tith held any of the alleged positions in Kirivong District during the temporal scope of the investigation in Sector 13 from 1976 until the end of 1977 or early 1978.

1070. There is insufficient evidence of the specific roles and responsibilities allegedly held by Mr YIM Tith on the Kirivong District Committee. The ICP adopts a broad-brush approach, attributing all actions of the Committee to Mr YIM Tith. This is contrary to his own assertion that DK Committees were tightly structured with distinct mandates: '[a] three-person committee consisting of a secretary, deputy secretary, and member governed each echelon in the CPK organisational hierarchy'.²⁰⁷⁶ In the ICP's view: 'the secretary was responsible for appointing and removing members of the committee, the deputy secretary was responsible for security, and the member was responsible for economics'.²⁰⁷⁷ The ICP fails to meet his own test, failing to present evidence that Mr YIM Tith exercised the roles of Secretary, Deputy Secretary, or Member by fulfilling the incumbent responsibilities to make appointments on the committee, to oversee security or to take decisions regarding economics, respectively.²⁰⁷⁸ Ultimately, the ICP is forced to make the vague and legally meaningless claim that 'the evidence as a whole paints a clear picture of Yim Tith's growing power'.²⁰⁷⁹

²⁰⁷⁴ *Supra*, paras 717 to 787.

²⁰⁷⁵ *Supra*, paras 717 to 787.

²⁰⁷⁶ *ICP's Final Submission*, D378/2, para. 117.

²⁰⁷⁷ *ICP's Final Submission*, D378/2, para. 120.

²⁰⁷⁸ *Supra*, paras 717 to 787.

²⁰⁷⁹ *ICP's Final Submission*, D378/2, para. 10.

1071. As argued above, there is simply no evidence on the Case File to suggest that Mr YIM Tith contributed to a CPK forced marriage policy in the Southwest Zone.²⁰⁸⁰ It is unclear what motivated the ICP to bring this allegation, since there is no evidence.

1072. On the basis of the foregoing analysis,²⁰⁸¹ it is clear that the ICP has misrepresented the Case File evidence to make unfounded allegations against Mr YIM Tith, and the Defence respectfully submits that there is insufficient evidence to find that Mr YIM Tith participated in the alleged common criminal plan in the Southwest Zone.

ii. Mr YIM Tith did Not Participate in the Alleged Common Criminal Plan in the Northwest Zone

1073. In accordance with the analysis of Case File 004 set out below, the Defence respectfully submits that the evidence of Mr YIM Tith's individual conduct in his alleged capacities in different positions in the Northwest Zone is insufficient to find that he participated in the alleged 'all-encompassing' common criminal plan.²⁰⁸²

(a) Mr YIM Tith did Not Hold the Alleged Positions in the Northwest Zone

1074. The ICP claims that 'it is difficult to precisely identify the dates during which Mr YIM Tith held each of his positions in the Northwest Zone.'²⁰⁸³ The Defence submits that the reason for the ICP's 'difficult[y]' to precisely identify the dates during which Mr YIM Tith held each of his positions in the Northwest Zone' is that there is a lack of evidence that Mr YIM Tith actually served in any of these positions. There is insufficient evidence on Case File 004 to make factual findings that: (1) Mr YIM Tith was the *de facto* leader in the Northwest Zone; (2) Mr YIM Tith was *de jure or de facto* Deputy Secretary of the Northwest Zone; (3) Mr YIM Tith was *de jure or de facto* Secretary of Sector 1; (4) Mr YIM Tith was *de jure or de facto* Secretary of Sector 2; (5) Mr YIM Tith was *de jure or de facto* Secretary of Sector 3; (6) Mr YIM Tith was *de jure or de facto* Secretary of Sector 4.

²⁰⁸⁰ *Supra*, paras 917 to 926.

²⁰⁸¹ *Supra*, paras 648 to 1065.

²⁰⁸² *Supra*, paras 460 to 463.

²⁰⁸³ *ICP's Final Submission*, D378/2, para. 47.

(1) Mr YIM Tith was Not the *De Facto* Leader in the Northwest Zone

1075. The ICP claims that Mr YIM Tith ‘rose to prominence as a *de facto* leader in the Northwest Zone’ in late 1976 or early 1977, prior to his alleged formal appointment.²⁰⁸⁴ In support of this claim, the ICP relies solely upon one witness, SAO Chobb. No other supporting evidence exists.

1076. The ICP’s claim is unfounded. Primarily, the Introductory and Supplementary Submissions do not place Mr YIM Tith in the Northwest Zone until ‘mid-1977.’²⁰⁸⁵ SAO Chobb’s evidence covers events in the Northwest Zone before mid-1977.²⁰⁸⁶ Furthermore, SAO Chobb’s evidence has no probative value.

1077. SAO Chobb’s evidence has been provided through seven WRIs, the first of which was on 17 May 2016²⁰⁸⁷ when SAO Chobb was 84 years old,²⁰⁸⁸ and a further six from 31 March 2017 until 12 June 2017.²⁰⁸⁹ Below, the WRIs are analysed chronologically. The changes in SAO Chobb’s evidence are revealing.

First Interview

1078. SAO Chobb was first interviewed on 17 May 2016.²⁰⁹⁰ In this WRI he stated that he joined the Khmer Rouge movement in 1972 as a soldier,²⁰⁹¹ and remained a soldier after 17 April 1975.²⁰⁹² He was living in Khveng Village, Koas Krala District (Sector 1), and he was a member of Unit 22, Division 3, Battalion 2.²⁰⁹³ The Commander of his Division was An, who died in 1976²⁰⁹⁴ (SAO Chobb was not asked who replaced An). SAO Chobb stated that he did not have any rank, but he had a duty to supervise soldiers which included leading soldiers to provide security protection, to work on the paddy rice field, and to do farming.²⁰⁹⁵ His unit was under the command of the Koas Krala District.²⁰⁹⁶

²⁰⁸⁴ ICP’s Final Submission, D378/2, paras 48, 97 to 100, and 148.

²⁰⁸⁵ ICP’s Third Introductory Submission, D1, para. 94.

²⁰⁸⁶ D219/983, SAO Chobb, WRI, A29-A31, EN 01519560-1, A59, EN 01519565.

²⁰⁸⁷ D219/763, SAO Chobb, WRI.

²⁰⁸⁸ D219/763, SAO Chobb, WRI, EN 01337016.

²⁰⁸⁹ D219/956, D219/980, D219/981, D219/982, D219/983 and D219/984.

²⁰⁹⁰ D219/763, SAO Chobb, WRI.

²⁰⁹¹ D219/763, SAO Chobb, WRI, A5-6, EN 01337018.

²⁰⁹² D219/763, SAO Chobb, WRI, A7-8, EN 01337018.

²⁰⁹³ D219/763, SAO Chobb, WRI, A7-A17, EN 01337018-9.

²⁰⁹⁴ D219/763, SAO Chobb, WRI, A18-A20, EN 01337019-20.

²⁰⁹⁵ D219/763, SAO Chobb, WRI, A15-A16, EN 01337019.

²⁰⁹⁶ D219/763, SAO Chobb, WRI, A27-A28, EN 01337020-1.

1079. SAO Chobb remembers that Southwest Zone cadre came to Koas Krala District in 1977, 'perhaps months of A-sat' (August).²⁰⁹⁷ According to SAO Chobb, at first, the Southwest Zone cadre did not conduct any activities, but the 'killing started in '78.'²⁰⁹⁸ SAO Chobb does not know who took over Koas Krala District after the arrival of Southwest Zone cadres; he remembers only Yom, who was a low-ranking cadre, who was a soldier or a unit chief.²⁰⁹⁹ After the arrival of Southwest Zone cadres, SAO Chobb was no longer a soldier, he was assigned to do farming.²¹⁰⁰ He stated that he did not witness any killings because when the 'killing started' in 1978, he fled to the jungle.²¹⁰¹

1080. SAO Chobb remembers that until 1978, the members of Koas Krala District committee were Leng, Chhoeung and Yeun.²¹⁰² He also remembers that the chief of Koas Krala cooperative in 1975-76 was Yan, and the supervisor of the cooperative was Yeun.²¹⁰³

1081. SAO Chobb stated that he does not know who the secretary of the Northwest Zone was before the Southwest Zone cadre arrived, but he remembers Ta Vanh, who was 'the region chief.'²¹⁰⁴ He does not know what happened to Ta Vanh in 1977 and 1978 because he left the army after the arrival of Southwest Zone cadre in the middle of 1977²¹⁰⁵ and then fled to the jungle in 1978.²¹⁰⁶

1082. SAO Chobb also gave evidence about Koas Krala District prison. He stated that the prison was located in Porpel Village, it was under district authority, and that Phen, who was appointed by the military, was supervising it.²¹⁰⁷ He stated that this prison was created to imprison the Northwest Zone cadres who committed mistakes, but when Southwest Zone cadres 'took over' in 1978, the prison no longer existed.²¹⁰⁸

1083. SAO Chobb also gave evidence about his own involvement in the operation of Koas Krala District prison. He explained that in 1976 he supervised the soldiers of one platoon, and

²⁰⁹⁷ D219/763, SAO Chobb, WRI, A34, EN 01337021.

²⁰⁹⁸ D219/763, SAO Chobb, WRI, A27-A28, EN 01337020-1; *See also*: A64, EN 01337026 and A79-80, EN 01337028.

²⁰⁹⁹ D219/763, SAO Chobb, WRI, A35-A39, EN 01337022.

²¹⁰⁰ D219/763, SAO Chobb, WRI, A35-A38, EN 01337022.

²¹⁰¹ D219/763, SAO Chobb, WRI, A40, A42, EN 01337022; A44-A48, EN 01337023; A107, EN 01337031.

²¹⁰² D219/763, SAO Chobb, WRI, A29-A30, EN 01337021.

²¹⁰³ D219/763, SAO Chobb, WRI, A23-A35, EN 01337020-2.

²¹⁰⁴ D219/763, SAO Chobb, WRI, A42-44, A68, EN 01337022-3, 01337026.

²¹⁰⁵ D219/763, SAO Chobb, WRI, A34-A38, EN 01337021-2.

²¹⁰⁶ D219/763, SAO Chobb, WRI, A44-45, EN 01337023.

²¹⁰⁷ D219/763, SAO Chobb, WRI, A72-76, EN 01337027.

²¹⁰⁸ D219/763, SAO Chobb, WRI, A77-80, EN 01337027-8.

his unit was stationed near the prison.²¹⁰⁹ He stated that he visited the prison at least five times in 1976 because he wanted to know why people were imprisoned and what their mistakes were which led to their imprisonment. He explained that, considering that he was platoon supervisor, he wanted to get some knowledge about wrongdoings or the reasons why people would be sent to the prison.²¹¹⁰

1084. Explaining the specific location of this prison, SAO Chobb stated that there were two places at Porpel and at the paddy rice field, and that ‘the people were brought in there to work hard’ on the rice fields at Rek An-trea.²¹¹¹ He also said that some parts of the prison had walls and other parts did not, that prisoners’ legs were shackled,’ a ‘long building was made,’ and that ‘small rooms without any walls were also created.’²¹¹² SAO Chobb stated that killings in his area (Koas Krala District²¹¹³) connected to this prison were continuous from 1975 until 1976 and that some prisoners were killed in Koas Krala prison.²¹¹⁴

1085. In relation to the name ‘Ta Tit,’ the investigator asked the following question: ‘When Vietnamese took control of this region, did you ever hear about ‘Ta Tit,’ Ta Pet and Ta Teav?’ SAO Chobb replied that he heard about ‘Ta Tit,’ Ta Pet and Ta Sou who were cadres, ‘supervised [the] lathing unit,’²¹¹⁵ and that they supervised his area until Southwest Zone cadre arrived in 1977.²¹¹⁶ He also said that ‘Ta Tit’ was a Northwest Zone cadre²¹¹⁷ and that ‘Ta Tit’ supervised the dam construction and repair of the riverbank.²¹¹⁸ He described ‘Ta Tit’ as a person of medium build, 1.60 metres tall, with short hair and dark skin.²¹¹⁹

1086. SAO Chobb stated that because he and ‘Ta Tit’ worked in different places, he only saw ‘Ta Tit’ occasionally, usually at meetings held at Kanghat Dam and in Battambang.²¹²⁰ These meetings were presided over by Ta Vanh.²¹²¹ He cannot remember what comments

²¹⁰⁹ D219/763, SAO Chobb, WRI, A87, EN 01337029; A95-96, EN 01337030.

²¹¹⁰ D219/763, SAO Chobb, WRI, A82-96, EN 01337028-30.

²¹¹¹ D219/763, SAO Chobb, WRI, A154-155, EN 01337037.

²¹¹² D219/763, SAO Chobb, WRI, A156-157, EN 01337037-8.

²¹¹³ D219/763, SAO Chobb, WRI, A7-A17, EN 01337018-9.

²¹¹⁴ D219/763, SAO Chobb, WRI, A102-103, EN 01337031.

²¹¹⁵ D219/763, SAO Chobb, WRI, A49-A52, EN 01337023-4.

²¹¹⁶ D219/763, SAO Chobb, WRI, A59-A64, EN 01337025-6.

²¹¹⁷ D219/763, SAO Chobb, WRI, A53-A54, EN 01337024.

²¹¹⁸ D219/763, SAO Chobb, WRI, A81, EN 01337028.

²¹¹⁹ D219/763, SAO Chobb, WRI, A55-A58, EN 01337024-5.

²¹²⁰ D219/763, SAO Chobb, WRI, A65-A68, EN 01337026.

²¹²¹ D219/763, SAO Chobb, WRI, A65-A68, EN 01337026.

‘Ta Tit’ made at the meetings, but he said that it was something ‘about reports.’²¹²² He also said that he saw ‘Ta Tit’ at Kanghat Dam in 1976 and 1977 when it was being built, and that ‘Ta Tit’ supervised construction.²¹²³

1087.SAO Chobb explained that meetings held at Kanghat Dam and in Battambang were organized for the armed forces, cooperatives, districts and regions.²¹²⁴ Meetings in Kanghat Dam were held once a month or once every three or four months,²¹²⁵ and were organized only for soldiers²¹²⁶ to exchange experiences.²¹²⁷

1088.When SAO Chobb mentioned that, in 1977, he was present at two meetings held in Battambang at a former secondary school,²¹²⁸ the investigator asked him whether ‘Ta Tit’ was at these meetings.²¹²⁹ When SAO Chobb answered positively, for the first time during the interview, the investigator mentioned Ta Mok’s name and asked SAO Chobb whether Ta Mok was also present.²¹³⁰ SAO Chobb again answered positively.²¹³¹ The investigator did not clarify with SAO Chobb whether he knew who Ta Mok was, and how he knew him.

1089.SAO Chobb also added that ‘Ta Tit’ did not need to introduce himself at the meetings because everyone in this area knew him,²¹³² and that Ta Mok and ‘Ta Tit’ did not work together because ‘they had their own work.’²¹³³ He said that Ta Mok and ‘Ta Tit’ would meet each other at the meetings, but not after the meetings.²¹³⁴

1090.SAO Chobb explained that after those meetings, all participants, including Ta Chet, Ta Vanh, Ta Mok, ‘Ta Tit’ and himself, went together to visit every cooperative and factory which was under Ta Chet’s supervision in order to ‘get experience’ from those places.²¹³⁵

²¹²² D219/763, SAO Chobb, WRI, A69-A70, EN 01337026.

²¹²³ D219/763, SAO Chobb, WRI, A71, EN 01337026.

²¹²⁴ D219/763, SAO Chobb, WRI, A117-A120, EN 01337032-33; A126-128, EN 01337033-34.

²¹²⁵ D219/763, SAO Chobb, WRI, A122-A123, EN 01337033.

²¹²⁶ D219/763, SAO Chobb, WRI, A124-A125, EN 01337033.

²¹²⁷ D219/763, SAO Chobb, WRI, A134, EN 01337034.

²¹²⁸ D219/763, SAO Chobb, WRI, A126-A128, EN 01337033-4.

²¹²⁹ D219/763, SAO Chobb, WRI, A126-A131, EN 01337033-4.

²¹³⁰ D219/763, SAO Chobb, WRI, A126-A131, EN 01337033-4.

²¹³¹ D219/763, SAO Chobb, WRI, A130, EN 01337034.

²¹³² D219/763, SAO Chobb, WRI, A134, EN 01337034.

²¹³³ D219/763, SAO Chobb, WRI, A137, EN 01337035.

²¹³⁴ D219/763, SAO Chobb, WRI, A137, EN 01337035.

²¹³⁵ D219/763, SAO Chobb, WRI, A136-141, EN 01337035.

He stated that sometimes, after the meeting, they also visited the lathing unit (supervised by 'Ta Tit'²¹³⁶) Kanghat Dam and Tuol Mtes cooperative.²¹³⁷

1091. In response to the investigator's specific question '[a]s far as you know, did Ta Tit get involved in the killings?' (referring to Koas Krala prison, as described by the witness²¹³⁸), SAO Chobb answered: 'Yes, more or less he did.'²¹³⁹ He explained that 'Ta Tit' told him (when they attended one of the meetings at Kanghat Dam in 1977) that he commanded and assigned soldiers to conduct investigations into mistakes made by his subordinates.²¹⁴⁰ SAO Chobb also explained that 'Ta Tit' was the chief (he supervised the lathing unit²¹⁴¹) and that, because of SAO Chobb's own knowledge of the 'established practice,' he speculated that 'Ta Tit' facilitated the killers.²¹⁴² SAO Chobb, himself being a platoon commander, knew the 'process' through his own 'practice' and he explained: 'Angkar had various units. This person would be assigned to investigate that person.'²¹⁴³ SAO Chobb then speculated, based on his knowledge of the practice, that if a mistake was found, a report was made.²¹⁴⁴ SAO Chobb continued with his speculation: 'If the mistake was serious enough to be killed, then permission to kill was issued.'²¹⁴⁵ SAO Chobb did not say in his WRI, as led by the investigator's question Q/A114, that 'Ta Tit' told him that he assigned the killers to execute people.²¹⁴⁶

Second Interview: Day 1

1092. The second interview with SAO Chobb was conducted 10 months after the first interview and lasted for 5 days.²¹⁴⁷

1093. On the first day of the interview (D219/956 on 21 May 2017), during the introductory remarks (page 2 of the WRI), the investigator informed SAO Chobb that the current charged person was Mr YIM Tith, and that the investigator had an intention to identify the charged person because the name, Tith, is confusing. Immediately thereafter, the

²¹³⁶ D219/763, SAO Chobb, WRI, A136-145, EN 01337035-6.

²¹³⁷ D219/763, SAO Chobb, WRI, A136-149, EN 01337035-6.

²¹³⁸ *Supra*, paras 1080 to 1084.

²¹³⁹ D219/763, SAO Chobb, WRI, A110, EN 01337032.

²¹⁴⁰ D219/763, SAO Chobb, WRI, A114-A121, EN 01337032-3.

²¹⁴¹ D219/763, SAO Chobb, WRI, A49-A52, EN 01337023-4.

²¹⁴² D219/763, SAO Chobb, WRI, A111-A121, EN 01337032-3.

²¹⁴³ D219/763, SAO Chobb, WRI, A113, EN 01337032.

²¹⁴⁴ D219/763, SAO Chobb, WRI, A121, EN 01337033.

²¹⁴⁵ D219/763, SAO Chobb, WRI, A111-A121, EN 01337032-3.

²¹⁴⁶ D219/763, SAO Chobb, WRI, A110-A114, EN 01337032.

²¹⁴⁷ D219/956, D219/980, D219/981, D219/982, D219/983, SAO Chobb, WRIs.

investigator identified the charged person himself, feeding the witness with the following details: Mr YIM Tith was from Trapeang Thum Village, Tram Kak District, Takeo Province, Sector 13 in the Southwest Zone and Ta Tith was Ta Mok's younger brother in law. Again, immediately thereafter, the investigator asked the witness 'is this Ta Tith and the one whose name was Ta Tith that you mentioned the same person?' SAO Chobb's answer is put in brackets: '(Yes, Ta Tith that I mentioned in the previous interview is the same person).'²¹⁴⁸

1094. But at the very beginning of questioning, at Question 2, SAO Chobb said that there are two people with the name Ta Tith.²¹⁴⁹ The investigator noted after this answer that they will 'clarify further "on Ta Tith" during the interview.'²¹⁵⁰

1095. At Question 3, the investigator then explained to SAO Chobb that 'our office is collecting evidence independently for both inculpatory and exculpatory purposes' and that the investigation is focused on the factual events that happened in this area under the Southwest Zone cadres, after they replaced the Northwest Zone cadres. The investigator continues at Question 3: 'Khmer Krom were persecuted. Forced marriages were practiced.'²¹⁵¹ After feeding the witness with inculpatory conclusions, the investigator continued at Question 3 by misinforming the witness, by telling him: 'We are not forcing you to speak with us, but we request that you provide information to help the court about what you know and about what happened. Being a witness also means that you were a victim in the [Democratic Kampuchea] regime. Obviously, you are a victim and you would have known or witnessed what happened.'²¹⁵²

1096. There is a strong likelihood that such feeding of information contaminated SAO Chobb's evidence. For example, in his first WRI, SAO Chobb stated that 'Ta Tit' was a company commander.²¹⁵³ By the time of his sixth interview, SAO Chobb stated that 'Ta Tit' was 'upper echelon.'²¹⁵⁴ SAO Chobb was such an unreliable witness that the investigators' notes record their concerns about his evidence. For example, in his second WRI, the investigator's note reads: 'At this time, we are still not clear, and we have not obtained

²¹⁴⁸ D219/956, SAO Chobb, WRI, EN 01456263.

²¹⁴⁹ D219/956, SAO Chobb, WRI, A2, EN 01456264.

²¹⁵⁰ D219/956, SAO Chobb, WRI, EN 01456264.

²¹⁵¹ D219/956, SAO Chobb, WRI, Q/A3, EN 01456264.

²¹⁵² D219/956, SAO Chobb, WRI, Q/A6, EN 01456264

²¹⁵³ D219/956 Sao Chobb WRI, A17, 27, EN 01456265, 66.

²¹⁵⁴ D219/983 Sao Chobb WRI, A13, EN 01519557.

satisfying information about the identity of YIM Tith yet.²¹⁵⁵ In his second WRI, SAO Chobb stated that he was confused.²¹⁵⁶

1097. Regardless of the investigator's statement that he is interested in events which happened after the Southwest Zone cadres came to the Northwest Zone, SAO Chobb was very clear that all the events on which he can provide evidence happened before the Southwest Zone cadres arrived in the Northwest Zone.²¹⁵⁷

1098. The investigator tried to clarify with SAO Chobb the identity of the two people with the name Tith. SAO Chobb stated that one Ta Tith had no role and was a soldier working with him. He guessed that this Ta Tith was working in the platoon and was assigned to do various tasks. The second Ta Tith 'is related to Ta Mok'²¹⁵⁸ and is the man whom he often worked with and went places with, but only before Southwest Zone cadres arrived.²¹⁵⁹ SAO Chobb was not asked, nor did he explain what work he was performing with 'Ta Tith who is related to Ta Mok' and what places they went together.

1099. SAO Chobb then proceeded to speak about 'Ta Tith who was with Ta Mok' and he said that he first met him in 1976 before he was wounded.²¹⁶⁰ Considering that SAO Chobb was wounded in the middle of the 1976,²¹⁶¹ it is fair to conclude that he met this 'Ta Tith' in the first half of 1976. SAO Chobb also said that he would meet 'Ta Tith' at study sessions in Sector 1 (in Battambang and at the Kanghat Dam worksite)²¹⁶² after he returned from Battambang hospital where he had spent three months recovering from his injury.²¹⁶³

1100. SAO Chobb stated that, at that time, in 1976, 'Ta Tith' was the commander of a company, but he did not know where the company was stationed.²¹⁶⁴ SAO Chobb knew, however, that 'Ta Tith' worked in the Northwest Zone from 1976 to 1979,²¹⁶⁵ and that 'Ta Tith's'

²¹⁵⁵ D219/956 Sao Chobb WRI, A22, EN 01456266.

²¹⁵⁶ D219/956 Sao Chobb WRI, A23, EN 01456266.

²¹⁵⁷ D219/956, SAO Chobb, WRI, A64, EN 01456270; A35, EN 01456267.

²¹⁵⁸ Information fed to the witness by the investigator. See *supra*, para. 1093.

²¹⁵⁹ D219/956, SAO Chobb, WRI, A9-A11, EN 01456265.

²¹⁶⁰ D219/956, SAO Chobb, WRI, 'A13: I first met him in 1976. After I was wounded I was sent away from him.' 'A15: At the time I was wounded I knew Ta Tith.' EN 01456265.

²¹⁶¹ D219/956, SAO Chobb, WRI, A55-A57, EN 01456269.

²¹⁶² D219/956, SAO Chobb, WRI, A14, EN 01456265.

²¹⁶³ D219/956, SAO Chobb, WRI, A15, EN 01456265; A55-A57, EN 01456269.

²¹⁶⁴ D219/956, SAO Chobb, WRI, A17-18, EN 01456265.

²¹⁶⁵ D219/956, SAO Chobb, WRI, A20-A21, EN 01456265-6; A27, EN 01456266.

company was under the supervision of the Northwest Zone.²¹⁶⁶ After 1979, SAO Chobb and 'Ta Tith' parted ways.²¹⁶⁷ SAO Chobb said that he knew that Ta Tith was related to Ta Mok because Ta Tith 'accompanied Ta Mok.'²¹⁶⁸ No further explanation was given by SAO Chobb, nor was he asked to give one. SAO Chobb stated first that Ta Mok was the Sector Committee,²¹⁶⁹ but later he admitted that he was not clear who Ta Mok was because he had only heard his name.²¹⁷⁰ SAO Chobb was not asked, nor did he offer an explanation when and from whom he heard the name Ta Mok. Furthermore, SAO Chobb stated that Ta Mok was a military person, commander of the division.²¹⁷¹ No other explanation was given by SAO Chobb as to who Ta Mok was and how he actually knew that Ta Mok and 'Ta Tith' were related, and whether he knew this before the investigator told him about Ta Mok and Ta Tith's relationship in his introductory remarks.²¹⁷² It is fair to conclude that his knowledge about Ta Mok and 'Ta Tith who is related to Ta Mok' was tainted, considering the information SAO Chobb provided in his first WRI.²¹⁷³

1101. Contrary to his previous evidence that he had only heard Ta Mok's name,²¹⁷⁴ SAO Chobb now stated that he first saw Ta Mok in 1976, after he left the hospital, at the study session at Kanghat Dam worksite, where cadres from all sectors went to study.²¹⁷⁵ SAO Chobb explained that he was chief of the platoon that was under the command of the district,²¹⁷⁶ and Committee members of Sector 1 invited him and 'Ta Tith' to join this study session,²¹⁷⁷ together with his soldiers.²¹⁷⁸ The meeting was about cooperative work in various communes and districts 'to see how much progress the communes and districts had made.'²¹⁷⁹ SAO Chobb stated that he went to this meeting together with 'Ta Tith,' without specifying whether he was referring to Ta Tith 'who is related to Ta Mok,' or Ta Tith, the soldier, and that the 'trainers' at this meeting were Ta Vanh and 'Ta Tith'²¹⁸⁰ (who, at the time, was commander of a company under the supervision of the Northwest

²¹⁶⁶ D219/956, SAO Chobb, WRI, A27, EN 01456266.

²¹⁶⁷ D219/956, SAO Chobb, WRI, A20-A21, EN 01456265-6; A27, EN 01456266.

²¹⁶⁸ D219/956, SAO Chobb, WRI, A15, EN 01456265; A36, EN 01456267.

²¹⁶⁹ D219/956, SAO Chobb, WRI, A37-38, EN 01456267.

²¹⁷⁰ D219/956, SAO Chobb, WRI, A37, EN 01456267.

²¹⁷¹ D219/956, SAO Chobb, WRI, A18, EN 01456265.

²¹⁷² D219/956, SAO Chobb, WRI, EN 01456263.

²¹⁷³ *Supra*, paras 1078 to 1091.

²¹⁷⁴ D219/956, SAO Chobb, WRI, A37, EN 01456267.

²¹⁷⁵ D219/956, SAO Chobb, WRI, A22, EN 01456266; A62 EN 01456270.

²¹⁷⁶ D219/956, SAO Chobb, WRI, A39, EN 01456267; A59, EN 01456269.

²¹⁷⁷ D219/956, SAO Chobb, WRI, A28, EN 01456266.

²¹⁷⁸ D219/956, SAO Chobb, WRI, A62, EN 01456270.

²¹⁷⁹ D219/956, SAO Chobb, WRI, A62, EN 01456270.

²¹⁸⁰ D219/956, SAO Chobb, WRI, A24-A25, EN 01456266.

Zone²¹⁸¹). SAO Chobb stated that he did not remember the names of other committee members, but he said that Ta Vanh was a Secretary of Sector 1.²¹⁸² After the study session all of the participants went to visit factories and other places.²¹⁸³

1102. SAO Chobb stated that, at the time of this study session, the Southwest Zone cadres had not yet arrived in the Northwest Zone.²¹⁸⁴

1103. SAO Chobb also stated that, after Southwest Zone cadres arrived in 1978, 'Ta Tith who is related to Ta Mok' and him were separated since they fled to the forest. He said that he saw Ta Mok and 'Ta Tith' briefly in 1979 in Poipet while they were on the run, and then again, they separated.²¹⁸⁵

1104. By the end of this interview (Q/A64), the investigator was unable to obtain clear information to identify either of the two individuals with name 'Ta Tith' (Ta Tith 'who is related to Ta Mok,' and Ta Tith, the soldier).

Second Interview: Day 2

1105. Hence, at the start of the second day of this interview (D219/980 on 26 April 2017), the investigator starts again with an introduction, as on the previous day,²¹⁸⁶ again feeding SAO Chobb with information about Mr YIM Tith, namely that the Ta Tith he is interested in is the Ta Tith who is the younger brother-in-law of Ta Mok.²¹⁸⁷ The Investigator starts the interview by stating that he has not yet understood 'things clearly' and that they need SAO Chobb to explain events further.²¹⁸⁸

1106. This interview was very short, and the investigator asked leading questions throughout the interview. At the end of the interview, SAO Chobb complained about this style of questioning: 'When you ask me questions in fragment like that it was difficult for me to

²¹⁸¹ D219/956, SAO Chobb, WRI, A27, EN 01456266.

²¹⁸² D219/956, SAO Chobb, WRI, A28-A30, EN 01456266.

²¹⁸³ D219/956, SAO Chobb, WRI, A25, EN 01456266.

²¹⁸⁴ D219/956, SAO Chobb, WRI, A25, EN 01456266.

²¹⁸⁵ D219/956, SAO Chobb, WRI, A11, EN 01456265; A64 EN 01456270.

²¹⁸⁶ D219/956, SAO Chobb, WRI, EN 01456263.

²¹⁸⁷ D219/980, SAO Chobb, WRI, EN 01517542.

²¹⁸⁸ D219/980, SAO Chobb, WRI, Q/A7, EN 01517543.

remember. But if you ask and let me tell the whole story at one time it is easy for me to answer.’²¹⁸⁹

1107. The investigator asked SAO Chobb to clarify details about the meeting or study session at Kanghat Dam where the witness allegedly saw Ta Mok for the first time.²¹⁹⁰ SAO Chobb clarified his statements from the previous interviews and said that he was invited to a study session at Kanghat Dam after he was released from hospital (in 1976, probably in October²¹⁹¹).²¹⁹² At the time, he was in charge of the platoon under the control of Koas Krala District,²¹⁹³ and that the District sent him to this meeting or study session that was organized only for the chiefs, and not for ordinary soldiers.²¹⁹⁴ At the meeting or study session, he met all of the participants, including Ta Mok and ‘Ta Tith.’ He stated that the meeting or study session took place when Kanghat Dam was under construction²¹⁹⁵ and that after the meeting or study session, all the participants went together to Battambang town to visit an old junior high school and different factories.²¹⁹⁶

1108. No clarification about the identity of ‘Ta Tith, the soldier,’ or ‘Ta Tith who was related to Ta Mok,’ nor regarding Ta Mok, was given by SAO Chobb nor sought by the investigator.

Second Interview: Day 3

1109. The third day of the second interview (D219/981 on 27 April 2017) did not start with an introduction setting out the intent to clarify the identity of ‘Ta Tith, the soldier’ and ‘Ta Tith who was related to Ta Mok,’ or the identity of Ta Mok. By the time of this interview, it was obvious that the investigator had decided that whenever SAO Chobb mentioned ‘Ta Tith,’ he was going to assume that SAO Chobb was talking about Mr YIM Tith. It is clear that, through this approach, the investigator was solely seeking inculpatory evidence, rather than ‘collecting evidence independently for both inculpatory and exculpatory purposes’ as previously claimed.²¹⁹⁷

²¹⁸⁹ D219/980, SAO Chobb, WRI, Q/27, EN 01517545.

²¹⁹⁰ D219/980, SAO Chobb, WRI, A8-27, EN 01517544-5.

²¹⁹¹ *Supra*, para. 1101.

²¹⁹² D219/980, SAO Chobb, WRI, A8, EN 01517544.

²¹⁹³ D219/980, SAO Chobb, WRI, A10, EN 01517544.

²¹⁹⁴ D219/980, SAO Chobb, WRI, A20-21, EN 01517545.

²¹⁹⁵ D219/980, SAO Chobb, WRI, A22-23, EN 01517545.

²¹⁹⁶ D219/980, SAO Chobb, WRI, A23-26, EN 01517545.

²¹⁹⁷ D219/956, SAO Chobb, WRI, Q/A3, EN 01456264.

1110. Despite the investigator's approach from this interview onwards, SAO Chobb stayed consistent in this and in his subsequent two interviews, that everything he is talking about happened before Southwest Zone cadres arrived in the Northwest Zone in the middle of 1977,²¹⁹⁸ that 'Ta Tith' and Ta Mok were not from the Southwest Zone,²¹⁹⁹ that they (SAO Chobb, 'Ta Tith' and Ta Mok) went their separate ways after the Southwest group arrived,²²⁰⁰ and that he did not see 'Ta Tith' and Ta Mok after the meeting or study session allegedly held at the Kanghat Dam at the end of 1976, and after the arrival of the Southwest Zone.²²⁰¹

1111. In this interview, questions were concentrated exclusively on a three-day study session at Kanghat Dam which was allegedly held in the second part of 1976,²²⁰² at a time before the Kanghat Dam collapsed and before the arrival of Southwest Zone cadres.²²⁰³ According to SAO Chobb, this was the first time he met Ta Mok and 'Ta Tith.'²²⁰⁴

1112. The three-day study session was chaired by Ta Vanh who was on the Sector 1 Committee.²²⁰⁵ Attendees were cadres from Sector 1,²²⁰⁶ and as stated by SAO Chobb, 'they all came from Ta Mok's area.'²²⁰⁷ Ta Mok and 'Ta Tith' introduced themselves, and that is how SAO Chobb recalled that he learned their names.²²⁰⁸ SAO Chobb did not know 'Ta Tith's' and Ta Mok's positions,²²⁰⁹ but repeated that Ta Mok and 'Ta Tith' were not from Southwest Zone, and that the Southwest Zone group had not arrived at the time when this meeting was held.²²¹⁰ SAO Chobb concluded that Ta Mok had a senior position to 'Ta Tith' and he assumed that they came from the same unit from the fact that he saw them walk together.²²¹¹

²¹⁹⁸ D219/981, SAO Chobb, WRI, A15, A18-A21, EN 01502686; D219/983, A30-31, EN 01519561; A36-A39, EN 01519562; A59-A61, EN 01519565-6.

²¹⁹⁹ D219/981, SAO Chobb, WRI, A18-A21, EN 01502686.

²²⁰⁰ D219/981, SAO Chobb, WRI, A21, EN 01502686.

²²⁰¹ D219/981, SAO Chobb, WRI, A21, EN 01502686; D219/982, A23-A24, EN 01517551.

²²⁰² D219/981, SAO Chobb, WRI, A11-A13, EN 01502686.

²²⁰³ D219/981, SAO Chobb, WRI, A12-A15, EN 01502686.

²²⁰⁴ D219/981, SAO Chobb, WRI, A3-A4, EN 01502685.

²²⁰⁵ D219/981, SAO Chobb, WRI, A17-A19, EN 01502686.

²²⁰⁶ D219/981, SAO Chobb, WRI, A5, EN 01502685; A17-A19, EN 01502686.

²²⁰⁷ D219/981, SAO Chobb, WRI, A5, EN 01502685.

²²⁰⁸ D219/981, SAO Chobb, WRI, A16, EN 01502686.

²²⁰⁹ D219/981, SAO Chobb, WRI, A5, EN 01502685.

²²¹⁰ D219/981, SAO Chobb, WRI, A22-A23, EN 01502686-7.

²²¹¹ D219/981, SAO Chobb, WRI, A27-A28, EN 01502687; A35, EN 01502687.

1113. SAO Chobb explained that the meeting was organized to exchange experiences, and to discuss the level of progress, shortcomings and needs.²²¹² Participants at this meeting visited Kanghat Dam before the first day session started.²²¹³ SAO Chobb stated that most presentations during the three-day study session were made by the Secretary of Sector 1, Ta Vanh,²²¹⁴ who was also overall in charge of Kanghat Dam.²²¹⁵ Ta Mok and ‘Ta Tith’ shared their experiences, achievements and production numbers from the units and districts.²²¹⁶ At the end of the third day, around 30 participants, including SAO Chobb, Ta Vanh, Ta Chet, Ta Mok and ‘Ta Tith,’ were taken to visit different factories, construction sites, hospital and a school in Battambang.²²¹⁷

Second Interview: Day 4

1114. An analysis the WRI for the fourth day of SAO Chobb’s interview (D219/982 on 28 April 2017) demonstrates that the investigator was presuming that the ‘Ta Tit’ that SAO Chobb spoke about in his first WRI (D219/763) was the same person he was talking about in his later interviews. The investigator ignores SAO Chobb’s evidence from his second WRI that he knew two people with the name ‘Tit.’²²¹⁸ As a result of this presumption, the investigator completely confused SAO Chobb.

1115. At the very beginning of the interview SAO Chobb repeated once more that after the three-day study session held in the middle of 1976, where he first saw and met ‘Ta Tith’ and Ta Mok, he did not see them again.²²¹⁹

1116. After that, the investigator fundamentally misstated the previous evidence of SAO Chobb:

- The investigator confronted the witness with his first statement (D219/763) claiming that in this statement SAO Chobb said that ‘Ta Tit’ was a leader who ordered other people to carry out the killing.²²²⁰ This is a misstatement of the evidence. SAO Chobb explained that ‘Ta Tit’ was the chief of a unit and that,

²²¹² D219/981, SAO Chobb, WRI, A5, EN 01502685.

²²¹³ D219/981, SAO Chobb, WRI, A41-A43, EN 01502688; A45-A61, EN 01502688-9.

²²¹⁴ D219/981, SAO Chobb, WRI, A29-A30, A35, EN 01502687.

²²¹⁵ D219/981, SAO Chobb, WRI, A48, EN 01502688.

²²¹⁶ D219/981, SAO Chobb, WRI, A26, EN 01502687.

²²¹⁷ D219/981, SAO Chobb, WRI, A6-A8, EN 01502685, A35-A40, EN 01502687-8.

²²¹⁸ *Supra*, para. 1094.

²²¹⁹ D219/982, SAO Chobb, WRI, A23-A24, EN 01517551.

²²²⁰ D219/982, SAO Chobb, WRI, Q/A25 EN 01517551-2.

because of SAO Chobb's knowledge of the established practice, he speculated that 'Ta Tit' facilitated the killers.²²²¹

- The investigator claimed that SAO Chobb said, 'yesterday and the day before' that 'Ta Tit' was involved in killing 'just a little' and that he could be involved in assigning other people to carry out the killings. This is a complete fabrication of SAO Chobb's evidence as it was not recorded in interviews D219/956, D219/980 or D219/981.

1117. Obviously confused by being asked questions on evidence which he did not provide, and pressed by the investigator using a style of questioning that SAO Chobb had previously complained about,²²²² SAO Chobb adjusts his story in an attempt to answer the investigator's questions and gives new information he did not mention before that An told him that 'Ta Tith' assigned him [An] to kill people, that killing took place from 1975 to 1977 before Southwest Zone cadres arrive,²²²³ and that 'Ta Tith' assigned them [not clear whom] to search for the CIA agents and Vietnamese in 1976 and 1977,²²²⁴ SAO Chobb said that An was a company commander in the district military unit.²²²⁵ The investigator did not attempt to clarify whether the 'An' mentioned by the witness is the same 'An' who was the commander of Division 3 under the command of Koas Krala District²²²⁶ who died in 1976.²²²⁷ Neither did the investigator attempt to clarify what authority 'Ta Tith' who, according to the prior evidence with which the investigator confronted SAO Chobb with (from D219/763), 'supervised [the] lathing unit,'²²²⁸ at Kanghat Dam,²²²⁹ had over the individual referred to as An, whoever he was.

1118. The investigator confronted SAO Chobb again with his statement D219/763 and asked him about specific names of alleged killers. SAO Chobb answered that there were three killers in Koas Krala District; Pak, An, and Thach, who were in the same unit of which An was the commander, Pak was deputy and Thach was member.²²³⁰ All three were

²²²¹ D219/763, SAO Chobb, WRI, A111-A121, EN 01337032.

²²²² *Supra*, para. 1106.

²²²³ D219/982, SAO Chobb, WRI, A25-A33, EN 01517552.

²²²⁴ D219/982, SAO Chobb, WRI, A33, EN 01517552.

²²²⁵ D219/982, SAO Chobb, WRI, A38, EN 01517553.

²²²⁶ D219/763, SAO Chobb, WRI, A27-A28, EN 01337020-1.

²²²⁷ D219/763, SAO Chobb, WRI, A18-A20, EN 01337019-20.

²²²⁸ D219/763, SAO Chobb, WRI, A49-A52, EN 01337023-4.

²²²⁹ D219/763, SAO Chobb, WRI, A81, EN 01337028.

²²³⁰ D219/982, SAO Chobb, WRI, A39-41, EN 01517553.

promoted to a higher rank after they killed people.²²³¹ SAO Chobb gave his opinion that they were promoted by 'Ta Tith' and Ta Mok because they were 'upper echelon,' and SAO Chobb added new information that he saw them coming to attend district meetings in Koas Krala.²²³² In his statement D219/763, SAO Chobb did not specify any time when Pak, An and Thach were 'killers' and when they got promoted. Nevertheless, SAO Chobb stated in this statement that the killings took place from 1975 until 1977 before the Southwest Zone cadres arrived and that 'Ta Tith' 'assigned them' to search for CIA agents and Vietnamese, and that searches took place continuously until the arrival of Southwest Zone cadres²²³³ in the middle of 1977.²²³⁴

Second Interview: Day 5

1119. On the fifth day of the interview (D219/983 on 29 April 2017), in response to the continued questioning of the investigator, SAO Chobb added new information that he had never mentioned before, and which is inconsistent with his previous statements.

1120. SAO Chobb stated that Ta Mok, 'Ta Tith,' Pak, An, Thach, the district committee and the cooperative committees held a meeting in district office once a month, about four to five times.²²³⁵ He did not know what was said at the meetings but that Pak, An and Thach carried out activities to go to arrest people.²²³⁶ Arrests took place once a month.²²³⁷ SAO Chobb said that 'Ta Tith' and Ta Mok went to see the detention place in Châk Kâ-koh where prisoners were kept, and Koas Krala prison.²²³⁸ SAO Chobb assumed that 'Ta Tith' and Ta Mok went to these places because their task was to go to different places to assign work to the lower level ranks.²²³⁹

1121. SAO Chobb remained consistent in one fact: all the events that he was describing happened before the arrival of the Southwest Zone cadres in the middle of 1977.²²⁴⁰

²²³¹ D219/982, SAO Chobb, WRI, A39-41, EN 01517553.

²²³² D219/982, SAO Chobb, WRI, A42-47, EN 01517553.

²²³³ D219/982, SAO Chobb, WRI, A33, EN 01517552.

²²³⁴ D219/763, SAO Chobb, WRI, A34, EN 01337021.

²²³⁵ D219/983, SAO Chobb, WRI, A15-A18, EN 01519558.

²²³⁶ D219/983, SAO Chobb, WRI, A15, EN 01519558.

²²³⁷ D219/983, SAO Chobb, WRI, A41, EN 01519562.

²²³⁸ D219/983, SAO Chobb, WRI, A20-25, EN 01519559; A47-48, EN 01519563; A55-A58, EN 01519564-5.

²²³⁹ D219/983, SAO Chobb, WRI, A47-52, EN 01519563-4.

²²⁴⁰ D219/983, SAO Chobb, WRI, A29-A31, EN 01519560-1, A59, EN 01519565; D219/763, SAO Chobb, WRI, A34, EN 01337021.

Second Interview: Day 6

1122. On the sixth day of his interview (D219/983 on 4 May 2017), a site identification was performed,²²⁴¹ following which a short statement was taken from SAO Chobb who explained that he was showing the investigators the location of Koas Krala District Centre and Koas Krala District Security Centre at the time the Northwest Zone was in control.²²⁴² SAO Chobb explained that after the arrival of the Southwest Zone cadres, they moved the security centre to a new location and called it 'Kos Krala Security Centre,' but SAO Chobb did not see that new security centre, because he fled to the jungle two months after the arrival of the Southwest Zone cadre.²²⁴³ SAO Chobb also specified that during the time under the Northwest Zone's control, some prisoners in the Koas Krala prison who had done something wrong were taken to be killed at Chhleav, and some were sent to be kept at Châk Kâ-koh.²²⁴⁴

Conclusion regarding the ICP's claim that Mr YIM Tith was de facto leader in the Northwest Zone

1123. SAO Chobb did not positively identify Mr YIM Tith as a person he saw and knew during the period from 1976 until the middle of 1977.

1124. SAO Chobb was consistent in that: i. he could only provide evidence of the time period when the Northwest Zone cadres were in power as he fled to the jungle when the Southwest Zone cadres arrived;²²⁴⁵ and ii. 'Ta Tit' was a Northwest Zone cadre.²²⁴⁶ SAO Chobb's evidence was heavily tainted by the investigators feeding him inculpatory information,²²⁴⁷ and by his speculative evidence,²²⁴⁸ which the investigators relied upon as established fact in their follow-up questions.²²⁴⁹ These actions have influenced the

²²⁴¹ D219/993, Site identification Report, 12 June 2017.

²²⁴² D219/984, SAO Chobb, WRI, A1, EN 01517557.

²²⁴³ D219/984, SAO Chobb, WRI, A11-A12, EN 01517558.

²²⁴⁴ D219/984, SAO Chobb, WRI, A13, EN 01517558.

²²⁴⁵ D219/763, SAO Chobb, WRI, A44-45, EN 01337023 ; D219/956, SAO Chobb, WRI, A25, EN 01456266; A35, EN 01456267; A64, EN 01456270; D219/981, SAO Chobb, WRI, A22-A23, EN 01502686-7; D219/982, SAO Chobb, WRI, A33, EN 01517552; D219/983, SAO Chobb, WRI, A29-A31, EN 01519560-1, A59, EN 01519565; D219/984, SAO Chobb, WRI, A11-A12, EN 01517558.

²²⁴⁶ D219/763, SAO Chobb, WRI, A53-A54, EN 01337024; D219/956, SAO Chobb, WRI, A27, EN 01456266; D219/981, SAO Chobb, WRI, A18-A23, EN 01502686-7.

²²⁴⁷ D219/956, SAO Chobb, WRI, preamble, Q2, Q3, Q6, EN 01456264 ; D219/980, SAO Chobb, WRI, EN 01517542.

²²⁴⁸ D219/763, SAO Chobb, WRI, A111-A121, EN 01337032-3.

²²⁴⁹ D219/982, SAO Chobb, WRI, Q/A25 EN 01517551-2.

probative value of SAO Chobb's evidence to the extent that both the investigators and the witness admitted to being confused.²²⁵⁰ SAO Chobb said that he was confused by the fragmented style of questioning in the interviews,²²⁵¹ while the investigators said that they were 'still not clear' and not satisfied by the information regarding Mr YIM Tith's identity.²²⁵²

1125. Furthermore, there is no corroborating evidence for the following assertions of SAO Chobb: i. 'Ta Tit' and Ta Mok were Northwest Zone cadres;²²⁵³ ii. 'Ta Tit' was in control of the region until the Southwest Zone cadres arrived;²²⁵⁴ iii. 'Ta Tit' supervised the construction of Kanghat Dam in 1976 until middle 1977;²²⁵⁵ iv. at some time before the middle of 1977, 'Ta Tit' was present at a meeting in Battambang province;²²⁵⁶ v. 'Ta Tit' inspected Tuol Mtes construction site in 1976 and until middle of 1977;²²⁵⁷ vi. 'Ta Tith' was a company commander under the command of the Northwest Zone;²²⁵⁸ vii. in 1976, 'Ta Tith' went to study at Kanghat Dam;²²⁵⁹ viii. Ta Mok was a military person, commander of a division in the Northwest Zone;²²⁶⁰ and ix. Ta Mok and 'Ta Tith' attended a meeting of District and Commune members in one region of the Northwest Zone in 1976.²²⁶¹

1126. In light of the above, no probative value can be afforded to SAO Chobb's evidence that he is referring to Mr YIM Tith. As SAO Chobb is the only witness upon which the ICP relies for his assertion that Mr YIM Tith was a 'powerful'²²⁶² and 'important'²²⁶³ *de facto* leader in the Northwest Zone' from late 1976 or early 1977, prior to his alleged formal appointment,²²⁶⁴ the ICP's assertion cannot stand.

²²⁵⁰ D219/956 SAO Chobb WRI, A23, EN 01456266.

²²⁵¹ *Supra*, para. 1106. D219/980, SAO Chobb, WRI, Q/27, EN 01517545.

²²⁵² *Supra*, para. 1104 to 1105. D219/956 SAO Chobb WRI, A22, EN 01456266. ('At this time, we are still not clear and we have not obtained satisfying information about the identity of Mr YIM Tith yet.')

²²⁵³ D219/763, SAO Chobb, WRI, A53-A54, EN 01337024; D219/956, SAO Chobb, WRI, A27, EN 01456266; D219/981, SAO Chobb, WRI, A18-A23, EN 01502686-7.

²²⁵⁴ D219/763 SAO Chobb WRI, A59-60, EN 01337025.

²²⁵⁵ D219/763 SAO Chobb WRI, A71, EN 01337026.

²²⁵⁶ D219/763 SAO Chobb WRI, A127-129, EN 01337034.

²²⁵⁷ D219/763 SAO Chobb WRI, A146-147, EN 01337036.

²²⁵⁸ D219/956 SAO Chobb WRI, A17, 27, EN 01456265-6.

²²⁵⁹ D219/956 SAO Chobb WRI, A22, EN 01456266.

²²⁶⁰ D219/956, SAO Chobb, WRI, A18, EN 01456265.

²²⁶¹ D219/981, SAO Chobb, WRI, A26, EN 01502687.

²²⁶² *ICP's Final Submission*, D378/2, para. 48.

²²⁶³ *ICP's Final Submission*, D378/2, para. 49.

²²⁶⁴ *ICP's Final Submission*, D378/2, paras 48, 97 to 100, and 148.

1127. Also, the ICP fails to account for the 268 witnesses who lived and worked in the Northwest Zone and who had never heard of Mr YIM Tith.²²⁶⁵

²²⁶⁵ D118/286, KHEAV Neap, WRI, A77, EN 01044702; D219/409, ANG Sar, WRI, A60-A61, EN 01142884; D219/143, AUN Phally, WRI, A22, EN 01063730; D219/576, BIN Sa Em, WRI, A48, EN 01178693; D219/671, CHEAL Choeun, WRI, A99-A100, EN 01213340; D219/411, CHHORN Chhoeun, WRI, A31, EN 01142917; D219/20, CHHUM Vanny, WRI, A67, EN 01050474; D219/390, HANG Suom, WRI, A31, EN 01130578; D219/783, HEM Preng, WRI, A63, EN 01485054; D118/240, HOEY San, WRI, A88-A89, EN 01033044; D219/157, KHAY Chhaury, WRI, A13, EN 01066847; D219/796, KHAY Chhaury, WRI, A13, A14, EN 01485082; D219/14, KHIN Khien, WRI, A143, EN 01047722; D219/374, KHIN Khim, WRI, A66, EN 01120045; D219/764, KOEUN Saroeuth, WRI, A90, EN 01305567; D118/290, KONG Vach, WRI, A124, EN 01066784; D219/946, LAO Kang, WRI, A77, EN 01502660; D118/294, LAY Eng, WRI, A11-A12, EN 01037356; D219/652, LUOM Nhanh, WRI, A26, EN 01207484; D219/417, MEAS Proeung, WRI, A96, EN 01135100; D219/624, PEI Poeut, WRI, A12, EN 01187718; D118/3, PEK Em, WRI, A24, EN 00978797; D219/11, PENH Nhanh, WRI, A25, EN 01047038; D118/221, PHAN Yim, WRI, A129, EN 00987759; D219/158, PHOEUK Lam, WRI, A12, EN 01066854; D118/196, ROEUNG Sopheap, WRI, A75, EN 00986417; D219/254, RY Rang, WRI, A33, EN 01095812; D118/280, SANG Say, WRI, A21, EN 01044669; D219/747, SAY Em, WRI, A85, A86, EN 01248108; D118/277, SEM Veung, WRI, A100, EN 01025282; D219/514, SEM Soem, WRI, A25, EN 01167968; D219/830, SENG Reut, WRI, A52, EN 01390106; D219/65, SIE Korn, WRI, A85, EN 01053972; D219/517, SOY Chhoeun, WRI, A81, EN 01166180; D219/748, SREY Soeurn, WRI, A58, EN 01251812; D219/721, SUOM Bao, WRI, A14, EN 01216213; D219/908, SUON Sun, WRI, A48, EN 01517522; D219/650, TEN Loeng, WRI, A58, EN 01207463; D219/142, TEP Sarun, WRI, A53, EN 01063714; D219/172, TOCH Bunthy, WRI, A31, EN 01076966; D219/50, UY Chinda, WRI, A167, EN 01056865; D219/773, YIN Nean, WRI, A 113, EN 01307926; D219/451, YON Han, WRI, A38, EN 01149270; D219/423, YON Yoeun, WRI, A36, EN 01135131; D219/740, CHHAM Mao, WRI, A102-A103, EN 01235818; D118/135, CHHOM Youn, WRI, A22, EN 00970437; D219/481, CHROENG Sohpeap, WRI, A48, EN 01172523; D118/210, HUL Peou, WRI, A20, EN 00985145; D219/549, ING Oeum, WRI, A50, EN 01178547; D219/3, KEU Seung, WRI, A156, EN 01047117; D118/298, KHIEM Bo, WRI, A98, EN 01044748; D219/137, KHIEM Saon, WRI, A101, EN 01072551; D219/156, KIM Chat, WRI, A24, EN 01066839; D105/7, KIM Heng, WRI, A40, EN 00919420; D118/17, KREP Ron, WRI, A20, EN 00938184; D219/832, LIM Saloeun, WRI, A87, EN 01391244; D219/147, MANN Chuon, WRI, A236, EN 01063776; D219/134, NET Saveun, A262, EN 01060016; D219/229, OUK Sokunthea, WRI, A51, EN 01089991; D219/424, RIEM Dos, WRI, A26, EN 01135144; D219/89, SAM Leng, WRI, A100, EN 01057835; D118/232, SAN Mao alias SAN Ang, WRI, A36, EN 01029395; D219/945, SOK Chhoeut, WRI, A72, EN 01523956; D105/2, SUON Heng, WRI, A34, EN 00787184; D219/432, THA Nam, WRI, A86, EN 01142955; D219/310, VOAN Samut, WRI, A24, EN 01111941; D219/453, YAT Yoeun, WRI, A38, EN 01151149; D219/644, YOM Yeang, WRI, A112, EN 01207421; D219/367, REACH Saran, WRI, A8, EN 01128246; D219/89, SAM Leng, WRI, A100, EN 01057835; D219/241, AM Sokhon alias Khon, WRI, A128, EN 01092971. D219/734, BEA Sieb alias Siet, WRI, A86, A87, EN 01238163; D219/220, BUOY Sab, WRI, A118, EN 01088573; D118/125, CHAB Khuong, WRI, A100, EN 00976596; D219/921, CHAP Puth, WR, A93, EN 01451433; D219/735, CHHEA Eng, WRI, A67, EN 01479483; D118/198, CHHIM Srom, WRI, A64, EN 00985099; D219/692, CHHUON Hai, WRI, A94, EN 01215982; D219/737, DIM Kimheat, WRI, A55, EN 01300132; D219/267, DOM Doeun alias Yeay Doeun or Mer Savdy, WRI, A86, EN 01098477; D219/936, DUCH Chantha, WRI, A113, EN 01493001; D219/289, EK Virak, WRI, A41-A42, EN 01079689-90; D219/184, HAM Sinuon, WRI, A111, EN 01079328; D219/221, HENG Sieng, WRI, A80, EN 01104766; D219/733, KEM Phen, WRI, A166, EN 01238137; D219/639, KEO Meur, WRI, A98, EN 01198194; D219/556, KEP Pov, WRI, A99, EN 01178661; D219/664, KHIEV Phan alias KHIEV Saroeun, WRI, A149, EN 01207575; D219/605, KHOEM Samon, WRI, A95, EN 01185808; D219/244, KONG Ngorn, WRI, A 90, EN 01093003; D219/57, KONG Run, WRI, A50-A51, EN 01040562; D118/229, KUOY Bunthoeurn, WRI, A43, EN 01055771; D219/588, KUY Yin, WRI, A106-A107, EN 01178761; D219/611, LAM Savuon, WRI, A125, EN 01185843; D118/248, LY Lonn, WRI, A41, EN 01034976; D118/246, MEAS Vocurn, WRI, A140, EN 01034947; D219/16, MECH Nhanh, WRI, A195, EN 01034120; D118/228, MENG Chhon, WRI, A67, EN 01056765; D118/217, MEY Sam, WRI, A45, EN 00985659; D118/126, MEY Savoeun, WRI, A76, EN 00978761. D118/191, NGET Chat, WRI, A102, EN 00986723; KH 00977073 (English translation is in error. Khmer version of A102 is 'No, I did not'). D118/254, NGET Loy, WRI, A71, EN 01025239; D118/226, NGET Vut, WRI, A103-A104, EN 01055760; D118/273, NGET Yi, WRI, A112, EN 01035041; D219/736, NHEP Chhan, WRI, A39, EN 01486562; D219/345, NOEM Lorn, WRI, A33, EN 01116102; D219/223, NUON Rin, WRI, A33, A34, EN 01088596; D219/758, OEM Lun, WRI, A103, EN 01251826; D219/187, PHAN Khorn, WRI, A53, EN 01104750; D118/236, PHAN Not, WRI, A49, EN 01055624; D118/189, PHAN Saray, WRI, A22, EN

00986689; D118/202, PRAK Sarin, WRI, A42, EN 00986213; D118/265, PRING Proeun, WRI, A102, EN 01031752; D118/258, ROS Him, WRI, A49, EN01000656; D219/587, WRI, SOK Pan, WRI, A82, EN 01178734; D219/219, SUM Rem, WRI, A98, EN 01088563; D118/262, TEP Phon, WRI, A112, EN01033061; D118/122, THEK Bunroeun, WRI, A24, EN 00975864; D118/123, THOEUK Yoeun, WRI, A15, EN 00975875; D118/1, UK Soeum, WRI, A8, EN 00876119; D118/199, UONG Sav, WRI, A24, EN 00985107. D118/173, VAN Chauk, WRI, A31, EN 00981759; D118/192, VEN Van, WRI, A100, EN 00986179; D118/175, VOERN Dara, WRI, A42, EN 00981833. D118/193, VORN Moch, WRI, A72, EN 00986201; D118/197, YEAN Phan, WRI, A67, EN00985087; D219/849, YEAY Nan, WRI, A26-A27, EN 01356228; D134/2, YEAY Nan, WRI, A15, EN 00974273; D219/222, YEAY Yan, WRI, A150, EN 01088586; D219/269, YUN Saroeun, WRI, A68, EN 01098496; D219/676, HOK Sarin, WRI, A123, EN 01213370; D118/263, HUL Hak, WRI, A99, EN 01033076; D118/281, KEO Sokha, WRI, A15, EN 01040514; D118/2, KHIEV Sim, WRI, A63, EN 00876109; D118/288, LAY Bony, WRI, A29, EN 010667601; D118/177, LORN Heng, WRI, A46, EN 00981788; D118/190, MOEU Pov, WRI, A122, EN 00986172; D118/178, MOUL Van, WRI, A123, EN 00981988; D219/657, PHANN Sok, WRI, A63, EN 01207552; D118/127, POV Sinuon, WRI, A42, EN 00979974; D219/185, SOEM Moeun, WRI, A82, EN 01079807; D118/176, SOEM Voeun, WRI, A124, EN 00981970. D219/344, SOK Phe, WRI, A106, EN 01116095; D219/336, TOAM Cheah, WRI, A86, EN 01117994; D219/7, VEN Yoeu, WRI, A46, EN 01047910, A143, EN 01047922; D219/8, YANG Sokhom, WRI, A136, EN 01047786; D118/170, YEAY Rim, WRI, A132, A133, A137, EN 00980013; D219/861, YEAY Rim, WRI, A28, EN01364076; A112, A115, A116, A124, EN 01364084-01364085; D219/869, YEAY Rim, WRI, A44, A45, A47, A49, EN 01365562; D118/194, RUOS Narin, WRI, A101, EN 00986741; D219/740, CHHAM Mao, WRI, A102-A103, EN 01235818; D118/135, CHHOM Youn, WRI, A22, EN 00970437; D219/549, ING Oeum, WRI, A50, EN 01178547; D219/156, KIM Chat, WRI, A24, EN 01066839; D219/147, MANN Chuon, WRI, A236, EN 01063776; D219/644, YOM Yeang, WRI, A112, EN 01207421; D118/281, KEO Sokha, WRI, A15, EN 0104054; D219/185, SOEM Moeun, WRI, A82, EN 01079807; D219/164, CHHEANG Meng, WRI, A75, EN 01076934; D219/626, CHHENG CHHIN alias MUY Sot, WRI, A49, EN 01191091. D219/476, CHHONG Man, WRI, A7, EN 01152331; D219/36, CHHUOM Savoeun, WRI, A32, EN 01053607; D219/930, EM Lay, WRI, A27, EN 01492913; D219/667, HUN Moeun, WRI, A43, EN 01204501; D219/163, LEM Ann, WRI, A85, EN 01073540; D212/161, KHAT Pho, WRI, A86, EN 01073520; D219/801, KHI Thav, WRI, A25, EN 01479517; D118/223, KOEM Huoy, WRI, A27, EN 01057642; D219/784, MOM Krath, WRI, A48, EN 01485068; D219/697, NAUK Chheath, WRI, A39, EN 01213443; D219/162, NET Yean, WRI, A46, EN 01074546; D219/489, NHEM Phum, WRI, A195, A200, EN 01152361-01152362; D118/67, NHIM Ho, WRI, A47, EN 00950718; D118/64, POL Seun, WRI, A21, A46, EN 00950700, 00950702; D219/929, PRES Setha, WRI, A44, EN 01451512; D219/947, RITH Sary, WRI, A51, EN 01522743; D219/186, SENG Kheang, WRI, A68, EN 01079344; D118/107, SET Dun, WRI, A23, EN 00976912; D219/421, TEA Nguon, WRI, A39, EN 01135113; D219/666, YANG Sarieb, WRI, A82, EN 01204297; D219/906, HUN Chhunly, WRI, A69, EN 01517514; D219/926, HUN Ret, WRI, A10, EN 01451492; D219/799, KHLEANG San, WRI, A63, EN 01479513; D118/250, MUTH Voeuk, WRI, EN 01032481; D118/84, TOCH Phoeun, WRI, A19, EN 00976937; D219/481, CHROENG Sohpeap, WRI, A48, EN 01172523; D118/210, HUL Peou, WRI, A20, EN 00985145; D219/3, KEU Seung, WRI, A156, EN 01047117; D118/298, KHIEM Bo, WRI, A98, EN 01044748; D219/137, KHIEM Saon, WRI, A101, EN 01072551; D105/7, KIM Heng, WRI, A40, EN 00919420; D118/17, KREP Ron, WRI, A20, EN 00938184; D219/832, LIM Saloeun, WRI, A87, EN 01391244; D219/424, RIEM Dos, WRI, A26, EN 01135144; D219/945, SOK Chhoeut, WRI, A72, EN 01523956; D105/2, SUON Heng, WRI, A34, EN 00787184; D219/310, VOAN Samut, WRI, A24, EN 01111941; D219/453, YAT Yoeun, WRI, A38, EN 01151149; D118/281, KEO Sokha, WRI, A15, EN 0104054; D219/906, HUN Chhunly, WRI, A69, EN 01517514; D219/799, KHLEANG San, WRI, A63, EN 01479513; D118/250, MUTH Voeuk, WRI, EN 01032481; D219/839, CHEA Koeung, WRI, A126, EN 01399450; D219/42, CHECH Sopha, WRI, A83, EN 01050633; D219/503, CHHOM Hun, WRI, A34, EN 01167879; D219/395, CHIEV Heng, WRI, A48, EN 01132668; D219/699, CHOEUNM Veun, WRI, A39, EN 01213458; D219/841, HENG KuyLany, WRI, A96, EN 01390140; D219/564, HENG Phat, WRI, A72, EN 01180948; D219/865, HENG Puth, WRI, A82, EN 01373662; D219/683, HIN Non, WRI, A84, EN 01213406; D219/404, HOEUNG Sambo, WRI, A63, EN 01147883. D219/892, HUOT Sat, WRI, A20, EN 01412962; D219/693, KANG Muon, WRI, A49, EN 01224776; D219/167, KHIEM Koeuy, WRI, A25, EN 01072567; D219/895, KHIM Lumtaun, WRI, A45, EN 01407408; D219/955, KOEN Moeun, WRI, A64, EN 01456260; D219/863, LAI Loeum, WRI, A90, EN 01373636; D219/866, LOEUY Mon, WRI, A102, EN 01373675; D219/207, LONG Chhoeum, WRI, A10, EN 01088506; D219/838, LONG Khen, WRI, A130, EN 01492873; D219/299, MAK Met, WRI, A13, EN 01111868; D219/414, MAO Heang, WRI, A19, EN 01135065; D219/44, NGAM Ngoeum, WRI, A40, EN 01050663; D219/893, NGUON Ngin, WI, A45, EN 01421344; D219/307, PALL Yung, WRI, A68, EN 01111928; D219/312, PANG Thai, WRI, A35, EN 01111954; D219/779, PANG Thai, WRI, A42, EN 01344765; D219/651, PECH Pek, WRI, A47, EN 01207476; D219/339, PEM sev, WRI, A17, EN 01118193; D219/311, PENG San, WRI, A22, EN 01111946; D219/238, PHANN Sarang, WRI, A28, EN 01092942; D219/754, PRAUCH Boeun, WRI, A39, EN 01306008; D219/719,

(2) Mr YIM Tith did Not ‘Serve’ as Deputy Secretary of the Northwest Zone nor was he *De Jure* or *De Facto* Deputy Secretary of the Northwest Zone

1128. The sources that the ICP cites do not support his claims that Mr YIM Tith ‘served,’ or was *de jure* or *de facto* Deputy Secretary of the Northwest Zone.²²⁶⁶ Furthermore, the ICP misstates and cherry-picks the evidence from the Case File to support his claims. All the evidence that the ICP cites is hearsay and it is not corroborated by any direct evidence from the Case File, if any exists. The evidence relied upon by the ICP is analysed below.

ROEUNG Mean, A47, EN 01216027; D219/309, SAOY Yen, WRI, A19, EN 01111934; D219/25, SAOY Yen, WRI, A66, EN 01050589; D219/778, SATH Lady, WRI, A33, EN 01337049; D219/829, SEK Moeun, WRI, A96, EN 01390093; D219/939, SEK Muntha, WRI, Q6, EN 01493008; D219/413, SOK Nou, WRI, A23, EN 01135052; D219/125, SREY Soeum, WRI, A78-A79, EN 01067738; D119/109, SUON Lauv, WRI, A78 00984914; D219/941, SUON Sorphorn, WRI, A64, 01519543; D219/393, TEK Sim, WRI, A27, EN 01130585; D118/241, THACH Sokh, WRI, A99, EN 01040506; D219/891, THUN Sovat, WRI, A45, EN 0142336; D219/957, UN Ny, WRI, A80, EN 01456281; D219/356, VAN Nak, WRI, A121, EN 01116340; D219/831, VENH Vanna, WRI, A122, EN 01391222; D219/781, YAN Prak, WRI, A139, EN 01348623; D219/599, YANG Phy, WRI, A37, EN 01185776; D219/192, YOAB Sinit, WRI, A132, EN 01079365; D219/718, HENG Leap, WRI, A56, EN 01219974; D219/367, REACH Saran, WRI, A8, EN 01128246; D219/147, MANN Chuon, WRI, A236, EN 01063776; D219/432, THA Nam, WRI, A86, EN 01142955; D219/799, KHLEANG San, WRI, A63, EN 01479513; D118/250, MUTH Voeuk, WRI, EN 01032481; D219/718, HENG Leap, WRI, A56, EN 01219974; D119/94, BOU Mao, WRI, A24, EN 0982758; D219/130, CHHAO Chat, WRI, A204, EN 01059962; D119/33, CHHIT Yoeuk, WRI, A27, EN 00923050; D118/230, CHHUON Bun, WRI, A103, EN 01055563; D118/61, CHIEP CHHEAN, WRI, A30, EN 00945840; D119/98, KOR Len, WRI, A12, EN 00985186; D119/133, NITH Sorth, WRI, A128, EN 01037379; D119/120, SAM Sak, WRI, A150, EN 01057754; D219/131, THANG Thoeuy, WRI, A131, EN 01025307; D219/39, THOY Thiem, WRI, A95, EN 01050615; D119/115, TIL Hev, WRI, A23, EN 00987793; D219/934, TIL Nov, WRI, A3, EN 01492976; D119/112, TIL Sengly, WRI, EN 00987784; D119/132, YENG Chhan, WRI, A105, EN 01035106; D219/1, YOU Mut, WRI, A78, EN 01044865; D219/140, YOUK Neam, WRI, A187, EN 01063686; D119/156, CHHOENG Choeun, WRI, A15, EN 01044843; D219/919, VONG San, WRI, A62, EN 01476072; D219/676, HOK Sarin, WRI, A123, EN 01213370. D219/22, ORK Chhoeun, WRI, A279, 01050529; D219/134, NET Saveun, A262, EN 01060016; D118/263, HUL Hak, WRI, A99, EN 01033076; D118/288, LAY Bony, WRI, A29, EN 010667601; D118/190, MOEU Pov, WRI, A122, EN 00986172; D118/178, MOUL Van, WRI, A123, EN 00981988; D219/657, PHANN Sok, WRI, A63, EN 01207552; D118/127, POV Sinuon, WRI, A42, EN 00979974; D118/176, SOEM Voeurn, WRI, A124, EN 00981970; D219/336, TOAM Cheah, WRI, A86, EN 01117994; D118/194, RUOS Narin, WRI, A101, EN 00986741; D219/282, HEL Uon, WRI, A83, EN 01098549; D219/340, KE Y, WRI, A81, EN 01117706; D219/555; D118/264, KHEM Sok, WRI, A53, EN 01033086; D219/265, KHOEM Sarun, WRI, A82, EN 01098463; D219/279, KOU Molly, WRI, A106, EN 01098540; D219/246, LIN Samnang, WRI, A13, EN 01093010; D219/554, NGET Kuon, WRI, A89, EN 01178624; D219/276, NHOEM Nguy, WRI, A89, EN 01098507; D219/653, ONG Sorn, WRI, A87, A88, A89, EN 01207499; D219/729, PAN Samut, WRI, A174, EN 01486551; D219/266, PEN Sith, WRI, A81, EN 01098470; D134/3, SAT Chhang, WRI, A40, EN 00974285; D219/277, SOEM CHHEAN, WRI, A40, EN 01098513; D219/526, TEP Hoeun, WRI, A115, EN 01168057; D219/612, THAT Mon, WRI, A146, EN 01207375; D134/1, UNG Chhat, WRI, A27, EN 00974267; D219/182, UON Heav, WRI, A91, EN 01079793. D219/193, VAT Phat, WRI, A204, A205, EN 01079903; D219/5, CHEAM Nhor, WRI, A24, A25, A26, A27, A28, EN 01047125; D219/6, OUK Heung, WRI, A137, EN 01047758; D118/2, KHIEV Sim, WRI, A63, EN 00876109; D118/177, LORN Heng, WRI, A46, EN 00981788; D134/5, HUOT MOENG, WRI, A22, EN 00974303. See Annex V.

²²⁶⁶ ICP's Final Submission, D378/2, para. 45.

HEM Moeun's Evidence Regarding Mr YIM Tith's Alleged Position on the Northwest Zone Committee

1129. HEM Moeun gave one statement to DC-Cam,²²⁶⁷ two statements to the ICIJ,²²⁶⁸ and he testified in Case 002/02.²²⁶⁹
1130. HEM Moeun's father was Ta Mok's cousin.²²⁷⁰ HEM Moeun was a soldier in the Southwest Zone army in Division 10²²⁷¹ and worked in Ta Mok's office.²²⁷² He stated that Ta Mok sometimes treated him as a messenger and sometimes as his guard.²²⁷³ He stated that he did not know 'Ta Tith' during the time when he worked in the Southwest Zone in Ta Mok's office,²²⁷⁴ and that he met 'Ta Tith' for the first time in Battambang after the witness arrived there in the rainy season in 1978²²⁷⁵ (the rainy season in Cambodia being from approximately May to November).
1131. To support his claim that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone, the ICP cherry-picks and cites only certain parts of two contradictory answers from the witness's WRIs. The ICP cites HEM Moeun's first WRI, where he stated that 'Ta Mok made an announcement in front of the army that "Ta Tit is in charge of the zone when I am absent,""²²⁷⁶ not that 'Ta Tit' was the Deputy Secretary of the Northwest Zone as the ICP is claiming. However, HEM Moeun added in the same answer of that first WRI, which the ICP disregards, that this meeting was held in Ta Mok's house,²²⁷⁷ that he was not present at that meeting, and that he never attended any meetings where 'Ta Tit' was present.²²⁷⁸ HEM Moeun could not have had any direct knowledge of what was said at the meeting, or any meeting which 'Ta Tit' attended.

²²⁶⁷ D123/1/5.16, HEM Moeun, DC-Cam.

²²⁶⁸ D118/150 and D118/222, HEM Moeun, WRIs.

²²⁶⁹ D219/899.1.6, HEM Moeun, Transcript, 2 August 2016.

²²⁷⁰ D118/150, HEM Moeun, WRI, A5, EN 00975007.

²²⁷¹ D118/150, HEM Moeun, WRI, A2, EN 00975006-7; A10, EN 00975008; D118/222, HEM Moeun, WRI, A26, EN 00988136.

²²⁷² D118/150, HEM Moeun, WRI, A6, EN 00975007.

²²⁷³ D118/150, HEM Moeun, WRI, A7, EN 00975007.

²²⁷⁴ D118/150, HEM Moeun, WRI, A63, A67, EN 00975015; A78, EN 00975017.

²²⁷⁵ D118/222, HEM Moeun, WRI, A15-A17, EN 00988134-5.

²²⁷⁶ D118/150, HEM Moeun, WRI, A61, EN 00975015.

²²⁷⁷ D347/2.1.36, HEM Moeun, Transcript, 2 August 2016, EN 01351805.

²²⁷⁸ D118/150, HEM Moeun, WRI, A62, EN 00975015.

1132. The ICP also cites one answer from HEM Moeun's second WRI where he clarified that he arrived in Battambang Province in the rainy season in 1978,²²⁷⁹ and that he was not present when Ta Mok allegedly made this announcement, but only heard about it one week after he arrived in Battambang Province.²²⁸⁰ HEM Moeun did not say who told him about the announcement, rendering this evidence unsubstantiated anonymous hearsay. When questioned by the Prosecutor during the trial in Case 002/02 about this alleged announcement – an issue which was not irrelevant for Case 002/02 – HEM Moeun confirmed that he did not attend this meeting and added that he did not know the contents of the meeting.²²⁸¹

1133. Furthermore, HEM Moeun's identification of Mr YIM Tith is questionable. If he did not know 'Ta Tit' when he was working in Ta Mok's office, and according to his evidence, he met 'Ta Tit' for the first time when he arrived in Battambang in the rainy season in 1978, and never attended any meeting with him, how did he know who 'Ta Tit' was? And how did he know that 'Ta Tit' was even present at any of the meetings in Battambang during the time that HEM Moeun was there? HEM Moeun did not positively identify Mr YIM Tith.

1134. The ICP's conclusion that 'YIM Tith's position as deputy zone secretary was a powerful one' is drawn solely from HEM Moeun's uncorroborated, unsubstantiated hearsay in his WRIs.²²⁸² The ICP's overreaching assertion has no merit.

CHHEAN Hea's evidence about Mr YIM Tith's Alleged Position on the Northwest Zone Committee

1135. CHHEAN Hea gave three statements to the ICIJ.²²⁸³ He was Ta Pet's bodyguard and his messenger from 17 April 1975²²⁸⁴ 'until the Vietnamese almost arrived.'²²⁸⁵ On the day when 'Mok's messenger came to tell Ta Pet to prepare his belongings to move to another location' CHHEAN Hea escaped to Sang Rang cooperative and then to the jungle.²²⁸⁶ He

²²⁷⁹ D118/222, HEM Moeun, WRI, A17, EN 00988135.

²²⁸⁰ D118/222, HEM Moeun, WRI, A14, EN 00988134.

²²⁸¹ D339.1.1, HEM Moeun, Transcript, 2 August 2016, p. 64. Ll. 6-18, EN 01351805.

²²⁸² *ICP's Final Submission*, D378/2, para. 45.

²²⁸³ D118/136, D118/271 and D219/233, CHHEAN Hea, WRIs.

²²⁸⁴ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

²²⁸⁵ D118/136, CHHEAN Hea, WRI, A3, EN 00969637.

²²⁸⁶ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

stated ‘As soon as I heard that, I escaped.’²²⁸⁷ He did not witness Ta Pet’s alleged arrest. He escaped three months before the Vietnamese arrived²²⁸⁸ and according to this witness, the Vietnamese army arrived in Battambang in February 1979.²²⁸⁹ From his statement it appears that Ta Pet was allegedly told by Ta Mok’s messenger to prepare to move to another location sometime in November 1978.²²⁹⁰ He stated that after 1979 he met Ta Pet and he told him that he ‘had been assigned to cut a clump of bamboo per day in Oral mountain, Kampong Speu Province.’²²⁹¹ He stated that he saw ‘Ta Tith’ only once, before Ta Pet’s alleged arrest, when Ta Pet came to ‘Ta Tith’s’ place for a meeting and stayed with him for an hour.²²⁹² This meeting took place three to four months before the Vietnamese arrived²²⁹³ which would be, according to the timing of Vietnamese arrival in Battambang provided by this witness, October or November of 1978.

1136. To support his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP cites only one partial answer from the witness’s second WRI, D118/271, in which CHHEAN Hea changed his statement from his first WRI, D118/136, having been fed information by the investigator and encouraged to speculate:

Q: In your answer to question 36, you said that Ta Keu (n) had been arrested, and that Ta Pet was captured two months later. I was under the impression that during that time Ta Pet was under house arrest. In your answer to question 2, you said that Ta Pet replaced Ta Keu, and he consequently became the second highest ranking cadre in the Northwest Zone. Hence, it is not correct that Ta Pet was under house arrest. Please help clarify this matter.

A34: At the time, the Southwest cadres disliked the Northwest cadres, and after they arrested Ta Nhim and Ta Keu, the Southwest cadres could not promote Ta Pet to be a senior ranking cadre any longer. Therefore, I would like to correct my answer in the previous interview that Ta Pet replaced Ta Keu after they had arrested Ta Keu. I would like to explain about this story. They arrested Ta Nhim first, and about five months later they arrested Ta Keu. Ta Tith and Ta Mok replaced them.²²⁹⁴

²²⁸⁷ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

²²⁸⁸ D118/136, CHHEAN Hea, WRI, A20, EN 00969641.

²²⁸⁹ D118/136, CHHEAN Hea, WRI, A20, EN 00969641.

²²⁹⁰ D118/136, CHHEAN Hea, WRI, Q/A20, EN 00969640-1. “Q: When you knew *Ta* Pet was arrested, how long did you escape to the cooperative before you fled into the jungle? A:20 I stayed at the cooperative of Sang Rang Village for two months before I escaped to Tradak Pong jungle; I stayed in the jungle for more than a month before the Vietnamese came in. The Vietnamese arrived in Battambang around February 1979.

²²⁹¹ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

²²⁹² D118/271, CHHEAN Hea, WRI, A25-A26, EN 01029420-1.

²²⁹³ D118/271, CHHEAN Hea, WRI, A24, EN 01029420.

²²⁹⁴ D118/271, CHHEAN Hea, WRI, A34, EN 01029422.

1137. However, in his third WRI, D219/233, CHHEAN Hea changed his statement again, and confirmed that his first WRI D118/136 was correct regarding Ta Pet's appointment as a second chairman of the Northwest Zone:

Q: In document D118/136, ERN 00969638, you mentioned that *Ta Nhim* was the first chairman, *Ta Keu* was the second chairman and *Ta Pet* was the third chairman but after *Ta Keu* had been arrested, *Ta Pet* was promoted and became the second chairman. This morning, you told us that *Ta Pet* did not hold any position at the zone level. Which answer is the correct?

A59: My answer in the first interview is correct.²²⁹⁵

1138. The ICP also cites CHHEAN Hea's first WRI, where he just confirmed the investigator's proposition:

Q: You said *Ta Tit* was a close aide of *Ta Mok* who controlled the Northwest Zone: Did you mean *Ta Tit* also held some position in the Northwest Zone?

A10: Sure! *Ta Tit* held a position in the Zone as well.²²⁹⁶

1139. This answer is tainted evidence as the investigator is leading the witness to an answer.

1140. The ICP disregards answer A9 from his first interview D118/136, where CHHEAN Hea stated that he never attended any meetings with Ta Tith because after Ta Pet had allegedly been arrested, CHHEAN Hea escaped to the jungle and did not know anything apart from that 'Ta Tith was in charge of Sector 1' without any explanation as to how he knew that.²²⁹⁷

1141. CHHEAN Hea admitted that, at the relevant time, he was too young to understand what positions Ta Nhim and Ta Keu held,²²⁹⁸ regardless of the fact that he worked for Ta Pet since 1975. Consequently, his testimony about 'Ta Tith's' position in the Northwest Zone is not reliable.

1142. CHHEAN Hea does not support the ICP claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone. He is an unreliable witness due to the contradictions in his evidence, due to the fact he was fed information by the investigators, and due to his

²²⁹⁵ D219/233, CHHEAN Hea, WRI, A56, EN 01090012.

²²⁹⁶ D118/136, CHHEAN Hea, WRI, A10, EN 00969639.

²²⁹⁷ D118/136, CHHEAN Hea, WRI, A9, EN 00969639.

²²⁹⁸ D118/271, CHHEAN Hea, WRI, A44-A45, EN 01029424.

speculation as to the material issue of Mr YIM Tith's role in the Northwest Zone, regardless of CHHEAN Hea's position as Ta Pet's bodyguard.

NUON Muon's Evidence Regarding Mr YIM Tith's Alleged Position on the Northwest Zone Committee

1143. NUON Muon gave one statement to the ICP²²⁹⁹ and four statements to the ICIJ.²³⁰⁰ In support of his claim that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone, the ICP cherry-picks from NUON Muon's evidence.

1144. NUON Muon was a Northwest Zone cadre who was, at first, an assistant to the Sector 4 Committee, he was then demoted to assistant to the Battambang District Committee, and finally he was demoted to Secretary of Chamlang Kouy Cooperative in Battambang District, Sector 4.²³⁰¹ NUON Muon stated that he was arrested in January 1977 as part of the network of then Secretary of Sector 1, Ta Say, who was himself replaced by a Northwest Zone cadre, Ta Vanh.²³⁰² NUON Muon said that when he was arrested he was first placed in Banan Prison which was run by Sector 1, and after three days he was sent to Tuol Mtes, 'a tempering place.'²³⁰³ He fled from Tuol Mtes to the forest in June or July 1977.²³⁰⁴

1145. In support of his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP cites only three answers from NUON Muon's third WRI, A14, A16 and A17, in which NUON Muon stated that Ta Tith 'became Deputy Chairman of Ta Mok's Northwest Zone,' and that he arrived at that conclusion because, at the time, only Ta Mok and 'Ta Tith' were high-ranking figures from the Southwest Zone.²³⁰⁵ But, tellingly, the ICP omits answer A15 where NUON Muon's reliability seriously comes to question when he explains the timing of 'Ta Tith's' alleged position as Deputy Chairman:

Q: Do you remember in which year Ta Tith became Deputy Chairman of the Northwest Zone?

A15: From 1977. I clearly remember that it was in 1977, because it was when I ran from Tuol Mtes Correctional Facility and went to hide in the forest,

²²⁹⁹ D1.3.11.36, NUON Muon, ICP Statement.

²³⁰⁰ D105/3, D118/18, D118/69 and D219/569, NUON Muon, WRIs.

²³⁰¹ D1.3.11.36, NUON Muon, ICP Statement, EN 00210530; D118/69, NUON Muon, WRI, A1-A5, EN 00950725-6.

²³⁰² D1.3.11.36, NUON Muon, ICP Statement, EN 00210530.

²³⁰³ D1.3.11.36, NUON Muon, ICP Statement, EN 00210532.

²³⁰⁴ D105/3, NUON Muon, WRI, A25, A28, EN 00787176; D118/69, NUON Muon, WRI, A15, EN 00950727.

²³⁰⁵ D118/69, NUON Muon, WRI, A14, A16-A17, EN 00950727.

and I met with people; I asked them who Secretary of Sector 1 was and they told me that it was Ta Tith.²³⁰⁶

The recollection of NUON Muon that, in June or July 1977, he heard from people in the forest that Ta Tith was already the Secretary of Sector 1 is not plausible, since it pre-dates even the earliest dates that the ICP dared to allege²³⁰⁷ that Mr YIM Tith was active in this position. It seriously undermines the reliability of NUON Muon's evidence.

1146. Furthermore, in A17, NUON Muon contradicted his previous answer and his escape from Tuol Mtes to the forest by saying:

Q: Did they ever announce that Ta Tith became Deputy of the Zone?

A17: They never announced that. I knew that through people and Southwest cadres who controlled a cooperative and union. The union was designed for cotton farmers, and the cooperative was designed for rice farmers.²³⁰⁸

1147. Furthermore, the ICP disregards answer A23 of NUON Muon's third WRI where he changes his previous answers and stated that he did not know whether 'Ta Tith' was on the Northwest Zone Committee.²³⁰⁹

1148. From the cited answers, it is apparent this witness evidence is unsubstantiated contradictory hearsay and is devoid of probative value.

LOEM Tim's Evidence Regarding Mr YIM Tith's Alleged Position on the Northwest Zone Committee

1149. LOEM Tim gave two statements to the ICIJ.²³¹⁰ To support his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP cites three answers from this witness from his first WRI.²³¹¹ The ICP is taking evidence of this witness out of context and disregards the relevant answers from both WRIs.

²³⁰⁶ D118/69, NUON Muon, WRI, A15, EN 00950727.

²³⁰⁷ ICP's Final Submission, D378/2, para. 325.

²³⁰⁸ D118/69, NUON Muon, WRI, A17, EN 00950727.

²³⁰⁹ D118/69, NUON Muon, WRI, A23, EN 00950728.

²³¹⁰ D118/108 and D219/649, LOEM Tim, WRIs.

²³¹¹ ICP's Final Submission, D378/2, para. 45, fn 81.

1150. LOEM Tim was appointed as the Chief of the Security Guards at Kampong Kol Sugar Factory in May or June 1978 by Ta Yan, a Northwest Zone cadre, who at the time was the factory Chairman.²³¹² After his appointment, he was sent by Ta Yan to attend an assembly in Battambang. He stated that ‘Ta Tith’ came to Battambang in mid-1978 because he saw him at the assembly where ‘Ta Tith’ was allegedly introduced ‘as on the Committee of the Northwest Zone.’²³¹³ He also explained that this ‘assembly’ was actually a meeting of the security guards (low level cadres).²³¹⁴

1151. LOEM Tim stated that he was not sure of the month in 1978 when this assembly was organized,²³¹⁵ but he knew that at the time of this assembly HENG Teav alias Ta Pet, secretary of Sector 1, had already been arrested.²³¹⁶ Given the clear evidence that HENG Teav alias Ta Pet was seen at a meeting in November 1978,²³¹⁷ it can only be inferred that this ‘assembly’ was held, at the earliest, in late November 1978. LOEM Tim said that at this assembly ‘Ta Tith’ told the participants to protect the factory from the Vietnamese in case they came to rob or set fire to it.²³¹⁸ This message is consistent with the assembly being held at the very end of the DK regime when the Vietnamese army was already within Cambodia²³¹⁹ and approaching Battambang.

1152. LOEM Tim also stated that he never saw ‘Ta Tith’ before or after this assembly²³²⁰ and that ‘Ta Tith’ never came to Kampong Kol Sugar Factory²³²¹ where LOEM Tim was a body guard. He does not know the person who allegedly introduced ‘Ta Tith’ at the assembly, he does not even know whether the person who introduced ‘Ta Tith’ was a woman or man.²³²²

1153. In sum, LOEM Tim can only remember that a man that he recalls was referred to as ‘Ta Tith’ was introduced at an assembly,²³²³ a man he only saw once.²³²⁴ He cannot remember anybody else who was present at the assembly, or the time when the assembly took

²³¹² D118/108, LOEM Tim, WRI, A4, EN 00976921-2.

²³¹³ D118/108, LOEM Tim, WRI, A17, EN 00976924.

²³¹⁴ D219/649, LOEM Tim, WRI, A52, EN 01207438.

²³¹⁵ D219/649, LOEM Tim, WRI, A40, EN 01207436.

²³¹⁶ D118/108, LOEM Tim, WRI, A17, EN 00976924.

²³¹⁷ *Infra*, para. 1258.

²³¹⁸ D118/108, LOEM Tim, WRI, A22, EN 00976925; D219/649, WRI, A69-A71, EN 01207441.

²³¹⁹ *Infra*, paras 1436 to 1437.

²³²⁰ D118/108, LOEM Tim, WRI, A23, EN 00976925; D219/649, WRI, A51, A55, EN 01207438-9.

²³²¹ D118/108, LOEM Tim, WRI, A16, EN 00976924.

²³²² D219/649, LOEM Tim, WRI, A37, EN 01207436.

²³²³ D219/649, LOEM Tim, WRI, A37, EN 01207436.

²³²⁴ D118/108, LOEM Tim, WRI, A23, EN 00976925; D219/649, WRI, A51, A55, EN 01207438-9.

place.²³²⁵ Placed in context, the evidence suggests that this assembly took place at the very end of the DK regime when the Vietnamese army was already within Cambodia, in November 1978.²³²⁶ Finally, LOEM Tim never positively identify Mr YIM Tith.

HAN Thy's Evidence Regarding Mr YIM Tith's Alleged Position on the Northwest Zone Committee

1154. HAN Thy gave one statement to the ICP²³²⁷ and three statement to the ICIJ.²³²⁸ HAN Thy died on 28 March 2015.²³²⁹ The evidence of this witness is not reliable.

1155. HAN Thy was appointed as Chief of Kantueu Commune after April 1975 by Ta Pet, who was, at the time, responsible for Sector 1.²³³⁰ He stayed in the same position until days before the Vietnamese arrived.²³³¹

1156. In support of his claim that Mr YIM Tith 'served' as Deputy Secretary of the Northwest Zone, the ICP cites HAN Thy's statement that he met 'Ta Tith' twice, and that during the second meeting 'Ta Tith' asked him to hold a meeting with the people in his commune 'in order to remove Ta Pet from his position in the Northwest Zone, and for him [Ta Tith] to rise to the zone's secretary.'²³³² HAN Thy's statement is not plausible, even based on the ICP's reasoning. Consistent with the ICP's elaborate analysis of CPK Authority Structure and Communication,²³³³ it is implausible that one commune in the Northwest Zone could influence the appointment of individuals to the Zone Committee, let alone to the position of Secretary of the Zone.

1157. In any case, HAN Thy's statements regarding 'Ta Tith' are confusing and inconsistent. In the same WRI that the ICP cites in support of his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP disregards HAN Thy's self-contradicting evidence that he did not know 'Ta Tith' and that he never met him.²³³⁴ HAN Thy stated that he attended a meeting in Battambang in 1978 immediately prior to the

²³²⁵ D219/649, LOEM Tim, WRI, A40, EN 01207436.

²³²⁶ *Supra*, paras 1436 to 1437.

²³²⁷ D1.3.11.55, HAN Thy, ICP statement.

²³²⁸ D20, D105/8 and D118/63, HAN Thy, WRIs.

²³²⁹ D219/456.1, Death Certificate for HAN Thy.

²³³⁰ D1.3.11.55, HAN Thy, ICP statement, EN 00221577.

²³³¹ D1.3.11.55, HAN Thy, ICP statement, EN 00221584-5.

²³³² D105/8, HAN Thy, WRI, A27, EN 00803457.

²³³³ *ICP's Final Submission*, D378/2, Chapter IV.

²³³⁴ D105/8, HAN Thy, WRI, A9, EN 00803455.

arrival of the Vietnamese. HAN Thy said that many people attended this meeting and he initially stated that out of all the participants present he only knew ‘three of them – Ta Paet, Ta Nhoem and myself.’²³³⁵ He changed his statements two answers later and said that ‘Ta Tith’ chaired the meeting, that he talked about ‘plans’ and that he ‘resolved to attack Vietnam.’²³³⁶ When talking about this same meeting in his statement given to the ICP, HAN Thy stated that he saw ‘Ta Tith’ for first time at the end of 1978. Although he was not sure of the time, he stated that three days after this meeting the Vietnamese army arrived in Battambang.²³³⁷ HAN Thy repeated this in his statement to the ICIJ.²³³⁸

1158. HAN Thy’s statements in relation to ‘Ta Tith’ are unreliable. HAN Thy contradicts himself as to whether he met ‘Ta Tith,’²³³⁹ and if he did meet ‘Ta Tith,’ whether this was immediately before the Vietnamese arrived,²³⁴⁰ when plans were drawn up to defend against the invading Vietnamese.²³⁴¹ HAN Thy’s statement that ‘Ta Tith’ held a meeting in order to remove Ta Pet from his position in the Northwest Zone and to rise to the zone’s secretary²³⁴² is simply implausible. Furthermore, HAN Thy did not positively identify Mr YIM Tith.

1159. In view of the above analysis, HAN Thy evidence has no probative value.

NHOEK Ly’s Evidence Regarding Mr YIM Tith’s Alleged Position on the Northwest Zone Committee

1160. NHOEK Ly gave two statements to DC-Cam²³⁴³ and one statement to the ICIJ.²³⁴⁴ According to the ICIJ the WRIA dated 3 May 2016, NHOEK Ly died in 2014.²³⁴⁵ In support to his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP cherry-picks, misinterprets, and consequently misrepresents, NHOEK Ly’s evidence.

²³³⁵ D105/8, HAN Thy, WRI, A13-A16, EN 00803456.

²³³⁶ D105/8, HAN Thy, WRI, A18, EN 00803456.

²³³⁷ D1.3.11.55, HAN Thy, ICP statement, EN 00221584-5, EN 00221587.

²³³⁸ D20, HAN Thy, WRI, EN 00710285-6.

²³³⁹ D105/8, HAN Thy, WRI, A9, EN 00803455.

²³⁴⁰ D1.3.11.55, HAN Thy, ICP statement, EN 00221584-5, EN 00221587.

²³⁴¹ D105/8, HAN Thy, WRI, A18, EN 00803456.

²³⁴² D105/8, HAN Thy, WRI, A27, EN 00803457.

²³⁴³ D123/1/1.4a and D123/1/1.4b, NHOEK Ly, DC-Cam statement.

²³⁴⁴ D118/86, NHOEK Ly, WRI.

²³⁴⁵ D219/755, WRIA, 3 May 2016, EN 01240240.

1161. NHOEK Ly was the Chief of Ou Dambang Muy Commune, Sector 3²³⁴⁶ until 27 August 1978 when he was transferred to Snoeng Commune and appointed by Ta Chheng to the Snoeng Commune Committee,²³⁴⁷ where he stayed until the Vietnamese arrived.²³⁴⁸ He never met Ta Mok or 'Ta Tith.'²³⁴⁹

1162. In support of his claims, the ICP cites just one part of NHOEK Ly's answer from a DC-Cam statement, thereby misinterpreting his evidence viewed in its totality.²³⁵⁰ The ICP cites:

Q: But who was Northwest Zone Com[mittee]?

A: I do not know who they brought in back then, because there were [...] Ta Tith for one and Ta Mok for one and whoever else of theirs. [...] I knew that Ta Mok came to be Zone Com[mittee] and that he grasped things therein.

1163. The full answer of NHOEK Ly puts the ICP's citation into context:

Dany: But who was Northwest Zone Com?

Li: I do not know who they brought in back then because there were was Ta Tith for one and Ta Mok for one and whoever else of theirs. And then I had already gone to live at Snoeng and I did not know much about such matters. **I knew that Ta Mok came to be Zone Com and that he grasped things therein.** I then said it would not be possible for me to survive because they said that I all those with whom I had been in league had been arrested and their offspring would also have to be arrested. But like I said whoever by coincidence was not to die got left alone by them whom they were looking to kill still got protected and they did not let get killed. Then at the meeting this is what they said "How many enemies did you take" I said I did not protect those who must be smashed and disposed of whether or not they had a biography as long as they had opposed the revolution they must all be smashed and disposed of defending only those who were clean.

1164. When the entire answer is taken into consideration, it is obvious that NHOEK Ly does not say that 'Ta Tith' was on the Northwest Zone Committee. NHOEK Ly is saying that at the time he had gone to live in Snoeng, he did not know who was on the Zone Committee. Furthermore, in his WRI, NHOEK Ly clarified that he first heard about Ta

²³⁴⁶ D118/86, NHOEK Ly, WRI, A2, EN 00976957-8.

²³⁴⁷ D118/86, NHOEK Ly, WRI, A4, EN 00976958-9.

²³⁴⁸ D118/86, NHOEK Ly, WRI, A5, EN 00976959.

²³⁴⁹ D118/86, NHOEK Ly, WRI, A5, EN 00976959.

²³⁵⁰ D123/1/1.4a Nhoek Ly alias Ta Kim DC-Cam Statement, EN 01390380 ["Q: But who was Northwest Zone Com[mittee]? A: I do not know who they brought in back then, because there were [...] Ta Tith for one and Ta Mok for one and whoever else of theirs. [...] I knew that Ta Mok came to be Zone Com[mittee] and that he grasped things therein."];

Mok and ‘Ta Tith’ when he arrived at Snoeng Commune (after 27 August 1978²³⁵¹) and after Ta Nhim was arrested.²³⁵² NHOEK Ly never met ‘Ta Tith,’ but just heard his name.²³⁵³

1165. NHOEK Ly’s evidence does not support the ICP’s assertion that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone. The ICP misrepresents NHOEK Ly’s DC-Cam statement, which enjoy no presumption of relevance and reliability,²³⁵⁴ and omits the relevant part that NHOEK Ly does not know if ‘Ta Tith’ was on the Northwest Zone Committee. NHOEK Ly’s evidence regarding ‘Ta Tith’ is hearsay as he left Snoeng Commune and he just head rumours mentioning the name. Ta Tith.

CHHEUN Chhuoy’s Evidence Regarding Mr YIM Tith’s Alleged Position on the Northwest Zone Committee

1166. CHHEUN Chhuoy gave only one statement to the ICIJ.²³⁵⁵ In support of his claim that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone, the ICP cherry-picks answers from CHHEUN Chhuoy’s WRI and consequently misstates it.

1167. During the relevant period, CHHEUN Chhuoy stated that he worked in a mobile unit. In early 1977 he worked at Kanghat Dam for three months, following which he worked in Kantueu Commune until the end of the DK regime.²³⁵⁶ He was not sure in which Sector he worked, he only remembers that it was in the Northwest Zone.²³⁵⁷

1168. In support of his claim, the ICP cherry-picks three answers from this witness, ignoring the totality of the witness’s evidence.²³⁵⁸ Nevertheless, even in the parts of the answers the ICP cites, the witness does not say that ‘Ta Tith’ ‘served as the Deputy Secretary of the Northwest Zone,’ as the ICP is claiming. The ICP disregards that CHHEUN Chhuoy stated that ‘Ta Tith’ arrived in CHHEUN Chhuoy’s area ‘in late 1978 in the cold season

²³⁵¹ D118/86, NHOEK Ly, WRI, A4, EN 00976958-9.

²³⁵² D118/86, NHOEK Ly, WRI, 23, EN 00976963.

²³⁵³ D118/86, NHOEK Ly, WRI, A24, EN 00976963.

²³⁵⁴ Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 124.

²³⁵⁵ D219/515, CHHEUN Chhuoy, WRI.

²³⁵⁶ D219/515, CHHEUN Chhuoy, WRI, A4-6, EN 01156938, A10, EN 01156939, A51, EN 01156948.

²³⁵⁷ D219/515, CHHEUN Chhuoy, WRI, A3, EN 01156938.

²³⁵⁸ D219/515 CHHEUN Chhuoy WRI, A30, EN 01156944 [‘Ta Tith held the position of Zone Committee for about two or three months. [...] The master of ceremonies introduced Ta Tith to the attendees as being Zone Committee or possibly the Sector Committee, I don’t know.’], A47, EN 01156947 [‘Ta Pet suddenly disappeared, and Ta Tith was introduced as Zone Committee.’], A57, EN 01156949;

– in November or December 1978.²³⁵⁹ CHHEUN Chhuoy also explained that the Southwest Zone cadres arrived because they were under attack by Vietnam.²³⁶⁰ At the meeting where CHHEUN Chhuoy allegedly saw ‘Ta Tith’ and where ‘Ta Tith’ was allegedly introduced ‘as being Zone Committee or possibly the Sector Committee, I don’t know,’²³⁶¹ which was held at Wat Banan Pagoda in November 1978,²³⁶² it was never announced that ‘Ta Tith’ had replaced Ta Pet.²³⁶³ Furthermore, CHHEUN Chhuoy never heard of Ta Mok during the Khmer Rouge regime,²³⁶⁴ and never explained how he identified the person he saw at this meeting as ‘Ta Tith.’

1169. Interestingly, two years after the ICIJ took this statement from CHHEUN Chhuoy, on 23 January 2017, an ICIJ investigation team visited him at his residence in Battambang Province and made the following report about the visit: ‘Screening interview was conducted, and witness had no knowledge of Ta TITH, Ta MOK, purges, Sector 5 structure or policy.’²³⁶⁵

1170. CHHEUN Chhuoy’s evidence does not support the ICP’s assertion that Mr YIM Tith ‘served’ as the Deputy Secretary of the Northwest Zone. CHHEUN Chhuoy did not know what position ‘Ta Tith’ was, or that the person introduced at the meeting in November 1978 was ‘Ta Tith.’ Furthermore, CHHEUN Chhuoy then stated, two years later, that he had no knowledge of ‘Ta Tith.’ No probative value can be placed on CHHEUN Chhuoy’s evidence regarding Mr YIM Tith.

CHEY TOUCH’s Evidence Regarding Mr YIM Tith’s Alleged Position on the Northwest Zone Committee

1171. CHEY Touch gave one statement to DC-Cam²³⁶⁶ and one statement to the ICIJ.²³⁶⁷ In support of his claim that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone, the ICP cherry-picks from CHEY Touch’s evidence and consequently misrepresents it.

²³⁵⁹ D219/515, CHHEUN Chhuoy, WRI, A27, EN 01156943.

²³⁶⁰ D219/515, CHHEUN Chhuoy, WRI, A40, EN 01156946.

²³⁶¹ D219/515 CHHEUN Chhuoy WRI, A30, EN 01156944.

²³⁶² D219/515, CHHEUN Chhuoy, WRI, A44, EN 01156947.

²³⁶³ D219/515, CHHEUN Chhuoy, WRI, A47, EN 01156947.

²³⁶⁴ D219/515, CHHEUN Chhuoy, WRI, A43, EN 01156946-7.

²³⁶⁵ D219/913, CHHEUN Chhuoy, WRIA, EN 01388592-3.

²³⁶⁶ D123/2/1.13a, CHEY Touch, DC-Cam statement.

²³⁶⁷ D219/917, CHEY Touch, WRI.

1172. CHEY Touch was a worker in a salt farm in Kampot in the Southwest Zone.²³⁶⁸ She was sent to Battambang in 1977 and she worked in Daun Teav Factory 'which manufactured rice sacks.'²³⁶⁹ She stayed in Daun Teav until 1978 when she was sent back to the Southwest Zone.²³⁷⁰

1173. In support of his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP cherry-picks selected sections of three answers, A11, 13, 15, from CHEY Touch's WRI and constructs a false narrative:

D219/917 Chey TOUCH WRI, A11, 13, 15, EN01519526 ["when I was relocated to Daun Teav in Battambang I heard of [Yim Tith] [...] I heard people talking about him in a worker meeting. [...] [Ta Bo] just said that Ta Tith was the Secretary of the Zone."]²³⁷¹

1174. Reading the complete answers A11, 13, 15, together with the answers A10, 12, 14, all of which were disregarded by the ICP, gives a different picture:

Q: When you were in the Southwest Zone, did you ever hear of Ta Tith who was also known as YIM Tith?

A10: No, I don't. [EN 01519526]

Q: Did you never hear of his name whilst you were in the Southwest Zone?

A11: No, I didn't. However, when I was relocated to Daun Teav in Battambang, I heard of him. But I did not know what he looked like.

Q: You heard of Ta Tith when you worked at Daun Teav Factory. What did you hear about him?

A12: Some people talked about him. But I did not know if he was in charge of the zone. At the factory, I knew nothing; I only knew about my work.

Q: Why did you assume that he might be the Zone Secretary? What made you say that?

A13: I heard people talking about him in a working meeting. But I did not know in which zone he was. I was a worker. I only knew that the work started at 7.00 a.m. and finished at 11.00 a.m.; and in the afternoon it commenced at 1.00 p.m. and finished at 5.00 p.m. During that regime we knew nothing than our own work. They would say that we would be convicted if we did not work hard. [EN 01519526]

Q: You said people talked about Ta Tith during a meeting at Daun Teav Factory, and you learned that he worked at the zone. Who talked about Ta Tith at that time?

A14: Ta Bo, who was the chairman of Daun Teav Factory, did.

²³⁶⁸ D219/917, CHEY Touch, WRI, A4-A8, EN 01519526.

²³⁶⁹ D219/917, CHEY Touch, WRI, A9, EN 01519526.

²³⁷⁰ D219/917, CHEY Touch, WRI, A40, EN 01519528.

²³⁷¹ ICP's Final Submission, D378/2, para. 45, fn 81.

Q: Besides saying that Ta Tith was a Zone Secretary, what else did Ta Bo say about Ta Tith?

A15: He didn't say anything else. He just said that Ta Tith was the Secretary of the Zone. But I did not know of which zone he was the Secretary. During the meeting we were just there to listen.²³⁷²

1175. From the full citation it is clear that CHEY Touch heard that 'Ta Tith' might be working at a zone, not that he was Zone Secretary as was suggested by the investigator in his questions, or that 'Ta Tith' served as Deputy Secretary of the Northwest Zone, as claimed by the ICP. CHEY Touch's statement that she knew that Ta Nhim was the Northwest Zone Secretary while she worked in Daun Teav Factory,²³⁷³ that Ta Nhim was arrested before she was sent back to Southwest Zone,²³⁷⁴ and that she did not know who replaced him,²³⁷⁵ can only lead to the conclusion that her testimony about 'Ta Tith's' alleged positions was contaminated by the investigator's leading questions.

1176. CHEY Touch's cited hearsay evidence does not support the ICP's claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone.

TOP Seung's Evidence Regarding Mr YIM Tith's Alleged Position on the Northwest Zone Committee

1177. TOP Seung gave one statement to DC-Cam²³⁷⁶ and one statement to the ICIJ.²³⁷⁷ In support of his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP cherry-picks from TOP Seung's evidence and consequently misrepresents it.

1178. TOP Seung worked in the salt field in Kampot Province, Southwest Zone for two or three years and she was sent to the Northwest Zone in 1977 or 1978.²³⁷⁸ She worked in Sangkae Mobile Unit at Kanghat Dam²³⁷⁹ in 1978.²³⁸⁰ TOP Seung stated that she did not know 'Ta Tith' when she was in the Southwest Zone.²³⁸¹

²³⁷² D219/917, CHEY Touch, WRI, A10-A15, EN 01519526.

²³⁷³ D219/917, CHEY Touch, WRI, A41, EN 01519528.

²³⁷⁴ D219/917, CHEY Touch, WRI, A42, EN 01519528.

²³⁷⁵ D219/917, CHEY Touch, WRI, A43-A44, EN 01519528-9.

²³⁷⁶ D123/2/1.1a, TOP Seung, DC-Cam statement.

²³⁷⁷ D219/117, TOP Seung, WRI.

²³⁷⁸ D219/117, TOP Seung, WRI, A4-A9, A14-A15, EN 01067699-700.

²³⁷⁹ D219/117, TOP Seung, WRI, A70, EN 01067708.

²³⁸⁰ D219/117, TOP Seung, WRI, A17-A19, EN 01067701.

²³⁸¹ D219/117, TOP Seung, WRI, A25, EN 01067702.

1179. In support of his claim, the ICP cherry-picks from TOP Seung's evidence. The ICP partially cites one of TOP Seung's answers from his DC-Cam statement, crucially ignoring the timing of the event. Furthermore, The ICP disregards TOP Seung's evidence seen in its entirety.

1180. It is necessary to show the entire questions and answers in order to understand the timing of the events as set out by TOP Seung. The ICP cited only what is emphasised in bold below, without the rest of the statement:

Usman: When you did something, who did you get your orders from before you passed them to your subordinates?

Seung: You mean my orders from higher level?

Usman: Yes.

Seung: That man may have been arrested, but I am not sure. When I first arrived there, there were only Ta Pet and Uncle Pon, but then they disappeared. I did not know why. I remained in charge. **A cadre from here arrived at the Northwest Zone. He was Zone Committee. Uncle Tith is still alive. I lived with him since 1979.**²³⁸²

1181. An analysis of TOP Seung's entire evidence shows that her statement about the position of 'Uncle Tith' is her assumption. She stated that when she arrived in the Northwest Zone 'Ta Paet was Northwest Zone Committee' or 'Sector 1 Committee and Staff Assistant to the Northwest Zone' and she saw only Ta Pet to 'come by car to inspect dam work site'²³⁸³ and to assign work to her mobile unit.²³⁸⁴ Then she stated that 'around mid-1978,' 'Ta Tith' came to replace Ta Pet. A few months later the Vietnamese soldiers arrived, and we all fled.'²³⁸⁵ TOP Seung also stated that she did not attend meetings with 'Ta Tith,'²³⁸⁶ he never introduced himself or stated his position,²³⁸⁷ nor he was introduced by others. TOP Seung said that she found out 'Ta Tith's' alleged position from her unit chairperson, Ye, who told her that 'Ta Tith' came to replace Ta Paet and was 'Sector Committee and Staff Assistant to the Northwest Zone.'²³⁸⁸ However, when she was asked

²³⁸² D123/2/1.1a, TOP Seung, DC-Cam statement, EN 01069524.

²³⁸³ D219/117, TOP Seung, WRI, A58-A61, EN 01067706.

²³⁸⁴ D219/117, TOP Seung, WRI, A65-A66, EN 01067707.

²³⁸⁵ D219/117, TOP Seung, WRI, A68, EN 01067707, A85, EN 01067710.

²³⁸⁶ D219/117, TOP Seung, WRI, A144-A147, EN 01067718.

²³⁸⁷ D219/117, TOP Seung, WRI, A99, EN 01067712.

²³⁸⁸ D219/117, TOP Seung, WRI, A79-A80, EN 01067709.

who ‘Ta Tith’s’ leader was, TOP Soeung stated that she only knew that ‘Ta Tith’ was the highest leader at her workplace.²³⁸⁹

1182. It is obvious that TOP Soeung and her supervisor, Ye, assumed that ‘Ta Tith’ held the same positions as Ta Pet because he allegedly came to ‘replace him’ at Kanghat Dam. This is also confirmed through TOP Seung’s answers about the Northwest Zone leaders in which she stated that she heard that Ta Nhim was Northwest Zone Committee but when she arrived she ‘saw only new Ta Pet as Zone Committee.’²³⁹⁰

1183. TOP Soeung’s evidence does not support the ICP’s assertion that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone. TOP Soeung’s evidence regarding ‘Ta Tith’ was based on hearsay together with speculation based on the hearsay and it has no probative value.

NOP Ngim’s Evidence Regarding Mr YIM Tith’s Alleged Position on the Northwest Zone Committee

1184. NOP Ngim gave one statement to DC-Cam,²³⁹¹ three statements to the ICIJ²³⁹² and she testified in Case 002/02.²³⁹³ The ICIJ issued her with a Letter of Assurance on 21 April 2014.²³⁹⁴ In support of his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP cherry-picks from NOP Ngim’s evidence and consequently misrepresents her evidence.

1185. NOP Ngim worked at the Srae Ambel salt field situated in Kampot Province, Sector 35, Southwest Zone.²³⁹⁵ She was sent to Samlaut District in the Northwest Zone in early 1978.²³⁹⁶ Three months after she was sent to the Northwest Zone, in August 1978, she got married²³⁹⁷ and in September 1978 she was assigned to be the deputy Secretary of

²³⁸⁹ D219/117, TOP Seung, WRI, A87, EN 01067710.

²³⁹⁰ D219/117, TOP Seung, WRI, A84-A85, EN 01067710.

²³⁹¹ D123/2/2.17a, NOP Ngim, DC-Cam Statement.

²³⁹² D118/285, D219/298, D219/835, NOP Ngim, WRI;

²³⁹³ D219/974.1.2, NOP Ngim, T. 5 Sep 2016.

²³⁹⁴ D118/285/1, NOP Ngim, ICIJ Letter of Assurance.

²³⁹⁵ D118/285, NOP Ngim, WRI, A2, EN 01044673-4, D219/298, NOP Ngim, WRI, A2, EN 01111858; D219/835, WRI, A4-A9, EN 01432947. Also see Maps D347/2.1.55 and D1.3.27.1.

²³⁹⁶ D118/285, NOP Ngim, WRI, A8, EN 01044675; A28, EN 01044678.

²³⁹⁷ D123/2/2.17a, NOP Ngim, DC-Cam Statement, EN 01155597; D118/285, NOP Ngim, WRI, A68, EN 01044685-6,

Samlaut District of Sector 1²³⁹⁸ until she escaped from Vietnamese troops and the DK regime collapsed.²³⁹⁹

1186. In support of his claim, the ICP cites only one answer (A91) from one WRI (D219/835) where NOP Ngim said, 'I knew that Om Mok and Om Tith were zone level,' not that Mr YIM Tith served as Deputy Secretary of the Northwest Zone as the ICP is claiming. The ICP disregards NOP Ngim's following answer where she corrected herself:

Q: Why do you say that that study session or meeting was zone level?

A91: I knew that Om Mok and Om Tith were zone level.

Q: You say this was a sector meeting and that Ta Mok and Ta Tith were zone level cadres. Did you know what roles Ta Mok and Ta Tith had in the Northwest Zone?

A92: When we came to the zone I knew that Ta Tith was Sector 1 Com and Ta Mok was Zone Com.²⁴⁰⁰

The investigator did not ask how the witness knew that 'Ta Tith' was Sector 1 Committee.

1187. NOP Ngim's evidence does not support the ICP's assertion that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone.

HUY Krim's Evidence Regarding Mr YIM Tith's Alleged Position on the Northwest Zone Committee

1188. HUY Krim gave three statements to the ICIJ.²⁴⁰¹ In support of his claim that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone, the ICP cherry-picks one answer from this witness and consequently misrepresents his evidence.

1189. HUY Krim was evacuated from Phnom Penh after 17 April 1975 to the Northwest Zone, where he worked as a simple worker, first in Mreah Prov Cooperative, and then in Ream Kun, MOUNG RUSSEI District, Sector 4, where he stayed until May 1979 with the Khmer Rouge.²⁴⁰²

²³⁹⁸ D219/298, NOP Ngim, WRI, A6, EN 01111859; D219/835, NOP Ngim, WRI, A72-A76, EN 01432957.

²³⁹⁹ D219/298, NOP Ngim, WRI, A4, EN 01111859.

²⁴⁰⁰ D219/835, NOP Ngim, WRI, A91-A92, EN 01432959-60.

²⁴⁰¹ D105/4, D118/75 and D219/780, HUY Krim, WRIs.

²⁴⁰² D118/75, HUY Krim, WRI, A1-A5, EN 00976613-4; A42, EN 00976620; A35, EN 00976619 : Huy Krim confirmed that he was detained at Thomayuth Pagoda at the end of 1978.

1190. In support of his claim, the ICP cites answer A20 (D105/4) from the witness: ‘Ta Mok and Ta Tith were known as the Zone Committee.’ This does not state that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone. Reading one answer (A19) before the answer cited by the ICP (A20), and one answer after (A21), provides the full picture. The knowledge of this witness is through unsubstantiated hearsay:

Q: Have you ever heard of Ta Mok and Ta Tith?

A19: Yes, I have, but I have never met any of them.

Q: What have you heard about them?

A20: Ta Mok and Ta Tith, were known as the Zone Committee. They came.

Q: What were their roles?

A21: I don't know what their roles were, because they never met with the people: they just met with the leaders.²⁴⁰³

1191. The investigator does not follow up to question the source of the witness' knowledge. An assessment of the other statements of HUY Krim reveal that he makes assumptions, based on this hearsay, including what positions ‘Ta Tith’ and Ta Mok had in the Northwest Zone. In his second WRI (D118/75), HUY Kim stated that Ta Mok was on the Sector 4 Committee, not in the Zone Committee²⁴⁰⁴ on the basis that ‘Ta Sou had been in the same unit and so I assumed that Ta Mok was on the committee of Sector 4.’²⁴⁰⁵ HUY Krim also stated that ‘once, they told me that “Ta Tit”, the Zone Committee, will be coming to chair a meeting at the pagoda,’²⁴⁰⁶ but he reiterated again that he never saw ‘Ta Tit.’²⁴⁰⁷ In affirming his answers in his next WRI (D219/780), HUY Krim added that this happened in 1978.²⁴⁰⁸

1192. HUY Krim's evidence does not support the ICP's assertion that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone. Furthermore, HUY Krim's evidence regarding ‘Ta Tith's’ position in the Northwest Zone is based on unsubstantiated hearsay and speculation and has no probative value.

²⁴⁰³ D105/4, HUY Krim, WRI, A19-A21, EN 00787165.

²⁴⁰⁴ D118/75, HUY Krim, WRI, A20-A21, EN 00976617.

²⁴⁰⁵ D118/75, HUY Krim, WRI, A25, EN 00976618.

²⁴⁰⁶ D118/75, HUY Krim, WRI, A25, EN 00976618;

²⁴⁰⁷ D118/75, HUY Krim, WRI, A26, EN 00976618.

²⁴⁰⁸ D219/780, HUY Krim, WRI, A45-A47, EN 01344856.

CHIM Chanthoeun's Evidence Regarding Mr YIM Tith's Alleged Position on the Northwest Zone Committee

1193. CHIM Chanthoeun is a Civil Party Applicant. He submitted his CPA²⁴⁰⁹ and his Additional Complaint²⁴¹⁰ to the ECCC on 1 November 2007. He gave a statement to the ICIJ on 27 March 2013.²⁴¹¹ CHIM Chanthoeun was a worker in Mokh Chhneang Village in Phnom Srok District, Sector 5. In October 1977, he was sent to work at Trapeang Thma dam, Sector 5.²⁴¹²

1194. In support of his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP cites answer A28 from CHIM Chanthoeun's WRI, where he said that he heard 'Ta Tith's' name when he worked at Trapeang Thma Dam in 1978 and that he does not know 'Ta Tith's' real position except that he was a supervisor, not that Mr YIM Tith served as Deputy Secretary of the Northwest Zone.²⁴¹³ Furthermore, CHIM Chanthoeun never met 'Ta Tith' in person.²⁴¹⁴

1195. Neither in his CPA nor in his Additional Complaint did CHIM Chanthoeun mention 'Ta Tith' or Mr YIM Tith among the persons he considered responsible for his suffering. The first time CHIM Chanthoeun mentioned 'Ta Tith' was in his WRI taken in 2013, after the ICP's Third Introductory Submission was unlawfully leaked from the ECCC to the public.²⁴¹⁵

1196. CHIM Chanthoeun's evidence does not support the ICP's assertion that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone.

NOM Phuon's Evidence Regarding Mr YIM Tith's Alleged Position on the Northwest Zone Committee

1197. NOM Phuon is a Civil Party Applicant. He submitted his CPA on 26 January 2010²⁴¹⁶ and Supplementary information on 17 June 2010.²⁴¹⁷ In 2015 he gave two statements to

²⁴⁰⁹ D219/979.1.4, CHIM Chanthoeun, CPA.

²⁴¹⁰ D219/979.1.5, CHIM Chanthoeun, Additional Complaint.

²⁴¹¹ D118/65, CHIM Chanthoeun, WRI.

²⁴¹² D118/65, CHIM Chanthoeun, WRI, A20-24, EN 00950707.

²⁴¹³ D118/65, CHIM Chanthoeun, WRI, A28, EN 00950708.

²⁴¹⁴ D118/65, CHIM Chanthoeun, WRI, A28, EN 00950708.

²⁴¹⁵ *Supra*, para. 34.

²⁴¹⁶ D219/979.1.15, NOM Phuon, CPA.

²⁴¹⁷ D219/979.1.17, NOM Phuon, Supplementary Information.

the ICIJ.²⁴¹⁸ In support of his claim that Mr YIM Tith was Deputy Secretary of the Northwest Zone, the ICP is misstating, and consequently misrepresenting, NOM Phuon's evidence.

1198. NOM Phuon's father and older brother were LON Nol soldiers.²⁴¹⁹ In 1974, when he was 15 years old, NOM Phuon also joined the LON Nol army and served for one year.²⁴²⁰ When the Khmer Rouge entered Phnom Penh in 1975, he was evacuated with his family from Phnom Penh, first to the Southwest Zone, and then to the Northwest Zone to Krahut Village, Krahut Commune, Sangkae District, Sector 1 where he stayed until the end of the regime.²⁴²¹ NOM Phuon was a mobile worker during the entire regime.²⁴²²

1199. In support of his claim, the ICP cites several answers from both NAM Ponn's WRIs (D219/268, A43 and 48; D219/373, A89-90 and 117). An analysis of the cited evidence demonstrates how the ICP compartmentalizes the evidence to fit his theory with no regard to truth. The Defence has cited below the relevant answers that are disregarded by the ICP (the ICP's citations are marked in bold):

D219/268, NOM Phuon WRI, A43, 48, EN 01098485:

Q: During 1977 and 1978, did you hear of *Ta* Tith and IM Chaem?

A42: Yes, I did.

Q: What did you hear about them?

A43: Some people called *Ta* Tith *Ta* Pet. They said he was a zone committee chief. I believe it was true because when he came to inspect us at Tumnob Prayut, he had a car, messenger, and guards accompanying him. In addition, I knew clearly about his position because I once saw him in a big meeting near the dam to break the ground for the dam construction at Krahut Dam. His name and position were announced by the committee of the meeting announced. Other cadres had their names and positions announced too.

Q: When and where did that big meeting happen?

A44: It was held at a location along Sangkae Stream in 1978.

Q: Did you see *Ta* Mok and *Ta* Tith in the meeting?

²⁴¹⁸ D219/268 and D219/373, NOM Phuon, WRIs.

²⁴¹⁹ D219/268, NOM Phuon, WRI, A2-A5, EN 01098480-1.

²⁴²⁰ D219/268, NOM Phuon, WRI, A6, EN 01098481.

²⁴²¹ D219/268, NOM Phuon, WRI, A10, EN 01098481-2, A22, EN 01098483.

²⁴²² D219/268, NOM Phuon, WRI, A13, EN 01098482; A25, EN 01098483; A50, EN 01098486; A77, EN 01098488.

A45: No, I did not see *Ta Mok*, but I saw *Ta Tith*, who was called *Ta Pet*. I also saw *Ta Nhim* who was called *Ta Kao*. I saw *Ta Vanh*, and *Ta Chan*.

Q: When you say *Ta Tith* came to inspect the worksite, do you refer to Tumnob Prayut?

A46: Yes, I do. People were mobilised from Sectors 1,2,3,4,5,6 and 7 to work at the dam.

Q: What did *Ta Tith* look like?

A47: *Ta Tith*'s a well-built man with curly hair. He's not very tall. He had light complexion, short hair combed to the back. However, *Ta Nhim* was a well built, tall, and light-skinned man.

Q: How many times did you see *Ta Tith*?

A48: I saw him very frequently because he came to inspect the building of the dam. I saw him once in a week. I saw *Ta Kao* only occasionally.

D219/373 NOM Phuon WRI, A89-90, 117, EN 01128273, 75-76

Q: Between *Ta Tith* and *Ta Vanh*, do you know who was more powerful? Why?

A89: *Ta Tith* was more powerful because *Ta Vanh* was on the sector committee, but *Ta Tith* was on the zone committee with *Ta Nhim*, alias *Kao*.

Q: How had you known that *Ta Tith* worked at the same zone level with *Ta Nhim*?

A90: I was in the mobile unit. I hear people saying this.

Q: Can you tell me the name of this person?

A91: His name was *Ta Tith*, alias *Pet*. I knew him because by that time the regiment commanders and the battalion commanders had come and they told us that he had arrived.

Q: At Answer 43 of your previous interview, you stated that you heard of YIM Tith, and his position through the announcement in a big meeting at Stung Sangke River in early 1978. What was his position when it was announced?

A117: At first, the battlefield committee, who was the master of ceremonies, announced the presence of the meeting chairmen whom they called *Angkar'* s upper echelons. Afterward the battlefield committee read and announced the presence of *Ta Vanh*, the sector committee, *Ta Tith*, the zone committee, and *Ta Nhim*, the Northwest Zone Secretary. They announced that *Ta Tith* was the Zone Deputy Secretary. After they announced the presence of the meeting chairmen, *Ta Vanh* made a speech, and after he finished, *Ta Tith* was invited to speak. *Ta Nhim* was the last person to speak. Therefore, *Ta Nhim* was definitely the chairman, because they announced the presence of those cadres in hierarchical order.

Q: In that interview, you thought that YIM Tith and *Ta* Pet was the same person. We have evidence proving that *Ta* Tith and *Ta* Pet were different people. We want you to confirm who made the speech. Was the speaker the person in the photo?

A118: I do not know if *Ta* Tith and *Ta* Pet were different people. But it was him in the photo. I can recognise his hair. At that time, he was young and looked handsome with thicker hair, but his hair style is the same. This facial shape is his face.

1200. Taking into consideration the ICP's own argument that *Ta* Vanh, Secretary of Sector 1 was sent to Phnom Penh and replaced by *Ta* Pet in June 1977,²⁴²³ the timing of this event can be only before *Ta* Vanh left, while he was still performing his duties and while *Ta* Pet was Deputy Secretary and *Ta* Nhim Secretary of the Northwest Zone.²⁴²⁴ No evidence exists in the Case File that *Ta* Vanh served as a Sector 1 Secretary at the same time as Mr YIM Tith was allegedly on the Northwest Zone committee, nor does the ICP make this claim in his Final Submission. In addition, NOM Phuon speculated with uncertainty that 'Ta Tith' was 'probably' Northwest Zone cadre.²⁴²⁵

1201. It is more than obvious that NOM Phuon never saw or knew 'Ta Tith,' and that he confused him with *Ta* Pet. It also appears that NAP Phorn did not mention 'Ta Tith,' or Mr YIM Tith, in his CPA nor in his Supplementary information as among the persons he consider responsible for his suffering. Instead, he first recalled 'Ta Tith's' name in his OCIJ interviews in 2015, after the ICP's Third Introductory Submission was unlawfully leaked from the ECCC to the public²⁴²⁶ and before Mr YIM Tith was charged and his name and his picture were released officially to the public.²⁴²⁷

1202. In an apparent attempt to rectify NOM Phuon's confusion between 'Ta Tith' and *Ta* Pet, the investigator showed NOM Phuon contemporaneous photographs of seven Khmer Rouge cadres (ERN 00968211, ERN 009682212, ERN 01075668, ERN 00968202, and ERN 00968200) and one recent photograph (00704582) asking him to recognise 'Ta Tith.' NOM Phuon allegedly recognised Mr YIM Tith in the photograph with the ERN 00704582.²⁴²⁸ This 'recognition' was false. Primarily, there is no suggestion that *Ta* Pet

²⁴²³ ICP's Final Submission, D378/2, para. 336.

²⁴²⁴ ICP's Final Submission, D378/2, para. 333.

²⁴²⁵ D219/373, NOM Phuon, WRI, A126, EN 01128276.

²⁴²⁶ *Supra*, para. 34.

²⁴²⁷ *Written Record of Initial Appearance*, 9 December 2015, D281. Photograph available at: <https://www.eccc.gov.kh/en/case/topic/120>.

²⁴²⁸ D219/373, NOM Phuon, WRI, A54-A55, EN 01128270.

was in any of the presented photographs. Furthermore, the photograph with ERN 00704582, where the witness ‘recognised’ Mr YIM Tith, has a label on the photograph that states legibly the following text: ‘Yim Tith (known as Ta Tith), Photo by Vanthan Peoudara, Deputy Director of the Documentation Center of Cambodia, January 22, 2011.’²⁴²⁹ Interestingly, this picture was put in the Case File on 11 July 2011, as an attachment to the ICP’s Supplementary Submission Regarding Sector 1 Crime Sites and persecution of Khmer Krom.²⁴³⁰ There is no indication as to how DC-Cam obtained this picture, and who originally identified one of the individuals in the picture as Mr YIM Tith.

1203. Furthermore, the investigator used torture-tainted evidence to question NOM Phuon :

Q: According to what we have, it is logical when Ros Nhim confessed that they arrested him in June 1978. And according to your answers today, I believe that you worked at that dam until July 1978. Is that correct?

A84: I remember that it was raining because when I left, it was raining, so it might have been during that month.²⁴³¹ [EN 01128273]

1204. NOM Phuon’s evidence does not support the ICP’s assertion that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone. NOM Phuon was clearly confused about the identities of ‘Ta Tith’ and Ta Pet. The investigator showed NOM Phuon a picture purporting to show Mr YIM Tith, and then asked him to identify the person whose name was already printed clearly on the photo. Furthermore, the investigator uses torture-tainted evidence in order to promote an inculpatory theory. No probative value can be placed on NOM Phuon’s evidence regarding Mr YIM Tith alleged positions in the Northwest Zone.

TEN Cheum’s Evidence Regarding Mr YIM Tith’s Alleged Position on the Northwest Zone Committee

1205. TEN Cheum gave one statement to SOAS on 18 November 2005,²⁴³² one statement to the ICIJ on 29 May 2013,²⁴³³ after which she gave a statement to DC-Cam on 4 March 2015,²⁴³⁴ and finally one further statement to the OCIJ on 3 February 2017.²⁴³⁵ In support

²⁴²⁹ D65.1.54, Photo of Yim Tith (known as Ta Tith) by Vanthan Peoudara.

²⁴³⁰ *Supplementary Submission Regarding Sector 1 Crime Sites and persecution of Khmer Krom*, 18 July 2011, D65. Corrected version of this Supplementary Submission was filed on 25 November 2016.

²⁴³¹ D219/373, NOM Phuon, WRI, A84, EN 01128273,

²⁴³² D1.3.11.53, TEN Cheum, SOAS statement.

²⁴³³ D118/68, TEN Sheum, WRI.

²⁴³⁴ D219/844.1.5, TEN Cheum, DC-Cam statement.

²⁴³⁵ D219/915, TEN Cheum, WRI.

of his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP cites just one sentence from TEN Cheum's SOAS statement, which does not support his claim.

1206. TEN Cheum was a member of Kong Psey District in the West Zone until late 1978 when she became a member of the Sector 33 Committee in the Southwest Zone.²⁴³⁶ She stated that she heard 'Ta Tith's' name during the Khmer Rouge regime, but she never attended any meetings with him, nor did she know what position 'Ta Tith' held during the regime.²⁴³⁷

1207. The ICP cites one sentence from the SOAS statement where TEN Cheum allegedly said that 'the Northwest Zone Committee consisted of Ta Mok, Teut and Rin,'²⁴³⁸ The SOAS statement does not state that Mr YIM Tith served as Deputy Secretary of the Northwest Zone.

1208. The SOAS summary is not an original interview transcript. It is a summary of short-hand notes whose chain of custody is unknown. It is unknown who created this document, how many edited versions of the document were produced, or whether any documents were shown to TEN Cheum before or during the interview. There is no mention of the interview being audio recorded, nor are there any original notes of the interview on the Case File. Importantly, it is unclear if TEN Cheum ever saw this document; there is no record of her agreeing to its contents and it does not contain her signature. The fact that TEN Cheum, in her subsequent statements to the ICIJ, never said that 'Ta Tith' was on the Northwest Zone Committee, confirms that this SOAS interview has no probative value. Moreover, in her last statement to the ICIJ she stated that she heard of 'Ta Tith' from different people, that he was called "Ta 15" (which was the code name for Ta Mok²⁴³⁹), that she never saw him,²⁴⁴⁰ and that she did not know what position he held.²⁴⁴¹ Furthermore, TEN Cheum was not present in the Northwest Zone at any time during the DK period and it is unclear how she would know who the members of the Northwest Zone Committee were.

²⁴³⁶ D118/68, TEN Cheum, WRI, 10, EN 00950722.

²⁴³⁷ D118/68, TEN Cheum, WRI, A12-A15, EN 00950722-3.

²⁴³⁸ D1.3.11.53, Ten Cheum, SOAS Interview, EN 00217752.

²⁴³⁹ *ICP's Final Submission*, D378/2, para. 162, fn 484; para. 670, fn 2469; para. 693, fn 2554.

²⁴⁴⁰ D219/915, TEN Cheum, WRI, A14, EN 01519514.

²⁴⁴¹ D219/915, TEN Cheum, WRI, A14, EN 01519514.

1209. TEN Cheum's evidence does not support the ICP's assertion that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone. The CIJs have held that statements or other evidence collected without judicial supervision enjoy 'no presumption of relevance and reliability'²⁴⁴² and that the information contained therein has been relied on by the CIJs only when corroborated by other sources.²⁴⁴³ The ICP is relying upon a SOAS summary interview which has no record of a chain of custody or of the interview conditions, and therefore has no probative value. Furthermore, the information contained in the SOAS statement has not been corroborated by other sources and it is contradicted by TEN Cheum's in her WRIs.

EK (UI) Hoeun's Evidence Regarding Mr YIM Tith's Alleged Position on the Northwest Zone Committee

1210. EK (UI) Hoeun gave one statement to DC-Cam,²⁴⁴⁴ three statements to the ICIJ,²⁴⁴⁵ and he testified in Case 002/02.²⁴⁴⁶ In support of his claim that Mr YIM Tith served as Deputy Secretary of the Northwest Zone, the ICP cites only one answer from one statement from this witness.

1211. EK (UI) Hoeun's position in the DK regime is hard to summarize as his statements vary significantly.²⁴⁴⁷ It is not clear whether he worked as a physical labourer²⁴⁴⁸ in Tram Kak District Office until March 1977 and then left with 200 Southwest Zone cadres to go to the East Zone,²⁴⁴⁹ or he lived in his village from 1977 until September 1978²⁴⁵⁰ when he fled to the East Zone to live with PECH Chim.²⁴⁵¹

1212. In support of his claim, the ICP cites EK (UI) Hoeun's statement that:

²⁴⁴² Case 004/01, Closing Order (Reasons), 10 July 2017, D308/3, para. 104 (footnotes omitted). Case 004/2, Closing Order (Indictment), 16 August 2018, D360, para. 124. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 486.

²⁴⁴³ Case 004/01, Closing Order (Reasons), 10 July 2017, D308/3, para. 108. Case 004/2, Closing Order (Indictment), 16 August 2018, D360, para. 127. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 489.

²⁴⁴⁴ D119/70/4, Ek (UI) Hoeun, DC-Cam statement.

²⁴⁴⁵ D118/208, D118/209 and D219/34 (same interview is also in the Case File under the number D193/8.2), EK (UI) Hoeun, WRIs.

²⁴⁴⁶ D315.1.20, EK (UI) Hoeun, Transcript from 002/02, 7 May 2015 and D315.1.21, EK (UI) Hoeun, Transcript from 002/02, 8 May 2015.

²⁴⁴⁷ *Supra*, para. 678.

²⁴⁴⁸ D118/208, EK (UI) Hoeun, WRI, A18-A20, EN 00981813; D219/34, EK (UI) Hoeun, WRI, A5, EN 01053570-1; D315.1.20, EK (UI) Hoeun, Transcript from 002/02, 7 May 2015, EN 01096790-1, l. 7-25 and l. 1.

²⁴⁴⁹ D219/34, EK (UI) Hoeun, WRI, A39, EN 01053576.

²⁴⁵⁰ D118/209, EK (UI) Hoeun, WRI, A6, EN 00983568.

²⁴⁵¹ D118/209, EK (UI) Hoeun, WRI, A5, EN 00983568.

Ta Mok ordered SAOM Dan, Tram Kak District Office Chairman, to prepare name lists of the cadres who were assigned to take charge of the Northwest Zone. I saw the name lists, in which Ta Tith was assigned to take charge of Battambang and Ta Chay and Yeay Chaem were assigned to go to Preah Netr Preah District.²⁴⁵²

The ICP does not have regard to the totality of EK (UI) Hoeun's evidence and its relevance to the assessment of his credibility. Primarily, the statement of EK (UI) Hoeun cited by the ICP is not plausible. It is not plausible that Ta Mok, Secretary of the Southwest Zone, would allow a 'District Office Chairman' to decide who is going to be sent from the Southwest Zone to the Northwest Zone. Furthermore, there is no evidence in the Case File suggesting that 'Ta Tith' was under the authority of the Tram Kak District Office Chairman, so that the Tram Kak District Office Chairman could decide to send 'Ta Tith' to the Northwest Zone, and moreover, to assign him to a position in the Northwest Zone. EK (UI) Hoeun never explains when, how and from whom he finds out this information, which raises particular concerns over the reliability of his evidence given that he was a low-level worker in the Tram Kak District Office. Finally, EK (UI) Hoeun never mentioned this alleged list in his previous WRIs²⁴⁵³ (D119/70/4, D118/208, D118/209), nor did he mention it in his testimony in Case 002/02 (D315.1.20, D315.1.21).

1213. EK (UI) Hoeun cited statement does not support the ICP's assertion that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone. His evidence regarding 'Ta Tith's' move to the Northwest Zone is implausible, based on unsubstantiated hearsay and consequently has no probative value.

Masato Matsushita and Stephen Heder, 'Interviews with Kampuchean Refugees at Thai-Cambodia Border,' 1980 – Evidence Regarding Mr YIM Tith's Position on the Northwest Zone Committee

1214. In support of his claim that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone, the ICP cites anonymous interviews held on unknown dates from the book by Masato Matsushita and Stephen Heder, *Interviews with Kampuchean Refugees at Thai-Cambodia Border*, 1980.²⁴⁵⁴

²⁴⁵² D219/34 EK (UI) Hoeun WRI, A43, EN 01053577.

²⁴⁵³ D119/70/4, D118/208 and D118/209.

²⁴⁵⁴ D1.3.27.5.

1215. This document does not represent original interview transcripts, and no notes or audio recordings of interviews were put on the Case File, nor is there any mention of interviews being audio recorded. There is no possibility of checking the accuracy and authenticity of these interviews. The CIJs have held that statements or other evidence collected without judicial supervision enjoy no presumption of relevance and reliability' and the information contained therein has been relied on by the CIJs only when corroborated by other sources.²⁴⁵⁵

1216. Taking into consideration that these interviews were collected without judicial supervision, that the authenticity of the documentary record contained in this publication cannot be assessed, nor corroborated by other sources, the Defence submits that this book is not reliable and has no probative value.

Other evidence relied upon by the ICP regarding Mr YIM Tith's Position on the Northwest Zone Committee

1217. The ICP also claims that 'around this time in June 1978, Sarun was appointed to the Northwest Zone Committee,' seemingly implying that somehow evidence relevant to Sarun's appointment is relevant to proving Mr YIM Tith's alleged appointment as the Deputy Secretary of the Northwest Zone.²⁴⁵⁶ In support of this claim, the ICP cites:

- UK Soeum's SOAS Interview,²⁴⁵⁷
- Kaing Guek Eav alias Duch WRI from 26 January 2008 taken in Case 002,²⁴⁵⁸ and
- Timothy Carney's article 'The Organization of power,' published as part of the book by Karl Jackson titled 'Cambodia 1975-1978: Rendezvous with Death.'²⁴⁵⁹

1218. The cited evidence does not support the ICP's claim that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone.

²⁴⁵⁵ *Supra*, paras 512 to 513.

²⁴⁵⁶ *ICP's Final Submission*, D378/2, para. 144.

²⁴⁵⁷ D6.1.616, UK Soeum, SOAS Interview

²⁴⁵⁸ D6.1.1052, Kaing Guek Eav alias Duch, WRI.

²⁴⁵⁹ D1.3.15.2, Timothy Carney's article 'The Organization of power,' published as a part of the book by Karl Jackson titled 'Cambodia 1975-1978.'

1219. Notwithstanding that it does not follow that Sarun's appointment is related to Mr YIM Tith's alleged appointment as the Deputy Secretary of the Northwest Zone, the implication made by the ICP is wrong. An assessment of the totality of the cited evidence shows that Mr YIM Tith was not appointed as Deputy Secretary of the Northwest Zone, and moreover, that he was far from being a 'senior leader' or 'most responsible' during the DK period.

1220. UK Soeum gave one statement to SOAS²⁴⁶⁰ and two statements to the OCIJ.²⁴⁶¹ UK Soeum gave evidence that during the DK regime he was the Rumlech cooperative chairman (Bakan District, Sector 2).²⁴⁶²

1221. In his SOAS statement, UK Soeum mentioned the names of DK cadres on the Northwest Zone Committee, Sector 2 Committee and Sector 7 Committee during the relevant period temporal jurisdiction of the ECCC (Mok, Secretary of NWZ; Sarun, Secretary of Sector 2, Sector 7, and member of the Northwest Zone Committee; Phaeng, Secretary of Bakan Kraom District, Secretary of Bakan Loe District, and later Secretary of Sector 2; Nan, Secretary of Sector 7). UK Soeum also mentioned several Southwest Zone cadres who came in to the Northwest Zone and took over different leading positions (Khan, Kung Sameun, Tauy, Rum, Phat, Kuon and others).²⁴⁶³ Crucially, UK Soeum stated that he had never heard of Ta Tith or YIM Tith.²⁴⁶⁴

1222. Kaing Guek Eav, alias Duch, is effectively the ICP's 'star witness.' According to the data accessible to the Defence (all data being accessible to the ICP), Duch gave three statements to UNHCHR in 1999,²⁴⁶⁵ one statement to the Investigative Judge of the Military Court in the Kingdom of Cambodia in 1999,²⁴⁶⁶ 19 interviews to the OCIJ in Cases 001 and 002,²⁴⁶⁷ his testimony as an accused in Case 001 for 24 days,²⁴⁶⁸ four

²⁴⁶⁰ D6.1.616, UK Soeum, SOAS statement.

²⁴⁶¹ D6.1.991 and D118/1, UK Soeum, WRI

²⁴⁶² D118/1, UK Soeum, WRI, A2-A3, EN 00876118.

²⁴⁶³ D6.1.616, UK Soeum, SOAS statement, pp. 1-2, ERN 00352105-6.

²⁴⁶⁴ D118/1, UK Soeum, WRI, A8, EN 00876119.

²⁴⁶⁵ D1.3.29.7a, D1.3.29.7b and D1.3.29.7c, Kaing Guek Eav alias Duch, UNHCHR Suspect statement.

²⁴⁶⁶ D6.1.882, Kaing Guek Eav alias Duch, WRI.

²⁴⁶⁷ D1.3.29.4, D6.1.1065, D6.1.1066, D6.1.1067, D1.3.29.2, D6.1.1051, D1.3.29.3, D6.1.1052, D6.1.1056, D6.1.1063, D6.1.1070, D6.1.1072, D1.3.29.6, D1.3.29.5, D1.3.29.8, D6.1.91, D6.1.92, D6.1.93 and D6.1.95, Kaing Guek Eav alias Duch, WRIs.

²⁴⁶⁸ D6.1.869, D6.1.872, D6.1.875, D6.1.861, D219/702.1.126, D219/702.1.128, D219/702.1.114, D219/702.1.8, D219/702.1.133, D6.1.862, D6.1.863, D6.1.865, D219/702.1.137, D219/702.1.117, D219/702.1.119, D219/702.1.120, D6.1.866, D219/702.1.127, D6.1.867, D219/702.1.129, D6.1.870, D219/702.1.140, D6.1.871 and D219/702.1.139, Kaing Guek Eav alias Duch, case 001, transcripts.

additional interviews to the OCIJ in Case 002,²⁴⁶⁹ his testimony a witness in Case 002/01 for five days in 2012,²⁴⁷⁰ his testimony as a witness in Case 002/02 for 12 days in 2016,²⁴⁷¹ and three interviews in Cases 003 and 004.²⁴⁷² The selected evidence of Duch that has been placed onto Case File 004 amounts to a total of 71 documents.

1223. To support his assertion that Sarun was appointed to the Northwest Zone Committee in June 1978, around the time when Mr YIM Tith allegedly assumed a formal position as Deputy Secretary of the Northwest Zone, the ICP cites Duch's statement from 24 January 2008, at EN 00160720. The ICP misstates, and consequently misrepresents, Duch's evidence.

1224. At EN 00160720, Duch actually stated:

On 3 January 1979, I was very tired, both physically and mentally. I slept all day, up until 7 January at 2:00 p.m. when I left S-21 with a unit of around 200 persons.... When we reached my wife's native village in the subdistrict of Peam. I presented myself to the Secretary of Region 31, in the Western Zone, called Yim, from whom I requested asylum and food. **I then kept on going and met Sarun, Deputy-secretary of the North Western Zone** (the Secretary of which was Ta Mok) with whom I escaped to Samlauth.

1225. Contrary to the ICP's claim, according to Duch, Sarun was the Deputy Secretary of the Northwest Zone, not Mr YIM Tith. Moreover, Duch did not mention Mr YIM Tith in any of the 71 documents available on Case File 004.

1226. Timothy Carney's article 'The Organization of Power,' published as part of the book by Karl Jackson titled 'Cambodia 1975-1978: rendezvous with death'²⁴⁷³ and cited by the ICP is even more revealing than Duch's 71 documents available in Case File 004.

1227. 'The Organization of power' describes the structure and the role of the CPK. It contains an analysis of the functions and structure of the Central Committee and Standing Committee and a table identifying the likely members of those bodies from 1975 to 1978.²⁴⁷⁴

²⁴⁶⁹ D6.1.637, D6.1.736, D6.1.796 and D219/702.1.150, Kaing Guek Eav alias Duch, case 002, WRIs.

²⁴⁷⁰ D127/2.1.12, D179/1.2.9, D179/1.2.11 and D179/1.2.13, Kaing Guek Eav alias Duch, case 002/01, transcripts.

²⁴⁷¹ D219/852.1.1, D219/852.1.2, D219/852.1.3, D219/852.1.4, D219/852.1.5, D219/852.1.6, D219/852.1.7, D219/852.1.8, D219/852.1.9, D219/852.1.10, D219/852.1.11 and D219/852.1.12.

²⁴⁷² D219/672, D219/673 and D219/674, Kaing Guek Eav alias Duch, cases 003 and 004, WRIs.

²⁴⁷³ D1.3.15.2, Timothy Carney's article 'The Organization of power,' published as a part of the book by Karl Jackson entitled 'Cambodia 1975-1978: rendezvous with death.'

²⁴⁷⁴ D1.3.15.2, Timothy Carney's article 'The Organization of power,' published as a part of the book by Karl Jackson entitled 'Cambodia 1975-1978: rendezvous with death,' EN 00105140-3 and EN 00105151-3.

1228. Contrary to the ICP's claim, the name 'Sarun' was not mentioned in Carney's article, and consequently, neither was the date of his alleged appointment to the Northwest Zone Committee. Mr YIM Tith's name is also not mentioned in these tables.

1229. However, it is asserted in the 'The Organization of Power' that in August 1978²⁴⁷⁵ Heng Teav alias Ta Pet was a Member of the Standing Committee, Member of the Central Committee and Member of regional Party Committee.²⁴⁷⁶

1230. The author also provides a table with the name, position, date of arrest and death of cadres during the purge of the Northwest Zone.²⁴⁷⁷ There is no note that Ta Pet was purged at any point.²⁴⁷⁸

1231. The probative value of Carney's evidence is very low, Furthermore, the analysis of this document demonstrates the ICP's misstatement, and consequently misrepresentation, of evidence.

Conclusion

1232. There is no direct evidence to support the ICP's claim that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone, *de facto* or *de jure*, at any point during the Khmer Rouge regime. None of the witnesses provide direct or indirect evidence that Mr YIM Tith, during the temporal scope of the investigation, received orders, communications, supervision or direction from Ta Mok as the alleged Secretary of the Northwest Zone or that Mr YIM Tith reported back to Ta Mok on any issues. None provide evidence, direct or indirect, that Mr YIM Tith sent orders, communications, or directions to the seven sectors of the Northwest Zone to supervise or exercise authority over them. No written document (order, instruction, telegram) exists to support that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone, issued orders to the seven sectors in the Northwest Zone, or received documents, instructions, or telegrams

²⁴⁷⁵ D1.3.15.2, Timothy Carney's article "The Organization of power", published as a part of the book by Karl Jackson entitled "Cambodia 1975-1978: rendezvous with death, EN 00105140, referring to August 1978 CPK Congress, Members of the Central Committee and the Table 3.

²⁴⁷⁶ D1.3.15.2, Timothy Carney's article "The Organization of power", published as a part of the book by Karl Jackson entitled "Cambodia 1975-1978: rendezvous with death, Table 3. EN 00105152.

²⁴⁷⁷ D1.3.15.2, Timothy Carney's article "The Organization of power", published as a part of the book by Karl Jackson entitled "Cambodia 1975-1978: rendezvous with death, EN 00105154-7.

²⁴⁷⁸ D1.3.15.2, Timothy Carney's article "The Organization of power", published as a part of the book by Karl Jackson entitled "Cambodia 1975-1978: rendezvous with death, EN 00105154.

from the Centre in order to disseminate it through the seven sectors and implement the Centre's alleged policies.

1233. The evidence the ICP cites is hearsay that does not support his claim. He cites evidence of 15 witnesses, two Civil Party Applicants, and one SOAS document, none of which claim that Mr YIM Tith served as the Deputy Secretary of the Northwest Zone. No witness gives direct evidence on Mr YIM Tith's alleged position in the Northwest Zone; all evidence is hearsay evidence, which cannot be used to corroborate other hearsay evidence. The ICP's attempt to satisfy the standard through sheer quantity of evidence, regardless of its relevance or quality, risks sending Mr YIM Tith to trial solely on 'widespread rumours.'²⁴⁷⁹

1234. At the same time, the ICP is systematically disregarding evidence that is contrary to his claims, such as the evidence of CHOU Yorn who stated that 'Ta Tith' was not on the Northwest Zone Committee, as Ta Nhim held this position, and when Ta Nhim was arrested, Ta Mok assigned his personal assistant Om Sien to be the Northwest Zone Committee chief.²⁴⁸⁰

1235. Also, the ICP fails to account for the 268 witnesses who lived and worked in the Northwest Zone during the relevant time and who had never heard of Mr YIM Tith or 'Ta Tith.'²⁴⁸¹

(3) Mr YIM Tith did Not 'Serve' Nor was he *De Jure* or *De Facto* Secretary of Sector 1

1236. The sources that the ICP cites do not support his claims that Mr YIM Tith served, nor that he was *de jure* or *de facto* Secretary of Sector 1.²⁴⁸² Furthermore, the ICP is misstating, cherry-picking and compartmentalising the evidence from the Case File to support his claims. All the evidence that the ICP cites is hearsay and it is not corroborated

²⁴⁷⁹ Case 002/01, *Appeal Judgment*, 23 November 2016, F36, para. 419: In Case 002/01 the Supreme Court Chamber found that relying on a 'multiplicity of evidentiary items' irrespective of their probative value may not necessarily meet the requisite standard of proof. More specifically the Supreme Court Chamber held that 'such an approach would mean that an accused could be convicted merely on the basis of widespread rumours.'

²⁴⁸⁰ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208092.

²⁴⁸¹ *Supra*, para. 1127, fn 2265.

²⁴⁸² *ICP's Final Submission*, D378/2, paras 45, 148.

by any direct evidence from the Case File, if any exists. The evidence relied upon by the ICP is analysed below.

- Evidence regarding Mr YIM Tith's Alleged Position as *de jure* Secretary of Sector 1

1237. The ICP claims that Mr YIM Tith was formally appointed Sector 1 Secretary in mid-1978.²⁴⁸³ For this claim, the ICP cites only the interviews of HENG Teav alias Ta Pet with Stephen Heder taken in 1990. This evidence has no probative value.

HENG Teav alias Ta Pet's evidence regarding Mr YIM Tith's *de jure* position as Secretary of Sector 1

1238. There are four documents in Case File 004 purporting to be the interviews of HENG Teav alias Ta Pet taken by Stephen Heder in August 1990 (D1.3.11.15, D34.1.10, D287/2/1.1 and D34.1.9.), and two audio records (D34.1.9R and D34.1.10R²⁴⁸⁴).

1239. According to the ICP, Ta Pet was a high-ranking DK cadre in the Northwest Zone and became Secretary of Sector 1 in June 1977,²⁴⁸⁵ after Ta Vanh left the Northwest Zone to work in the Ministry of Foreign Affairs.²⁴⁸⁶ According to the evidence in the Case File, he was performing his duties as a Secretary of Sector 1 until, at the earliest, November 1978.²⁴⁸⁷

1240. Stephen Heder has a BA in Asian Studies and an MA in Government from Cornell University, New York, US.²⁴⁸⁸ In his long career he had numerous jobs and performed different functions, and the Defence sets out hereunder those that are relevant to this Response. From 1979 to 1993 he was a Fellow of the Institute of Asian Studies at Chulalongkorn University conducting research at the Thai-Cambodian Border on the Khmer Rouge 'while they were in power.'²⁴⁸⁹ From 1991 to 1993, he worked as a Deputy

²⁴⁸³ ICP's Final Submission, D378/2, para. 148.

²⁴⁸⁴ Both audio recordings are placed *proprio motu* from Case File 002 to Case File 004 on 7 July 2011 by OCIJ, and both have a date 10 August 1990 (as is marked in ZyLab).

²⁴⁸⁵ ICP's Final Submission, D378/2, para. 333.

²⁴⁸⁶ ICP's Final Submission, D378/2, para. 336.

²⁴⁸⁷ VY Phann, WRI, A3, EN 01061168-9; D105/8, HAN Thy, WRI, A13-A16, EN 00803456. See also, *supra*, para. 1135.

²⁴⁸⁸ E1/220.1, Public Trial Transcript, Case 002/02, p. 94, l. 13-16.

²⁴⁸⁹ E1/220.1, HENG Teav alias Ta Pet, Public Trial Transcript, Case 002/02, p. 95, l. 23-25 to p. 96, l. 1-6.

Director at UNTAC in the information/educational division.²⁴⁹⁰ In 2006 Stephen Heder was contracted by UNAKRT to work in the Office of Co-Investigative Judges but, upon an agreement between ICIJ and ICP he was 'lent' to the OCP and worked as an investigator, researcher or analyst in the OCP for the entirety of 2006, following which he was sent back to work in the OCIJ in 2007 pursuant to an agreement between the then ICIJ and the then ICP.²⁴⁹¹

HENG Teav's 'interview' documents D1.3.11.15 and D287/2/1.1 are not reliable

1241. Document D1.3.11.15 is not cited in the ICP's Third Introductory Submission dated 20 November 2008,²⁴⁹² but it was put on Case File 004 on the same date by the OCIJ, under the title 'OCP Interview of HENG Teav, dated 10 August 1990.'²⁴⁹³ The title of this document is misleading. Although Stephen Heder was working for the OCP in 2006, this document was created in 1990 while he was a Fellow of the Institute of Asian Studies at Chulalongkorn University, and in his private capacity. If it was indeed Heder who conducted this interview, then he was free from the professional obligations incumbent on OCP staff members. Moreover, the OCP did not exist at the time of this purported 'OCP interview,' it having been established pursuant to the UN-RGC Agreement ratified by Cambodia 19 October 2004.²⁴⁹⁴

1242. The content of Document D1.3.11.15 further undermines its reliability. The document is headed as an 'ECCC interview,' which is 21 minutes long, with HENG Teav (Ta Pet), which is said to have been conducted on an unknown date by an unknown interviewer. Furthermore, the start and end of the interview was unrecorded or missing from this document.²⁴⁹⁵

1243. Some clarification (or perhaps further confusion) is provided by comparing this document with D34.1.10 titled 'Transcript of Interview HENG Teav' and dated by the OCIJ as 10 August 1990.²⁴⁹⁶ D34.1.10 is the 'interview script' of audio file D34.1.10R dated 14

²⁴⁹⁰ E1/220.1, HENG Teav aka Ta Pet, Public Trial Transcript, Case 002/02, p. 95, l. 23-25 to p. 95, l. 13-22 and p. 97, l. 25 to p. 98, l. 1-3.

²⁴⁹¹ E1/220.1, Public Trial Transcript, Case 002/02, p. 98, ll. 5-25 to p. 99, ll. 1-7.

²⁴⁹² ICP's Third Introductory Submission, D1, 10 November 2008.

²⁴⁹³ Decision on Response to Second Request of the International Co-Prosecutor to place Evidentiary Documents from Case File 002 onto Case File 004, D64, 17 October 2013, para. 3, fn 5.

²⁴⁹⁴ *Supra*, para. 135.

²⁴⁹⁵ D1.3.11.15, HENG Teav aka Ta Pet, Stephen Heder interview, p. 1, EN 00426118, and p. 12, EN 00426129.

²⁴⁹⁶ Note of the Placement of Documents from Case File 002 on Case File 004, D34, fn 5, 7 July 2011.

August 1990²⁴⁹⁷ (the length of which is 56 minutes 43 seconds) and was transferred *proprio motu* by the OCIJ from Case File 002 to Case File 004 on 7 July 2011.²⁴⁹⁸ This document identifies Stephen HEDER as the Interviewer and Mr HENG Teav as the Interviewee. The length of the interview stated in the document is 56 minutes and 55 seconds.

1244. Although D34.1.10 is significantly longer than D1.3.11.15, the two documents are clearly transcriptions from the same audio tape, D34.1.10R. Both transcriptions begin and end with the same questions and answers²⁴⁹⁹ and some other parts of both documents appear

²⁴⁹⁷ ZyLab data for audio recording D34.1.10R.

²⁴⁹⁸ *Note of the Placement of Documents from Case File 002 on Case File 004*, D34, 7 July 2011.

²⁴⁹⁹ As an example, the Defence invites the CIJs to have regard to the text on the first page of both interviews:

D34.1.10, p. 1:

HENG Teav: [The Khmer Rouge] made citizens angry [They] killed people Citizens were scared so they ran into the jungle. It was said that if our Revolution continued like it was going it would definitely fail one day.

Stephen Heder: Was this information reported by letter or phone call? Or was it sent by a messenger? Or what?

HENG Teav: I have the letter. A messenger delivered it.

Stephen Heder: Yes.

HENG Teav: Yes the story was like that. But Ta Sean asked me to meet him. I reported to him and he further reported to the higher echelon.

Stephen Heder: Ta Sean?

HENG Teav: Yes his name is TOUCH Sean alias Ta Sean. During that regime everyone knew him. But I do not know how he is doing nowadays. He was the chief of Department 560 in Battambang. He worked with us and he was also sent to work in Phnom Penh. His hometown is Dambae in Kampong Cham Province. He sent us the report. He was a reporter.

D1.3.11.15, p. 1:

R: ... made the people very angry.

Q: Yes.

R: Killed people, and the people were terrified and they all fled to the forests. So then, our revolution, if it acted like that, would someday certainly be defeated.

Q: But was that in a letter or over the telephone, or did a messenger bring a letter, or what exactly?

R: I had a letter, a letter brought by someone. So that was how it was, but Ta Sean, someone reported for me to meet him. I told him, and he reported it on.

Q: Ta Sean?

R: Ta Sean, Ta TAUCH Sean. Everyone knew him before, Ta TAUCH Sean;

I don't know where he is these days. He was chairman of our Office 560 in Battambang. He was with (inaudible).

TAUCH Sean was in Dambae, Kampong Cham; that was his birthplace. He reported, since he was the reporter.

And last page of the both Interviews:

D34.1.10, p. 25

HENG Teav: Well I have not completely forgotten the language. It is just that...[inaudible] I have not used it for a long time. At that time I studied about nuclear weapons in China. Nuclear...

Stephen Heder: Yes

HENG Teav: Technical Logistics. I think this is all I have to tell you. Please excuse me.

Stephen Heder: That is alright.

HENG Teav: I have not prepared anything [inaudible]...

Stephen Heder: Yes. Please, please.

D1.3.11.15, p. 12

Q: You know Chinese as well?

R: Yes, I studied in China.

Q: You studied?

the same (although the quality of transcription/translation is significantly different). The Defence has no explanation as to how and why the difference of 35 minutes and 55 seconds in the length of the transcription of the same audio file D34.1.10R accrued. It is obvious that this difference brings into serious doubt the authenticity of D1.3.11.15 as audio recording D34.1.10R does not support veracity of this Document (D1.3.11.15). Also, D1.3.11.15 title as 'ECCC interview' is misleading.

1245. Document D287/2/1.1 originates from Stephen Heder and is titled 'Interview of HENG Teav, 10 August 1990.' This document is referenced in the ICP's Third Introductory Submission, although it was placed onto Case File 004 only on 26 January 2016,²⁵⁰⁰ after the intervention of the ICIJ.²⁵⁰¹ The title of this document is misleading. From the document itself, it appears that this is actually a reconstruction of the notes from a discussion or interview conducted by Stephen Heder, and does not constitute a formal record of an interview. No date of this 'reconstruction' is provided, and any original notes on which the reconstructed document was based, as well as any audio recording, should they exist, have not been placed onto Case File 004. The ICIJ and Defence have no way to check the authenticity and reliability of this document.

HENG Teav's 'interview' documents D34.1.9 and D34.1.10 have no probative value

1246. Documents D34.1.9²⁵⁰² and D34.1.10 are transcripts of two audio recordings (D34.1.9R and D34.1.10R, both dated 10 August 1990) that originate from Stephen Heder, both titled 'Interview of HENG Teav.' Both interviews were conducted in August 1990, at the time when HENG Teav was already integrated into the new Cambodian regime and had become a member of the State Council and Party Secretary to the Kampuchea Union Federation,²⁵⁰³ and had become a cadre of the People's Republic of Kampuchea ('PRK')

R: Yes, I studied. I have forgotten it all.

Q: Forgotten, so I need not speak Chinese.

R: I cannot recall everything, I can just say (inaudible), It's gone now. But I studied technology in China. Technology!

Q: Yes.

R: Logistics technology. I have nothing else, forgive me.

²⁵⁰⁰ *International Co-Prosecutor's Response to the International Co-Investigative Judge's Request*, 26 January 2016, D287/2/1.

²⁵⁰¹ *Joint Decision on the Request of IM Chaem and Yim Tith Concerning the Third Introductory Submission*, para. 22, 22 January 2016, D287/2.

²⁵⁰² D34.1.9 is dated 14 August 1990. The Khmer translation of the audio record was placed on Case File 004 on 25 November 2013 and the English translation on 16 December 2015, both by the OCIJ.

²⁵⁰³ D34.1.9, HENG Teav aka Ta Pet, Stephen Heder interview, p. 3, EN 01181105.

that was proclaimed in January 1979 after the disintegration of the DK regime and backed by the Vietnamese.²⁵⁰⁴

1247. It is important to note that at the time when HENG Teav joined the PRK in the second half of 1979, the founding Communiqué of the Solidarity Front for the Salvation of the Kampuchean Nation from December 1978 was in place²⁵⁰⁵. The Communiqué committed the new regime (PRK) to ‘sternly punish the ringleaders of treason to the nation who stubbornly oppose the people and owe blood debts to the people.’ However, it also promised ‘leniency *vis-a-vis* those who are honest and who understand and sincerely correct their wrongdoings’ and ‘to praise and appropriately encourage those who perform feats on behalf of the revolution,’ which was referring to the PRK. The Solidarity Front thus declared that it was ready ‘to warmly welcome and create favourable conditions for officers and enlisted men’ in the CPK’s armed forces and ‘for cadre and personnel of the traitorous [i.e., DK] state power to return to and join hands with the people.’²⁵⁰⁶ Consequently, in order to keep his government job and, importantly, to avoid prosecution, it would have been necessary for HENG Teav to adjust any statement he gave to Stephen Heder. Analysis of his statements shows that he gave the two interviews dated 10 August 1990 and recorded in D34.1.9R and D34.1.10R, in light of the political situation in 1990 and with self-preservation in mind.

1248. In his D34.1.10 interview, HENG Teav stated that he joined revolution in 1954 and that ‘after Geneva Conference, the Indochinese War ended’ and that he was sent by ‘Kampuchean Communist Party to study in Vietnam for fifteen years.’²⁵⁰⁷ He returned in Cambodia in 1970,²⁵⁰⁸ stayed there for little more than a year and then returned in Vietnam in April 1971.²⁵⁰⁹ He learned about the situation and POL Pot’s policy from his friends and decided to escape.²⁵¹⁰ He stated that he did not know the situation in Cambodia ‘before and after the 1975 liberation’²⁵¹¹ but he stated that he knew ‘a bit about the killings’

²⁵⁰⁴ D248.1.5, EN 01102576.

²⁵⁰⁵ D248.1.5, Stephen Heder: ‘A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of Extraordinary Chambers in the Court of Cambodia,’ 1 August 2011, EN 01102576.

²⁵⁰⁶ D248.1.5, Stephen Heder: ‘A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of Extraordinary Chambers in the Court of Cambodia,’ 1 August 2011, EN 01102576.

²⁵⁰⁷ D34.1.10, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181088.

²⁵⁰⁸ D34.1.10, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181088.

²⁵⁰⁹ D34.1.10, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181089.

²⁵¹⁰ D34.1.10, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181090.

²⁵¹¹ D34.1.10, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181090.

which happened after he left POL Pot.²⁵¹² He stayed in Vietnam until 1978.²⁵¹³ In April 1978, he joined some Cambodian friends, and they together organized two battalions and joined the Vietnamese in attacking the Khmer Rouge in Cambodia.²⁵¹⁴

1249. In his D34.1.9. interview, Ta Pet stated that in 1975, after the liberation, he still ‘worked with Khmer Rouge’ but that between 1975 and 1978 his life ‘encountered difficulties, as POL pot always threatened me with arrest, transfer, and so on, during 1975 and 1979, and even after 1979.’²⁵¹⁵ He stated that he was arrested probably in September or October 1978.²⁵¹⁶ He stated that ‘Ta Mok, his bodyguards, and lorry of his soldiers’ forced him and his wife to enter the vehicle and ‘ride on the vehicle with them’ to Phnom Penh. Upon their arrival in Phnom Penh he stated that they ‘placed them in a house near red bank [National Bank of Cambodia],’ at the CPK’s house used for receiving the guests (he knew this house because he often went there to attend CPK’s meetings) and they were given a food²⁵¹⁷. He did not explain what happened with Ta Mok, his bodyguards or the truck full of soldiers who escorted him and his wife to Phnom Penh. Then he stated that a group of soldiers from Kampong Speu took him to Kampong Speu²⁵¹⁸ where he was sent to Chan Reangsei Barracks where he stayed until the Vietnamese arrived.²⁵¹⁹

1250. His own evidence and other evidence in the Case File contradicts HENG Teav’s statement that he was ‘arrested.’ HUON Choeum stated that Ta Pet ‘escaped to live in inundated forest, and when the Vietnamese entered, he came out,’²⁵²⁰ and CHHORN Vorn stated that Ta Pet ‘was not arrested then because he had gone to Phnom Penh.’²⁵²¹ VY Phann saw him at the meeting in Kanghat Dam in November 1978 where Ta Pet announced that ‘Ta Tith’ who was from Southwest Zone, had come ‘to help govern Sector 1’²⁵²² and his bodyguard, CHHEAN Hea, was present when ‘Mok’s messenger came to tell Ta Pet to prepare his belongings to move to another location’²⁵²³ and, according to his evidence,

²⁵¹² D34.1.10, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181089.

²⁵¹³ D34.1.10, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181089.

²⁵¹⁴ D34.1.10, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181092-6.

²⁵¹⁵ D34.1.9, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181104.

²⁵¹⁶ D34.1.9, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181104.

²⁵¹⁷ D34.1.9, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181115.

²⁵¹⁸ D34.1.9, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181104.

²⁵¹⁹ D34.1.9, HENG Teav alias Ta Pet, Interview with Stephen Heder, EN 01181106.

²⁵²⁰ D118/106, HUON Choeum, WRI, A8-A11, EN 00978419.

²⁵²¹ D118/137, CHHORN Vorn, WRI, A20-A24, EN 00970082-3.

²⁵²² D219/85, VY Phann, WRI, A3, EN 01061168-9. *See also supra*, para. 1258.

²⁵²³ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

this happened in October of November 1978.²⁵²⁴ CHHORN Vorn also stated that after 1979 he met Ta Pet and he told him that he ‘had been assigned to cut a clump of bamboo per day in Oral mountain, Kampong Speu Province.’²⁵²⁵

1251. The timing of HENG Teav’s travel to Phnom Penh is also mentioned in the statements of other witnesses. VY Phann saw him at the meeting in Kanghat Dam in November 1978 where Ta Pet announced that ‘Ta Tith’ who was from Southwest Zone, had come ‘to help govern Sector 1’²⁵²⁶ and his bodyguard, CHHEAN Hea, was present when ‘Mok’s messenger came to tell Ta Pet to prepare his belongings to move to another location’²⁵²⁷ and, according to his evidence, this happened in October or November 1978.²⁵²⁸

1252. Considering Ta Pet’s own evidence and the evidence of CHHEAN Hea and VY Phann, the ICP’s claim that Mr YIM Tith was appointed as Secretary of Sector 1 in mid-1978,²⁵²⁹ specifically in July 1978,²⁵³⁰ is not supported by the evidence in the Case File. In addition, as submitted above, evidence in the Case File shows that in August 1978, HENG Teav was a Member of CPK Standing Committee, member of Central Committee and Member of regional party Committee.²⁵³¹

1253. Furthermore, The CIJs have held that statements or other evidence collected without judicial supervision enjoy ‘no presumption of relevance and reliability’²⁵³² and the information contained therein has been relied on by the CIJs only when corroborated by other sources.²⁵³³

²⁵²⁴ *Supra*, para. 1135.

²⁵²⁵ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

²⁵²⁶ D219/85, VY Phann, WRI, A3, EN 01061168-9. *See also supra*, para. 1258..

²⁵²⁷ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

²⁵²⁸ *Supra*, para. 1135.

²⁵²⁹ *ICP’s Final Submission*, D378/2, para. 148.

²⁵³⁰ *ICP’s Final Submission*, D378/2, para. 47

²⁵³¹ *Supra*, para. 1229.

²⁵³² Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 104 (footnotes omitted); Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 124; Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 486.

²⁵³³ Case 004/01, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 108. Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 127. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 489.

Other Evidence Regarding Mr YIM Tith's Alleged *De Jure* Position as Secretary of Sector 1

1254. In support of his assertion that Mr YIM Tith was appointed as *de jure* Sector 1 Secretary, the ICP also cites LEK Phiv, CHHAM Luy, NOP Ngim, VY Phann, CHHEAN Hea, SOK Cheat and HAM Saom.²⁵³⁴ Nothing in the evidence of these witnesses cited by the ICP says that Mr YIM Tith was formally appointed as Sector 1 Secretary. The ICP is misstating, and consequently misrepresenting, the evidence of these witnesses. Again, the ICP is attempting to satisfy the standard for indictment through sheer quantity of evidence, regardless of its relevance or quality.

Conclusion regarding Mr YIM Tith's Alleged *de jure* Position as Secretary of Sector 1

1255. The ECCC case law established that statements going to prove acts and conducts of the accused must be excluded from assessment of evidence if there is no opportunity for cross-examination, except where a witness is deceased, in which case 'it would not base any conviction decisively thereupon.'²⁵³⁵ Ta Pet's self-serving, contradictory out-of-court statement has no probative value, and it is not supported by any evidence in the Case File. The Defence submits that the CIJs must disregard his statements from their considerations. The ICP did present sufficient evidence to support his claim that Mr YIM Tith was *de jure* Secretary of Sector 1.

Evidence Regarding Mr YIM Tith's Alleged Position as *De Facto* Secretary of Sector 1

1256. Primarily, the ICP claims that 'even before being formally appointed as Sector 1 Secretary [...] Mr YIM Tith was publicly introduced as someone who had come to help govern Sector 1,' which, according to the ICP makes Mr YIM Tith a 'powerful *de facto* leader.'²⁵³⁶ In support of this claim, the ICP only partially cites one answer from one of VY Phann's WRIs.²⁵³⁷ The ICP's claim has no merit.

1257. The ICP relied on answer A3 of VY Phann's WRI (D219/85):

²⁵³⁴ ICP's Final Submission, D378/2, para. 148, fn 426.

²⁵³⁵ *Supra*, para. 521.

²⁵³⁶ ICP's Final Submission, D378/2, para.45.

²⁵³⁷ ICP's Final Submission, D378/2, para. 45, fn 93.

Ta Pet announced at the meeting that Ta Tith, who was from the Southwest Zone, had come to help govern Sector 1. At that time, there was a mass assembly attended by approximately 700 to 800 participants including ordinary people and the village, commune, and district chairpersons. That assembly was held at Kanghat Dam worksite.²⁵³⁸

1258. The ICP disregards the rest of VY Phann's answer where he said that this meeting at Kanghat Dam was held in November 1978, when 'Ta Tith' arrived in his area and that this was the first time he saw 'Ta Tith.'²⁵³⁹ The ICP's conclusion that this meeting happened 'more likely' in November 1977²⁵⁴⁰ is without merit. VY Phann was determined in his statement that this meeting was held in November 1978 and he repeated the same date five months after he gave his only statement, on 30 March 2015, to the ICIJ investigator when he accompanied him to several sites near Banan temple. This is recorded in the WRIA:

Vy stated that when he was called to the 1978 group meeting at Kang Hort dam chaired by Ta Tith, Vy was living in his home village and not working at the dam.²⁵⁴¹

1259. Furthermore, the ICP claims that Mr YIM Tith 'served' as Sector 1 Secretary, Northwest Zone.²⁵⁴² In order to substantiate his claim, the ICP relies on WRIs from LEK Phiv and SOK Cheat who lived and worked in Koas Krala District; VY Phann, CHUON Than, and CHHOEUNG Bean who lived and worked in Sangkae District; NOP Ngim who was a Southwest Zone cadre who came to the Northwest Zone in 1978 and worked in Samlaut District from September 1978; CHHEAN Hea who was HENG Teav alias Ta Pet's bodyguard; EK (Ul) Hoeun who was a simple worker from the Southwest Zone who never had any position in the Southwest Zone and did not go to the Northwest Zone during the DK period; and HENG Teav Ta Pet's 1990 out court interviews given to Stephen Heder.

HENG Teav, Ta Pet's Evidence Regarding Mr YIM Tith's Alleged Position as *de facto* Secretary of Sector 1

1260. As already argued in the Response, HENG Teav alias Ta Pet's evidence has no probative value and should not be used by OCIJ assessment of evidence in the Case File.²⁵⁴³

²⁵³⁸ D219/85, VY Phann WRI, A3, EN 01061168-9.

²⁵³⁹ D219/85, VY Phann, WRI, A3, EN 01061168-9.

²⁵⁴⁰ *ICP's Final Submission*, D378/2, para. 58.

²⁵⁴¹ D219/245, VY Phann, WRIA, EN 01080973.

²⁵⁴² *ICP's Final Submission*, D378/2, para. 45.

²⁵⁴³ *Supra*, paras 1238 to 1251.

EK (Ul) Hoeun's evidence about Mr YIM Tith's Alleged Position as *de facto* Secretary of Sector 1

1261. As stated above, EK (Ul) Hoeun lived and worked in Tram Kak District, Southwest Zone, from where he was transferred in East Zone in 1977 or 1978.²⁵⁴⁴ He never went to the Northwest Zone. As it will be argued in this Response, EK (Ul) Hoeun's evidence has no probative value.²⁵⁴⁵ Specifically, evidence of this witness regarding 'Ta Tith's' move to the Northwest Zone is implausible and based on unsubstantiated hearsay.²⁵⁴⁶

CHHEAN Hea's Evidence Regarding Mr YIM Tith's Alleged Position as *de facto* Secretary of Sector 1

1262. As already argued in the Response, CHHEAN Hea's evidence regarding Mr YIM Tith's alleged position in the Northwest Zone has limited probative value.²⁵⁴⁷ He stated that he saw 'Ta Tith' only once, before Ta Pet's alleged arrested, when Ta Pet came to 'Ta Tith's' place for a meeting and stayed with him for an hour.²⁵⁴⁸ He also stated that, after he fled to his cooperative in October or November 1978 and then to jungle, he knew nothing, apart from that 'Ta Tith was in charge of Sector 1.'²⁵⁴⁹ He gave no explanation how he knew that, nor explanation was asked by investigator. CHHEAN Hea's evidence does not support the ICP's claim.

Evidence about Mr YIM Tith's alleged exercise of *de facto* command responsibility in Sector 1

1263. Finally, for YIM Tith's alleged exercise of *de facto* command responsibility in the Districts of Sector 1, the ICP relies on the following evidence:

- in Koas Krala District, the ICP relies on only one witness, LEK Phiv;²⁵⁵⁰
- in Sangkae District, the ICP relies on evidence of three witnesses, CHHOEUNG Bean, SOK Cheat and VY Phann;
- in Samlaut District, the ICP relies on one witness, NOP Ngim;

²⁵⁴⁴ *Supra*, para. 678.

²⁵⁴⁵ *Supra*, paras, 674 to 683, 1044 to 1147 and 1210 to 1213. *Infra*, para. 1510.

²⁵⁴⁶ *Supra*, paras 1210 to 1213.

²⁵⁴⁷ *Supra*, paras 1135 to 1142.

²⁵⁴⁸ D118/271, CHHEAN Hea, WRI, A25-A26, EN 01029420-1.

²⁵⁴⁹ D118/136, CHHEAN Hea, WRI, A3, A9, EN 00969637 and EN 00969639.

²⁵⁵⁰ *ICP's Final Submission*, D378/2, paras 150-153.

- the ICP also relies on evidence of witness CHUON Than, but this witness gives evidence in relation to Sector 3 and does not support the ICP's claims regarding Sector 1.

LEK Phiv's Evidence Regarding Mr YIM Tith's Alleged Position as *de facto* Secretary of Sector 1 (Koas Krala District)

1264. The ICP claims, based on the statements of a single witness, that Mr YIM Tith 'exercised significant direct, personal control over Koas Krala District.'²⁵⁵¹ LEK Phiv's evidence does not support this claim.

1265. LEK Phiv gave three statements to the ICIJ.²⁵⁵² Until the end of 1977 he was chief of Thipakdei Cooperative in Koas Krala District, at which time he was demoted and became the deputy to Ta Yean, chairman of Chak/Ka Koah Cooperative in Maong Russei District.²⁵⁵³

1266. In his first statement (D219/210), LEK Phiv stated that he did not know 'Ta Tith' while he was the chief of Thipakdei Cooperative in Koas Krala District.²⁵⁵⁴ He stated that 'Ta Tith' became Sector 1 Secretary when he was deputy chairman in Chak/Ka Koah Cooperative in Maong Russei District, and after the disappearance of Ta Pet in the rainy season of 1978, at the time when seedlings were being transplanted to the fields.²⁵⁵⁵ There is no explanation as to how he knows this.

1267. LEK Phiv said that he is not sure that 'Ta Tith' held the position of Sector 1 Secretary until the end of the DK regime, because 'Ta Tith' disappeared about half a year before the DK regime collapsed, and Ta Yean (who was chief of Chak/Ka Koah Cooperative in Maong Russei District) became his successor.²⁵⁵⁶ This statement puts the evidence of this witness in serious doubt as it appears that he is not talking about 'Ta Tith' but about somebody else. Instead of clarifying this answer, the investigator stopped the interview after 10 questions at 12.30 p.m. stating that 'we do not have enough time today.'²⁵⁵⁷

²⁵⁵¹ ICP's Final Submission, D378/2, para. 153.

²⁵⁵² D219/210, D219/236 and D219/292, LEK Phiv, WRIs.

²⁵⁵³ D219/210, LEK Phiv, WRI, A1-A2, EN 01088521-2; A7, EN 01088523.

²⁵⁵⁴ D219/210, LEK Phiv, WRI, A5, EN 01088522.

²⁵⁵⁵ D219/210, LEK Phiv, WRI, A3-A5, EN 01088522. The rainy season in Cambodia runs from May to November.

²⁵⁵⁶ D219/210, LEK Phiv, WRI, A10, EN 01088523.

²⁵⁵⁷ D219/210, LEK Phiv, WRI, Q/A11, EN 01088523.

1268. Nevertheless, it is significant to point out that LEK Phiv is also profoundly confused about the alleged meetings held by the person he recalled as ‘Ta Tith.’

1269. First, he said that when he was deputy to Ta Yean (in Chak/Ka Koah Cooperative in Maong Russei District) all the cooperative committee chiefs and deputies were called to attend a meeting at Anlong Vil and Wat Ta Moem Pagoda in Sangkhae District which was led by ‘Ta Tith.’²⁵⁵⁸

1270. Then he changed his evidence and said that after Ta Yean, who was district committee of Koas Krala District, disappeared, ‘Ta Tith’ chaired meetings instead, and that he noticed that the same cooperative committee members who attended the meetings that were led by Ta Yean and Ta Pet also attended the meetings that were led by ‘Ta Tith.’²⁵⁵⁹ This is contrary to his statement that he was transferred and demoted from Koas Krala District to Maong Russei District before ‘Ta Tith’ came to the area.²⁵⁶⁰ It is not clear from his evidence whether he was talking about meetings in Koas Krala District, Maong Russei District or Sangkhae District. The investigator failed to clarify this uncertainty in LEK Phiv’s evidence.

1271. In the second interview (D219/236), instead of clarifying the confusion from LEK Phiv’s first interview, the investigator misrepresented LEK Phiv’s evidence from the first interview, starting his question with the following misleading proposition:

Q: In your previous interview, you stated that you went to attend the meetings that were held by Ta Tith. When you were the chief of Thipakdei Cooperative and attended the meetings with Ta Tith, did you ever ask him about the enemies or any traitors? What should they do to act against those enemies and traitors?²⁵⁶¹

1272. This way of misrepresenting evidence to the witness results in a false narrative and removes any probative value of the answers the witness gives. The investigator never asked LEK Phiv to clarify the confusion about the alleged meetings at Anlong Vil and Wat Ta Moem Pagoda in Sangkhae District, or how he knows about ‘Ta Tith’s’ alleged position as Secretary of Sector 1. But, LEK Phiv provided an explanation himself, confusing as it is:

²⁵⁵⁸ D219/210, LEK Phiv, WRI, A4, EN 01088522.

²⁵⁵⁹ D219/210, LEK Phiv, WRI, A6, EN 01088522-3.

²⁵⁶⁰ D219/210, LEK Phiv, WRI, A3-A5, EN 01088522.

²⁵⁶¹ D219/236, LEK Phiv, WRI, Q/A18, EN 01092932.

He [Ta Tith] was on the committee of Sector 1. I am not certain of the roles of *Ta* Pet and *Ta* Tith. When *Ta* Tith talked during meetings, I listened to him.²⁵⁶²

1273. LEK Phiv did not positively identify Mr YIM Tith and his contradictory and confusing evidence has no probative value. There is no other evidence in the Case File supporting the evidence of this witness. Consequently, the evidence of LEK Phiv does not support the ICP's claim regarding Mr YIM Tith's alleged control over the Koas Krala District.

SOK Cheat's Evidence Regarding Mr YIM Tith's Alleged Position as *de facto* Secretary of Sector 1 (Sangkae District)

1274. SOK Cheat gave three WRIs to the ICIJ in 2016.²⁵⁶³ In support of his claim that Mr YIM Tith served as Sector 1 Secretary, the ICP cherry-picks two answers from one of SOK Cheat's statements and consequently misrepresents his evidence.

1275. At the beginning of the Khmer Rouge regime in 1975, SOK Cheat was assigned by his uncle *Ta* Pet to be in charge of the sector mobile unit to build Steung Kanghat (Kanghat Dam, Sangkae District).²⁵⁶⁴ SOK Cheat was in charge of 6000 people.²⁵⁶⁵ In August 1977 SOK Cheat was removed from the sector mobile unit and was assigned to work at Tuol Mtes.²⁵⁶⁶ He stayed in Tuol Mtes (Kos Krala District) until August 1978, when he fled to the jungle and became a paramilitary soldier for SEUN San.²⁵⁶⁷ When he was working in Kanghat Dam his commander was Khen, a female from Pursat Province,²⁵⁶⁸ who came to control Kanghat Dam,²⁵⁶⁹ and *Ta* Vanh was 'the sector level.'²⁵⁷⁰ SOK Cheat did not provide information, nor was he asked, who was his commander from August 1977 when he said he was working in Tuol Mtse.

1276. In support of his claim, the ICP cites two answers from SOK Cheat's first WRI where he stated that 'The Southwest Zone cadres, particularly *Ta* Tith, were sent to be in charge of

²⁵⁶² D219/236, LEK Phiv, WRI, A18, EN 01092932.

²⁵⁶³ D219/654, D219/689 and D219/765, SOK Cheat, WRIs.

²⁵⁶⁴ D219/654, SOK Cheat, WRI, A66, EN 01207516.

²⁵⁶⁵ D219/654, SOK Cheat, WRI, A5-A9, EN 01207505-6; D219/689, WRI A3, EN 01216243.

²⁵⁶⁶ D219/654, SOK Cheat, WRI, A11, EN 01207506; D219/689, WRI A4, EN 01216243; A29-A31, EN 01216246.

²⁵⁶⁷ D219/654, SOK Cheat, WRI, A12-A18, EN 01207506-7; D219/689, WRI A5-A10, EN 01216243; A29-A31, EN 01216246.

²⁵⁶⁸ D219/654, SOK Cheat, WRI, A31-A33, EN 01207509-10.

²⁵⁶⁹ D219/765, SOK Cheat, WRI, A12-A13, EN 01305571.

²⁵⁷⁰ D219/654, SOK Cheat, WRI, A56, EN 01207515.

the cooperatives in Sector 1' and that 'Ta Tith came to control the Sector before I fled into the forest.'²⁵⁷¹

1277. The ICP disregards a large swathe of SOK Cheat's evidence which demonstrates that his answers have no probative value whatsoever. SOK Cheat stated that Southwest Zone cadres came to his area after Kanghat Dam broke²⁵⁷² and that they 'worked above Comrade Khen.'²⁵⁷³ He also stated that he did not know when 'Ta Tith' arrived in the Northwest Zone.²⁵⁷⁴ SOK Cheat received all orders from 'Comrade Khen'²⁵⁷⁵ and she never told him that she received orders from 'Ta Tith,'²⁵⁷⁶ but he assumed that 'Ta Tith' was in charge because '[w]hen Comrade Khen came from a meeting, she used the word Angkar. I thought that Angkar was Ta Tith and Ta Tith's men who were in charge.'²⁵⁷⁷ His assumptions were based on 'whispers.'²⁵⁷⁸ SOK Cheat also stated that during the communist regime, keeping secrets was very important and that he only knew events at his 'working place.'²⁵⁷⁹ He did not even know whether his uncle, Ta Pet, worked in other sectors of the Northwest Zone,²⁵⁸⁰ nor was he aware that Ta Pet worked at the Zone level with Ta Nhim.²⁵⁸¹

1278. SOK Cheat allegedly met 'Ta Tith' only once at a meeting in Banan Loeur pagoda, at the end of 1977,²⁵⁸² when he was already working in Tuol Mtes.²⁵⁸³ SOK Cheat said that 'Ta Tith' was not introduced at the meeting and neither were any other participants.²⁵⁸⁴ Consequently, it is unclear how SOK Cheat knew that one of the people at this meeting was 'Ta Tith,' as people were 'whispering that a new person with great power was

²⁵⁷¹ D219/689, SOK Cheat WRI, A20, EN 01216244; A81, EN 01216253.

²⁵⁷² D219/689, SOK Cheat, WRI A17-A19, EN 01216244.

²⁵⁷³ D219/689, SOK Cheat, WRI A21, EN 01216245.

²⁵⁷⁴ D219/689, SOK Cheat, WRI A20, EN 01216244.

²⁵⁷⁵ D219/689, SOK Cheat, WRI A22, EN 01216245.

²⁵⁷⁶ D219/689, SOK Cheat, WRI A47, EN 01216248.

²⁵⁷⁷ D219/689, SOK Cheat, WRI A23, EN 01216245; A48-A50, EN 01216248.

²⁵⁷⁸ D219/689, SOK Cheat, WRI A50, EN 01216248; D219/765, SOK Cheat, WRI, A6-A11, EN 01305571.

²⁵⁷⁹ D219/765, SOK Cheat, WRI, A13, EN 01305571

²⁵⁸⁰ D219/765, SOK Cheat, WRI, A2-A5, EN 01305570-1.

²⁵⁸¹ D219/765, SOK Cheat, WRI, A3, EN 013055701, "I don't know about the work of the high echelons, even though I worked with them. He might have worked in the Zone, but I don't know."

²⁵⁸² D219/654, SOK Cheat, WRI, A75-76, EN 01207519; D219/689, WRI A40, EN 01216247.

²⁵⁸³ D219/654, SOK Cheat, WRI, A11, EN 01207506; D219/689, WRI A4, EN 01216243; A29-A31, EN 01216246.

²⁵⁸⁴ D219/689, SOK Cheat, WRI A44, EN 01216247.

coming' without mentioning any names.²⁵⁸⁵ Furthermore, SOK Cheat stated explicitly that his supervisor, Khen, never mentioned any names.²⁵⁸⁶

1279. Contrary to the evidence of SOK Cheat cited by the ICP, SOK Cheat stated that he does not know whether 'Ta Tith' officially held any position at the time when he was present at the meeting at Banan Loeur pagoda, at the end of 1977.²⁵⁸⁷ SOK Cheat's uncle, Ta Pet, never told him anything about 'Ta Tith,' nor was he aware that they worked together.²⁵⁸⁸ SOK Cheat did not know who worked closely with 'Ta Tith.'²⁵⁸⁹ He also stated that he visited his uncle, Ta Pet, several times in 1978 before he fled to the forest in August 1978 and he did not notice that 'Ta Pet was missing' before he fled.²⁵⁹⁰

1280. Another inconsistency in SOK Cheat's evidence is that he heard that Ta Pet was arrested in 1977 while he was in the forest.²⁵⁹¹ However, SOK Cheat only escaped to the forest in August 1978.²⁵⁹²

1281. SOK Cheat did not positively identify Mr YIM Tith. His evidence regarding 'Ta Tith' is based on unsubstantiated hearsay (referred to by SOK Cheat as 'whispers') and speculation and therefore has no probative value. SOK Cheat does not support the ICP's claim that Mr YIM Tith served as *de facto* Sector 1 Secretary.

VY Phann's Evidence Regarding Mr YIM Tith's Alleged Position as *de facto* Secretary of Sector 1 (Sangkae District)

1282. VY Phann gave only one statement to the OCIJ.²⁵⁹³ In support of his claim that Mr YIM Tith was serving as *de facto* Sector 1 Secretary, the ICP cherry-picks from VY Phann's evidence.

1283. After the Khmer Rouge took power in April 1975, VY Phann was assigned to be the chairperson of Kampang Village in Sangkae District, Sector 1. When the Southwest group

²⁵⁸⁵ D219/689, SOK Cheat, WRI A50, EN 01216248.

²⁵⁸⁶ D219/689, SOK Cheat, WRI A23, EN 01216245; A48-A50, EN 01216248.

²⁵⁸⁷ D219/689, SOK Cheat, WRI A45, EN 01216247.

²⁵⁸⁸ D219/689, SOK Cheat, WRI A37-A39, EN 01216247.

²⁵⁸⁹ D219/689, SOK Cheat, WRI A92-A94, EN 01216254-5.

²⁵⁹⁰ D219/689, SOK Cheat, WRI, A26-A28, EN 01216245.

²⁵⁹¹ D219/689, SOK Cheat, WRI, A24-A25, EN 01216245.

²⁵⁹² D219/689, SOK Cheat, WRI, A24-A25, EN 01216245.

²⁵⁹³ D219/85, VY Phann, WRI.

arrived, VY Phann stated that they assigned their own member to be the chairperson and he became the deputy chairperson of the same village.²⁵⁹⁴

1284. In support of his claim, the ICP cites one answer from VY Phann's statement, where VY Phann said that 'The Sector 1 Chairman then was also from the Southwest Zone. His name was Ta Tith.'²⁵⁹⁵ VY Phann was not asked how he knows that 'Ta Tith' was Sector 1 Chairman.

1285. VY Phan remembers that the very first Sector 1 Committee chairman was Ta Say who was later replaced by Ta Vanh. After Ta Vanh was accused of planning to rebel, he was arrested, and Ta Pet came to replace him. He said that one year later, 'Ta Tith' replaced Ta Pet,²⁵⁹⁶ but he never provided the source of this information nor he was asked to explain.

1286. VY Phann also remembers that Ta Tith arrived in his area around November 1978²⁵⁹⁷ and that the first time he saw 'Ta Tith' and Ta Pet was at a meeting in Kanghat Dam, where Ta Pet announced that 'Ta Tith,' who was from the Southwest Zone, had come 'to help govern Sector 1.'²⁵⁹⁸ The ICP's conclusion that this meeting happened 'more likely' in November 1977²⁵⁹⁹ is without merit. VY Phann was determined in his statement that this meeting was held in November 1978 and he repeated the same date five months after he gave his only statement, on 30 March 2015, to an OCIJ investigator when he accompanied him to several sites near Banan temple; this is recorded in a WRIA:

Vy stated that when he was called to the 1978 group meeting at Kang Hort dam chaired by Ta Tith, Vy was living in his home village and not working at the dam.²⁶⁰⁰

1287. VY Phann does not support the ICP's claim that Mr YIM Tith served as *de facto* Sector 1 Secretary. VY Phann's source of knowledge that 'Ta Tith' was Sector 1 Chairman is unknown. It appears that VY Phann's conclusion is merely his opinion. He allegedly heard that 'Ta Tith' had come 'to help govern Sector 1' by Ta Pet in November 1978.²⁶⁰¹

²⁵⁹⁴ D219/85, VY Phann, WRI, A1, EN 01061167-8.

²⁵⁹⁵ D219/85 VY Phann WRI, A2, EN 01061168.

²⁵⁹⁶ D219/85, VY Phann, WRI, A3, EN 01061168-9.

²⁵⁹⁷ D219/85, VY Phann, WRI, A3, EN 01061168-9.

²⁵⁹⁸ D219/85, VY Phann, WRI, A3, EN 01061168-9.

²⁵⁹⁹ ICP's Final Submission, D378/2, para. 58.

²⁶⁰⁰ D219/244, VY Phann, WRIA, EN 01080973.

²⁶⁰¹ D219/85, VY Phann, WRI, A3, EN 01061168-9.

‘Helping to govern’ does not equate to being the Secretary. Furthermore, it was the Sector 1 Secretary, Ta Pet, who made this announcement.

CHHOEUNG Bean’s Evidence Regarding Mr YIM Tith’s Alleged Position as *de facto* Secretary of Sector 1 (Sangkae District)

1288. CHHOEUNG Bean gave four statements to the ICIJ, all in 2015.²⁶⁰² In support of his claim that Mr YIM Tith was serving as the Sector 1 Secretary,²⁶⁰³ the ICP cherry-picks from CHHOEUNG Bean’s statements and does not have regard to the entirety of his evidence.

1289. CHHOEUNG Bean was 15 years old when the Khmer Rouge took power in 1975.²⁶⁰⁴ His statements about his work during the Khmer Rouge period are inconsistent and confusing. In his first WRI, CHHOEUNG Bean stated that during the Khmer Rouge period he was a mobile worker in Banan District, in Sector 1 of the Northwest Zone²⁶⁰⁵ and that in May 1976 he was assigned to work at Kanghat Dam.²⁶⁰⁶ In a later WRI he changed his statement and said that he worked at Kanghat Dam from 1975.²⁶⁰⁷ In his first WRI, CHHOEUNG Bean stated that he had no position in his mobile unit,²⁶⁰⁸ which is understandable giving his age at the time. But, in a later WRI he changed his story and said that he was a squad chief in the Absolute Mobile Unit in May 1976,²⁶⁰⁹ which was under the direct command of Sector 1²⁶¹⁰ and commanded by the Deputy Secretary of Sector 1, Ta Prum.²⁶¹¹ This statement is not plausible for at the time he was 16 years old. According to the number of witnesses, young people of that age were assigned to the children’s units.²⁶¹²

²⁶⁰² D219/368, D219/430, D219/465, D219/533, CHHOEUNG Bean, WRIs;

²⁶⁰³ ICP’s Final Submission, D378/2, para. 45.

²⁶⁰⁴ D219/368, CHHOEUNG Bean, WRI EN 01117714.

²⁶⁰⁵ D219/368, CHHOEUNG Bean, WRI, Q/A1, EN 01117714-5.

²⁶⁰⁶ D219/368, CHHOEUNG Bean, WRI, A6-A7, EN 01117715-6; D219/430, CHHOEUNG Bean, A1, EN 01128708.

²⁶⁰⁷ D219/430, CHHOEUNG Bean, A52, EN 01128714-5.

²⁶⁰⁸ D219/368, CHHOEUNG Bean, WRI, A18, A68, EN 01117716 and 01117720.

²⁶⁰⁹ D219/430, CHHOEUNG Bean, A13, EN 01128709.

²⁶¹⁰ D219/430, CHHOEUNG Bean, A2-4, EN 01128708-9.

²⁶¹¹ D219/430, CHHOEUNG Bean, A6, EN 01128709.

²⁶¹² D219/409, ANG Sar, WRI, A1, A6, A7, A8, A12, EN 01142873, EN 01142875-6, 14 years old according to his DOB, EN 01142872; D219/143, AUN Phally, WRI, A1, A4, EN 01063725-6, 13 years old according to his DOB, EN 01063724; D219/764, KOEUN Saroeuth, WRI, A2, A3, A29, A37, A57, EN 01305561-4, 5 years old according to DOB, EN 01305561; D219/652, LUOM Nhanh, WRI, A7, EN 01207481-2, 16 years old according to DOB, EN 01207479; D118/17, KREP Ron, WRI, A1, A2, A3, EN 00938183, 12 years old according to DOB, EN 00938182; D219/644, YOM Yeang, WRI, A9, EN 01207407, 12 years old according to DOB, EN 01207405;

1290. In support of his claim, the ICP cites conflicting statements of CHHOEUNG Bean²⁶¹³ that ‘Ta Tith’ ‘came to power prior or in July 1978 because Ta Tith chaired the meetings as the mobile unit in September 1978; that ‘Ta Tith replaced Ta Pet in July or August 1977; and that Ta Tith replaced Ta Pet in July or August 1978.’²⁶¹⁴

1291. The ICP is not assessing CHHOEUNG Bean’s evidence in its entirety, notably disregarding the age of CHHOEUNG Bean at the relevant time and his frequent changes of evidence in his four WRIs. Upon a proper analysis of his WRIs, one can conclude that information given by CHHOEUNG Bean to the ICIJ investigators was learned from other people, mostly after the fall of the DK regime in 1979.²⁶¹⁵ Consequently, verification of his statements from the original source is not possible (as most of the people he mentions are dead or he does not know where they are),²⁶¹⁶ or the source of his evidence is unclear.

1292. The ICP also disregards CHHOEUNG Bean’s entire evidence regarding ‘Ta Tith’s’ alleged position in Sector 1, which is contradictory and confusing in each WRI. In his

D219/100, ING Den, WRI, A20, A21, EN 01074522-3, 19 years old according to DOB, EN 01074519; D219/184, HAM Sinuon, WRI, A28, A33, EN 01079316-8, 15 years old according to DOB, EN 01079311; D118/229, KUOY Bunthoeun, WRI, A15, EN 01055767, 15 years old according to DOB, EN 01055763. D219/588, KUY Yin, WRI, A8, A9, A12, A15, EN 01178749-50, 15 years old according to DOB, EN 01178747; D219/611, LAM Savuon, WRI, A45, A46, A47, EN 01185832, 14 years old according to DOB, EN 01185824; D118/226, NGET Vut, WRI, A24, EN 01055747, 12 years old according to DOB, EN 01055743; D118/122, THEK Bunroeun, WRI, A7, A8, EN 00975862, 14 years old according to DOB, EN 00975860; D118/175, VOERN Dara, WRI, D11, A30, EN 00981829, EN 00981832, 11 years old according to DOB, EN 00981827; D219/269, YUN Saroeun, WRI, A23, A24, A25, EN 01098492, 15 years old according to DOB, EN 01098490; D118/190, MOEU Pov, WRI, A13, A19, EN 00986158-9, 14 years old according to DOB, EN 00986156; D219/503, CHHOM Hun, WRI, A10, A27, EN 01167872, EN 01167878, 17 years old according to DOB, EN 01167869; D219/307, PALL Yung, WRI, A3, A4, EN 01111922-3, 18 years old according to DOB, EN 01111922; D219/25, SAR Samay, WRI, A16, A26, EN 01050583-4, 12 years old according to DOB, EN 01050580; D219/192, YOAB Sinit, WRI, A9, A11, A25, EN 01079349, EN 01079351, 13 years old according to DOB, EN 01079347; D119/120, SAM Sak, WRI, A27, EN 01057739, 12 years old according to DOB, EN 01057734; D119/131, THANG Thoeuy, WRI, A7, A32, EN 01025289, EN 01025292, 17 years old according to DOB, EN 01025287; D119/112, TIL Sengly, WRI, A4, EN 0987777, 15 years old according to DOB, EN 00987775; D219/919, VONG San, WRI, A10, A64, A65 EN 01476068, EN 01476072, 13 years old according to DOB, EN 01476067; D219/729, PAN Samut, WRI, A11, A12, EN 01486531, 15 years old according to DOB, EN 01486528.

²⁶¹³ ICP’s Final Submission, D378/2, para. 45. Footnote 80.

²⁶¹⁴ D219/430 CHHOEUNG Bean WRI, A117, EN 01128723; D219/430 CHHOEUNG Bean WRI, A95, EN 01128720; D219/368 CHHOEUNG Bean WRI, A39-40, EN 01117718; D219/430 CHHOEUNG Bean WRI, A99, EN 01128720.

²⁶¹⁵ D219/430 CHHOEUNG Bean WRI, A117, EN 01128723; D219/430 CHHOEUNG Bean WRI, A95, EN 01128720; D219/368 CHHOEUNG Bean WRI, A39-40, EN 01117718; D219/430 CHHOEUNG Bean WRI, A99, EN 01128720.

²⁶¹⁶ D219/430, CHHOEUNG Bean, A28, EN 01128712; A30, EN 01128712; A32, EN 01128712; A59, EN 01128715-6; A77, EN 01128718; A79, EN 01128718; A80, EN 01128718-9; A117, EN 01128723; D219/465, CHHOEUNG Bean, A16, EN 01139583-4; A32, EN 01139588; A38, EN 01139589-90; A40, EN 01139590-1; A47, EN 01139593; A61, EN 01139597; D219/533, CHHOEUNG Bean, A69, EN 01178481; A76-A81, EN 01178482-3 (“forced” marriage); A93-A96, EN 01178485; A99, EN 01178486; A109-A111, EN 01178488; A113, EN 01178489; A129-A131, EN 01178492; A133-A137, EN 01178493-4; A148, EN 01178497; A156, EN 01178499; A172, EN 01178502; A201, EN 01178506; A217, EN 01178509;

first WRI, he stated that he assumes that ‘Ta Tith’ replaced Ta Vanh as a Secretary of Sector 1 in late 1977 or early 1978 and bases this assumption on seeing ‘Ta Tith’ allegedly ‘inspecting’ the Kanghat Dam with Ta Mok.²⁶¹⁷ But later in the same WRI, he changed his evidence and stated that ‘Ta Tith’ replaced Ta Pet in July or August 1977.²⁶¹⁸ Furthermore, he is not saying what position Ta Pet held in July or August 1977.

1293. In his first WRI, CHHOEUNG Bean stated that ‘Ta Tith’ was introduced as a sector committee member at a meeting held in August or September 1977.²⁶¹⁹ Contrary to this, but later in this same WRI, CHHOEUNG Bean stated that the meeting he was talking about was held in September 1978, and that ‘Ta Tith’ was not officially introduced to the participants during the meeting.²⁶²⁰

1294. In his second WRI, CHHOEUNG Bean stated that ‘Ta Tith’ first visited Kanghat Dam in April or May 1978 with Ta Pet,²⁶²¹ and that during this visit, he observed that Ta Pet had more senior rank than ‘Ta Tith.’²⁶²² CHHOEUNG Bean then changes his statement in the same WRI and said that ‘Ta Tith’ came [to the Northwest Zone] to replace Ta Pet in July or August 1978.²⁶²³

1295. There are a number of factors which make CHHOEUNG Bean’s evidence unreliable. Primarily, if ‘Ta Tith’ was not introduced at the meeting held in September 1978 where CHHOEUNG Bean saw him for the first time, it is not clear how CHHOEUNG Bean knew that ‘Ta Tith’ came to replace Ta Pet. Furthermore, if CHHOEUNG Bean saw ‘Ta Tith’ for the first time in September 1978 at the meeting where ‘Ta Tith’ was not introduced, it is not clear how CHHOEUNG Bean knows that ‘Ta Tith’ first visited Kanghat Dam in April or May 1978 with Ta Pet. CHHOEUNG Bean would not know that it was actually ‘Ta Tith’ accompanying Ta Pet. The investigator failed to clarify this confusion with CHHOEUNG Bean’s evidence.

1296. CHHOEUNG Bean’s evidence does not support the ICP’s claim that Mr YIM Tith served as *de facto* Sector 1 Secretary. CHHOEUNG Bean did not positively identify Mr YIM

²⁶¹⁷ D219/368, CHHOEUNG Bean, WRI, A14-A17, EN 01117716.

²⁶¹⁸ D219/368, CHHOEUNG Bean, WRI, A40-A41, EN 01117718.

²⁶¹⁹ D219/368, CHHOEUNG Bean, WRI, A36, EN 011177118.

²⁶²⁰ D219/430, CHHOEUNG Bean, A128, EN 01128724.

²⁶²¹ D219/430, CHHOEUNG Bean, A84-A87, EN 01128719.

²⁶²² D219/430, CHHOEUNG Bean, A94, EN 01128720.

²⁶²³ D219/430, CHHOEUNG Bean, A99, EN 01128720.

Tith. His evidence about Mr YIM Tith and ‘Ta Tith’ is unreliable and devoid of probative value.

NOP Ngim’s Evidence Regarding Mr YIM Tith’s Alleged Position as *de facto* Secretary of Sector 1 (Samlaut District)

1297. As stated above, NOP Ngim gave one statement to DC-Cam, three statements to the ICIJ, and testified in Case 002/02.²⁶²⁴ In support of his claim that Mr YIM Tith was serving as Sector 1 Secretary, the ICP cherry-picks from NOP Ngim’s statements and consequently disregards the totality of her evidence.

1298. In support of his claims, the ICP cites two answers from NOP Ngim’s WRIs, one answer from her testimony in Case 002/02 and her statement from DC-Cam.²⁶²⁵ The ICP misstates, and therefore misrepresents, the cited evidence.

1299. In her DC-Cam statement, NOP Ngim stated that ‘Ta Tith’ was Samlaut District Chief, but this was only after ‘Dany,’ conducting the interview, told her: ‘So he [Ta Tith] must have been Sector Committee.’ NOP Ngim agreed with Dany’s proposition.²⁶²⁶

1300. Furthermore, the ICP cites NOP Ngim’s first WRI where she said ‘As far as I know, Ta Tith was Sector 1 Committee, Battambang, in 1978,’²⁶²⁷ but the ICP disregards NOP Ngim’s subsequent answers in the same WRI where she stated that she never heard a formal announcement of ‘Ta Tith’s’ position.²⁶²⁸ This explains her conditional answer ‘as far as I know’ given in her previous answer. NOP Ngim also stated that she did not know any other people on the Northwest Zone Committee, nor was she aware that ‘Ta Tith’ had any other positions.²⁶²⁹

1301. NOP Ngim’s evidence regarding Mr YIM Tith’s Alleged Position is based on her assumptions and has no probative value. Her evidence does not support the ICP’s claim that Mr YIM Tith served as Sector 1 Secretary.

²⁶²⁴ *Supra*, para. 1184.

²⁶²⁵ *ICP’s Final Submission*, D378/2, para. 45, fn 80.

²⁶²⁶ D123/2/2.17a, NOP Ngim, DC-Cam Statement, EN 01155610.

²⁶²⁷ D118/285, NOP Ngim, WRI, A7, EN 01044674-5; A63, EN 01044685.

²⁶²⁸ D118/285, NOP Ngim, WRI, A10, EN 01044675.

²⁶²⁹ D118/285, NOP Ngim, WRI, A60-A64, EN 01044684-5; D219/835, NOP Ngim, WRI, A92-A93, EN 01432960.

CHUON Than's Evidence Regarding Mr YIM Tit's Alleged Position as *de facto* Secretary of Sector 1

1302. CHUON Than gave two statements to the OCIJ.²⁶³⁰ In support of his claim that Mr YIM Tith was serving as *de facto* Sector 1 Secretary, the ICP cherry-picks from CHUON Than's statements and disregards the totality of his evidence, failing to recognize that his evidence is not relevant for Sector 1.
1303. CHUON Than was a low-level cadre in the Treang Cooperative, Ratanak Mondul District, Sector 1. He was the Treang Cooperative assistant and a platoon leader of the mobile unit consisting of 50 people.²⁶³¹ From his statements it is clear that he was not familiar with the administrative structures of Sector 1 or Sector 3.²⁶³² CHUON Than stated that he never saw anybody from the Zone committee, and he never attended any meetings conducted by the Sector cadres.²⁶³³ He did not know that Ta Vanh was replaced by Ta Pet in June 1977 as Secretary of Sector 1,²⁶³⁴ but he places 'Ta Tith' as a person who allegedly replaced Ta Vanh in June 1977.²⁶³⁵ He had never heard of Ta Mok.²⁶³⁶
1304. In support of his claim, the ICP cites one answer from CHUON Than's first WRI and one answer from his second WRI, where CHUON Than stated that at one meeting in Phnum Samprov where he was present he 'saw Ta Tith, the committee chairman of Sector 1' and that 'they said at the time that Ta Tith was on the Sector 1 committee.'²⁶³⁷ An analysis of CHUON Than's statements show that those two answers are not reliable and have no probative value.
1305. CHUON Than stated that at the beginning of 1978 he was sent with his mobile unit to work in Kraleong Dom located east of Kanghat Dam to farm and that, two or three months after he arrived there,²⁶³⁸ he received a summons signed by his cooperative chairman, Chhen, inviting him to attend a meeting in Phnum Sampov situated in Sector 3²⁶³⁹ and

²⁶³⁰ D118/245, and D118/299, CHUON Than, WRIs.

²⁶³¹ D118/245, CHUON Than, WRI, A4, EN 01029378-9.

²⁶³² D118/299, CHUON Than, WRI, A16-A19, EN 01044755-6.

²⁶³³ D118/245, CHUON Than, WRI, A5-A6, EN 01029379.

²⁶³⁴ D118/245, CHUON Than, WRI, A5, EN 01029379.

²⁶³⁵ D118/245, CHUON Than, WRI, A5, EN 01029379.

²⁶³⁶ D118/299, CHUON Than, WRI, A27, EN 01044757.

²⁶³⁷ ICP's Final Submission, D378/2, para. 45, fn 80.

²⁶³⁸ D118/245, CHUON Than, WRI, A12, EN 01029380.

²⁶³⁹ D118/245, CHUON Than, WRI, A13, EN 01029381; D118/299, CHUON Than, WRI, A13, EN 01044754.

that a car was sent to pick him up and take him to this meeting.²⁶⁴⁰ CHUON Than's evidence is confusing because it is not plausible that a cadre at his low-level would be sent to Sector 3 to attend a meeting, and he previously said that he never attended any meetings conducted by the Sector cadres.²⁶⁴¹ CHUON Than's credibility is cast further in doubt as it is highly unlikely that a car would have been sent to pick him up, as he was low-level cadre, and take him to the meeting.

1306. CHUON Than stated that 'Southwest Zone cadres chaired the meeting, but he cannot remember a single name of almost 100 people who attended the meeting, nor was he asked how then he knows that the meeting was chaired by the 'Southwest Zone.'²⁶⁴² CHUON Than remembers only one name, 'Ta Tith,' and he said that 'Ta Tith' was introduced at the meeting, but he does not remember by whom.²⁶⁴³ CHUON Than said that he only saw 'Ta Tith' once, during this meeting,²⁶⁴⁴ and during this interview in 2014, 36 years later, he gave the following description of 'Ta Tith': 'He looked like me. His height was around 1.7 metres. He had a big build, white complexion, and his head was a little bald.'²⁶⁴⁵

1307. CHUON Than does not support the ICP's claim that Mr YIM Tith served as *de facto* Sector 1 Secretary. He did not positively identify Mr YIM Tith. An analysis of CHUON Than's evidence shows that his account is not relevant for Sector 1 since it concerns a meeting in Sector 3. Furthermore, the source of his knowledge was not explored by the investigator. CHUON Than's evidence about Mr YIM Tith and 'Ta Tith' is not reliable and has no probative value.

Conclusion

1308. There is no direct evidence to support the ICP's claim that Mr YIM Tith was *de facto* or *de jure* Sector 1 Secretary at any point of time during the Khmer Rouge regime. None of the witnesses provides direct or indirect evidence that Mr YIM Tith, during the temporal scope of the investigation, received orders, communications, supervision or direction from higher echelons, in his alleged position as Secretary of Sector 1, nor is there

²⁶⁴⁰ D118/245, CHUON Than, WRI, A14-A15, EN 01029381.

²⁶⁴¹ D118/245, CHUON Than, WRI, A5-A6, EN 01029379.

²⁶⁴² D118/245, CHUON Than, WRI, A16, EN 01029381-2; D118/299, CHUON Than, WRI, A20, EN 01044756.

²⁶⁴³ D118/245, CHUON Than, WRI, A18, EN 01029382; D118/299, CHUON Than, WRI, A23-A24, EN 01044756-7.

²⁶⁴⁴ D118/299, CHUON Than, WRI, A26, EN 01044757.

²⁶⁴⁵ D118/245, CHUON Than, WRI, A19, EN 01029382.

evidence that Mr YIM Tith reported back to higher echelons on any issues. There is no sufficient evidence that Mr Mr YIM Tith sent orders, communications, or directions to the Sector 1 districts, to supervise or exercise authority over them. No written document (order, instruction, telegram) exists to prove that Mr YIM Tith served as the Sector 1 Secretary, issued orders to districts in Sector 1, or received documents, instructions, telegrams from the Centre in order to disseminate such information throughout Sector 1 and implement the Centre's policies.

1309. The evidence the ICP cites is hearsay which does not support his claims. The ICP is attempting to satisfy the standard through a sheer quantity of evidence (irrespective whether it supports his claims). The ICP cited evidence of seven witnesses, none of which gave direct evidence on Mr YIM Tith's alleged position as a Sector 1 Secretary.

1310. The ICP fails to account for 69 witnesses who lived and worked in Sector 1 during arelevant time, but who had never heard of Mr YIM Tith.²⁶⁴⁶

²⁶⁴⁶ D118/286, KHEAV Neap, WRI, A77, EN 01044702; D219/409, ANG Sar, WRI, A60-A61, EN 01142884; D219/143, AUN Phally, WRI, A22, EN 01063730; D219/576, BIN Sa Em, WRI, A48, EN 01178693; D219/671, CHEAL Choeun, WRI, A99-A100, EN 01213340; D219/411, CHHORN Chhoeun, WRI, A31, EN 01142917; D219/20, CHHUM Vanny, WRI, A67, EN 01050474; D219/390, HANG Suom, WRI, A31, EN 01130578; D219/783, HEM Preng, WRI, A63, EN 01485054; D118/240, HOEY San, WRI, A88-A89, EN 01033044; D219/157, KHAY Chhaury, WRI, A13, EN 01066847; D219/796, KHAY Chhaury, WRI, A13, A14, EN 01485082; D219/14, KHIN Khien, WRI, A143, EN 01047722; D219/374, KHIN Khim, WRI, A66, EN 01120045; D219/764, KOEUN Saroeuth, WRI, A90, EN 01305567; D118/290, KONG Vach, WRI, A124, EN 01066784; D219/946, LAO Kang, WRI, A77, EN 01502660; D118/294, LAY Eng, WRI, A11-A12, EN 01037356; D219/652, LUOM Nhanh, WRI, A26, EN 01207484; D219/417, MEAS Proeung, WRI, A96, EN 01135100; D219/624, PEI Poeut, WRI, A12, EN 01187718; D118/3, PEK Em, WRI, A24, EN 00978797; D219/11, PENH Nhanh, WRI, A25, EN 01047038; D118/221, PHAN Yim, WRI, A129, EN 00987759; D219/158, PHOEUK Lam, WRI, A12, EN 01066854; D118/196, ROEUNG Sopheap, WRI, A75, EN 00986417; D219/254, RY Rang, WRI, A33, EN 01095812; D118/280, SANG Say, WRI, A21, EN 01044669; D219/747, SAY Em, WRI, A85, A86, EN 01248108; D118/277, SEM Veung, WRI, A100, EN 01025282; D219/514, SEM Soem, WRI, A25, EN 01167968; D219/830, SENG Reut, WRI, A52, EN 01390106; D219/65, SIE Korn, WRI, A85, EN 01053972; D219/517, SOY Chhoeun, WRI, A81, EN 01166179-01166180; D219/748, SREY Soeum, WRI, A58, EN 01251812; D219/721, SUOM Bao, WRI, A14, EN 01216213; D219/908, SUON Sun, WRI, A48, EN 01517522; D219/650, TEN Loeng, WRI, A58, EN 01207463; D219/142, TEP Sarun, WRI, A53, EN 01063714; D219/172, TOCH Bunthy, WRI, A31, EN 01076966; D219/50, UY Chinda, WRI, A167, EN 01056865; D219/773, YIN Nean, WRI, A 113, EN 01307926; D219/451, YON Han, WRI, A38, EN 01149270; D219/423, YON Yoeun, WRI, A36, EN 01135131; D219/740, CHHAM Mao, WRI, A102-A103, EN 01235818; D118/135, CHHOM Youn, WRI, A22, EN 00970437; D219/481, CHROENG Sopheap, WRI, A48, EN 01172523; D118/210, HUL Peou, WRI, A20, EN 00985145; D219/549, ING Oeum, WRI, A50, EN 01178547; D219/3, KEU Seung, WRI, A156, EN 01047117; D118/298, KHIEM Bo, WRI, A98, EN 01044748; D219/137, KHIEM Saon, WRI, A101, EN 01072551; D219/156, KIM Chat, WRI, A24, EN 01066839; D105/7, KIM Heng, WRI, A40, EN 00919420; D118/17, KREP Ron, WRI, A20, EN 00938184; D219/832, LIM Saloeun, WRI, A87, EN 01391244; D219/147, MANN Chuon, WRI, A236, EN 01063776; D219/134, NET Saveun, A262, EN 01060016; D219/229, OUK Sokunthea, WRI, A51, EN 01089991; D219/424, RIEM Dos, WRI, A26, EN 01135144; D219/89, SAM Leng, WRI, A100, EN 01057835; D118/232, SAN Mao alias SAN Ang, WRI, A36, EN 01029395; D219/945, SOK Chhoeut, WRI, A72, EN 01523956; D105/2, SUON Heng, WRI, A34, EN 00787184; D219/432, THA Nam, WRI, A86, EN 01142955; D219/310, VOAN

(4) Mr YIM Tith was Not *De Jure* or *De Facto* Secretary of Sector 2

1311. The ICP claims that ‘various witnesses also identify Mr YIM Tith as the secretary of Sector 2’ and he requests that Mr YIM Tith be sent for trial for crimes occurring in Bakan District.²⁶⁴⁷ To support this claim and request, the ICP cites only one witness, CHHEOUN Von,²⁶⁴⁸ and cherry-picks from his evidence.

1312. Mr YIM Tith has not been charged as the Secretary of Sector 2, and therefore cannot be indicted on these allegations.²⁶⁴⁹ Nevertheless, the Defence will analyze the evidence on which the ICP is supporting his claim.

1313. CHHEOUN Von gave one statement to the ICIJ.²⁶⁵⁰ Between 1975 and 1979, CHHEOUN Von was an ordinary worker in Kantueu Mouy Commune, Banan District (a district which, according to the ICP’s Final Submission, belonged to Sector 3²⁶⁵¹) and he stayed in this commune throughout the duration of the DK regime.²⁶⁵²

1314. In support of his claim, the ICP cherry-picks two answers from CHHEOUN Von’s WRI, A13 and A20.²⁶⁵³ The ICP disregards the answers between A13 and A20 and the rest of his WRI.

1315. CHHEOUN Von stated that he ‘heard mention of the name Ta Tith’ when he attended the meeting at ‘Banan Pagoda in the middle of the Khmer Rouge regime.’ CHHEOUN Von also said that ‘he was introduced as the Sector Secretary and everyone knew that he was Sector Secretary,’ and that he was not certain ‘as to where Ta Tith came from’ and he was ‘not certain as to whether Ta Tith replaced anyone.’²⁶⁵⁴ CHHEOUN Von does not know when Southwest Zone cadre arrived in his area.²⁶⁵⁵ He does not remember which year and what month the meeting in Banan pagoda was held.²⁶⁵⁶ He saw ‘Ta Tith’ for the first and last time at this meeting in Banan Pagoda and that after this meeting he does not

Samut, WRI, A24, EN 01111941; D219/453, YAT Yoeun, WRI, A38, EN 01151149; D219/644, YOM Yeang, WRI, A112, EN 01207421; D219/367, REACH Saran, WRI, A8, EN 01128246. See Annex V.

²⁶⁴⁷ ICP’s Final Submission, D378/2, paras 46 and 158.

²⁶⁴⁸ ICP’s Final Submission, D378/2, para. 46, fn 85.

²⁶⁴⁹ *Supra*, paras 454 to 456.

²⁶⁵⁰ D219/684, CHHEOUN Von, WRI.

²⁶⁵¹ ICP’s Final Submission, D378/2, para. 169.

²⁶⁵² D219/684, CHHEOUN Von, WRI, A4-A5, EN 01214806.

²⁶⁵³ ICP’s Final Submission, D378/2, para. 46, fn 85.

²⁶⁵⁴ D219/684, CHHEOUN Von, WRI, A3, EN 01214806.

²⁶⁵⁵ D219/684, CHHEOUN Von, WRI, A6-A7, EN 01214806.

²⁶⁵⁶ D219/684, CHHEOUN Von, WRI, A11-A12, EN 01214807.

know where ‘Ta Tith’ went: ‘he [Ta Tith] disappeared.’²⁶⁵⁷ He does not know what was discussed at this meeting because he did not hear anything since ‘he [Ta Tith] was at the very front and I was at the very back.’²⁶⁵⁸ He stated that the meeting was attended by hundreds of people but he did not indicate any person who could corroborate his account.²⁶⁵⁹ Nobody told him what role ‘Ta Tith’ had and which Sector he controlled.²⁶⁶⁰ He stated that ‘Ta Tith’ did not supervise any security centres or worksites in Sector 2 because he just came to this meeting and then left.²⁶⁶¹

1316. CHHEOUN Von does not support the ICP’s claim that Mr YIM Tith served as Sector 2 Secretary. From the entirety of CHHEOUN Von’s statement it cannot be concluded that he is talking about Mr YIM Tith, nor that the person whom he is referring to had a role in Sector 2.

Conclusion

1317. Uncorroborated and unreliable evidence of one witness cannot support the ICP’s claim that Mr YIM Tith served as Sector 2 Secretary. The ICP fails to account for 81 witnesses who lived and worked in Sector 2 during the relevant time and who had never heard of Mr YIM Tith.²⁶⁶²

²⁶⁵⁷ D219/684, CHHEOUN Von, WRI, A14, EN 01214807.

²⁶⁵⁸ D219/684, CHHEOUN Von, WRI, A14, EN 01214807.

²⁶⁵⁹ D219/684, CHHEOUN Von, WRI, A16-A18, EN 01214807.

²⁶⁶⁰ D219/684, CHHEOUN Von, WRI, A19, EN 01214807.

²⁶⁶¹ D219/684, CHHEOUN Von, WRI, A21-A22, EN 01214808.

²⁶⁶² D219/89, SAM Leng, WRI, A100, EN 01057835; D219/241, AM Sokhon alias Khon, WRI, A128, EN 01092971; D219/734, BEA Sieb alias Siet, WRI, A86, A87, EN 01238163; D219/220, BUOY Sab, WRI, A118, EN 01088573; D118/125, CHAB Khuong, WRI, A100, EN 00976596; D219/921, CHAP Puth, WR, A93, EN 01451433; D219/735, CHHEA Eng, WRI, A67, EN 01479483; D118/198, CHHIM Sorn, WRI, A64, EN 00985099; D219/692, CHHUON Hai, WRI, A94, EN 01215982; D219/737, DIM Kimheat, WRI, A55, EN 01300132; D219/267, DOM Doeun alias Yeay Doeun or Mer Savdy, WRI, A86, EN 01098477; D219/936, DUCH Chantha, WRI, A113, EN 01493001; D118/289, EK Virak, WRI, A41-A42, EN 01079689-90; D219/184, HAM Sinuon, WRI, A111, EN 01079328; D219/221, HENG Sieng, WRI, A80, EN 01104766; D219/733, KEM Phen, WRI, A166, EN 01238137; D219/639, KEO Meur, WRI, A98, EN 01198194; D219/556, KEP Pov, WRI, A99, EN 01178661; D219/664, KHIEV Phan alias KHIEV Saroeun, WRI, A149, EN 01207575; D219/605, KHOEM Samon, WRI, A95, EN 01185808; D219/244, KONG Ngorn, WRI, A 90, EN 01093003; D219/57, KONG Run, WRI, A50-A51, EN 01040562; D118/229, KUOY Bunthoeurn, WRI, A43, EN 01055771; D219/588, KUY Yin, WRI, A106-A107, EN 01178761; D219/611, LAM Savuon, WRI, A125, EN 01185843; D118/248, LY Lonn, WRI, A41, EN 01034976; D118/246, MEAS Voeurn, WRI, A140, EN 01034947; D219/16, MECH Nhanh, WRI, A195, EN 01034120; D118/228, MENG Chhon, WRI, A67, EN 01056765; D118/217, MEY Sam, WRI, A45, EN 00985659; D118/126, MEY Savoeun, WRI, A76, EN 00978761; D118/191, NGET Chat, WRI, A102, EN 00986723; KH 00977073 (English translation is in error. Khmer version of A102 is ‘No, I did not’). D118/254, NGET Loy, WRI, A71, EN 01025239; D118/226, NGET Vut, WRI, A103-A104, EN 01055760; D118/273, NGET Yi, WRI, A112, EN 01035041; D219/736, NHEP Chhan, WRI, A39, EN 01486562; D219/345, NOEM Lorn, WRI, A33, EN 01116102; D219/223, NUON Rin, WRI, A33, A34, EN 01088596; D219/758, OEM Lun, WRI, A103, EN 01251826; D219/187, PHAN Khorn, WRI, A53, EN 01104750; D118/236, PHAN Not, WRI, A49,

(5) Mr YIM Tith was Not *De Jure* or *De Facto* Secretary of Sector 3

1318. According to the ICP,²⁶⁶³ Sector 3 was divided into six districts: Phnom Sampeou District (known as Banan District),²⁶⁶⁴ Mongol Borei District,²⁶⁶⁵ Bavel District,²⁶⁶⁶ Ampil District,²⁶⁶⁷ Poipet District,²⁶⁶⁸ and Thma Koul District.²⁶⁶⁹

1319. The ICP claims that ‘various witnesses also identify Mr YIM Tith as the secretary of Sector 3’ and he requests that Mr YIM Tith be indicted for crimes occurring in Phnom Sampeou District.²⁶⁷⁰ The evidence the ICP cites does not support his claim. Each witness will be taken in turn.

EN01055624; D118/189, PHAN Saray, WRI, A22, EN 00986689; D118/202, PRAK Sarin, WRI, A42, EN 00986213; D118/265, PRING Procun, WRI, A102, EN 01031752; D118/258, ROS Him, WRI, A49, EN01000656; D219/587, WRI, SOK Pan, WRI, A82, EN 01178734; D219/219, SUM Rem, WRI, A98, EN 01088563; D118/262, TEP Phon, WRI, A112, EN01033061; D118/122, THEK Bunroeun, WRI, A24, EN 00975864; D118/123, THOEUK Yoeun, WRI, A15, EN 00975875; D118/1, UK Soeum, WRI, A8, EN 00876119; D118/199, UONG Sav, WRI, A24, EN 00985107. D118/173, VAN Chauk, WRI, A31, EN 00981759; D118/192, VEN Van, WRI, A100, EN 00986179; D118/175, VOERN Dara, WRI, A42, EN 00981833. D118/193, VORN Moch, WRI, A72, EN 00986201; D118/197, YEAN Phan, WRI, A67, EN00985087; D219/849, YEAY Nan, WRI, A26-A27, EN 01356228; D134/2, YEAY Nan, WRI, A15, EN 00974273; D219/222, YEAY Yan, WRI, A150, EN 01088586; D219/269, YUN Saroeun, WRI, A68, EN 01098496; D219/676, HOK Sarin, WRI, A123, EN 01213370. D118/263, HUL Hak, WRI, A99, EN 01033076; D118/281, KEO Sokha, WRI, A15, EN 01040514; D118/2, KHIEV Sim, WRI, A63, EN 00876109; D118/288, LAY Bony, WRI, A29, EN 010667601; D118/177, LORN Heng, WRI, A46, EN 00981788; D118/190, MOEU Pov, WRI, A122, EN 00986172; D118/178, MOUL Van, WRI, A123, EN 00981988; D219/657, PHANN Sok, WRI, A63, EN 01207552; D118/127, POV Sinuon, WRI, A42, EN 00979974; D219/185, SOEM Moeun, WRI, A82, EN 01079807; D118/176, SOEM Vocurn, WRI, A124, EN 00981970. D219/344, SOK Phe, WRI, A106, EN 01116095; D219/336, TOAM Cheah, WRI, A86, EN 01117994; D219/7, VEN Yoeu, WRI, A46, EN 01047910, A143, EN 01047922; D219/8, YANG Sokhom, WRI, A136, EN 01047786; D118/170, YEAY Rim, WRI, A132, A133, A137, EN 00980013; D219/861, YEAY Rim, WRI, A28, EN01364076; A112, A115, A116, A124, EN 01364084-01364085; D219/869, YEAY Rim, WRI, A44, A45, A47, A49, EN 01365562; D118/194, RUOS Narin, WRI, A101, EN 00986741. See Annex V.

²⁶⁶³ ICP's Final Submission, D378/2, para. 169.

²⁶⁶⁴ D6.1.362 Pol Seun WRI, EN 00315904; D118/64 Pol Seun WRI, A4, EN 00950698; D118/76 Chuch Punlork WRI, A8, EN 00976625; D219/421 Tea Nguon WRI, A7, EN 01135107; D219/825.1.2 OCJ S-21 Prisoner List, Number 8535, EN 01222675, Number 8764, EN 01222686, Number 9601, EN 01222723, Number 9774, EN 01222731.

²⁶⁶⁵ D118/153 Long Vun WRI, A32, EN 00978773; D118/93 Prak Soeum WRI, A1, EN 00967035; D219/489 Nhem Phum WRI, A153-154, EN 01152355; D219/294 MOUL En WRI, A157, EN 01111842-3.

²⁶⁶⁶ D118/102 Toat Thoeun WRI, A53, EN 00974025; D219/649 LOEM Tim WRI, A45, EN 01207437; D219/900 MOUL En WRI, A111, EN 01517482.

²⁶⁶⁷ D219/825.1.2 OCJ S-21 Prisoner List, Number 214, EN 01222338, Number 897, EN 01222368, Number 1722, EN 01222404, Number 3215, EN 01222452, Number 7903, EN 01222646, Number 9087, EN 01222701.

²⁶⁶⁸ D219/693 Kang Muon WRI, A69, 75, EN 01224778; D6.1.693 Sokh Chin, A12, EN 00426294.

²⁶⁶⁹ D219/613 Vorng Sarorn WRI, A36, 50, EN 01185857,9; D219/930 Em Lay WRI, A29-30, EN 01492913; D219/421 Tea Nguon WRI, A23, EN 01135111.

²⁶⁷⁰ ICP's Final Submission, D378/2, paras 46 and 169.

(6) MOUL En's Evidence Regarding Mr YIM Tith's Alleged Position as Secretary of Sector 3

1320. MOUL En was a soldier in Takeo Province, Sector 13, Southwest Zone, under the command of Ta Mok until the middle of 1977²⁶⁷¹ when he was assigned to go to the Northwest Zone by Ta Mok.²⁶⁷² Ta Mok tasked him to replace a former Secretary of Bavel District approximately one month after Ta Nhim's arrest.²⁶⁷³ MOUL En recalls that, at the time he was appointed as Secretary of Bavel District, Ta Tom was a Secretary of Sector 3.²⁶⁷⁴ MOUL En stayed in this position until December 1978.²⁶⁷⁵ MOUL En stated that he did not know 'Ta Tith' while he was in the Southwest Zone and that he got to know him only after Ta Nhim's arrest²⁶⁷⁶ and the purges were stopped.²⁶⁷⁷ In support of his claim that Mr YIM Tith was serving as Sector 3 Secretary ICP is compartmentalizing MOUL En's statements and disregarding his evidence in its entirety.

1321. MOUL En stated that at the beginning of his term as Secretary of Bavel District, Bavel District belonged to Sector 5 whose Secretary was Ta Chay (who was from Takeo Province).²⁶⁷⁸ Ta Chay was appointed as Sector 5 Secretary after Ta Nhim's arrest.²⁶⁷⁹ Subsequently, parts of Sector 5 were reorganized, and Bavel District borders were reset, and it was put under the command of Ta Tith, in Sector 3.²⁶⁸⁰ MOUL En stated that he was not aware of 'Ta Tith's' position before Bavel District allegedly came under 'Ta Tith's' alleged authority.²⁶⁸¹

1322. In his first WRI, MOUL En stated that he met 'Ta Tith' twice.²⁶⁸² The first time was at a meeting in Battambang University around one month after Ta Nhim was arrested.²⁶⁸³ The second time was when 'Ta Tith' came to Bavel District in September or October 1978.²⁶⁸⁴

²⁶⁷¹ D219/294, MOUL En, WRI, A6-A8, EN 01111827-8; D219/900, MOUL En, WRI, A48, EN 01517477.

²⁶⁷² D219/294, MOUL En, WRI, A15-A17, EN 01111828; A33, EN 01111830.

²⁶⁷³ D219/294, MOUL En, WRI, A36, EN 01111830; A43, A46, EN 01111831.

²⁶⁷⁴ D219/294, MOUL En, WRI, A38-A40, EN 01111830.

²⁶⁷⁵ D219/294, MOUL En, WRI, A52, EN 01111832.

²⁶⁷⁶ D219/294, MOUL En, WRI, A30, EN 01111829.

²⁶⁷⁷ D219/900, MOUL En, WRI, A30-A39, EN 01517476-7. See also, D6.1.141, SAO Sarun, WRI, EN 00278694 and EN00278697; D118/259, PECH Chim, WRI, A188-A190, EN 01000689; D219/627, LOCH Eng, WRI, A18-A22, EN 01187741-2.

²⁶⁷⁸ D219/294, MOUL En, WRI, A44-A45, EN 01111831.

²⁶⁷⁹ D219/294, MOUL En, WRI, A92, EN 01111836.

²⁶⁸⁰ D219/294, MOUL En, WRI, A41, EN 01111830-31; A51, EN 01111831.

²⁶⁸¹ D219/294, MOUL En, WRI, A50, EN 01111831.

²⁶⁸² D219/294, MOUL En, WRI, A53, EN 01111832.

²⁶⁸³ D219/294, MOUL En, WRI, A68, EN 01111833-4.

²⁶⁸⁴ D219/294, MOUL En, WRI, A47-A48, EN 01111831.

MOUL En stated that, at the meeting in Battambang University, ‘Ta Tith’s’ position was not officially announced.²⁶⁸⁵ MOUL En stated: ‘I learned that he was the sector secretary when he came to my place. I knew about Ta Chay and Ta An very well because their positions were announced.’²⁶⁸⁶ The investigator did not explore this answer further, but it can be concluded that MOUL En made the assumption that ‘Ta Tith’ had the Sector secretary position because he came once in late September or early October 1978 ‘to inspect my rice fields.’²⁶⁸⁷

1323. Surprisingly, at the beginning of the second part of this interview, which resumed the following day, the investigator started with the question: ‘Yesterday, you stated that you attended a meeting in Sector 5 where Yim Tith was appointed to be in charge of Sector 3. Was this meeting held between Yeay Chaem, Yim Tith and Ta Mok in Battambang as what you stated earlier?’²⁶⁸⁸ MOUL En remained consistent and stated that he did not witness ‘Ta Tith’s’ appointment as the Sector Secretary at this meeting, and that he heard later that that Ta Mok ‘ceded Bavel to be under Yim Tith,’²⁶⁸⁹ though he was not sure anymore whether he heard that ‘Ta Tith’ was Sector 3 or Sector 2 Secretary.²⁶⁹⁰ MOUL En stated in his second WRI that he was also not sure if ‘Ta Tith’ worked in Sector 4 or elsewhere.²⁶⁹¹ MOUL En stated that, if ‘Ta Tith’ was appointed Sector Secretary, no other person besides Ta Mok would have had the power to make this appointment.²⁶⁹² MOUL En remembers that Ta Mok even appointed chiefs of communes in Bavel District, cadres from Takeo Province,²⁶⁹³ after he appointed him as a Secretary of Bavel District.²⁶⁹⁴

1324. MOUL En does not support the ICP’s claim that Mr YIM Tith served as Sector 3 Secretary. At no point did MOUL En hear of ‘Ta Tith’s’ official appointment. MOUL En could not even be certain of the position of ‘Ta Tith’ and assumed that ‘Ta Tith’ was the Secretary of Sector 3 based on his speculation that in late September or early October

²⁶⁸⁵ D219/294, MOUL En, WRI, A61-A62, EN 01111833; A68-A73, EN 01111833-4.

²⁶⁸⁶ D219/294, MOUL En, WRI, A73, EN 01111834.

²⁶⁸⁷ D219/294, MOUL En, WRI, A75, EN 01111834; A47-A48, EN 01111831.

²⁶⁸⁸ D219/294, MOUL En, WRI, Q109, EN 01111838.

²⁶⁸⁹ D219/294, MOUL En, WRI, A112, EN 01111838; A127, EN 01111839-40.

²⁶⁹⁰ D219/294, MOUL En, WRI, A110, EN 01111838; A157-A158, EN 01111842-3.

²⁶⁹¹ D219/900, MOUL En, WRI, A108-A114, EN 01517482-3.

²⁶⁹² D219/294, MOUL En, WRI, A111, EN 01111838.

²⁶⁹³ D219/294, MOUL En, WRI, A113, EN 01111838.

²⁶⁹⁴ D219/294, MOUL En, WRI, A114-A115, EN 01111838.

1978, ‘Ta Tith’ ‘came to inspect my rice fields.’²⁶⁹⁵ MOUL En’s Evidence Regarding Mr YIM Tith’s Alleged Position has no probative value.

CHHAM Luy’s Evidence Regarding Mr YIM Tith’s Alleged Position as Secretary of Sector 3

1325. CHHAM Luy gave two statements to the ICIJ.²⁶⁹⁶ In support of his claim that Mr YIM Tith was serving as Sector 3 Secretary, the ICP cites the part of CHHAM Luy’s evidence where he makes assumptions about ‘Ta Tith’s’ position. The ICP’s cherry-picks from CHHAM Luy’s statements and consequently disregards his evidence seen in its entirety.

1326. From 17 April 1975 until 1978, CHHAM Luy was a soldier in Sector 1 in Pailin Province, at the Thai border.²⁶⁹⁷ In 1978, about three or four months after Phat from Southwest Zone replaced his commander Ren, CHHAM Luy escaped to Boh Khnor Village (Sector 1). After he had lived there for about two or three months, the Vietnamese arrived.²⁶⁹⁸ According to CHHAM Luy, the Vietnamese arrived in his village around February or March 1979 after the rice harvest was completed.²⁶⁹⁹ CHHAM Luy was assigned to Boh Khnor Cooperative to farm rice with the base people.²⁷⁰⁰

1327. The ICP cites evidence from this witness where he assumes that ‘Ta Tith’ was in charge of Sector 1 and Sector 3 because ‘there were seemingly no cadres left to be in charge in Sector 3.’²⁷⁰¹ The witness himself admits that his statement ‘is based on my conclusion.’²⁷⁰²

1328. Witness opinion has no probative value,²⁷⁰³ but when one takes into consideration entire evidence from this witness, which the ICP disregards, it is even more obvious.

²⁶⁹⁵ D219/294, MOUL En, WRI, A75, EN 01111834; A47-A48, EN 01111831.

²⁶⁹⁶ D118/243 and D219/263, CHHAM Luy, WRIs.

²⁶⁹⁷ D118/243, CHHAM Luy, WRI, A2-A5, EN 01029399-400.

²⁶⁹⁸ D118/243, CHHAM Luy, WRI, A6, EN 01029400.

²⁶⁹⁹ D219/263, CHHAM Luy, WRI, A109, EN 01097415.

²⁷⁰⁰ D118/243, CHHAM Luy, WRI, A2-A8, EN 01029399-400.

²⁷⁰¹ D219/263, CHHAM Luy, WRI, A117, EN 01097415.

²⁷⁰² D219/263, CHHAM Luy, WRI, A119-A120, EN 01097415-6.

²⁷⁰³ *Supra*, para. 522.

1329. CHHAM Luy never met ‘Ta Tith’²⁷⁰⁴ and he never heard of him before he escaped back to his village in 1978,²⁷⁰⁵ three months before the Vietnamese arrived.²⁷⁰⁶ CHHAM Luy never went to Sector 3²⁷⁰⁷ and he stated that he heard from former Northwest Zone cadres in Sector 3 (never mentioning any names) that ‘the cadres in Sector 3 were all purged,’²⁷⁰⁸ but they never mentioned ‘Ta Tith.’²⁷⁰⁹

1330. CHHAM Luy does not support the ICP’s claim that Mr YIM Tith served as Sector 3 Secretary. CHHAM Luy’s evidence regarding ‘Ta Tith’s’ position is based on conjecture and has no probative value.

CHOU Yorn’s Evidence Regarding Mr YIM Tith’s Alleged Position as Secretary of Sector 3

1331. CHOU Yorn gave one statement to DC-Cam.²⁷¹⁰ He died on 22 December 2011.²⁷¹¹ In support of his claim that Mr YIM Tith was serving as Sector 3 Secretary, the ICP cites two sentences in CHOU Yorn’s 60-page DC-Cam statement, which does not support his claim.

1332. After the fall of Phnom Penh in 1975, CHOU Yorn was appointed as district mobile unit chairman in Kong Pisei District, Kampong Speu Province, Sector 32, Southwest Zone.²⁷¹² He and his entire family were sent to Battambang in June 1977,²⁷¹³ in Doun Teav District, Sector 4,²⁷¹⁴ where he worked in a ‘big-production unit’²⁷¹⁵ until the Vietnamese arrived in January 1979.²⁷¹⁶ He does not know where ‘Ta Tith’ lived in the Northwest Zone.²⁷¹⁷ He is sure that ‘Ta Tith’ was not the Sector 4 ‘committee chief’ because he said Ta Mok assigned Ek from Takeo province to that position,²⁷¹⁸ but it ‘seemed’ to him that ‘Ta Tith’

²⁷⁰⁴ D118/243, CHHAM Luy, WRI, A13, EN 01029401.

²⁷⁰⁵ D219/263, CHHAM Luy, WRI, A62-A63, EN 01097412.

²⁷⁰⁶ D118/243, CHHAM Luy, WRI, A6, EN 01029400; D219/263, CHHAM Luy, WRI, A109, EN 01097415.

²⁷⁰⁷ D219/263, CHHAM Luy, WRI, A121, EN 01097416.

²⁷⁰⁸ D219/263, CHHAM Luy, WRI, A118-A121, EN 01097415-6.

²⁷⁰⁹ D219/263, CHHAM Luy, WRI, A121, EN 01097416.

²⁷¹⁰ D219/900.1, CHOU Yorn, DC-Cam statement.

²⁷¹¹ D219/900, CHOU Yorn, Death Certificate.

²⁷¹² D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208079-80.

²⁷¹³ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208087-8.

²⁷¹⁴ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208094-6.

²⁷¹⁵ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208095.

²⁷¹⁶ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208116-6.

²⁷¹⁷ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208101.

²⁷¹⁸ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208096.

was in Sector 3.²⁷¹⁹ He also stated that ‘Ta Tith’ was not on the Northwest Zone Committee as Ta Nhim held this position, and when Ta Nhim was arrested Ta Mok assigned his personal assistant Om Sien to be the Northwest Zone Committee chief.²⁷²⁰ CHOU Yorn stated that he attended the meetings with Ta Nhim and Ta Sien and Ta Mok had no reason to be at those meetings because Ta Siem was present.²⁷²¹ CHOU Yorn stated that he sent reports about his work to Ta Sien.²⁷²² He was not aware that Ta Mok and ‘Ta Tith’ were related.²⁷²³

1333. CHOU Yorn does not support the ICP’s claim that Mr YIM Tith served as Sector 3 Secretary. As DC-Cam statements ‘were generated without the judicial guarantees and formality that characterise WRIs,’ it has been held that they enjoy no presumption of relevance and reliability.²⁷²⁴ Furthermore, CHOU Yorn presumed that ‘Ta Tith’ was in Sector 3 (it ‘seemed’), without setting out what was the basis for his presumption. As CHOU Yorn has now died, this information cannot be clarified. CHOU Yorn’s evidence on this issue is rendered less reliable as he was not based in Sector 3. CHOU Yorn’s evidence regarding ‘Ta Tith’s’ position has no probative value.

TUM Soeun’s Evidence Regarding Mr YIM Tith’s Alleged Position as Secretary of Sector 3

1334. TUM Soeun gave one statement to DC-Cam,²⁷²⁵ three statements to the OCIJ²⁷²⁶ and was one of the witnesses present at the confrontation hearing in the OCIJ.²⁷²⁷ He was issued with a Letter of Assurance on 2 December 2014.²⁷²⁸ The ICP misrepresents TUM Soeun’s evidence.

1335. TUM Soeun was appointed as the ‘deputy chief’ of the mobile unit in Trapeang Thum Commune, Tram Kak District, Southwest Zone from October 1976 until March 1977, after which he was sent to the Northwest Zone.²⁷²⁹ Upon his arrival in the Northwest Zone

²⁷¹⁹ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208091.

²⁷²⁰ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208092.

²⁷²¹ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208101-2.

²⁷²² D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208105.

²⁷²³ D219/900.1, CHOU Yorn, DC-Cam statement, EN 01208110.

²⁷²⁴ Case 004/2, Closing Order (Indictment), 16 August 2018, D360, para. 124.

²⁷²⁵ D119/64.1, TUM Soeun, DC-Cam statement.

²⁷²⁶ D106/5, D119/65 and D219/102, TUM Soeun, WRIs.

²⁷²⁷ D230, TUM Soeun; PHUON Suthy; SUM Sal/PHAN Sal; THIP Samphat; PHON Mon; KIM Yet, WRIs.

²⁷²⁸ D219/102/1, TUM Soeun, OCIJ, Letter of Assurance.

²⁷²⁹ D119/65, TUM Soeun, WRI, A29-A30, EN 00966781-2.

he was assigned to work in Preah Net Preah District by Ta Chiel, Sector 5 secretary (who was later replaced by Southwest Zone cadre Ta Rin²⁷³⁰) and Yeay Chem.²⁷³¹ He was appointed as Chief of Sector 5 Mobile Unit, in charge of controlling forces in all Sector 5 districts.²⁷³² In May 1978 he was assigned by Yeay Chem to the Education Department near Trayoung Mountain in Sector 5²⁷³³ and he stayed there until the Vietnamese arrived.²⁷³⁴

1336. TUM Soeun mentioned 'Ta Tith' in one of his statements (WRI, D119/65). The ICP cites only one answer (A266) in support of his claim that Mr YIM Tith was serving as Sector 3 Secretary:

Q: What was Ta 'it's function at that time?

A226: I did not know about it. After I had left, Ta Tit was sent to Sector 3 in Battambang province. And I did not know what role he had there.²⁷³⁵

1337. The ICP disregards the following answers given by TUM Soeun, which provide a better picture about the reliability of A266:

Q: Did you ever see Ta Tith in person during that time?

A227: Yes, I saw Ta Tith in Tram Kak District.

Q: Did Ta Tith go with you when you travelled to the Northwest Zone?

A228: No, he did not.²⁷³⁶

1338. No other explanation was given by TUM Soeun, nor was he asked any follow-up questions regarding the source of his knowledge. It is also unclear what timeframe the witness is talking about. What is clear from TUM Soeun's evidence is that he never saw 'Ta Tith' once he arrived in the Northwest Zone in the middle of 1977.

1339. TUM Soeun does not support the ICP's claim that Mr YIM Tith served as Sector 3 Secretary. TUM Soeun never stated that 'Ta Tith' was Sector 3 Secretary, but stated to the contrary that he did not know what 'Ta Tith' did in Sector 3. Furthermore, the source

²⁷³⁰ D119/65, TUM Soeun, WRI, A224, EN 00966813.

²⁷³¹ D119/65, TUM Soeun, WRI, A65-A69, EN 00966788-9, A73, EN 00966789.

²⁷³² D119/65, TUM Soeun, WRI, A86-A87, EN 00966792.

²⁷³³ D119/65, TUM Soeun, WRI, A48, EN 00966785, A141-AA146, EN 00966800, A175-A176, EN 00966805.

²⁷³⁴ D119/65, TUM Soeun, WRI, A210-A211, EN 00966811.

²⁷³⁵ D119/65, TUM Soeun, WRI, A226, EN 00966813.

²⁷³⁶ D119/65, TUM Soeun, WRI, A227-A228, EN 00966813.

of TUM Soeun's knowledge that 'Ta Tith' went to Sector 3 is unknown. TUM Soeun's evidence regarding the alleged position of 'Ta Tith' in Sector 3 has no probative value.

LOCH Eng's Evidence Regarding Mr YIM Tith's Alleged Position as Secretary of Sector 3

1340. LOCH Eng gave three statements to the OCIJ.²⁷³⁷ In support of his claim that Mr YIM Tith was serving as the Sector 3 Secretary, the ICP cherry-picks from LOCH Eng's statements and cites just one answer from LOCH Eng's second WRI and disregards his evidence seen in its entirety.

1341. LOCH Eng said he was a cadre from Samraong District in the Southwest Zone who came to Battambang Province in July 1978.²⁷³⁸ He was selected and sent to Battambang by the Chief of Samraong District Committee.²⁷³⁹ Before he reached Battambang, he stopped in Takeo Province where, together with several families, he had a meeting with Ta Mok who told them what their task in Battambang Province would be.²⁷⁴⁰

1342. When he arrived in Battambang, LOCH Eng, and the group of people that he came with, were divided into groups and assigned to work in different places by Ta Rin who was the Sector Committee Chief, although LOCH Eng did not know which Sector.²⁷⁴¹ Ta Rin assigned LOCH Eng to work as a member of the Cooperative in Boeng Prey Commune located in Doun Teav District,²⁷⁴² Sector 4.²⁷⁴³

1343. In the answer cited by the ICP, LOCH Eng stated that '[h]e [Ta Tith] was on the sector committee in Beong Prey and Phnom Sampov.'²⁷⁴⁴ It is unclear from this WRI what the source of LOCH Eng's knowledge is, taking into consideration that he worked in Sector 4, not Sector 3. Further confusion is caused by this witness when he said that 'Ta Tith'

²⁷³⁷ D118/96, D219/627 and D219/884, LOCH Eng, WRIs.

²⁷³⁸ D118/96, LOCH Eng, WRI, A4, EN 00974055.

²⁷³⁹ D118/96, LOCH Eng, WRI, A7, EN 00974055-6.

²⁷⁴⁰ D118/96, LOCH Eng, WRI, A8-A13, EN 00974056-7.

²⁷⁴¹ D118/96, LOCH Eng, WRI, A8, EN 00974056.

²⁷⁴² D118/96, LOCH Eng, WRI, A4-A6, EN 00974055.

²⁷⁴³ LOCH Eng cannot remember to which sector this district belonged at the time (D118/96, LOCH Eng, WRI, A5, EN 00974055. However, according to CHOU Yorn (D219/900.1, DC-Cam statement, EN 01208094-6, (cited in *ICP's Final Submission*, D378/2, para. 46, fn 86) this district belonged to Sector 4.

²⁷⁴⁴ D219/627, LOCH Eng, WRI, A12, EN 01187741.

arrived after him (the witness) and 'Ta Tith' came to replace Ta Rin,²⁷⁴⁵ contrary to TUM Soeun's evidence that Rin was Sector 5 Secretary until the end of the regime.²⁷⁴⁶

1344. Nevertheless, in his third WRI, LOCH Eng explained²⁷⁴⁷ that he did not know 'Ta Tith's' position well, because 'it was 1978 or 1979 already'²⁷⁴⁸ and 'Ta Tith' was never introduced as the Sector Secretary.²⁷⁴⁹

1345. LOCH Eng does not support the ICP's claim that Mr YIM Tith served as Sector 3 Secretary. The source of LOCH Eng's knowledge regarding 'Ta Tith' is unknown and he said that 'Ta Tith' was never introduced as the Sector Secretary. LOCH Eng did not positively identify Mr YIM Tith. LOCH Eng's evidence regarding Mr YIM Tith's alleged position in Sector 3 is not reliable and has no probative value.

THY Chea's Evidence Regarding Mr YIM Tith's Alleged Position as Secretary of Sector 3

1346. THY Chea is a daughter of the witness HAN Thy.²⁷⁵⁰ She gave only one statement to the ICIJ.²⁷⁵¹ In support of his claim that Mr YIM Tith served as Sector 3 Secretary, the ICP cites only one answer from THY Chea:

Q: Do you know when Ta Tith was Sector 2 Committee?

A18: I was confused. Ta was not Sector 2 Committee. He was Sector 3 Committee. Ta Tith was Sector 3 Committee for a long time since 1975 but do not know where they sent him when the Southwest cadres arrived.

1347. It is obvious from this cited evidence that THY Chea's evidence is completely unreliable. She is of the view that Ta Tith was a Northwest Zone cadre and that he was Sector 3 Committee from 1975 until the arrival of the Southwest Zone cadres. She did not positively identify Mr YIM Tith.

1348. THY Chea's evidence regarding Mr YIM Tith's alleged position in Sector 3 is devoid of probative value.

²⁷⁴⁵ D219/627, LOCH Eng, WRI, A13, EN 01187741.

²⁷⁴⁶ D119/65, TUM Soeun, WRI, A224 EN 00966813.

²⁷⁴⁷ D219/884, LOCH Eng, WRI, A10, EN 01476049.

²⁷⁴⁸ D219/884, LOCH Eng, WRI, A7, A10, EN 01476049.

²⁷⁴⁹ D219/884, LOCH Eng, WRI, A13, EN 01476049.

²⁷⁵⁰ *Supra*, paras 1154 to 1159.

²⁷⁵¹ D219/452, THY Chea, WRI.

CHHEUN Chhuoy's Evidence Regarding Mr YIM Tith's Alleged Position as Secretary of Sector 3

1349. As set out above,²⁷⁵² CHHEUN Chhuoy gave only one statement to the ICIJ (D219/515).

In support of his claim that Mr YIM Tith served as Sector 3 Secretary, the ICP cites the same evidence from this witness that he cited in support of his claim that Mr YIM Tith was the Deputy Secretary of the Northwest Zone. Again, the ICP is cherry-picking from the totality of CHHEUN Chhuoy's evidence.

1350. In support of his claim, the ICP cites one answer (A58) from CHHEUN Chhuoy's only WRI where the witness is talking about Kanghat Dam in Sector 1 and does not mention Sector 3. CHHEUN Chhuoy's evidence is not relevant for Mr YIM Tith's alleged position in Sector 3.

NHEM Hean's Evidence Regarding Mr YIM Tith's Alleged Position as Secretary of Sector 3

1351. NHEM Hean gave one statement to the ICIJ (D219/928)²⁷⁵³ where he explained that in 1975 he was 13 or 14 years old,²⁷⁵⁴ and that he was engaged in a children's unit in Koh Andet District²⁷⁵⁵ until late 1977, after which he was sent to the Northwest Zone to work at Kanghat Dam as a member of the children's unit.²⁷⁵⁶ He stayed at Kanghat Dam until the DK regime collapsed.²⁷⁵⁷ During the time he was at Kanghat Dam he attended meetings only with the children's chiefs, and he was never present at any meetings with Mr YIM Tith.²⁷⁵⁸ In the answer cited by the ICP, he said that he did not know Ta Tith's office 'but I heard that he was on Sector 3 Committee.'²⁷⁵⁹ The time and source of NHEM Hean's knowledge was not clarified during his interview.

1352. NHEM Hean's evidence does not support the ICP's claim that Mr YIM Tith served as Sector 3 Secretary. NHEM Hean's evidence regarding 'Ta Tith' is uncorroborated

²⁷⁵² *Supra*, para 1166.

²⁷⁵³ D219/928, NHEM Hean, WRI.

²⁷⁵⁴ D219/928, NHEM Hean, WRI, A5, A7, EN 01451498.

²⁷⁵⁵ D219/928, NHEM Hean, WRI, A6, EN 01451498.

²⁷⁵⁶ D219/928, NHEM Hean, WRI, A8-A9, EN 01451498.

²⁷⁵⁷ D219/928, NHEM Hean, WRI, A53, EN 01451502.

²⁷⁵⁸ D219/928, NHEM Hean, WRI, A69, EN 01451503.

²⁷⁵⁹ D219/928, NHEM Hean, WRI, A86, EN 01451504.

hearsay and the source of his knowledge is unknown. NHEM Hean's evidence regarding Mr YIM Tith's alleged position in Sector 3 has no probative value.

CHEA Choeun's Evidence Regarding Mr YIM Tith's Alleged Position as Secretary of Sector 3

1353. CHEA Choeun gave one statement to DC-Cam in which he did not mention Mr YIM Tith,²⁷⁶⁰ and two statements to the ICIJ.²⁷⁶¹

1354. In June 1976, CHEA Choeun, his family members, and other people were sent from the Southwest Zone to the Northwest Zone 'to help with works in Battambang' and he stayed there until the end of the regime.²⁷⁶² Before they were sent to Battambang by train, they had a meeting with Ta Mok who explained to them that they were being sent to Battambang to help with work there 'because soil is very fertile, and due to the lack of technically skilled people, our assistance was required.'²⁷⁶³ No high-ranking cadres were sent with them,²⁷⁶⁴ and when they arrived at Phnom Sampov Mountain, 'Om Nhim held a meeting' after which they were assigned to different working sites.²⁷⁶⁵ CHEA Choeun was assigned as the Chairman of Regiment of Ampoar Village, Phnom Sampov Commune. He kept this position until the end of the DK regime.²⁷⁶⁶ From June 1976 he did not see any Southwest Zone cadre in his area.²⁷⁶⁷

1355. CHEA Choeun never met nor ever attended any meetings with 'Ta Tith.'²⁷⁶⁸ The first time he heard about 'Ta Tith' was in the middle of 1978,²⁷⁶⁹ though he regularly attended meetings with Ta Chheng who was the Secretary of Phnom Sampov District.²⁷⁷⁰

1356. Below are CHEA Choeun's answers the ICP cites in support of its suggestion that Mr YIM Tith 'may have been' on the Sector 3 Committee:

Q: Immediately after your arrival in Ampoar Village, who was on the committee of Sector 3?

²⁷⁶⁰ D123/1/2.18a, CHEA Choeun, DC-Cam.

²⁷⁶¹ D118/85 and D219/907, CHEA Choeun, WRIs.

²⁷⁶² D118/85, CHEA Choeun, A9, EN 0097694.

²⁷⁶³ D118/85, CHEA Choeun, A10, EN 00976943.

²⁷⁶⁴ D118/85, CHEA Choeun, A17, EN 00976944-5.

²⁷⁶⁵ D118/85, CHEA Choeun, A17, EN 00976944-5.

²⁷⁶⁶ D118/85, CHEA Choeun, A18, EN 00976945.

²⁷⁶⁷ D118/85, CHEA Choeun, A20, EN 00976945.

²⁷⁶⁸ D118/85, CHEA Choeun, A30, EN 00976947; D219/907, CHEA Choeun, A21, EN 01476054.

²⁷⁶⁹ D118/85, CHEA Choeun, A27, EN 00976946.

²⁷⁷⁰ D219/907, CHEA Choeun, A2-A14, EN 01476052-3.

A25: The committee member of Sector 3 was *Ta Chham*, but I am not sure if he was the chairman. As I was told by *Achar Toek*, who was a member of Ampoar Village, all villagers ran away whenever they heard the sound of the arrival of *Ta Chham's* car because they were afraid that he would arrest and mistreat them right there on the spot. As for *Ta Nhim*, he was in charge of this Northwest Zone.

Q: Who told you that he had disappeared?

A27: I do not know what happened; he suddenly disappeared and no longer came to my village. Later on, I heard about *Ta Tit* in the middle of 1978. At that time, I heard *Ta Chheng*, committee member of Phnum Sampov District, talking about *Ta Tit*; however, *Ta Chheng* did not mention the position of *Ta Tit*. I am not sure if *Ta Tit* had been promoted to replace *Ta Chham*. *Ta Chheng* was already dead.

Q: In terms of rank, do you think *Ta Tit* was higher or lower than *Ta Chheng*?

A29: *Ta Tit* was higher than *Ta Chheng*.

1357. CHEA Choeun evidence does not support the ICP's claim that Mr YIM Tith served as Sector 3 Secretary. CHEA Choeun did not positively identify Mr YIM Tith and he is clear that he does not know the position of 'Ta Tith.' The investigator asks CHEA Choeun to engage in speculation over 'Ta Tith's' rank and the source for his speculation about 'Ta Tith's' alleged position is hearsay. CHEA Choeun's evidence regarding Mr YIM Tith's alleged position in Sector 3 has no probative value.

Conclusion regarding Evidence Regarding Mr YIM Tith's Alleged Position as Secretary of Sector 3

1358. The ICP's claim that Mr YIM Tith likely held the position as Sector 3 Secretary after *Ta Tom* was sent to S-21 in June 1978 and may have previously been on the Sector 3 Committee as a member²⁷⁷¹, has no merit. The evidence that the ICP cites does not support this claim. Mr YIM Tith is facing the most serious charges. The ICP has engaged in an indulgent game, presenting his 'theories' based on evidence with no probative value and which does not satisfy the minimum standard to indict an individual.

²⁷⁷¹ ICP's Final Submission, D378/2, para. 170.

1359. The ICP also fails to account for the 35 witnesses who lived and worked in Sector 3 during the relevant period of time and who had never heard of Mr YIM Tith.²⁷⁷²

(7) Mr YIM Tith was Not *De Jure* or *De Facto* Secretary of Sector 4

1360. According to the ICP,²⁷⁷³ Sector 4 was divided into three districts: Bak Prea alias District 41 (also known as Sangkae District²⁷⁷⁴), Daun Try alias District 42, and Doun Teav alias District 43.²⁷⁷⁵

1361. The ICP claims that ‘various witnesses also identify Mr YIM Tith as the secretary of Sector 4’²⁷⁷⁶ and he requests that Mr YIM Tith be indicted for crimes occurring in Bak Prea District (also known as Sangkae District and District 41) and Daun Try (District 42).²⁷⁷⁷ In support of his claim, the ICP cites evidence from two witnesses, HAN Thy and LOCH Eng.²⁷⁷⁸ The evidence the ICP cites does not support his claim.

²⁷⁷² D219/740, CHHAM Mao, WRI, A102-A103, EN 01235818; D118/135, CHHOM Youn, WRI, A22, EN 00970437; D219/549, ING Oeum, WRI, A50, EN 01178547; D219/156, KIM Chat, WRI, A24, EN 01066839; D219/147, MANN Chuon, WRI, A236, EN 01063776; D219/644, YOM Yeang, WRI, A112, EN 01207421; D118/281, KEO Sokha, WRI, A15, EN 01040514; D219/185, SOEM Moeun, WRI, A82, EN 01079807; D219/164, CHHEANG Meng, WRI, A75, EN 01076934; D219/626, CHHENG CHHIN alias MUY Sot, WRI, A49, EN 01191091. D219/476, CHHONG Man, WRI, A7, EN 01152331; D219/36, CHHUOM Savoeun, WRI, A32, EN 01053607; D219/930, EM Lay, WRI, A27, EN 01492913; D219/667, HUN Moeun, WRI, A43, EN 01204501; D219/163, LEM Ann, WRI, A85, EN 01073540; D219/161, KHAT Pho, WRI, A86, EN 01073520; D219/801, KHI Thav, WRI, A25, EN 01479517; D118/223, KOEM Huoy, WRI, A27, EN 01057642; D219/784, MOM Krath, WRI, A48, EN 01485068; D219/697, NAUK Chheath, WRI, A39, EN 01213443; D219/162, NET Yean, WRI, A46, EN 01074546; D219/489, NHEM Phum, WRI, A195, A200, EN 01152361; D118/67, NHIM Ho, WRI, A47, EN 00950718; D118/64, POL Seun, WRI, A21, A46, EN 00950700, 00950702; D219/929, PRES Setha, WRI, A44, EN 01451512; D219/947, RITH Sary, WRI, A51, EN 01522743; D219/186, SENG Kheang, WRI, A68, EN 01079344; D118/107, SET Dun, WRI, A23, EN 00976912; D219/421, TEA Nguon, WRI, A39, EN 01135115; D219/666, YANG Sarieb, WRI, A82, EN 01204297; D219/906, HUN Chhunly, WRI, A69, EN 01517514; D219/926, HUN Ret, WRI, A10, EN 01451492; D219/799, KHLEANG San, WRI, A63, EN 01479513; D118/250, MUTH Voeuk, WRI, EN 01032481; D118/84, TOCH Phoeun, WRI, A19, EN 00976937. *See also* Annex V.

²⁷⁷³ *ICP's Final Submission*, D378/2, para. 174.

²⁷⁷⁴ D219/719 Roeurng Mean WRI, A4, EN 01216023; D219/392 Tek Sim WRI, A18, EN 01130620; D219/891 Thun Sovat WRI, A18, EN 01421331.

²⁷⁷⁵ D1.3.27.2 Report from Sector 4, 28 May 1977, EN 00183603; D219/825.1.2 OCIJ S-21 Prisoner List, Numbers 1558, 12854, EN 01222398, 856; D6.1.557 DK Telegram from Chann to Duch, 8 Oct 1977, Number 40, EN 00143349; D219/906.1.2 Hun Chhunly, T. 6 Dec 2012, 13.57.30-14.00.34; D219/424 Riem Dos WRI, A12, EN 01135140.

²⁷⁷⁶ *ICP's Final Submission*, D378/2, para. 46.

²⁷⁷⁷ *ICP's Final Submission*, D378/2, para. 175.

²⁷⁷⁸ *ICP's Final Submission*, D378/2, para. 46, fn 87; para. 175, fn 531.

HAN Thy's Evidence Regarding Mr YIM Tith's Alleged Position as Secretary of Sector 4

1362. As stated above²⁷⁷⁹, HAN Thy said that he was appointed as a chief of Kantueu Commune (Sector 1)²⁷⁸⁰ after April 1975 by Ta Pet, who was at the time responsible for Sector 1.²⁷⁸¹ He stayed in the same position until several days before the Vietnamese arrived.²⁷⁸² The ICP cherry-picks HAN Thy's statements and consequently disregards his evidence seen in its entirety.

1363. To support his claim, the ICP cites three answers from HAN Thy's statements:²⁷⁸³

D105/8

Q: In the old Written Record, you were asked about Ta Tit, who served as secretary of Sector 1, weren't you?

A7: Ta Tit then served as secretary of Sector 4.

D118/63

Q: In the same interview, you stated that *Ta* Tit was Sector 4 secretary. Is that correct?

A34: At that time *Ta* Tit himself said he was from Sector 4 and this village was in Sector 1.

Q: Where was *Ta* Tit when he said that he was from Sector 4?

A35: I heard that *Ta* Tit was from Sector 4 when I attended the meeting with *Ta* Mok at Veal Bek Chan.

1364. The ICP disregards, among other things, HAN Thy's following statement which contradicts his claim that 'Ta Tith himself said he was from Sector 4':

D105/8

Q: You were asked about *Ta* Tit, weren't you?

A9: Yes, I was, but I did not know *Ta* Tit because he was in a different sector; **I never met him.**

1365. HAN Thy does not support the ICP's claim that Mr YIM Tith served as Sector 4 Secretary. HAN Thy never met 'Ta Tith,' who was, according to him, in a different Sector. The investigator failed to ask HAN Thy about his source of knowledge regarding

²⁷⁷⁹ *Supra*, paras 1154 to 1159.

²⁷⁸⁰ D118/63, HAN Thy, WRI, A34, EN 00945853, ".....this village was in Sector 1". Also, analysis of all HAN Thy's statements show that he was talking about events happening in Sector 1 during the Khmer Rouge regime.

²⁷⁸¹ D1.3.11.55, HAN Thy, ICP statement, EN 00221577.

²⁷⁸² D1.3.11.55, HAN Thy, ICP statement, EN 00221584-5.

²⁷⁸³ D1.3.11.55, HAN Thy, ICP statement. D20, D105/8 and D118/63, HAN Thy, WRIs

‘Ta Tith’s’ position. The source of HAN Thy’s evidence regarding ‘Ta Tith’ is uncorroborated hearsay and he did not positively identify Mr YIM Tith. HAN Thy’s evidence regarding Mr YIM Tith’s alleged position in Sector 4 has no probative value.²⁷⁸⁴

LOCH Eng’s Evidence Regarding Mr YIM Tith’s Alleged Position as Secretary of Sector 4

1366. As stated above,²⁷⁸⁵ LOCH Eng gave three statements to the ICIJ. In support of his claim that Mr YIM Tith was serving as Sector 4 Secretary, the ICP is cherry-picks from LOCH Eng statements and disregards his evidence seen in its entirety.

1367. LOCH Eng was a cadre from Samraong District, Southwest Zone, who came to Battambang Province in July 1978.²⁷⁸⁶ When he arrived in Battambang, LOCH Eng was assigned by Ta Rin, Sector Committee Chief,²⁷⁸⁷ to work as a member of the Cooperative in Boeng Prey Commune located in Doun Teav District.²⁷⁸⁸

1368. LOCH Eng’s evidence cited by the ICP in support of his claim that Mr YIM Tith was serving as Sector 4 Secretary is contradictory and, by itself, does not support his claim:

D118/96

Q: When you came to work in Boeng Prey Commune, who was the Sector Committee [Chief]?

A29: Ta Tit was the Sector Committee [Chief] at the time, but I did not know [who was] the Sector Deputy Chief or the members.

D219/627

Q: Do you still remember in what district and sector Boeng Prey was located?

A4: I do not remember well. I just remember that Boeng Prey was in Doun Teav District, but I do not remember in which sector it was.

D219/884

Q: Thank you. At Question and Answer 29 in the record of your first interview in 2013 you said that when you arrived at Boeng Prey Commune the Sector Secretary was Ta Tith. Do you still maintain this answer?

A4: Yes, I do.

²⁷⁸⁴ See also *supra*, paras 1154 to 1159.

²⁷⁸⁵ *Supra*, para. 1340.

²⁷⁸⁶ D118/96, LOCH Eng, WRI, A4, EN 00974055.

²⁷⁸⁷ D118/96, LOCH Eng, WRI, A8, EN 00974056.

²⁷⁸⁸ D118/96, LOCH Eng, WRI, A4-A6, EN 00974055.

Q: Do you remember the sector where Boeng Prey Commune was located?

A5: At that time it was not given a code name. It was located in Daun Teav.

Q: Are you talking about the sector or the district?

A6: I'm talking about the district. I forget the sector.

Q: In the record of your second interview at your Question and Answer 12 in 2015 you stated that Ta Tith was the Sector Secretary in Boeng Prey and Phnom Sampov Mountain. Please explain further about Ta Tith's role.

A7: I did not know well his last position and role. I only know that Ta Tith went there to be in charge of the sector but I did not know the code name of that sector. This was in 1978 or 1979 already.

Q: You are talking about a sector. To which sector do you refer?

A8: I did not know the code name of that sector. It was a sector without a code name.

1369. Taking into consideration LOCH Eng's statement that 'Ta Tith' never introduced himself at the alleged meetings he held 'in the rice field near the village' and 'in Boeng Prey Commune,'²⁷⁸⁹ his confusion about 'Ta Tith's' position is understandable.²⁷⁹⁰

1370. LOCH Eng's evidence regarding Mr YIM Tith's alleged position in Sector 4 does not support the ICP Claim.

Other witnesses cited by the ICP with Regard to Mr YIM Tith's Alleged Position as Secretary of Sector 4

1371. The ICP also claims that Mr YIM Tith, as the alleged secretary of Sector 4, was 'assisted by Southwest Zone cadre Ta Nen' and cites one answer from witness LONH Lun.²⁷⁹¹ The ICP's claim is without merit. LONH Lun's evidence is contrary to the ICP's claim.

1372. LONH Lun was a Northwest Zone cadre who lived in Sector 4.²⁷⁹² At first, LONH Lun lived in Prey Roneam near Tonle Sap Lake where he was a village chief.²⁷⁹³ Later he was chairperson in Chrey Cooperative, Loas Commune, MOUNG RUESSEI District.²⁷⁹⁴ And in

²⁷⁸⁹ D118/96, LOCH Eng, WRI, A31-A33, EN 00974060.

²⁷⁹⁰ See also *infra*, paras 1340 to 1345 and *supra*, paras 1425 to 1428.

²⁷⁹¹ ICP's Final Submission, D378/2, para. 175.

²⁷⁹² D219/528, LONH Lun, WRI, A1, EN 01168062; A13 EN 01168064.

²⁷⁹³ D219/528, LONH Lun, WRI, A4-A7, EN 01168063.

²⁷⁹⁴ D219/528, LONH Lun, WRI, A20-A5, EN 01168065.

1977, he became a member of the Kampong Kou Cooperative at Kach Roteh.²⁷⁹⁵ He was in Sector 4 until the end of the Khmer Rouge regime.²⁷⁹⁶

1373. LONH Lun gave only one statement to the ICIJ on 28 September 2015.²⁷⁹⁷ He was not asked, nor did he ever mention in his statement Mr YIM Tith or ‘Ta Tith,’ although he extensively testified about Ta Mok’s role in the Northwest Zone. He did state that, when the Southwest Zone group arrived around May 1978,²⁷⁹⁸ ‘Ta Mok was Zone Committee and Ta Nen was Sector Committee,’²⁷⁹⁹ and that ‘Ta Nen came to take charge of the Sector and Sector Office was located in Anlong Vil Village, Battambang Province.’²⁸⁰⁰

1374. It is clear from this witness statement that LONH Lun’s evidence is that Ta Nen was Sector 4 Secretary from Southwest Zone arrivals, and that LONH Lun never heard of Mr YIM Tith or ‘Ta Tith.’ Also, there is no evidence in Case File 004 showing any interaction between Mr YIM Tith and Ta Nen.

1375. The ICP also states that Southwest Zone cadres Yeay Chan and Ta Loek held sector-level positions and cites three witnesses; PHANN Sarang, CHECH Sopha and SEK Muntha.²⁸⁰¹

1376. The Defence will not analyse the statements of these three witnesses to show their veracity and the salient point with respect to all three witnesses is the same; they gave evidence concerning the administrative structure of Sector 4 yet knew nothing about Mr YIM Tith. When asked specifically of their knowledge of Mr YIM Tith or Ta Tith, all three replied that they never heard of Mr YIM Tith or Ta Tith.²⁸⁰²

1377. The evidence cited by the ICP shows that Mr YIM Tith did not hold the position of Sector 4 Secretary, contrary to the ICP’s claim.

²⁷⁹⁵ D219/528, LONH Lun, WRI, A30-A31, EN 01168066.

²⁷⁹⁶ D219/528, LONH Lun, WRI, A9, EN 01168063.

²⁷⁹⁷ D219/528, LONH Lun, WRI.

²⁷⁹⁸ D219/528, LONH Lun, WRI, A30, EN 01168066; A35, EN 01168067.

²⁷⁹⁹ D219/528, LONH Lun, WRI, A47, EN 01168070.

²⁸⁰⁰ D219/528, LONH Lun, WRI, A54, EN 01168071.

²⁸⁰¹ ICP’s Final Submission, D378/2, para. 175, fn 532.

²⁸⁰² PHANN Sarang, WRI, A28, EN 01092942. CHECH Sopha, WRI, A83, EN 01050633. D219/503. SEK Muntha, WRI, A6, EN 01493008.

Conclusion regarding Mr YIM Tith's Alleged Position as Secretary of Sector 4

1378. There is no direct evidence to prove the ICP's claim that Mr YIM Tith was *de facto* or *de jure* Secretary of Sector 4, at any point of time during the Khmer Rouge regime. None of the witnesses provide direct or indirect evidence that Mr YIM Tith, during the temporal scope of investigation, received orders, communications, supervision or direction from higher echelon or that Mr YIM Tith reported back to higher echelons on any issues. None provides evidence, direct or indirect, that Mr YIM Tith sent orders, communications, or directions to districts in Sector 4, to supervise or exercise authority over them. No written document (order, instruction, telegram) exists to support that Mr YIM Tith was *de facto* or *de jure* Secretary of Sector 4, issued orders to the districts in Sector 4, or received documents, instructions, telegrams from the Centre in order to disseminate them throughout Sector 4 districts and implement the Centre's alleged policies.

1379. Uncorroborated and unreliable evidence of two witnesses cannot support the ICP's claim that Mr YIM Tith served as Sector 4 Secretary. The ICP also fails to account for 70 witnesses who lived and worked in Sector 4 during the relevant time and who had never heard of Mr YIM Tith.²⁸⁰³

²⁸⁰³ D219/481, CHROENG Sohpeap, WRI, A48, EN 01172523; D118/210, HUL Peou, WRI, A20, EN 00985145; D219/3, KEU Seung, WRI, A156, EN 01047117; D118/298, KHIEM Bo, WRI, A98, EN 01044748; D219/137, KHIEM Saon, WRI, A101, EN 01072551; D105/7, KIM Heng, WRI, A40, EN 00919420; D118/17, KREP Ron, WRI, A20, EN 00938184; D219/832, LIM Saloeun, WRI, A87, EN 01391244; D219/424, RIEM Dos, WRI, A26, EN 01135144; D219/945, SOK Chhoeut, WRI, A72, EN 01523956; D105/2, SUON Heng, WRI, A34, EN 00787184; D219/310, VOAN Samut, WRI, A24, EN 01111941; D219/453, YAT Yoeun, WRI, A38, EN 01151149; D118/281, KEO Sokha, WRI, A15, EN 01040514; D219/906, HUN Chhunly, WRI, A69, EN 01517514; D219/799, KHLEANG San, WRI, A63, EN 01479513; D118/250, MUTH Voeuk, WRI, EN 01032481; D219/839, CHEA Koeung, WRI, A126, EN 01399450; D219/42, CHECH Sopha, WRI, A83, EN 01050633; D219/503, CHHOM Hun, WRI, A34, EN 01167879; D219/395, CHIEV Heng, WRI, A48, EN 01132668; D219/699, CHOEUNM Veun, WRI, A39, EN 01213458; D219/841, HENG KuyLany, WRI, A96, EN 01390140; D219/564, HENG Phat, WRI, A72, EN 01180948; D219/865, HENG Puth, WRI, A82, EN 01373662; D219/683, HIN Non, WRI, A84, EN 01213406; D219/404, HOEUNG Sambo, WRI, A63, EN 01147883. D219/892, HUOT Sat, WRI, A20, EN 01412962; D219/693, KANG Muon, WRI, A49, EN 01224776; D219/167, KHIEM Koeuy, WRI, A25, EN 01072567; D219/895, KHIM Lumtaun, WRI, A45, EN 01407408; D219/955, KOEN Moeun, WRI, A64, EN 01456260; D219/863, LAI Loeum, WRI, A90, EN 01373636; D219/866, LOEUY Mon, WRI, A102, EN 01373675; D219/207, LONG Chhoeum, WRI, A10, EN 01088506; D219/838, LONG Khen, WRI, A130, EN 01492873; D219/299, MAK Met, WRI, A13, EN 01111868; D219/414, MAO Heang, WRI, A19, EN 01135065; D219/44, NGAM Ngoeum, WRI, A40, EN 01050663; D219/893, NGUON Ngien, WRI, A45, EN 01421344; D219/307, PALL Yung, WRI, A68, EN 01111928; D219/312, PANG Thai, WRI, A35, EN 01111954; D219/779, PANG Thai, WRI, A42, EN 01344765; D219/651, PECH Pek, WRI, A47, EN 01207476; D219/339, PEM sev, WRI, A17, EN 01118193; D219/311, PENG San, WRI, A22, EN 01111946; D219/238, PHANN Sarang, WRI, A28, EN 01092942; D219/754, PRAUCH Boeun, WRI, A39, EN 01306008; D219/719, ROEUNG Mean, A47, EN 01216027; D219/309, SAOY Yen, WRI, A19, EN 01111934; D219/25, SAOY Yen, WRI, A66, EN 01050589; D219/778, SATH Lady, WRI, A33, EN 01337049; D219/829, SEK Moeun, WRI, A96, EN 01390093; D219/939, SEK Muntha, WRI, Q6, EN 01493008; D219/413, SOK Nou, WRI, A23, EN 01135052; D219/125, SREY Soeum, WRI, A78-A79, EN 01067738; D119/109, SUON Lauv, WRI, A78 00984914; D219/941, SUON Sorphorn, WRI,

(b) Mr YIM Tith did not contribute to the Alleged Common Criminal Plan in the Northwest Zone

1380. The Defence submits that there is insufficient evidence on Case File 004 that Mr YIM Tith participated in the alleged common criminal plan in the Northwest Zone.

1381. As set out above, there is insufficient evidence that Mr YIM Tith held any roles and responsibilities in the Northwest Zone that show that he was a member of the alleged common criminal plan or that he shared the common purpose of this criminal plan with members of the alleged common criminal through meetings, communications, or any other means.²⁸⁰⁴

1382. The evidence is insufficient to find that Mr YIM Tith contributed to implementation of (1) the alleged CPK's enemies policy, (2) the alleged CPK forced marriage policy (3) the alleged CPK enslavement policy.

(1) Mr YIM Tith did Not Contribute to the Implementation of the Alleged CPK Enemies Policy

1383. Throughout his Final Submission, the ICP cherry-picks from the evidence of witnesses. Consequently, he misrepresents their evidence, in order to support his claims against Mr YIM Tith. A proper analysis of all witness statements demonstrates that the ICP's claims have no merit.

Mr Yim Tith's alleged presence at 'large, public meetings'

1384. The ICP claims that eight witnesses gave evidence of Mr YIM Tith's alleged participation and contribution to enemies policies at meetings in the Northwest Zone:²⁸⁰⁵ NOP Ngim,

A64, 01519543; D219/393, TEK Sim, WRI, A27, EN 01130585; D118/241, THACH Sokh, WRI, A99, EN 01040506; D219/891, THUN Sovat, WRI, A99, EN 01040506; D219/957, UN Ny, WRI, A80, EN 01456281; D219/356, VAN Nak, WRI, A121, EN01116340; D219/831, VENH Vanna, WRI, A122, EN 01391222; D219/781, YAN Prak, WRI, A139, EN 01348623; D219/599, YANG Phy, WRI, A37, EN 01185776; D219/192, YOAB Sinit, WRI, A132, EN 01079365; D219/718, HENG Leap, WRI, A56, EN 01219974; D219/367, REACH Saran, WRI, A8, EN 01128246. *See also* Annex V.

²⁸⁰⁴ As it was stated in the Second Introductory Submission (Case 003, D65), members of common criminal plan included CPK senior leaders, para. 21; Case 002, Closing Order, D427, paras 156-220, members included the members of CPK Standing and Central Committees, heads of ministries and Secretaries of Zones, independent Sectors, and Party Centre Military Divisions.

²⁸⁰⁵ *ICP's Final Submission*, D378/2, para. 51.

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NOP Ngim's evidence about Mr YIM Tith's presence at 'large, public meetings'

1385. As stated above,²⁸⁰⁶ NOP Ngim gave one statement to DC-Cam, three statements to the ICIJ, and she testified in Case 002/02.

1386. NOP Ngim stated that the District Secretary usually attended the meetings²⁸⁰⁷ but she remembered that she attended her only meeting in Battambang in 1978,²⁸⁰⁸ at Ta Mok's house, 15 days after her wedding²⁸⁰⁹ (she was married on 20 August 1978)²⁸¹⁰ at which Ta Mok and 'Ta Tith' were allegedly present. The meeting participants were from the Districts and the Sectors. NOP Ngim stated that Ta Mok, 'Ta Tith' and ten more participants were sitting at the front, facing others.²⁸¹¹ NOP Ngim claims that 'Ta Tith' was present during the first two days of the meeting, but on the third day she did not see him.²⁸¹² She understood that the purpose of this meeting was to make everyone work hard, to have solidarity with others, and not to quarrel and have disputes with others.²⁸¹³ NOP Ngim stated that 'Ta Tith' talked about solidarity with others and to clear forests and the undergrowths to farm non-paddy and paddy fields.²⁸¹⁴

1387. NOP Ngim stated that Ta Mok and 'Ta Tith' talked about the enemy situation, and they instructed them that they must smash any enemy that opposed Angkar, but they did not say who the enemies were or what methods were to be used to smash those enemies.²⁸¹⁵ She understood that the phrase 'any enemy who betray us, we must smash' meant that the enemy must be killed.²⁸¹⁶ But, later on, in the same WRI she stated that she could not remember what 'Ta Tith' was talking about during this meeting.²⁸¹⁷ NOP Ngim also

²⁸⁰⁶ *Supra*, para. 1184.

²⁸⁰⁷ D118/285, NOP Ngim, WRI, A56, EN 01044684.

²⁸⁰⁸ D219/835, NOP Ngim, WRI, A85, EN 01432959.

²⁸⁰⁹ D219/298, NOP Ngim, WRI, A13, EN 01111860; D219/835, NOP Ngim, WRI, A61-A63, EN 01432955-6; D219/835, NOP Ngim, WRI, A81-A82, EN 01432958.

²⁸¹⁰ D118/285, NOP Ngim, WRI, A83, EN 01044688; A68, EN 01044685-6; D219/835, NOP Ngim, WRI, A79-A80, EN 01432958.

²⁸¹¹ D219/835, NOP Ngim, WRI, A110-A115, EN 01432963.

²⁸¹² D219/835, NOP Ngim, WRI, A107-A109, EN 01432963.

²⁸¹³ D219/835, NOP Ngim, WRI, A86-A87, EN 01432959.

²⁸¹⁴ D219/835, NOP Ngim, WRI, A97-A98, EN 01432961.

²⁸¹⁵ D118/285, NOP Ngim, WRI, A56, EN 01044684;

²⁸¹⁶ D118/285, NOP Ngim, WRI, A56, EN 01044684;

²⁸¹⁷ D118/285, NOP Ngim, WRI, A86, EN 01044689.

added that during this period of time things were very chaotic, so they did not know who the enemy was, they were afraid and had to defend their location.²⁸¹⁸

1388. NOP Ngim also stated that no Northwest Zone cadres were arrested when she attended this meeting. Furthermore, she never heard from the District Secretary that cadres were arrested at meetings in Battambang province until the end of the Khmer Rouge regime.²⁸¹⁹

1389. NOP Ngim's evidence about meetings with Ta Mok and 'Ta Tith' in Samlaut District office is inconsistent. First, NOP Ngim stated that she attended small meetings at the district level at Ta Mok's house and that these meetings were attended by district secretaries, district committee members and commune committee members, and held once a month.²⁸²⁰ She was present at seven meetings when she worked at the district level for seven months.²⁸²¹ Sometimes Ta Mok and 'Ta Tith' were the chairs of the meetings, and sometimes only one of them was chairing the meeting.²⁸²² But then, in her final WRI, she admitted that she was confused and that those district level meetings were held in the Samlaut district 'amongst ourselves' every month,²⁸²³ and not in Ta Mok's house as she said previously.

1390. NOP Ngim stated that 'Ta Tith' would come to the Samlaut District office once or twice a month to meet the District Secretary to receive overall information about the district.²⁸²⁴ He instructed the team to govern people and to follow-up the situation in case the Vietnamese army attacked the villages.²⁸²⁵ He never talked about internal enemies when she was present.²⁸²⁶ She never attended any other meetings where 'Ta Tith' was present except one meeting in Battambang and meetings in the Samlaut District office.²⁸²⁷

1391. On the concrete question from the investigator of how many times she actually saw Ta Mok participating in or leading meetings while she was living and working in Battambang Province, she answered that she saw him once at a meeting in Battambang province, and

²⁸¹⁸ D219/835, NOP Ngim, WRI, A99-A102, EN 01432961-2; D219/835, NOP Ngim, WRI, A130, EN 01432966.

²⁸¹⁹ D118/285, NOP Ngim, WRI, A57-A59, EN 01044684.

²⁸²⁰ D219/298, NOP Ngim, WRI, A13, EN 01111860.

²⁸²¹ D219/298, NOP Ngim, WRI, A14, EN 01111860.

²⁸²² D219/298, NOP Ngim, WRI, A14, EN 01111860.

²⁸²³ D219/835, NOP Ngim, WRI, A120-A121, EN 01432964.

²⁸²⁴ D118/285, NOP Ngim, WRI, A65, EN 01044685.

²⁸²⁵ D118/285, NOP Ngim, WRI, A65, EN 01044685.

²⁸²⁶ D118/285, NOP Ngim, WRI, A65, EN 01044685.

²⁸²⁷ D118/285, NOP Ngim, WRI, A66, EN 01044685.

one other time at ‘Ta Tith’s’ house.²⁸²⁸ The investigator failed to clarify how many times she actually saw ‘Ta Tith’ at meetings during her stay in Battambang Province.

1392. This evidence of NOP Ngim puts in serious doubt the credibility of her evidence regarding alleged District level meetings in Ta Mok’s house from her WRI D219/298, cited by the ICP in support of his claim that Mr YIM Tith contributed to the enemies policy.²⁸²⁹

1393. The ICP’s conclusion that ‘it is clear from NOP Ngim’s evidence that enemies referred to by Mr YIM Tith and Ta Mok were internal enemies – Cambodians perceived as being disloyal to the CPK,’²⁸³⁰ has no merit. It is far from clear to which evidence the ICP is referring, as NOP Ngim changed her evidence regarding the alleged District level meetings in Ta Mok’s house with ‘Ta Tith’s’ presence.²⁸³¹

PREAP Kap’s evidence about Mr YIM Tith’s presence at ‘large, public meetings’

1394. The ICP’s claim that ‘NOP Ngim’s husband, PREAP Kap, corroborated her regular attendance of meetings with Mr YIM Tith,’²⁸³² is wrong.

1395. PREAP Kap was a Khmer Rouge soldier from 1972 from Sector 13 of the Southwest Zone under the command of Ta Mok²⁸³³ until 12 April 1975 when he was wounded.²⁸³⁴ Because of his wounds, he lost his eyesight and he had to be led whenever he went.²⁸³⁵ He could not read or write.²⁸³⁶

1396. PREAP Kap stated that his wife, the witness NOP Ngim, as a Deputy District Secretary, never allowed him to be involved in her work and he knew nothing related to his wife’s work.²⁸³⁷ But then PREAP Kap contradicted his own evidence and stated that he accompanied his wife NOP Ngim to Battambang five or six times to the meetings with ‘Ta Tith’ in his house in Ampil Prahaong Village and two times to the training in

²⁸²⁸ D219/835, NOP Nhim, WRI, A122, EN 01432965.

²⁸²⁹ ICP’s Final Submission, D378/2, paras 52-55.

²⁸³⁰ ICP’s Final Submission, D378/2, para. 55.

²⁸³¹ D219/835, NOP Nhim, WRI, A120-A121, EN 01432964.

²⁸³² ICP’s Final Submission, D378/2, para. 54.

²⁸³³ D219/62, PREAP Kap, WRI, A14, EN 01053903.

²⁸³⁴ D219/62, PREAP Kap, WRI, A15, EN 01053903-4.

²⁸³⁵ D219/62, PREAP Kap, WRI, A17, EN 01053904.

²⁸³⁶ D219/62, PREAP Kap, WRI, A17, EN 01053904.

²⁸³⁷ D219/62, PREAP Kap, WRI, A55-A60, EN 01053912-3.

Battambang²⁸³⁸ instead of her messenger.²⁸³⁹ On the specific question from the investigator asking why he would go with NOP Ngim to those meetings instead of her messenger, considering the fact that he was blind, and how he performed the messenger duties, PREAP Kap gave an odd explanation that he was not there as her messenger but to assist her if she got sick.²⁸⁴⁰ No other explanation was sought by the investigator even when he stated that at the end of the meetings he would be told to transport NOP Ngim back to Samlaut District,²⁸⁴¹ and that while waiting for NOP Ngim to finish the meetings (in 1978), he saw some district level cadres coming out of the ‘Ta Tith’ house whom he got to know in 1979.²⁸⁴² Considering the witness was blind at the time of described events, the evidence regarding events that he saw is not credible. Moreover, his statements were contrary to his wife Nop Ngim’s evidence who stated that meetings were never held at the ‘Ta Tith’s’ house in Ampil Prahaong Village.²⁸⁴³

1397. PREAP Kap’s evidence is not reliable. Contrary to the ICP’s argument, PREAP Kap’s evidence does not support NOP Ngim’s evidence and does not support the ICP’s claim that Mr YIM Tith was present at ‘large public meetings.’

VY Phann’s evidence about Mr YIM Tith’s presence at ‘large, public meetings’

1398. The ICP claims that VY Phann attended a meeting at Kanghat Dam in November 1977 where 700 to 800 people were present and where Mr YIM Tith was introduced as someone who ‘had come to help govern Sector 1.’²⁸⁴⁴ The ICP is misstating, and consequently misrepresenting, VY Phann’s evidence.

1399. The ICP is referring to same parts of VY Phann’s testimony as in his claim that Mr YIM Tith served as Northwest Zone Secretary and that he was a ‘powerful de facto leader’ in the Northwest Zone.²⁸⁴⁵ The ICP’s claim has no merit.

²⁸³⁸ D219/62, PREAP Kap, WRI, A61-A62, EN 01053913-4.

²⁸³⁹ D219/62, PREAP Kap, WRI, A64, EN 01053914.

²⁸⁴⁰ D219/62, PREAP Kap, WRI, A64, EN 01053914.

²⁸⁴¹ D219/62, PREAP Kap, WRI, A66, EN 01053914.

²⁸⁴² D219/62, PREAP Kap, WRI, A69, EN 01053915.

²⁸⁴³ D219/298, NOP Ngim, WRI, A33, EN 01111863.

²⁸⁴⁴ ICP’s Final Submission, D378/2, paras 56 to 58.

²⁸⁴⁵ ICP’s Final Submission, D378/2, paras 45, 148.

1400. As stated above,²⁸⁴⁶ VY Phann remembers that ‘Ta Tith’ arrived in his area around November 1978²⁸⁴⁷ and that the first time he saw ‘Ta Tith’ and Ta Pet was at the meeting in Kanghat Dam, where Ta Pet announced that ‘Ta Tith,’ who was from Southwest Zone, had come ‘to help govern Sector 1.’²⁸⁴⁸ The ICP’s conclusion that this meeting happened ‘more likely’ in November 1977²⁸⁴⁹ is without merit. VY Phann appeared certain in his statement that this meeting was held in November 1978 and he repeated the same meeting date five months after he gave his only statement, on 30 March 2015, to an ICIJ investigator when he accompanied him to several sites near Banan temple, as recorded in a WRIA:

Vy stated that when he was called to the 1978 group meeting at Kang Hort dam chaired by Ta Tith, Vy was living in his home village and not working at the dam.²⁸⁵⁰

1401. As an argument that this meeting likely happened in November 1977, the ICP claims that Ta Pet was already arrested by November 1978. This claim also has no merit as the ICP’s only support for this claim is Ta Pet’s interview by Stephen Heder, which has no probative value²⁸⁵¹ and that evidence in the Case File show that Ta Pet left for Phnom Penh in November 1978.²⁸⁵²

1402. The simple fact is that this meeting took place in November 1978, as confirmed by VY Phan’s evidence. VY Phann stated that at the meeting in Kanghat Dam, ‘Ta Tith’ talked about fighting the Yuon.²⁸⁵³ According to VY Phann, ‘Ta Tith’ said that the Yuon were very strong when they attacked and stormed them, and that ‘his group’ had defeated the Yuon troops.²⁸⁵⁴ VY Phann expressed his opinion to the investigator that, at the time, he did not believe ‘Ta Tith’s’ statement because he saw many of ‘Ta Tit’s people’ flee the Southwest Zone and come to his area.²⁸⁵⁵ Nevertheless, VY Phan remembers that ‘Ta

²⁸⁴⁶ *Supra*, paras 1256 to 1258.

²⁸⁴⁷ D219/85, VY Phann, WRI, A3, EN 01061168-9.

²⁸⁴⁸ D219/85, VY Phann, WRI, A3, EN 01061168-9.

²⁸⁴⁹ *ICP’s Final Submission*, D378/2, para. 58.

²⁸⁵⁰ D219/245, VY Phann, WRIA, EN 01080973.

²⁸⁵¹ *Supra*, paras 1238 to 1252.

²⁸⁵² *Supra*, para. 1250.

²⁸⁵³ D219/85, VY Phann, WRI, A4, EN 01061169.

²⁸⁵⁴ D219/85, VY Phann, WRI, A4, EN 01061169.

²⁸⁵⁵ D219/85, VY Phann, WRI, A4, EN 01061169.

Tith' tried to encourage them saying that 'we were a powerful nation and that the Khmer were the warrior race that had built Angkor Wat.'²⁸⁵⁶

1403. VY Phan also remembers that during that meeting Ta Chheng, who was a Southwest Zone cadre in charge of seven communes in this area, talked about the activities of other movements such as the Khmer Liberation (Khmer Rumdoh) movement and Free Khmer (Khmer Serei) movement along the Khmer-Thai border saying that those movements had joined the Thai army to act against them.²⁸⁵⁷ According to the evidence in the Case File, the Free Khmer (Khmer Serei) was a mercenary army which was established and supported by the 'right wing, U.S. Central Intelligence Agency,'²⁸⁵⁸ based in Thailand and operating and carrying out sabotage activities in Cambodia in 1977²⁸⁵⁹ and 1978,²⁸⁶⁰ especially in Battambang Province.²⁸⁶¹

1404. Also, witness Khoeun Sngoeun, who lived in Krach Roteh Village, in Battambang Province,²⁸⁶² stated that he and his villagers had an idea to join Khmer Serei (Sereika is a different name for the same organization) since 1977, before the Southwest Zone cadres came to the Northwest Zone, and they finally decided to do it in August 1978, when they fled from their village and headed to Thailand.²⁸⁶³

1405. Assuming, *arguendo*, that Mr YIM Tith was present at this meeting, and that he and other speakers at this meeting in November 1978 talked about Yuon, CIA and Khmer Serei as their enemies, it was in the context of Cambodia being invaded at that time, meaning that their concerns were not an espousal of the CPK enemies policy, as the ICP claims.

²⁸⁵⁶ D219/85, VY Phann, WRI, A4, EN 01061169.

²⁸⁵⁷ D219/85, VY Phann, WRI, A7, EN 01061170.

²⁸⁵⁸ D117/36.1.11, Book by Craig Etcheson, entitled "The Rise and Demise of Democratic Kampuchea", EN 00393196; D6.1.940, Book by Wilfred Deac entitled "Road to the killing fields; Cambodian war 1970-1975" p. 35, EN 00430615.

²⁸⁵⁹ D6.1.488, SVB, Far Easter Relations – press review, VOPT ("Voice of the People of Thailand", 26 September 1977, EN 00390910.

²⁸⁶⁰ D6.1.825, Foreign Broadcast Information Service, collection of reports for September 1978, Thai Paper Reports Insurgent Activities by Lon Nol Supporters, Bangkok World in English, 14 September 1978, EN 00170376.

²⁸⁶¹ D67.2, Annex 2: The DC-Cam's promoting accountability field trip report Malai District – a former Khmer Rouge stronghold Banteay Mean Chey Province, EN 00728550.

²⁸⁶² D219/261, Khoeun Sngoeun WRI, A3-A4, EN 01095836.

²⁸⁶³ D219/261, Khoeun Sngoeun WRI, A9-A10, EN 01095837; A29, EN 01095840; D6.1.623, DC-Cam Interview, EN 00352060-1.

1406. VY Phann's evidence can, at best, only support the ICP's claim that Mr YIM Tith was present at large public meetings in November 1978, when DK was being invaded by Vietnam.

CHUON Than's evidence about Mr YIM Tith's presence at 'large, public meetings'

1407. The ICP claims that CHUON Than, a low-level cadre who was a platoon leader in Treang Cooperative (Ratanak Mondul District, Sector 1)²⁸⁶⁴ attended a meeting in mid-1978²⁸⁶⁵ at Wat Phnum Sampov (Sector 3)²⁸⁶⁶ and heard Mr YIM Tith give orders to 'smash' those believed to be enemies.²⁸⁶⁷

1408. As already argued in this Response, there is serious doubt over the veracity of this witness's evidence and his alleged recognition of 'Ta Tith' at this meeting.²⁸⁶⁸ He did not positively identify Mr YIM Tith.

1409. CHUON Than's evidence is not reliable. His knowledge of the administrative structure of the Northwest Zone and Sector 1 is very low²⁸⁶⁹ and his memory about this one meeting where he allegedly saw 'Ta Tith' is strikingly selective: he does not remember the names of any other participants except 'Ta Tith' and he does not remember whether any other person talked during that meeting, yet he claimed to remember exactly what 'Ta Tith' allegedly said. There is no evidence on the Case File corroborating his statements. Therefore, his testimony is not sufficiently reliable and probative to establish the fact that Mr YIM Tith was present at this meeting, spoke about 'enemies' or that this meeting ever took place.²⁸⁷⁰

CHHOEUNG Bean's evidence about Mr YIM Tith's presence at 'large, public meetings'

1410. The ICP claims that CHHOEUNG Bean described Mr YIM Tith's role in 'two important meetings,' one in August or September 1978 and the second in September or October 1978.²⁸⁷¹

²⁸⁶⁴ D118/245, CHUON Than, WRI, A4, EN 01029378-9.

²⁸⁶⁵ D118/245, CHUON Than, WRI, A12, EN 01029380.

²⁸⁶⁶ D118/245, CHUON Than, WRI, A13, EN 01029381; D118/299, CHUON Than, WRI, A13, EN 01044754.

²⁸⁶⁷ ICP's Final Submission, D378/2, para.59.

²⁸⁶⁸ *Supra*, paras 1302 to 1307.

²⁸⁶⁹ *Supra*, para. 1303.

²⁸⁷⁰ Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 130.

²⁸⁷¹ ICP's Final Submission, D378/2, paras 60-61.

1411. The ICP cherry-picks from CHHOEUNG Bean's evidence, as he did with the evidence of this witness to support his claim that Mr YIM Tith was serving as Sector 1 Secretary, which has already been addressed in this Response.²⁸⁷²

1412. The first meeting described by CHHOEUNG Bean was held in a children's unit²⁸⁷³ in Boeng Khtum (Sector 1).²⁸⁷⁴ It cannot be called an 'important meeting.' Given the fact that CHHOEUNG Bean was 15 years old when the Khmer Rouge took power,²⁸⁷⁵ his presence at this meeting of a children's unit was not surprising. CHHOEUNG Bean's evidence about this meeting is not consistent throughout his four WRIs.²⁸⁷⁶

1413. In his first WRI, CHHOEUNG Bean stated that 'Ta Tith' said that they were prohibited from serving the Vietnamese and the CIA, which was an agency serving the Vietnamese.²⁸⁷⁷ Furthermore, they were prohibited from giving to the Vietnamese and the CIA Angkar's internal information about the stations of different units and the places where the units lived.²⁸⁷⁸ It is obvious from those words, if they are true, that 'Ta Tith' was talking about an approaching Vietnamese army. But, in his last WRI, after investigator suggested to him that in his previous statement that 'Ta Tith' was not talking about the Vietnamese army but about a 'burrowing enemy,' he changed his testimony. CHHOEUNG Bean went along with the investigator's suggestion and added a new detail which was never mentioned in his previous WRI, that 'Ta Tith said that even people who stole and boiled potatoes and pumpkins were regarded as burrowing enemies' and if somebody stole potatoes, pumpkins and bananas, they had to be reported to Ta Tith immediately.²⁸⁷⁹ This fed part of CHHOEUNG Bean's testimony is cited by the ICP in support of his claim. The ICP disregards the contradictions and changes in CHHOEUNG Bean's evidence.

²⁸⁷² *Supra*, paras 1288 to 1296.

²⁸⁷³ D219/430, CHHOEUNG Bean, A127, EN 01128724.

²⁸⁷⁴ D219/368, CHHOEUNG Bean, WRI, A87-A93, EN 01117722-3; D219/430, CHHOEUNG Bean, A126-A127, EN 01128724.

²⁸⁷⁵ D219/368, CHHOEUNG Bean, WRI, EN 01117714. According to data from his Interviews he was born 3 June 1960.

²⁸⁷⁶ D219/368, D219/430, D219/465, D219/533, CHHOEUNG Bean, WRI.

²⁸⁷⁷ D219/368, CHHOEUNG Bean, WRI, A90, EN 01117722-3.

²⁸⁷⁸ D219/368, CHHOEUNG Bean, WRI, A90, EN 01117722-3.

²⁸⁷⁹ D219/533, CHHOEUNG Bean, Q/A11-A14, EN 01178473.

1414. Regarding the second meeting which was held in October 1978 at Wat Bay Damram Pagoda (Sector 1), CHHOEUNG Bean stated in his first WRI that this was a public meeting,²⁸⁸⁰ and that ‘Ta Tith’ said:

[He] told people to have a firm position. He said if we had to flee we had to move upwards not downwards. He also told the people not to tell the enemy about our cadres’ bases if the enemy asked for them. He told them to pay attention only to cultivation, and not to be worried because there were troops to defend them.²⁸⁸¹

1415. CHHOEUNG Bean explained that he understood that ‘Ta Tith’ advised them that if they had to flee, they had to go toward the jungle (meaning ‘upwards’) not towards Vietnam (meaning ‘downwards’).²⁸⁸² Assuming *arguendo* that this meeting ever happened and that Mr YIM Tith was present, the theme of this meeting must have been concerned with the impending approach of the Vietnamese army, not the ‘CPK enemies policy.’

1416. But again, in his last statement CHHOEUNG Bean changed his understanding of the alleged words of ‘Ta Tith’ and added new information by stating that ‘Ta Tith’ ‘indoctrinated people not to betray the Southwest group’s leadership, no [sic] to betray their policies and leadership’ and that people should escape to certain areas, so they would not be able to contact the Yuon.²⁸⁸³ Again, the ICP cites this new part of CHHOEUNG Bean’s evidence in support of his claim, while disregarding the contradictions and changes of CHHOEUNG Bean’s evidence.

1417. CHHOEUNG Beans evidence about ‘Ta Tith’s’ involvement in meetings is not reliable, and has no probative value. He did not positively identify Mr YIM Tith.

TOUCH Mary’s evidence about Mr YIM Tith’s presence at ‘large, public meetings’

1418. The ICP claims that TOUCH Mary, an ordinary worker, attended a large meeting at which Mr YIM Tith spoke in Moung District (Sector 4).²⁸⁸⁴ The ICP disregards TOUCH Mary’s evidence totality of evidence and consequently misinterprets it.

²⁸⁸⁰ D219/368, CHHOEUNG Bean, WRI, A94-A95, EN 01117723.

²⁸⁸¹ D219/368, CHHOEUNG Bean, WRI, A94, EN 01117723.

²⁸⁸² D219/368, CHHOEUNG Bean, WRI, A95, EN 01117723.

²⁸⁸³ D219/533, CHHOEUNG Bean, WRI, A38-A39, EN 01178477.

²⁸⁸⁴ *ICP’s Final Submission*, D378/2, para. 62.

1419. TOUCH Mary gave two statements to the ICIJ.²⁸⁸⁵ She was 17 years old when the Khmer Rouge took power in 1975, and during the period 1975 to 1979 she was a mobile unit member in Sector 4.²⁸⁸⁶ Though TOUCH Mary's interviews were 2 months apart,²⁸⁸⁷ her statements are significantly different.

1420. TOUCH Mary had very limited knowledge about the administrative structure. She remembered only the names of her immediate unit chiefs and she did not know any cadre above this lowest level of the DK administrative structure.²⁸⁸⁸ She cannot even say whether her unit belonged to the commune or to the district.²⁸⁸⁹ She did remember that Ta Loek and Yeay Chan, who were Southwest Zone cadres, came to her area from Takeo province, Srae Ambel Village²⁸⁹⁰ two or three months before end of the regime,²⁸⁹¹ and that Yeay Chan was in charge of TOUCH Mary's mobile unit.²⁸⁹²

1421. In her first WRI, TOUCH Mary stated that she knew 'Ta Tith' and that he was one level above Yeay Chan.²⁸⁹³ She stated that 'Ta Tith' came to her sector close to the end of the regime²⁸⁹⁴ from Srae Ambel, Takeo Province, and concluded this because he 'did not speak very clearly.'²⁸⁹⁵ TOUCH Mary stated that she saw 'Ta Tith' only once in a joint meeting at Kbal Thnal,²⁸⁹⁶ where lots of people participated²⁸⁹⁷ and that 'Ta Tith' said at the meeting that they needed to be 'vigilant' about moral wrongdoing and work,²⁸⁹⁸ and that 'enemies were undercover in our sector, in our villages and units,'²⁸⁹⁹ 'Ta Tith' spoke for 'no more than ten minutes,'²⁹⁰⁰ and he told them to report enemies to the upper echelons.²⁹⁰¹ 'Ta Tith' also assigned the locations for mobile units to go the next day to

²⁸⁸⁵ D219/836, and D219/872 TOUCH Mary, WRI;

²⁸⁸⁶ D219/836, TOUCH Mary WRI, A16-A17, EN 01399399; D219/872, TOUCH Mary, WRI, A1-A9, EN 01375358-9.

²⁸⁸⁷ WRI D219/836 is dated 21 September 2016 and WRI D219/872 is dated 23 November 2016.

²⁸⁸⁸ D219/836, TOUCH Mary WRI, A28-A32, EN 01399401; A45-50, EN 01399403-4; A75, EN 01399408; A98-A99, EN 01388411-2; A120, 01399414; D219/872 TOUCH Mary WRI, A15-A21, EN 01375359; A143, EN 01375367; A178, EN 01375370.

²⁸⁸⁹ D219/836, TOUCH Mary WRI, A38-A40, EN 01399402.

²⁸⁹⁰ D219/836, TOUCH Mary WRI, A129, EN 01399416; A142-A143, EN 01399417-8.

²⁸⁹¹ D219/836, TOUCH Mary WRI, A132-A135, EN 01399416-7.

²⁸⁹² D219/836, TOUCH Mary WRI, A129-A131, EN 01399416.

²⁸⁹³ D219/836, TOUCH Mary WRI, A158-A159, EN 01399420.

²⁸⁹⁴ D219/836, TOUCH Mary WRI, A170, EN 01399421.

²⁸⁹⁵ D219/836, TOUCH Mary WRI, A171, EN 01399422.

²⁸⁹⁶ D219/836, TOUCH Mary WRI, A160, EN 01399420.

²⁸⁹⁷ D219/836, TOUCH Mary WRI, A165-A166, EN 01399421.

²⁸⁹⁸ D219/836, TOUCH Mary WRI, A161, EN 01399420.

²⁸⁹⁹ D219/836, TOUCH Mary WRI, A162, EN 01399420.

²⁹⁰⁰ D219/836, TOUCH Mary WRI, A162, EN 01399420.

²⁹⁰¹ D219/836, TOUCH Mary WRI, A164, EN 01399421.

work.²⁹⁰² ‘Ta Tith’ spoke in detail about work matters²⁹⁰³ ‘rather loudly during the meeting.’²⁹⁰⁴ Because he spoke loudly, she stated that she was afraid that that she was ‘going to be summoned and killed.’²⁹⁰⁵ The ICP is referring to this WRI as evidence that Mr YIM Tith contributed to the enemies policy in the Northwest Zone.

1422. But, in her second interview, TOUCH Mary stated that she never saw ‘Ta Tith’ and that she heard during a meeting (it is not clear what meeting she was talking about) that ‘Ta Tith’ was Yeay Chan’s superior; she did not remember when that meeting was held.²⁹⁰⁶ Later in the same WRI, TOUCH Mary changed her statement, and stated that she saw ‘Ta Tith’ only once at Kbal Thnal meeting, but she did not know who he was at the time and what his name was.²⁹⁰⁷ After the Khmer Rouge regime collapsed and Vietnamese troops arrived,²⁹⁰⁸ her unit member told her that his name was ‘Tith.’²⁹⁰⁹ The ICP ignores TOUCH Mary’s second WRI which puts her testimony about ‘Ta Tith’s’ alleged presence and words at a meeting in Kbal Thnal in serious doubt.

1423. The ICP also ignored the fact that TOUCH Mary’s evidence is not corroborated by any other evidence in the Case File. Contrary to TOUCH Mary’s evidence, four witnesses who at the time worked under the rule of Yeay Chan never heard of Mr YIM Tith or ‘Ta Tith,’ and do not support her evidence about ‘Ta Tith’s’ involvement in Sector 4.

- KHIEM Saon stated that Yeay Chan and Ta Loek came in mid-1978 and took over Kampong Kou Cooperative in Sangkae District.²⁹¹⁰ KHIEM Saon never heard of ‘Ta Tith.’²⁹¹¹
- PANG Thai stated that Yeay Chan and Ta Loek were the ‘biggest cadre’ and they oversaw Reang Kesei Commune.²⁹¹² PANG Thai never heard the name ‘Ta Tith’ during the DK regime.²⁹¹³

²⁹⁰² D219/836, TOUCH Mary WRI, A163, EN 01399420.

²⁹⁰³ D219/836, TOUCH Mary WRI, A168, EN 01399421.

²⁹⁰⁴ D219/836, TOUCH Mary WRI, A169, EN 01399421.

²⁹⁰⁵ D219/836, TOUCH Mary WRI, A169, EN 01399421.

²⁹⁰⁶ D219/872 TOUCH Mary WRI, A147-A149, EN 01375368;

²⁹⁰⁷ D219/872 TOUCH Mary WRI, A165, EN 01375369;

²⁹⁰⁸ D219/872 TOUCH Mary WRI, A165, EN 01375369;

²⁹⁰⁹ D219/872 TOUCH Mary WRI, A150-A159, EN 01375368-9;

²⁹¹⁰ D219/137 KHIEM Saon, WRI, A49-A54 EN EN 01072544-5.

²⁹¹¹ D219/137 KHIEM Saon, WRI, A101, EN 01072551.

²⁹¹² D219/779 PANG Thai, WRI, A45-A47 EN 01344765.

²⁹¹³ D219/779 PANG Thai, WRI, A42, EN 01344765.

- LOEUY Mon stated that he attended meetings with Yeay Chan and Ta Loek at the end of the regime and that they were in charge of the cooperative committee in Reang Kesei Commune and oversaw that area.²⁹¹⁴ LOEUY Mon never heard of 'Ta Tith.'²⁹¹⁵
- SEK Muntha stated that Yeay Chan and Ta Loek came in December 1978 and were in charge of Reang Kesei Cooperative, District 41 and District 42.²⁹¹⁶ SEK Muntha attended meetings with them. He attended the first meeting with them in Wat Reang Kesei Pagoda one month after they arrived.²⁹¹⁷ No official from any other level was inspecting this area.²⁹¹⁸ SEK Muntha stated that he does not know any person named YIM Tith or 'Ta Tith.'²⁹¹⁹

1424. TOUCH Mary did not positively identify Mr YIM Tith. Her evidence is self-contradicting and based on hearsay. TOUCH Mary's evidence has no probative value regarding Mr YIM Tith's presence at the meetings and does not support the ICP's claim.

LOCH Eng's evidence about Mr YIM Tith's presence at 'large, public meetings'

1425. The ICP claims that LOCH Eng, a ordinary worker from Boeng Prey Commune, originally from the Southwest Zone, also attended the meeting at which Mr YIM Tith gave attendees instructions to monitor and report their fellow workers.²⁹²⁰ The ICP cherry-picks from his statements and disregards his evidence seen in its entirety.

1426. As already stated in the Response²⁹²¹, LOCH Eng stated in his first WRI that he never heard of 'Ta Tith' when he was working in the Southwest Zone.²⁹²² He came to Battambang Province in July 1978²⁹²³ where Ta Rin (Sector Committee Chief²⁹²⁴) assigned him to work as a member of the Cooperative in Boeng Prey Commune located in Doun Teav District.²⁹²⁵ Half a month after he came to Boeng Prey Commune he heard

²⁹¹⁴ D219/866 LOEUY Mon, WRI, A41-53, EN 01373669-70.

²⁹¹⁵ D219/866 LOEUY Mon, WRI, A103, EN 01373674.

²⁹¹⁶ D219/939, SEK Muntha, WRI, A45-A48 EN 01493020, A57, EN 01493023.

²⁹¹⁷ D219/939, SEK Muntha, WRI, A60-A61 EN 01493023-4,

²⁹¹⁸ D219/939, SEK Muntha, WRI, A76 EN 01493027,

²⁹¹⁹ D219/939, SEK Muntha, p. 5. EN 01493008,

²⁹²⁰ *ICP's Final Submission*, D378/2, para.63.

²⁹²¹ *Supra*, para. 1344.

²⁹²² D118/96, LOCH Eng, WRI, A30, EN 00974060;

²⁹²³ D118/96, LOCH Eng, WRI, A4, EN 00974055.

²⁹²⁴ D118/96, LOCH Eng, WRI, A8, EN 00974056.

²⁹²⁵ D118/96, LOCH Eng, WRI, A4-A6, EN 00974055.

‘Ta Tith’s’ name.²⁹²⁶ LOCH Eng stated that ‘Ta Tith’ held meetings attended by the District and Commune Committee in the rice fields and Boeng Prey Commune.²⁹²⁷ LOCH Eng stated that at the meetings held with ‘Ta Tith,’ they were discussing only farming activities²⁹²⁸ and ‘Ta Tith’ also said that they had to be careful and ensure there were no spies or agents in their village and Communes ‘because the situation in the country at the time was not stable’ and if they find them to report them to the District who ‘would decide what was to be done.’²⁹²⁹ The ICP is referring to this WRI as evidence that Mr YIM Tith contributed to the enemies policy in the Northwest Zone.

1427. The ICP ignores the second WRI of this witness where he changed his evidence and said that he was present at a meeting with ‘Ta Tith’ only once²⁹³⁰ and that was at the time when an ‘announcement came to forgive and pardon wrongdoers and start cooperation to work together.’²⁹³¹ According to the other evidence in the Case File, LOCH Eng was most probably referring to the order to stop the purges of the Northwest Zone.²⁹³² This meeting was held in late 1978 in Boeng Prey, and the attendees were mobile groups who grew rice. He added that ‘no upper echelon attended’²⁹³³ and during the meeting they talked only about crop production.²⁹³⁴

1428. LOCH Eng’s evidence does not support the ICP’s claim that Mr YIM Tith gave attendees instructions to monitor and report their fellow workers. LOCH Eng’s evidence, taken in its entirety, is that he met ‘Ta Tith’ once in a meeting where crop production was discussed²⁹³⁵ and it was announced that everyone should forgive and pardon wrongdoers and start cooperation to work together.²⁹³⁶ LOCH Eng did not positively identify Mr YIM Tith.

²⁹²⁶ D118/96, LOCH Eng, WRI, A30, EN 00974060;

²⁹²⁷ D118/96, LOCH Eng, WRI, A31-A32, EN 00974060;

²⁹²⁸ D118/96, LOCH Eng, WRI, A33, EN 00974060;

²⁹²⁹ D118/96, LOCH Eng, WRI, A34-A35, EN 00974060;

²⁹³⁰ D219/627, LOCH Eng, WRI, A18, EN 01187741-2;

²⁹³¹ D219/627, LOCH Eng, WRI, A18, EN 01187741-2;

²⁹³² D118/259, PECH Chim, WRI, A188-A190, EN 01000689; D6.1.141, SAO Sarun, WRI, EN 00278694 and EN00278697; D219/294, MOUL En, WRI, A68, EN 01111834.

²⁹³³ D219/627, LOCH Eng, WRI, A20-22, EN 01187742;

²⁹³⁴ D219/627, LOCH Eng, WRI, A29, EN 01187743;

²⁹³⁵ D219/627, LOCH Eng, WRI, A29, EN 01187743;

²⁹³⁶ D219/627, LOCH Eng, WRI, A18, EN 01187741-2;

MOUL En's evidence about Mr YIM Tith's presence at 'large, public meetings'

1429. The ICP claims that Mr YIM Tith also participated and contributed to the implementation of the enemies policy in private meetings with his subordinates.²⁹³⁷ In support of his claim, he cites one WRI²⁹³⁸ from one witness, MOUL En. However, the ICP misstated MOUL En's evidence.

1430. As already asserted above,²⁹³⁹ MOUL En replaced the former Secretary of Bavel District, based on Ta Mok's order, one month after Ta Nhim's arrest.²⁹⁴⁰

1431. He stated that he met 'Ta Tith' for the first time at the meeting in Battambang University, which was approximately one month after Ta Nhim was arrested.²⁹⁴¹ There were around 30 participants at this meeting, but only ten of them were cadres, including himself.²⁹⁴² According to MOUL En, this meeting was chaired by Ta Mok and attended by Yeay Chaem, Ta Bo and possibly Ta An.²⁹⁴³ The meeting was organized for the district and sector levels.²⁹⁴⁴ During the meeting Yeay Chaem and Ta Mok spoke.²⁹⁴⁵ MOUL En stated that 'Ta Tith' 'didn't dare to say anything since he was Ta Mok's younger brother-in-law.'²⁹⁴⁶ No further questions were asked to clarify this statement. MOUL En stated that at this meeting Ta Chay's and Ta An's positions were announced²⁹⁴⁷ but 'Ta Tith' was not assigned any role and MOUL En did not know what position 'Ta Tith held' at the time.²⁹⁴⁸

1432. MOUL En stated that the second time he met 'Ta Tith' was late September or early October 1978 when 'Ta Tith' came to inspect his rice fields.²⁹⁴⁹ He remembered that 'Ta Tith' spent one afternoon with them and he did not say much. 'Ta Tith' instructed them to grow rice and other crops according to plan (the plan that was introduced by Ta Chay

²⁹³⁷ ICP's Final Submission, D378/2, para. 64.

²⁹³⁸ D219/294, MOUL En, WRI.

²⁹³⁹ *Supra*, paras 1320 to 1324.

²⁹⁴⁰ D219/294, MOUL En, WRI, A36, EN 01111830; A43, A46, EN 01111831.

²⁹⁴¹ D219/294, MOUL En, WRI, A68, EN 01111834.

²⁹⁴² D219/294, MOUL En, WRI, A70-A71, EN 01111834.

²⁹⁴³ D219/294, MOUL En, WRI, A54-A55, EN 01111832.

²⁹⁴⁴ D219/294, MOUL En, WRI, A56, EN 01111832

²⁹⁴⁵ D219/294, MOUL En, WRI, A57-A58, EN 01111832

²⁹⁴⁶ D219/294, MOUL En, WRI, A69, EN 01111834.

²⁹⁴⁷ Ta Chay was appointed as Secretary of Sector 5, and Ta Tom was Secretary of Sector 5. *See*: D219/294, MOUL En, WRI, A92, EN 01111836; A38-A40, EN 01111830.

²⁹⁴⁸ *Supra*, para. 1321.

²⁹⁴⁹ D219/294, MOUL En, WRI, A75, EN 01111834.

at the time he was in charge of Bavel District²⁹⁵⁰) and to fend off the enemies.²⁹⁵¹ The ICP cites this part of MUOL En's first WRI in support of his claim that Mr YIM Tith participated and contributed to the implementation of the enemies policy.

1433. MOUL En explained that during the Khmer Rouge regime, the phrase 'to fend off the enemies' was widely used and 'enemies [...] referred to anyone who opposed, betrayed, complain of failed to work according to plan [...] no one would dare to challenge this even among the cadres. If someone failed to work according to plan he would be killed.'²⁹⁵² The ICP also cites this part of MUOL En's statement as evidence that Mr YIM Tith participated and contributed to the implementation of the enemies policy.²⁹⁵³

1434. However, the ICP disregards MOUL En's explanation that Ta Chay, who was his superior at the time when Bavel District belonged to Sector 5,²⁹⁵⁴ set this policy out, namely that anyone who was stubborn and did not perform their work had to be imprisoned.²⁹⁵⁵ He stated that when 'Ta Tith' came to visit Bavel District, he said nothing 'about this matter.' The ICP is intentionally ignoring this evidence and imputing Ta Chay's words to Mr YIM Tith.²⁹⁵⁶ Also, the ICP disregards MOUL En's evidence that arrests stopped when 'Ta Tith' 'took charge of Bavel District,' because at the time there was 'some regulation to pardon those who had been educated' and the 'practice of having people loaded on the truck and taken away was no longer in place.'²⁹⁵⁷

1435. The ICP is also ignoring MOUL En's evidence that under Ta Nhim's rule those labelled as enemies had been detained at Sector 3 prison in Bavel District,²⁹⁵⁸ that under Ta Chay's control many people were arrested and evacuated by truck²⁹⁵⁹ and that ROS Nhim ('Ta Nhim') was the one who arrested district cadres.²⁹⁶⁰

²⁹⁵⁰ D219/294, MOUL En, WRI, A97, EN 01111836.

²⁹⁵¹ D219/294, MOUL En, WRI, A81, EN 01111834-5.

²⁹⁵² D219/294, MOUL En, WRI, A81, EN 01111834-5.

²⁹⁵³ *ICP's Final Submission*, D378/2, para. 64.

²⁹⁵⁴ D219/294, MOUL En, WRI, A44-A45, EN 01111831; A92, EN 01111836.

²⁹⁵⁵ D219/294, MOUL En, WRI, A82, EN 01111835.

²⁹⁵⁶ *ICP's Final Submission*, D378/2, para. 64.

²⁹⁵⁷ D219/294, MOUL En, WRI, A95-A96, EN 01111836. See also, D6.1.141, SAO Sarun, WRI, EN 00278694 and EN00278697; D118/259, PECH Chim, WRI, A188-A190, EN 01000689; D219/627, LOCH Eng, WRI, A18-A22, EN 01187741-2.

²⁹⁵⁸ D219/294, MOUL En, WRI, A83-A86, EN 01111835.

²⁹⁵⁹ D219/294, MOUL En, WRI, A86-A91, EN 01111835.

²⁹⁶⁰ D219/294, MOUL En, WRI, A87, EN 01111835.

1436. MOUL En stated that he had a final meeting with ‘Ta Tith’ at his office in Boeng Pring, Battambang Province in late November or early December 1978.²⁹⁶¹ They spoke about the approaching Vietnamese army and how to fight them.²⁹⁶² He stated that, at that time, ‘there was a big influx of people moving into the area’ and ‘we had no idea where they come from.’ MOUL En’s description of the situation is telling:

Consequently, situation became chaotic and anarchic. I could not longer comprehend what was happening. The organizational structure was no longer functional. Civilians who were angry at the Khmer Rouge cadres were chasing them to kill them as revenge.²⁹⁶³

1437. According to MOUL En, in mid-December 1978, ‘Ta Tith’ fled to Pailin Province, and he escaped to the west to the Thai border.²⁹⁶⁴

1438. From this analysis it can be concluded that MOUL En had one ‘private meeting’ with ‘Ta Tith’ at the end of September or the beginning of October 1978, at which time the arrests had already stopped. The ICP’s claim that ‘in private meetings with his subordinates’ (plural), Mr YIM Tith contributed to the implementation of enemies policies is a misstatement of the evidence.

SOEUN Mat’s evidence about Mr YIM Tith’s presence at ‘large, public meetings’

1439. The ICP claims that ‘in addition to openly making threats against enemies, Mr YIM Tith also boosted the terror campaign by making sure that people were aware that his threats were indeed carried out.’²⁹⁶⁵ For this claim, the ICP cites evidence of one witness, SOEUN Mat who allegedly said that Mr YIM Tith presided over a meeting in Kanhath Dam in 1977 where it was publicly announced that Ta Kao had been arrested and taken to be killed and that Ta Pet was arrested too.²⁹⁶⁶ The ICP’s claim has no merit and it is contrary to his own claim that Ta Kao (Ros Nhim) was sent to S-21 in May 1978 and that Ta Pet ‘was arrested’ in September or October.²⁹⁶⁷

1440. SOEUN Mat gave only one statement to the ICIJ.²⁹⁶⁸ This statement is so erratic and full of contradictory evidence that it is very hard to follow his evidence. Though the

²⁹⁶¹ D219/294, MOUL En, WRI, A80, EN 01111834; A98-A100, EN 01111836-7.

²⁹⁶² D219/294, MOUL En, WRI, A101, EN 01111837.

²⁹⁶³ D219/294, MOUL En, WRI, A101, EN 01111837.

²⁹⁶⁴ D219/294, MOUL En, WRI, A106, EN 01111837.

²⁹⁶⁵ *ICP’s Final Submission*, D378/2, para. 65.

²⁹⁶⁶ *ICP’s Final Submission*, D378/2, para. 65.

²⁹⁶⁷ *ICP’s Final Submission*, D378/2, para. 335.

²⁹⁶⁸ D219/538, SOEUN Mat, WRI.

investigator promised that the ICIJ would come back and clarify his statement, this never happened.²⁹⁶⁹ An analysis of SOEUN Mat's statement reveals evidence that contradicts the ICP's claim.

1441. SOEUN Mat first stated that from 1975 to 1979 he lived in Banan Village, Kantueu Commune, Kantueu Cooperative, Sangkae District, Sector 1.²⁹⁷⁰ He worked in the Kantueu Cooperative mobile unit,²⁹⁷¹ 'until the end' (it is not clear to what time he is referring) when he was sent to work in a 'decisive mobile unit' in Kantueu Cooperative and this unit was sent to work at Kanghat Dam.²⁹⁷² He left Kanghat Dam and went back to his village half a year before the Khmer Rouge regime collapsed.²⁹⁷³ SOEUN Mat then changes his evidence and stated that he lived in his home village, Kampang Kaeut (east of the Sangkae River),²⁹⁷⁴ until half a year before the Khmer Rouge regime collapsed when he went to live in Banan Village (west of the Sangkae River).²⁹⁷⁵ In Banan village he became the messenger for Southwest Zone cadre Ta Chem.²⁹⁷⁶

1442. Crucially, SOEUN Mat stated that he did not know anything about the higher echelons; he only knew who his cooperative committee chairperson was.²⁹⁷⁷ Yet he remembered that that Ta Vanh was a manager at Kanghat Dam. He explained that when he saw someone managing, he called that person 'manager.'²⁹⁷⁸ SOEUN Mat then changed his evidence and stated that after Ta Kao was arrested, 'Ta Tith' became manager of Kanghat Dam.²⁹⁷⁹ The source of SOEUN Mat's knowledge is unclear. SOEUN Mat also stated that he heard about Ta Pet and he assumes that Ta Pet was Sector 1 chairman.²⁹⁸⁰

1443. SOEUN Mat stated that he knew nothing about the Southwest Zone administration and who was in charge of the sector at the time.²⁹⁸¹ He stated that he only knew that Ta Chem,

²⁹⁶⁹ D219/538, SOEUN Mat, WRI, p. 20, EN 01173589.

²⁹⁷⁰ D219/538, SOEUN Mat, WRI, A3-A8, EN 01173572-3.

²⁹⁷¹ D219/538, SOEUN Mat, WRI, A9-A11, EN 01173573-4.

²⁹⁷² D219/538, SOEUN Mat, WRI, A11, EN 01173574.

²⁹⁷³ D219/538, SOEUN Mat, WRI, A88, EN 01173589.

²⁹⁷⁴ D219/538, SOEUN Mat, WRI, A88-A89, EN 01173589.

²⁹⁷⁵ D219/538, SOEUN Mat, WRI, A52, EN 01173582; A88, EN 01173589.

²⁹⁷⁶ D219/538, SOEUN Mat, WRI, A74, EN 01173586.

²⁹⁷⁷ D219/538, SOEUN Mat, WRI, A13, EN 01173574.

²⁹⁷⁸ D219/538, SOEUN Mat, WRI, A20, EN 01173576.

²⁹⁷⁹ D219/538, SOEUN Mat, WRI, A14, EN 01173574.

²⁹⁸⁰ D219/538, SOEUN Mat, WRI, A37, EN 01173579.

²⁹⁸¹ D219/538, SOEUN Mat, WRI, A44, EN 01173580-1.

Ta Phan and ‘Ta Tith’ were from the Southwest²⁹⁸² and that Ta Chem was a village chief, Ta Phan was the cooperative chief and ‘Ta Tith’ was a military commander.²⁹⁸³

1444. SOEUN Mat stated that he first heard ‘Ta Tith’s’ name from Ta Phan and Ta Chem, when he overheard them talking and mentioning the name ‘Ta Tith.’²⁹⁸⁴ He also overheard them mentioning ‘Ta Tith’s soldiers,’ and he concluded that ‘Ta Tith’ was a military commander.²⁹⁸⁵ No timeframe for these events was provided by SOEUN Mat, nor was he asked to provide one.

First meeting in Kanghat Dam

1445. SOEUN Mat initially stated that he heard at a meeting in late 1977 that Ta Pet was arrested and detained in Ka Koah Prison and that Ta Kao was killed.²⁹⁸⁶ This was publicly announced by ‘Ta Tith.’²⁹⁸⁷ Contrary to this, SOEUN Mat later changes his evidence and stated that he learned about Ta Pet’s arrest and detention after 1979 from HAO Ti who was Ta Pet’s subordinate soldier.²⁹⁸⁸

1446. SOEUN Mat initially stated that the meeting where ‘Ta Tith’ allegedly announced the arrests of Ta Pet and Ta Kao was held in Kanghat Dam,²⁹⁸⁹ probably in late 1977.²⁹⁹⁰ He stated that thousands of people were present,²⁹⁹¹ that he was far from the platform and he could hear people talking only over the loudspeaker because they were not allowed to walk around during the meeting, they just had to sit in their row.²⁹⁹² He then changed his evidence and stated that he did not see high-level cadre at this meeting and that this was not a meeting where ‘Ta Tith’ spoke or announced arrests.²⁹⁹³ He explained that the meeting where ‘Ta Tith’ announced the arrests was held ‘in a field’ so he could see him speaking.²⁹⁹⁴ It is unclear when and where this meeting ‘in a field’ was held.

²⁹⁸² D219/538, SOEUN Mat, WRI, A53, EN 01173582.

²⁹⁸³ D219/538, SOEUN Mat, WRI, A54, EN 01173582.

²⁹⁸⁴ D219/538, SOEUN Mat, WRI, A38-A39, EN 01173579-80.

²⁹⁸⁵ D219/538, SOEUN Mat, WRI, A56, EN 01173583.

²⁹⁸⁶ D219/538, SOEUN Mat, WRI, A14, EN 01173574.

²⁹⁸⁷ D219/538, SOEUN Mat, WRI, A17, EN 01173575.

²⁹⁸⁸ D219/538, SOEUN Mat, WRI, A45, EN 01173581.

²⁹⁸⁹ D219/538, SOEUN Mat, WRI, A21, EN 01173576.

²⁹⁹⁰ D219/538, SOEUN Mat, WRI, A24, EN 01173576.

²⁹⁹¹ D219/538, SOEUN Mat, WRI, A22, EN 01173576.

²⁹⁹² D219/538, SOEUN Mat, WRI, A29, EN 01173578.

²⁹⁹³ D219/538, SOEUN Mat, WRI, A30, EN 01173578.

²⁹⁹⁴ D219/538, SOEUN Mat, WRI, A30, EN 01173578.

1447. SOEUN Mat stated that at the first meeting at Kanghat Dam, Ta Pet was the first person who spoke²⁹⁹⁵ and he did not introduce the Southwest Zone cadres, but just said that they came to work with them.²⁹⁹⁶ He stated that people who were present at this meeting did not pay too much attention to what Ta Pet spoke about, but rather went to the meeting just to get some rest from work.²⁹⁹⁷ He also stated that the Southwest cadre had just arrived in the area and he did not remember whether Ta Tith spoke at this meeting.²⁹⁹⁸

1448. Then SOEUN Mat tried to explain his evidence and stated that he attended two meetings. At the time of the first meeting, the Northwest Zone cadres and Southwest Zone cadres worked together. By the second meeting, the Southwest Zone cadres (not 'Ta Tith') declared that the Northwest Zone cadres betrayed Angkar.²⁹⁹⁹

Second meeting in Banan

1449. SOEUN Mat initially stated that he remembers that at the second meeting (which was held two or three months after the first meeting),³⁰⁰⁰ 'Ta Tith' announced that Ta Kao had been arrested and taken to be killed at Mong Chen and that Ta Pet had also been arrested.³⁰⁰¹

1450. But later, he changed his evidence and stated that he only believed that the meeting was conducted under 'Ta Tith's' management.³⁰⁰² He did not see the speaker because thousands of people joined the meeting and his team was sitting behind others.³⁰⁰³ He did not see 'Ta Tith's' face at this meeting.³⁰⁰⁴ The source of his information that 'Ta Tith' managed this meeting is unclear.

1451. After all of this, SOEUN Mat clarified that the two meetings he attended were held in different locations: one in Kanghat Dam and one in Banan.³⁰⁰⁵

²⁹⁹⁵ D219/538, SOEUN Mat, WRI, A35, EN 01173579; A41 EN 01173580.

²⁹⁹⁶ D219/538, SOEUN Mat, WRI, A36, EN 01173579.

²⁹⁹⁷ D219/538, SOEUN Mat, WRI, A41, EN 01173580.

²⁹⁹⁸ D219/538, SOEUN Mat, WRI, A42-A43, EN 01173580.

²⁹⁹⁹ D219/538, SOEUN Mat, WRI, A31-A33, EN 01173578; A63, EN 01173584.

³⁰⁰⁰ D219/538, SOEUN Mat, WRI, A48, EN 01173581.

³⁰⁰¹ D219/538, SOEUN Mat, WRI, A44, EN 01173580.

³⁰⁰² D219/538, SOEUN Mat, WRI, A49, EN 01173581.

³⁰⁰³ D219/538, SOEUN Mat, WRI, A49, EN 01173581.

³⁰⁰⁴ D219/538, SOEUN Mat, WRI, A49, EN 01173581.

³⁰⁰⁵ D219/538, SOEUN Mat, WRI, A57, EN 01173583.

1452. SOEUN Mat stated that the meeting in Banan was held in 1979, during the fighting, but before the Khmer Rouge collapsed,³⁰⁰⁶ and about one year after the first meeting (which was the meeting in Kanghat Dam where Ta Pet introduced the Southwest Zone cadres who came to work with them).³⁰⁰⁷ The meeting at Banan was the first time he saw ‘Ta Tith’ because he sat close to him.³⁰⁰⁸ This is the first time that SOEUN Mat said that he actually saw ‘Ta Tith’ ‘first-hand.’³⁰⁰⁹ He stated that the meeting was held in a building in Wat Banan Pagoda³⁰¹⁰ and only Southwest Zone cadres were present with their messengers.³⁰¹¹ He was present as Ta Chem’s messenger.³⁰¹² The meeting was attended by 400-500 soldiers³⁰¹³ and unit chiefs from other cooperatives.³⁰¹⁴ SOEUN Mat stated that he forgot most of ‘Ta Tith’s’ speech, but he remembers that he spoke about ‘Khmer Sa’ and the struggle against the Vietnamese.³⁰¹⁵

1453. It is obvious from this analysis that SOEUN Mat never heard ‘Ta Tith’s’ alleged ‘announcement’ in 1977 that Ta Kao and Ta Pet had been arrested, and that Ta Kao was taken to be killed. Also, SOEUN Mat did not positively identify Mr YIM Tith.

1454. The ICP’s claim, based on evidence of this single witness SOEUN Mat, that ‘in addition to openly making threats against enemies, Mr YIM Tith also boosted the terror campaign by making sure that people were aware that his threats were indeed carried out,’³⁰¹⁶ is a misrepresentation of the evidence.

Conclusion regarding ‘large public meetings’

1455. The ICP did not present sufficient evidence to support his claim that Mr YIM Tith contributed to the implementation of alleged CPK’s enemies policy through his presence at so-called ‘large public meetings.’ Taken at its highest, the totality of the evidence of witnesses cited by the ICP shows that ‘Ta Tith’ participated in meetings in the Northwest

³⁰⁰⁶ D219/538, SOEUN Mat, WRI, A50, EN 01173581.

³⁰⁰⁷ D219/538, SOEUN Mat, WRI, A51, EN 01173582.

³⁰⁰⁸ D219/538, SOEUN Mat, WRI, A51, EN 01173582.

³⁰⁰⁹ D219/538, SOEUN Mat, WRI, A79., EN 01173587.

³⁰¹⁰ D219/538, SOEUN Mat, WRI, A72, EN 01173586; A93, EN 01173590.

³⁰¹¹ D219/538, SOEUN Mat, WRI, A73, EN 01173586.

³⁰¹² D219/538, SOEUN Mat, WRI, A74, EN 01173586.

³⁰¹³ D219/538, SOEUN Mat, WRI, A75, EN 01173586-7.

³⁰¹⁴ D219/538, SOEUN Mat, WRI, A77, EN 01173587.

³⁰¹⁵ D219/538, SOEUN Mat, WRI, A79-A83, EN 01173587-8.

³⁰¹⁶ ICP’s Final Submission, D378/2, para. 65.

Zone at the end of the DK period at which time the Vietnamese army was advancing through Cambodia, and that ‘Ta Tith’ spoke about how people were to protect themselves.

Mr YIM Tith was not personally involved in arrests, imprisonments and killings

1456. The ICP claims that Mr YIM Tith furthered the alleged common criminal plan to extrajudicially arrest, imprison, and kill enemies in the Northwest Zone by issuing orders for arrests and killings and by visiting security centres in his areas of responsibility. The ICP bases this claim on evidence of Ta Pet, SAO Chobb, EK (UI) Hoeun and CHHOEUNG Bean.³⁰¹⁷ The ICP cherry-picks and misstates the evidence of these witnesses.

1457. As already argued in this Response, Ta Pet’s evidence is devoid of probative value and it cannot be used as evidence.³⁰¹⁸

1458. SAO Chobb’s evidence, beside the fact that it covers the time frame which is outside of the temporal scope of the investigation, also has no probative value. SAO Chobb’s evidence is heavily tainted by speculation³⁰¹⁹ and the investigator feeding inculpatory information.³⁰²⁰ The investigator then relies upon these as established fact in follow-up questions.³⁰²¹ In no interview was the identity of ‘Ta Tith the soldier’ and ‘Ta Tith who was Ta Mok’s relative’ clarified.³⁰²² The ICP misstates, and consequently misrepresents, the evidence of SAO Chobb and all of the ICP’s conclusions are based on misrepresented evidence and have no merit.³⁰²³

1459. Also, as already stated in this Response³⁰²⁴, there is uncertainty as to whether EK (UI) Hoeun worked as a labourer³⁰²⁵ in Tram Kak District Office until March 1977 when he joined 200 cadres from the Southwest Zone and left with them to go to the East Zone,³⁰²⁶

³⁰¹⁷ ICP’s Final Submission, D378/2, paras 68 to 74.

³⁰¹⁸ *Supra*, paras 1238 to 1252.

³⁰¹⁹ D219/763, SAO Chobb, WRI, A111-A121, EN 01337032-3.

³⁰²⁰ D219/956, SAO Chobb, WRI, preamble, Q2, Q3, Q6, EN 01456264; D219/980, SAO Chobb, WRI, EN 01517542.

³⁰²¹ D219/982, SAO Chobb, WRI, Q/A25 EN 01517551-2.

³⁰²² *Supra*, paras 1078 to 1125.

³⁰²³ ICP’s Final Submission, D378/2, para. 69-70.

³⁰²⁴ *Supra*, para. 678.

³⁰²⁵ D118/208, EK (UI) Hoeun, WRI, A18-A20, EN 00981813; D219/34, EK (UI) Hoeun, WRI, A5, EN 01053570-1; D315.1.20, EK (UI) Hoeun, Transcript from 002/02, 7 May 2015, EN 01096790-1, l. 7-25 and l. 1.

³⁰²⁶ D219/34, EK (UI) Hoeun, WRI, A39, EN 01053576.

or he lived in his village from 1977 until September 1978³⁰²⁷ when he fled to the East Zone to live with PECH Chim.³⁰²⁸ He never lived or worked in the Northwest Zone during the Khmer Rouge regime. EK (UI) Hoeun's evidence that he heard from an unnamed cousin that 'Ta Tith' ordered killings of student and factory workers in 1978 and 1979 in Preah Net Preah District³⁰²⁹ is devoid of probative value. In addition, no supporting evidence about Mr YIM Tith's involvement in any event in Preah Net Preah District, Sector 5, exists in the Case File.

1460. Finally, as already argued in this Response, CHHOEUNG Bean's evidence has low probative value³⁰³⁰.

1461. The ICP claims that CHHOEUNG Bean's evidence is that 'he heard from an arrested relative' that Mr YIM Tith ordered a Northwest Zone cadre named Ta Saman to arrest some of those imprisoned at Khnang Kou Prison.³⁰³¹ The ICP is not taking into consideration evidence that Ta Saman, who was 'manager of decisive mobile unit' escaped to the forest when Southwest Zone cadres arrived³⁰³² contradicting this statement. CHHOEUNG Bean's evidence is anonymous hearsay, with no supporting evidence on the Case File.

1462. The ICP also claims that CHHOEUNG Bean's evidence attests that as Vietnamese forces were approaching in December 1978, Mr YIM Tith ordered the killing of all prisoners remaining in Wat Bay Daram detention facility. The killing was allegedly carried out by militiamen under the control of a subordinate of Mr YIM Tith known as Ta Nen. The ICP cites CHHOEUNG Bean's answers A103-A194 and A108 from his WRI D219/533.³⁰³³ However, the ICP ignores CHHOEUNG Bean's evidence which follows the investigator's question 'How do you know about this?' In A109-A111, CHHOEUNG Bean explains that he went with other villagers, without mentioning any other names, 'to the office and saw nothing except blood and clubs,' and that after 1979 he went to look around and saw bones at that place but did not know whose bones they were.³⁰³⁴ A further

³⁰²⁷ D118/209, EK (UI) Hoeun, WRI, A6, EN 00983568.

³⁰²⁸ D118/209, EK (UI) Hoeun, WRI, A5, EN 00983568.

³⁰²⁹ *ICP's Final Submission*, D378/2, para. 73. and footnote 163.

³⁰³⁰ *Supra*, paras 1288 to 1296 and 1410 to 1417.

³⁰³¹ *ICP's Final Submission*, D378/2, para. 71.

³⁰³² D219/538, SOEUN Mat, WRI, A20, EN 01173576.

³⁰³³ *ICP's Final Submission*, D378/2, para. 71.

³⁰³⁴ D219/533, CHHOEUNG Bean, A109-A111, EN 01178488.

analysis of CHHOEUNG Bean's statement reveals that everything he knew about this alleged detention facility he learned from his mother-in-law.³⁰³⁵ CHHOEUNG Bean provided no further explanation. He did not explain why he thought that 'Ta Tith' ordered the killings. He did not explain why he thought that Ta Nen was under the command of 'Ta Tith.' There is no evidence in the Case File to support these assertions or evidence in the Case File supporting the ICP's claim that 'Ta Nen' and 'militiamen' were under Mr YIM Tith's control.

1463. The ICP is misstating CHHOEUNG Bean's evidence, which was provided by anonymous hearsay and his evidence has no probative value.

Conclusion regarding the Implementation of the alleged CPK's enemies policy

1464. The ICP did not present sufficient evidence to support his claim that Mr YIM Tith contributed to the implementation of the alleged CPK's enemies policy through his personal involvement in arrests, imprisonments and killings. There is no direct evidence in the Case File to prove the ICP's claim.

Mr Yim Tith did not visit security centres in the Northwest Zone

1465. The ICP claims that Mr YIM Tith visited security centres in his area of responsibility 'at which unlawful imprisonment, torture and murder were being committed,'³⁰³⁶ including security centre in Chak Kakaoh and Koas Krala District Security Centre.³⁰³⁷ In support of his assertion, the ICP cites only one witness, SAO Chobb, whose entire evidence refers to the events before the Southwest Zone cadre arrived in the Northwest Zone and it is outside of temporal scope of investigation. Mr YIM Tith is not charged for events in Chak Kakaoh at any point of time during DK period.

1466. It is worth nothing that, according to the ICP, Koas Krala Security Centre, for which Mr YIM Tith was charged, was established in early 1978³⁰³⁸ which also shows that SAO Chobb's evidence is not relevant to the events in Koas Krala Security Centre.

³⁰³⁵ D219/533, CHHOEUNG Bean, A119-A131, EN 01178490-2.

³⁰³⁶ ICP's Final Submission, D378/2, para. 1142.

³⁰³⁷ ICP's Final Submission, D378/2, para. 74.

³⁰³⁸ ICP's Final Submission, D378/2, para. 384.

1467. ICP presents no evidence that Mr YIM Tith visited any security centre in the Northwest Zone charged by the ICIJ during any time within the temporal scope of the investigation.

There is no evidence that the pace of killings in the Northwest Zone increased following Mr Yim Tith's arrival

1468. The ICP claims that the implementation of the enemies policy in the Northwest Zone intensified following Mr YIM Tith's arrival and that a 'number of witnesses' emphasised the connection between Mr YIM Tith's arrival and an increase in killings.³⁰³⁹ The ICP cites two witnesses: SOK Cheat and SAO Chobb. The ICP is misstating evidence.

1469. SAO Chobb's evidence, beside the fact that it covers a time frame which is outside the temporal scope of charges, has no probative value.³⁰⁴⁰ SAO Chobb's evidence is heavily tainted by speculation³⁰⁴¹ and the investigator feeding inculpatory information.³⁰⁴² The investigator then relied upon this as established fact in follow-up questions.³⁰⁴³ Furthermore, SAO Chobb did not positively identify Mr YIM Tith.³⁰⁴⁴

1470. As noted above,³⁰⁴⁵ SOK Cheat stated that he does not know when 'Ta Tith' arrived in the Northwest Zone,³⁰⁴⁶ he did not positively identify Mr YIM Tith, and his evidence regarding 'Ta Tith' is based on unsubstantiated hearsay ('whispers') and conjecture and has no probative value³⁰⁴⁷. Consequently, his statements about the connection between Mr YIM Tith's arrival in the Northwest Zone and any alleged increase in killings is devoid of probative value.

1471. Finally, there is evidence in the Case File that directly contradicts the ICP's claim that there was an 'increase of killings' in the Northwest Zone following Mr YIM Tith's arrival, whenever that might have been. Civil party TIEV Vieng's opinion is that when the Southwest Zone group were in control there were fewer killings of Khmer Krom

³⁰³⁹ ICP's Final Submission, D378/2, para. 75.

³⁰⁴⁰ *Supra*, paras 1076 to 1125.

³⁰⁴¹ D219/763, SAO Chobb, WRI, A111-A121, EN 01337032-3.

³⁰⁴² D219/956, SAO Chobb, WRI, preamble, Q2, Q3, Q6, EN 01456263-4; D219/980, SAO Chobb, WRI, EN 01517542.

³⁰⁴³ D219/982, SAO Chobb, WRI, Q/A25 EN 01517551-2.

³⁰⁴⁴ *Supra*, paras 1076 to 1125.

³⁰⁴⁵ *Supra*, paras 1274 to 1281.

³⁰⁴⁶ D219/689, SOK Cheat, WRI A20, EN 01216244.

³⁰⁴⁷ *Supra*, paras 1274 to 1281.

families.³⁰⁴⁸ Witness AY Se in his OCP statement, sets out that before IM Chaem came to Preah Net Preah District, the killing ‘was really bad’ but when she arrived ‘there were no more killings.’³⁰⁴⁹ MOUL En stated that the arrests stopped when ‘Ta Tith’ ‘took charge of Bavel District’ and the ‘practice of having people loaded on the truck and taken away was no longer in place.’³⁰⁵⁰

Conclusion

1472. The ICP did not present sufficient evidence to support his claim that the implementation of the enemies policy in the Northwest Zone intensified following Mr YIM Tith’s arrival.

Mr YIM Tith did not have specific intent to destroy the Vietnamese and Khmer Krom national and racial groups ‘as such’

1473. The ICP claims that Mr YIM Tith’s animus towards Vietnamese and Khmer Krom combined with evidence of annihilation of Vietnamese and Khmer Krom in areas under Mr YIM Tith’s control constitute ‘clear and consistent evidence’ that Mr YIM Tith intended to destroy the Vietnamese national group in Cambodia – including particularly the Khmer Krom, whom he and the other JCE members viewed as untrustworthy because of their perceived Vietnamese nationality.³⁰⁵¹ The ICP’s claim is erroneous.

1474. Primarily, Mr YIM Tith was not charged for genocide against the Vietnamese, which demonstrates that the ICIJ did not find ‘clear and consistent evidence’ that Mr YIM Tith is criminally responsible for commission of genocide against Vietnamese.³⁰⁵² The ICP’s assertion that the Khmer Krom were subsumed by Vietnamese national group has no basis in law or in fact.³⁰⁵³

1475. Furthermore, the evidence cited by the ICP in support of this claim, is not sufficient to support his claim.

³⁰⁴⁸ D2119/333, TIEV Vieng, WRI, A22, EN 01117982.

³⁰⁴⁹ D1.3.11.3, AY Se, ICP statement, EN 00210405.

³⁰⁵⁰ D219/294, MOUL En, WRI, A95-A96, EN 01111836. See also, D6.1.141, SAO Sarun, WRI, EN 00278694 and EN00278697; D219/627, LOCH Eng, WRI, A18-A22, EN 01187741-2; D118/259, PECH Chim, WRI, A188-A190, EN 01000689.

³⁰⁵¹ *ICP’s Final Submission*, D378/2, para. 81.

³⁰⁵² Rule 55(4); *Notification of Amended Charges*, D350.1.

³⁰⁵³ *Supra*, paras 457 to 459 and 618 to 640.

1476. The ICP claims that ‘hatred and suspicion of Vietnam, the Vietnamese, and anything associated with either was a constant theme of Mr YIM Tith’s rhetoric regarding enemies’ and cites his alleged words conveyed by several witnesses.³⁰⁵⁴

LAM Lin’s evidence about Mr YIM Tith’s alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups ‘as such’

1477. The ICP cites LAM Lin’s evidence that Mr YIM Tith ‘talked about enemies’ and said ‘we need to be vigilant against Yuon enemy.’³⁰⁵⁵ ICP is cherry-picking certain parts of Lam Lin’s evidence and ignoring the rest of it, including those parts which give context to his alleged words. The alleged words were said by ‘Ta Tith,’ not Mr YIM Tith. The witness never confirmed that the ‘Ta Tith’ that he saw was Mr YIM Tith, instead stating that ‘Ta Tith’ ‘was a Northwest Zone person and not Southwest.’³⁰⁵⁶ The investigator did not clarify which ‘Ta Tith’ the witness was talking about. (The witness gave only one statement to the ICIJ in 2017.³⁰⁵⁷)

1478. During the Khmer Rouge period LAM Lin lived in Tradak Porng cooperative³⁰⁵⁸ and at the end of 1978 and the beginning of 1979 he worked in Tuol Mtes in the rice field³⁰⁵⁹ where he saw ‘Ta Tith’ only once at the meeting ‘near the liberation time in 1979.’³⁰⁶⁰ When put in context, this was around time when the Vietnamese were about to or had indeed already invaded Cambodia. An invading force is, by definition, an enemy.³⁰⁶¹ LAM Lin does not link the Khmer Krom to the Vietnamese.

VY Phan’s evidence about Mr YIM Tith’s alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups ‘as such’

1479. The ICP cites VY Phann’s evidence that ‘Ta Tith’ ‘talked about fighting the Yuon’ and ‘talked about internal enemies burrowing inside our movement and said Yuon [...] were hiding among us.’³⁰⁶² Again, the ICP ignores the entirety of the witness’s evidence who

³⁰⁵⁴ ICP’s Final Submission, D378/2, para. 76.

³⁰⁵⁵ ICP’s Final Submission, D378/2, para. 76.

³⁰⁵⁶ D219/943, LAM Lin, WRI, A27-A28, EN 01523946.

³⁰⁵⁷ D219/943, LAM Lin, WRI.

³⁰⁵⁸ D219/943, LAM Lin, WRI, A5-A7, EN 01523944.

³⁰⁵⁹ D219/943, LAM Lin, WRI, A10-A11, EN 01523944.

³⁰⁶⁰ D219/943, LAM Lin, WRI, A14, EN 01523945; A29-A31, EN 01523946; A34-A35, EN 01523946

³⁰⁶¹ Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Article 4.

³⁰⁶² ICP’s Final Submission, D378/2, para. 76, fn.172.

stated that Ta Tith arrived in the Northwest Zone in November 1978,³⁰⁶³ when he saw him first time at the meeting at Kanghat Dam.³⁰⁶⁴ And again, when put into context, this was around the time when the Vietnamese were about to or had indeed already invaded Cambodia. VY Phann does not link the Khmer Krom to Vietnamese.

YOU Phnom's evidence about Mr YIM Tith's alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups 'as such'

1480. The ICP cites YOU Phnom's evidence that 'Ta Tith' said that the "'Vietnamese had their agents embedded inside the Khmer Rouge ranks" and complained about "'Yvon' Khmer" embedded within the CPK ranks.³⁰⁶⁵ As already argued in this Response, the ICP has cherry-picked from YOU Phnom's evidence in order to present a coherent, though entirely misleading, assertion.³⁰⁶⁶

1481. YOU Phnom lived and worked in Kirivong District during the Khmer Rouge Regime. He was first assigned to a children's unit and later a youth unit. During 1977 to 1978 he was assigned as a militiaman in Kouk Prech Commune and then as a district soldier 'for less than a year before the Vietnamese arrived.'³⁰⁶⁷

1482. You Phnom's evidence contains no specific details about when and where meetings at which he said he was present took place, nor how many meetings there were, nor what Ta Tith said, if anything.³⁰⁶⁸ Moreover, he was very clear and said:

A167: I did not hear what he said. However, I saw him speaking.³⁰⁶⁹

Q: What did he say?

A168: He was talking to his staff, and I dared not go near them.³⁰⁷⁰

1483. Also, as set out before, YOU Phnom's evidence regarding 'embedded Vietnamese' was undoubtedly tainted by the investigator's leading questions³⁰⁷¹ and in general suffers from concerns that it is unreliable and self-contradictory.³⁰⁷² In addition to the foregoing issues

³⁰⁶³ D219/85, VY Phann, WRI, A3, EN 01061168-9. *See also supra* para. 1258.

³⁰⁶⁴ D219/85, VY Phann, WRI, A3, EN 01061168-9.

³⁰⁶⁵ ICP's Final Submission, D378/2, para. 76, n.173-174.

³⁰⁶⁶ *Supra*, paras 802 to 808, 834 to 840 and 918 to 925.

³⁰⁶⁷ D219/108, You Phnom WRI, A2, EN 01076890-1.

³⁰⁶⁸ *Supra*, paras 802 to 808.

³⁰⁶⁹ D219/406, You Phnom WRI, A167, EN 01139571.

³⁰⁷⁰ D219/406 You Phnom WRI, Q/A168, EN 01139571.

³⁰⁷¹ *Supra*, paras 918 to 925.

³⁰⁷² *Supra*, paras 918 to 925.

with YOU Phnom's evidence, there is a significant doubt as to whether he was referring to Vietnamese agents spying on the Khmer Rouge cadre, or rather, to internal monitoring carried out by the CPK Centre.³⁰⁷³

MOUL EN's evidence about Mr YIM Tith's alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups 'as such'

1484. The ICP claims that Mr YIM Tith's 'hostility' towards the Vietnamese encompassed the Khmer Krom as well, because as a matter of CPK policy, the Khmer Krom 'were regarded as Vietnamese because they lived in Vietnamese territory,' and that Ta Mok explained that that 'those who lived in Vietnamese territory were all Vietnamese' and 'all Vietnamese were our enemies.' In support of this claim, the ICP cites only the evidence of MOUL En.³⁰⁷⁴ The ICP's argument is unsound as he misstated the evidence. MOUL En did not say that CPK policy was that Khmer Krom were regarded as Vietnamese. The following exchange took place between Moul En and the investigator:

Q: Did the chiefs ever talk about Khmer Krom?

A81: No they did not. They, including POL Pot, did not care about Khmer Krom. For them, those who lived in Vietnamese territory were all Vietnamese.

1485. MOUL En clearly differentiates between the Vietnamese and Khmer Krom, noting that the Khmer Rouge did not talk about the Khmer Krom.

1486. More importantly, the ICP is not presenting evidence that Mr YIM Tith was 'a chief.' MOUL En is talking about his presence when Ta Mok allegedly said the words 'those who lived in Vietnamese territory were all Vietnamese' and 'all Vietnamese were our enemies.' MOUL En did not give evidence that Mr YIM Tith ever agreed with those words.

CHHEAN Hea's evidence about Mr YIM Tith's alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups 'as such'

1487. The ICP cites CHHEAN Hea's evidence that 'Ta Tit announced that the Northwest Zone leaders were traitors as they were affiliated with the Vietnamese.'³⁰⁷⁵ As already argued

³⁰⁷³ *Supra*, paras 802 to 808 and 918 to 925.

³⁰⁷⁴ *ICP's Final Submission*, D378/2, para. 77.

³⁰⁷⁵ *ICP's Final Submission*, D378/2, para. 76, n.174.

in this Response, the ICP has cherry-picked from CHHEAN Hea's evidence to present a misleading assertion.³⁰⁷⁶

1488. CHHEAN Hea was a bodyguard of Ta Pet,³⁰⁷⁷ former Sector 1 Secretary.³⁰⁷⁸ Initially, CHHEAN Hea stated that once Ta Pet was arrested, he escaped.³⁰⁷⁹ CHHEAN Hea stated that he never attended any meetings with 'Ta Tith,'³⁰⁸⁰ but then contradicted himself by saying that he met 'Ta Tith' personally³⁰⁸¹ whilst the Vietnamese were advancing their attacks towards Battambang Province.³⁰⁸² The investigator did not ask CHHEAN Hea to explain his contradictory statements.

1489. CHHEAN Hea's evidence about Mr YIM Tith's specific intent is devoid of probative value.

NANG Ny's evidence about Mr YIM Tith's alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups 'as such'

1490. The ICP cites NANG Ny's evidence that '[Yim Tith] said that [...] the Northwest group had "Khmer bodies with Yuon heads." They accused them of collaborating with Vietnam. That was why they arrested and killed the Northwest cadres.'³⁰⁸³ The ICP cherry-picks from NANG Ny's evidence and consequently misinterprets it.

1491. During the Khmer Rouge regime NANG Ny was a mobile unit worker in Sector 1 and in 1977, before the Southwest Zone cadre arrived, he was sent to work at Kanghat Dam.³⁰⁸⁴ He allegedly saw 'Ta Tith' for the first and only time³⁰⁸⁵ at the meeting in Baydamram three months before the Vietnamese arrived,³⁰⁸⁶ which places this meeting probably around October 1978. The ICP disregarded the witness's explanation about the timing of the meeting. When put into context, this was around the time when the Vietnamese were

³⁰⁷⁶ *Supra*, paras 1135 to 1142.

³⁰⁷⁷ D118/136 CHHEAN Hea WRI, A2, EN 00969636-7.

³⁰⁷⁸ *ICP's Final Submission*, D378/2, para. 72.

³⁰⁷⁹ D118/136 CHHEAN Hea WRI, A9, EN 00969639.

³⁰⁸⁰ D118/136 CHHEAN Hea WRI, A9, EN 00969639.

³⁰⁸¹ D118/136 CHHEAN Hea WRI, A12-13, EN 00969639.

³⁰⁸² D118/271 CHHEAN Hea WRI, A24, EN 01029420.

³⁰⁸³ *ICP's Final Submission*, D378/2, para. 76, n.174.

³⁰⁸⁴ D118/77, NANG Ny, A1, EN 00970451.

³⁰⁸⁵ D118/77, NANG Ny, A29, EN 00970456.

³⁰⁸⁶ D118/77, NANG Ny, A25, EN 00970456.

about to or had indeed already invaded Cambodia. An invading force is, by definition, an enemy.³⁰⁸⁷

1492. It is telling that the ICP places Mr YIM Tith's name in square brackets in his citation as NANG Ny cannot identify the person holding the microphone, simply assuming that it is 'Ta Tith.'³⁰⁸⁸ The investigator does not challenge how NANG Ny believed he knew the identity of 'Ta Tith.'

1493. NANG Ny's evidence about Mr YIM Tith's specific intent is devoid of probative value.

CHHEUN Chhuoy's evidence about Mr Yim Tith's alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups 'as such'

1494. The ICP cites CHHEUN Chhuoy's evidence in support of his assertion that '[Yim Tith] complained about 'Yuon' Khmer" embedded within the CPK ranks.'³⁰⁸⁹ As already argued in this Response, the ICP has misinterpreted CHHEUN Chhuoy's evidence to present a misleading assertion.³⁰⁹⁰ CHHEUN Chhuoy stated that 'Ta Tith' arrived in the Northwest Zone around November or December 1978.³⁰⁹¹ When put into context, this was around the time when the Vietnamese were about to or had indeed already invaded Cambodia. An invading force is, by definition, an enemy.³⁰⁹²

LEK Phiv's evidence about Mr Yim Tith's alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups 'as such'

1495. The ICP cites LEK Phiv to support his assertion that 'during meetings Yim Tith "always talked about the Vietnamese enemies" and "alleged that the Vietnamese wanted to swallow our country."'³⁰⁹³ As already argued in this Response, the ICP has misinterpreted LEK Phiv's evidence to present a misleading assertion.³⁰⁹⁴ LEK Phiv sets out that 'Ta Tith' became Sector 1 Secretary in the rainy season of 1978.³⁰⁹⁵ Only after this date does

³⁰⁸⁷ Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Article 4.

³⁰⁸⁸ D118/77 NANG Ny WRI, A24, EN 00970455-6.

³⁰⁸⁹ ICP's Final Submission, D378/2, para. 76, fn 174.

³⁰⁹⁰ *Supra*, paras 1166 to 1170 and 1349 to 1350.

³⁰⁹¹ D219/515 CHHEUN Chhuoy WRI, A27, EN 01156943.

³⁰⁹² Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Article 4.

³⁰⁹³ ICP's Final Submission, D378/2, para. 76, fn 175.

³⁰⁹⁴ *Supra*, paras 1264 to 1273.

³⁰⁹⁵ D219/210 LEK Phiv WRI, A5, EN 01088522.

LEK Phiv assert that ‘Ta Tith’ held meetings.³⁰⁹⁶ The rainy season of 1978 runs until as late as November 1978. When put into context, this was around the time when the Vietnamese were about to or had indeed already invaded Cambodia. An invading force is, by definition, an enemy.³⁰⁹⁷ The ICIJ investigator also understands this context as he requests clarification that LEK Phiv means Vietnamese soldiers.³⁰⁹⁸ LEK Phiv does not link the Khmer Krom to the Vietnamese.

1496. LEK Phiv’s evidence about Mr YIM Tith’s specific intent is devoid of probative value.

MOENG Vet’s evidence about Mr Yim Tith’s alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups ‘as such’

1497. The ICP cites A45 from MOENG Vet’s WRI D219/488 as evidence of CPK hostility towards the Khmer Krom: ‘[The enemies were] the KGB and the CIA. [...] [T]he KGB was affiliated with Vietnam. [...] If I had relatives who had come from Kampuchea Krom I would be regarded as having affiliation with the Vietnamese KGB.’.³⁰⁹⁹ As already argued in this Response, the ICP has misinterpreted MOENG Vet’s evidence to present a misleading assertion.³¹⁰⁰ MOENG’s Vet’s evidence demonstrates the opposite to what the ICP asserts, namely that the Khmer Krom were welcomed into DK:

Q: During that regime, in Kirivong District and other districts in Sector 13, did you ever hear that there were Khmer Krom among the people?

A140: First, I did not hear that there were Khmer Krom, but in 1978, there were Khmer Krom people from Vietnam wanting to join the Khmer Rouge army. The Khmer Rouge created a regiment for them. Maybe it was Regiment 15 or 16. I am not sure. It was under Division 250. The forces were created to fight the Vietnamese. The commander of that regiment was Ta Prach. They were stationed to the south of Wat Saom Pagoda and in Wat Preal Pagoda, in Kirivong District.

Q: Did the Khmer Rouge treat the Khmer Krom the same as the ordinary Khmer?

A141: Those Khmer Krom were not ordinary people; they were soldiers. They were treated the same as the normal Khmer soldiers because they joined us and were alongside us. We also created a regiment for them to fight the Vietnamese.³¹⁰¹

³⁰⁹⁶ D219/210 LEK Phiv WRI, A6, EN 01088522-3.

³⁰⁹⁷ Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Article 4.

³⁰⁹⁸ D219/236 LEK Phiv WRI, A19, EN 01092933.

³⁰⁹⁹ D219/488 MOENG Vet WRI, A45, EN 01170588.

³¹⁰⁰ *Supra*, paras 661 to 671, 703 to 708 and 766 to 767.

³¹⁰¹ D219/488 MOENG Vet WRI, A140-141, EN 01170598.

1498. MOENG Vet clearly differentiates between the Vietnamese and Khmer Krom.

TOEMPhal's evidence about Mr Yim Tith's alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups 'as such'

1499. The ICP misstates, and consequently misrepresents, TOEM Phal's evidence that orders for the killings of many Khmer Krom in Kouk Prech Commune in Kirivong District were received from Kirivong District Committee at the time when Mr YIM Tith served on that committee.³¹⁰² This is what TOEMPhal said:

Q: You said that you were transferred to Kouk Prech Commune govern the Khmer Krom. What did "govern" mean?

A119: "Govern" meant leading them to work.³¹⁰³

Q: How long did you live with the Khmer Krom?

A121: I lived with the Khmer Krom for a maximum of three months.³¹⁰⁴

Q: During your three-month stint in Kouk Prech Commune, was there any change in the district committee?

A137: No, there was no change. *Ta Sieng* remained the same. But I am not sure about *Ta Tith* and *Khoeun*, because I never met them. The reason why I never met *Ta Tith* and *Ta Khoeun* was because I was later transferred from Kouk Prech Commune to Prey Ampok Commune in Kaoh Andaet District. At the time I was no longer under *Ta Sieng*. I was under the new district committee of Koh Andaet District.³¹⁰⁵

Q: Do you know if Khmer Krom people were killed?

A45: I had heard about such a killing.

Q: Do you know where or when they were killed?

A46: It was in 1976 or 1977 when the Khmer Krom people came to this village.

Q: What do you know about the killing of the Khmer Krom people?

A47: I do not know anything about it except that they were called prisoners.

Q: Where were the Khmer Krom people taken for execution?

A48: I do not know where they were executed.

Q: How many Khmer Krom people were killed?

³¹⁰² ICP's Final Submission, D378/2, para. 78.

³¹⁰³ D219/471 TOEMPhal WRI, A119, EN 01154822.

³¹⁰⁴ D219/471, TOEMPhal, WRI, A121, EN 01154822.

³¹⁰⁵ D219/471, TOEMPhal, WRI, A137, EN 01154824.

A49: I do not know the number of people killed, but I know they were killed. At the time, *Ta Paoh* and *Ta Sarau* were in charge of the Khmer Krom people. Both of them assigned work for them such as digging canals.³¹⁰⁶

1500. The evidence of TOEM Phal is clear and needs no further elaboration.

CHHOENG Chhoeuth's evidence about Mr Yim Tith's alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups 'as such'

1501. The ICP claims that 'suspicion and hatred of the Vietnamese eventually crystalized into a policy of annihilation.' For this serious claim, the ICP misstates and consequently misrepresents the evidence of one witness, CHHOENG Chhoeuth.³¹⁰⁷

1502. The ICP claims that at the large meeting at Kanghat Dam, late in the DK period, Mr YIM Tith said that the CPK leaders 'wanted to purge the Yuon enemy [...] The purpose of the meeting was to talk about this matter.'³¹⁰⁸

1503. The ICP is cherry-picking from CHHOENG Chhoeuth's evidence. First, according to CHHOENG Chhoeuth's evidence, the meeting at which he allegedly saw 'Ta Tith' (he allegedly saw him just once, at this meeting, when according to him the overall situation was chaotic³¹⁰⁹) was held late during DK period, not at Kanghat Dam as the ICP is claiming, but west of Kangchrong Village, under the mango trees.³¹¹⁰ CHHOENG Chhoeuth in fact stated that he never saw 'Ta Tith' at Kanghat Dam.³¹¹¹

1504. CHHOENG Chhoeuth also said that many people participated at this meeting, but he does not remember who exactly.³¹¹² He did not see 'Ta Tith' with his own eyes because he was sitting at the back,³¹¹³ he could not describe his face,³¹¹⁴ and he 'could not listen to his voice clearly as there were too many people. He stated, 'I heard people calling him *Ta*.'³¹¹⁵ But then CHHOENG Chhoeuth contradicts himself and stated that 'he [Ta] said they wanted to purge the Yuon enemy.'³¹¹⁶ He did not remember any other words from

³¹⁰⁶ D118/23, TOEMPhal, WRI, A45-A49, EN 00967021-2.

³¹⁰⁷ ICP's Final Submission, D378/2, para. 79.

³¹⁰⁸ ICP's Final Submission, D378/2, para. 79.

³¹⁰⁹ D219/953, CHHOENG Chhoeuth WRI, A20, EN 01451712; A55-A58, EN 01451716-7.

³¹¹⁰ D219/953, CHHOENG Chhoeuth WRI, A16, EN 01451712; A65-A66, EN 01451717.

³¹¹¹ D219/953, CHHOENG Chhoeuth WRI, A21, EN 01451712.

³¹¹² D219/953, CHHOENG Chhoeuth WRI, A68, EN 01451717.

³¹¹³ D219/953, CHHOENG Chhoeuth WRI, A69, EN 01451717.

³¹¹⁴ D219/953, CHHOENG Chhoeuth WRI, A79, EN 01451718.

³¹¹⁵ D219/953, CHHOENG Chhoeuth WRI, A69, EN 01451717.

³¹¹⁶ D219/953, CHHOENG Chhoeuth WRI, A70, EN 01451718.

this meeting,³¹¹⁷ and he did not have a good memory about that meeting because ‘it was long time ago’³¹¹⁸ and he ‘could not hear it well.’³¹¹⁹ When the investigator asked him to clarify his evidence that ‘Ta Tith’ said that ‘they wanted to purge Yuon enemy’ but that he could not see nor hear ‘Ta Tith’s’ words, CHHOENG Chhoeuth’s explanation that ‘The purpose of the meeting was to talk about this matter,’³¹²⁰ shows that this was actually CHHOENG Chhoeuth’s own speculative conclusion, not that he actually heard the words of the speaker.

1505. Interestingly, CHHOENG Chhoeuth stated that he heard for the first time about ‘YIM Tith or Ta Tith’ at this meeting, and that he heard it from the village chiefs whose names he cannot remember.³¹²¹ Considering CHHOENG Chhoeuth’s evidence that he did not see ‘Ta Tith’s’ face, that he heard people calling him Ta, and that he saw many soldiers guarding ‘Ta Tith’ during this meeting,³¹²² his identification of Mr YIM Tith cannot be relied upon. There is no evidence in the Case File that Mr YIM Tith was a military commander, nor that he ever had soldiers at his disposal to provide him with security.

1506. The ICP also cites CHHOENG Chhoeuth’s opinion that ‘[a]nyone who could speak Vietnamese and connected with Vietnamese blood was executed.’³¹²³ The ICP is disregarding CHHOENG Chhoeuth’s explanation that he does not know what ‘connection’ means,³¹²⁴ that the ‘Khmer Rouge’ never made this statement, that this was his ‘observation because Prasat Banan Temple’s area was killing place’ but then he never went even near Banan,³¹²⁵ and he learned about it from a ‘group chief’ whose name he did not know.³¹²⁶

1507. CHHOENG Chhoeuth’s evidence about Mr YIM Tith’s specific intent is devoid of probative value.

³¹¹⁷ D219/953, CHHOENG Chhoeuth WRI, A80-81, EN 01451718.

³¹¹⁸ D219/953, CHHOENG Chhoeuth WRI, A62, EN 01451717

³¹¹⁹ D219/954, CHHOENG Chhoeuth WRI, A8, EN 01451518.

³¹²⁰ D219/953, CHHOENG Chhoeuth WRI, A69, EN 01451717.

³¹²¹ D219/953, CHHOENG Chhoeuth WRI, A56-A59, EN 01451716-7.

³¹²² D219/953, CHHOENG Chhoeuth WRI, A67, EN 01451717; A73, EN 01451718.

³¹²³ *ICP’s Final Submission*, D378/2, para. 79. D219/953, CHHOENG Chhoeuth WRI, A72, EN 01451718.

³¹²⁴ D219/954, CHHOENG Chhoeuth WRI, A11, EN01451518.

³¹²⁵ D219/954, CHHOENG Chhoeuth WRI, A29-A31, EN01451520.

³¹²⁶ D219/954, CHHOENG Chhoeuth WRI, A33, EN01451520.

SAO Chobb's, EK (UI) Hoeun's and ORK Chan's evidence about Mr YIM Tith's alleged specific intent to destroy the Vietnamese and Khmer Krom national and racial groups 'as such'

1508. At the end of the specific intent section, the ICP uses the evidence of three witnesses, SAO Chobb, EK (UI) Hoeun and ORK Chan to claim that Mr YIM Tith order the killing of 'thousands' of 'CIA agents and Vietnamese and Chinese,'³¹²⁷ and contributed to the campaign of 'hate and hostility towards the Vietnamese (including Khmer Krom).'³¹²⁸

1509. As set out previously in this Response, SAO Chobb's evidence has no probative value. Besides the fact that his evidence covers the time frame which is outside of temporal scope of charges,³¹²⁹ he never clearly identified Mr YIM Tith as the person he was talking about in his statements.³¹³⁰ Furthermore, SAO Chobb does not link the Khmer Krom to the Vietnamese.

1510. EK (UI) Hoeun's evidence also lacks probative value as he never lived or worked in the Northwest Zone during the Khmer Rouge regime. His evidence, on which the ICP relying, comes from an unnamed cousin who allegedly told him that 'Ta Tith' ordered the killings of student and factory workers in 1978 and 1979 in Preah Net Preah District.³¹³¹ EK (UI) Hoeun does not link the Khmer Krom to Vietnamese.

1511. ORK Chan's evidence cited by the ICP has no probative value. First and foremost, the investigator leads ORK Chan on a key issue: 'Do you remember that the Khmer Krom group in Kirivong district were arrested and killed?'³¹³² The effect of this leading questioning is that the witness is told what is perceived to have happened. Such information is likely to taint the rest of his account and diminish the probative value of the WRI. Furthermore, ORK Chan speaks of a group of Khmer Krom soldiers who, due to being armed, would have been seen to be a threat, irrespective of the fact that they were Khmer Krom.³¹³³ The investigator then manipulates this answer in his questioning, to encompass all Khmer Krom.³¹³⁴ Finally, ORK Chan speaks in general terms about the

³¹²⁷ ICP's Final Submission, D378/2, para. 80.

³¹²⁸ ICP's Final Submission, D378/2, para. 80.

³¹²⁹ *Supra*, paras 1076 to 1125.

³¹³⁰ *Supra*, paras 1076 to 1125.

³¹³¹ ICP's Final Submission, D378/2, para. 73 and fn 163.

³¹³² D105/5 ORK Chan WRI, Q28, EN 00803443.

³¹³³ D105/5 ORK Chan WRI, A28, EN 00803443.

³¹³⁴ D105/5 ORK Chan WRI, Q34, EN 00803444.

hierarchical structure of the Khmer Rouge³¹³⁵ which the investigator – rather than the witness – then uses as conjecture to assert that ‘Ta Tith’ targeted the Khmer Krom.³¹³⁶

1512. In sum, the investigator feeds evidence to the witness and manipulate his answers. The result of this investigative technique is a complete lack of probative value of ORK Chan’s evidence.

1513. ORK Chan also stated explicitly that the District level could not issue an order to kill prisoners³¹³⁷ and that it was not ‘Ta Tith’ who organised a list of Khmer Krom to be killed, but rather the commune chief.³¹³⁸ ORK Chan does not say that there was a plan to kill the Khmer Krom.³¹³⁹ He was not able to recognise Mr YIM Tith when he was presented with a picture purportedly depicting Mr YIM Tith.³¹⁴⁰ Accordingly, no weight can be given to this assertion to demonstrate Mr YIM Tith’s intent to destroy the Khmer Krom.

1514. No evidence in the Case File corroborates the evidence of those three witnesses.

Conclusion

1515. None of the witnesses cited by the ICP provides any evidence that Mr YIM Tith acted in furtherance of an alleged overall objective of destroying the Khmer Krom, nor that he expressed hostility towards the Khmer Krom.

1516. As stated above,³¹⁴¹ the ICP’s argument that the evidence cited in paragraphs 76-80 ‘constitutes clear and consistent evidence that YIM Tith intended to destroy the Vietnamese national group in Cambodia’³¹⁴² (as submitted above, this is a crime for which Mr YIM Tith has not been charged³¹⁴³) and Khmer Krom ‘whom he and the other JCE members viewed as untrustworthy because of their perceived Vietnamese

³¹³⁵ D105/5 ORK Chan WRI, A40, A55 EN 00803445, 46.

³¹³⁶ D105/5 ORK Chan WRI, A41-43, Q55 EN 00803445, 46.

³¹³⁷ D118/156 ORK Chan WRI, A58-59, EN 00980472.

³¹³⁸ D105/5 ORK Chan WRI, A44, EN 00803445.

³¹³⁹ D105/5 ORK Chan WRI, A54, EN 00803446.

³¹⁴⁰ D105/5 ORK Chan WRI, A104, EN 00803451.

³¹⁴¹ *Supra*, paras 1473 to 1514.

³¹⁴² *ICP’s Final Submission*, D378/2, para. 82.

³¹⁴³ *Supra*, paras 457 to 459.

nationality'³¹⁴⁴ is erroneous, and has no support in his cited evidence, nor in any evidence in the Case File, whatsoever. The ICP's conclusion is hollow.³¹⁴⁵

(2) Mr YIM Tith did Not Contribute to the Implementation of Alleged CPK Forced Marriage Policy

1517. The ICP claims that Mr YIM Tith 'contributed to the implementation of the CPK's forced marriage policy in the Northwest Zone.' In support of his claim, the ICP refers to one wedding ceremony in Samlaut District performed by Ta Mok in August 1978, and the evidence of two witnesses who were present at this ceremony, NOP Ngim and her husband PREAP Kap.³¹⁴⁶

1518. NOP Ngim and PREAP Kap gave contradicting evidence about Mr YIM Tith's involvement in this wedding ceremony.

NOP Ngim's evidence about Mr YIM Tith's alleged contribution to CPK's forced marriage policy

1519. As stated above,³¹⁴⁷ NOP Ngim worked at the Srae Ambel salt field situated in Kampot Province, Sector 35, Southwest Zone.³¹⁴⁸ She was sent to Samlaut District in the Northwest Zone in early 1978.³¹⁴⁹ Three months after she was sent to the Northwest Zone, in August 1978, she got married,³¹⁵⁰ and in September 1978 she was assigned to be the deputy Secretary of Samlaut District of Sector 1.³¹⁵¹

1520. NOP Ngim stated that she and 40 more women were forced to marry in August 1978. She was forced to marry a handicapped soldier named PREAP Kap (she is still married to him³¹⁵²).³¹⁵³ She stated that Ta Mok told her that if she respected the assignments from

³¹⁴⁴ ICP's Final Submission, D378/2, para. 82.

³¹⁴⁵ *Supra*, paras 618 to 640.

³¹⁴⁶ ICP's Final Submission, D378/2, paras 82-84.

³¹⁴⁷ *Supra*, para. 1185.

³¹⁴⁸ D118/285, NOP Ngim, WRI, A2, EN 01044673-4, D219/298, NOP Ngim, WRI, A2, EN 01111858; D219/835, WRI, A4-A9, EN 01432947. Also see Maps D347/2.1.55 and D1.3.27.1.

³¹⁴⁹ D118/285, NOP Ngim, WRI, A8, EN 01044675; A28, EN 01044678.

³¹⁵⁰ D123/2/2.17a, NOP Ngim, DC-Cam Statement, EN 01155597; D118/285, NOP Ngim, WRI, A68, EN 01044685-6,

³¹⁵¹ D219/298, NOP Ngim, WRI, A6, EN 01111859; D219/835, NOP Ngim, WRI, A72-A76, EN 01432957.

³¹⁵² D118/285, NOP Ngim, WRI, EN 01044672; A81, EN 01044687-8.

³¹⁵³ D118/285, NOP Ngim, WRI, A68, EN 01044685-6.

Angkar, she had to marry PREAP Kap, because she was 30 years old at the time.³¹⁵⁴ The other people in this group also had to marry because they were adults.³¹⁵⁵ In her first interview, NOP Ngim initially stated that Ta Mok performed the wedding and that after the wedding day nobody monitored them at night to see whether they had sexual intercourse and they were allowed to stay with each other.³¹⁵⁶ But in her last interview, given two years later, NOP Ngim stated that there was ‘some keeping track’ by the commune militia themselves (she does not remember their names), and that this ‘keeping track’ was done with no orders from above.³¹⁵⁷ She understood that they kept track of newlyweds because they were afraid that couples would not love each other and were not sleeping with each other.³¹⁵⁸ She explained that if the militia reported them to the commune committee, any couple who was not getting along would be summoned for instruction to love each other.³¹⁵⁹ She said that it was not in the Khmer tradition to keep track of the newlyweds to see whether they were sleeping together or not, but that was in accordance with the system of rules ‘of us, Khmer Rouge.’³¹⁶⁰

1521. NOP Ngim stated in her first interview that ‘Ta Tith’ did not attend the wedding, but that he came and talked to Ta Mok before the wedding started, although she does not know about what.³¹⁶¹ In her last interview, she added that ‘Ta Tith’ told them after the wedding ‘Please, friends, do as the organization has organized things.’³¹⁶² She understood this to mean that once they were married they had to ‘love from their hearts’ and they must sleep with each other. NOP Ngim explained that ‘it was like it was with our parents having us take a husband...we had to take him, like him, who did not love him, still had to marry him.’³¹⁶³

³¹⁵⁴ D219/298, NOP Ngim, WRI, A10-A11, EN 01111859-60; D219/835, NOP Nhim, WRI, A143-A145, EN 01432969.

³¹⁵⁵ D219/298, NOP Ngim, WRI, A10-A11, EN 01111859-60; D219/835, NOP Nhim, WRI, A143-A145, EN 01432969.

³¹⁵⁶ D118/285, NOP Ngim, WRI, A68-A71, EN 01044685-6.

³¹⁵⁷ D219/835, NOP Ngim, WRI, A146-148, EN 01432969; A155-157, EN 01432971.

³¹⁵⁸ D219/835, NOP Ngim, WRI, A146-148, EN 01432969; A155-157, EN 01432971.

³¹⁵⁹ D219/835, NOP Ngim, WRI, A158, EN 01432971.

³¹⁶⁰ D219/835, NOP Ngim, WRI, A155, EN 01432970-1.

³¹⁶¹ D118/285, NOP Ngim, WRI, A73, EN 01044686.

³¹⁶² D219/835, NOP Ngim, WRI, A149, EN 01432970.

³¹⁶³ D219/835, NOP Ngim, WRI, A150-A153, EN 01432970.

PREAP Kap's evidence about Mr YIM Tith's alleged contribution to CPK's forced marriage policy

1522. As already argued in this Response,³¹⁶⁴ PREAP Kap was a Khmer Rouge soldier of Sector 13, Southwest Zone, under the command of Ta Mok³¹⁶⁵ from 1972 until 12 April 1975 when he was wounded.³¹⁶⁶ Because of his wounds he lost his eyesight, he had to be led wherever he went, and he could not read or write. For all practical purposes, he was blind.³¹⁶⁷

1523. PREAP Kap explained that, since he was disabled and blind, he did not know the organizational structure of the Southwest Zone from 1975 to 1979 except he knew that the unit of disabled people where he was sent in 1976 was under the Ta Mok's supervision.³¹⁶⁸ He stated that his friends told him that Ta Mok visited his unit three or four times per year.³¹⁶⁹ While he was in the Southwest Zone, before and after he was wounded, he never knew or met 'Ta Tith'³¹⁷⁰ and his wife told him that 'Ta Tith' attended his wedding ceremony.³¹⁷¹ PREAP Kap did not explain when exactly she told him that.

1524. PREAP Kap stated that he got married on 20 August 1978 in Samlaut District, Northwest Zone.³¹⁷²

1525. PREAP Kap stated that several days before he was sent to the Northwest Zone he had a meeting with his unit, chaired by Ta Mok. Ta Mok told them that 100 people from this unit were going to be transferred to the Northwest Zone.³¹⁷³ Ta Mok did not explain the reason for this transfer.³¹⁷⁴ His group arrived in Battambang around 10 August 1978³¹⁷⁵ and three days after, Ta Mok came and held a meeting in which he told them that the 40 people who were able to walk would be sent to Samlaut District and the others who could not walk would be sent elsewhere.³¹⁷⁶ PREAP Kap stated that Ta Mok personally selected

³¹⁶⁴ *Supra*, para. 1395.

³¹⁶⁵ D219/62, PREAP Kap, WRI, A14, EN 01053903.

³¹⁶⁶ D219/62, PREAP Kap, WRI, A15, EN 01053903-4.

³¹⁶⁷ D219/62, PREAP Kap, WRI, A17, EN 01053904.

³¹⁶⁸ D219/62, PREAP Kap, WRI, A16, A18, A22, EN 01053904-5.

³¹⁶⁹ D219/62, PREAP Kap, WRI, A22, EN 01053905.

³¹⁷⁰ D219/62, PREAP Kap, WRI, A29-30, EN 01053907; A72, EN 01053915-6.

³¹⁷¹ D219/62, PREAP Kap, WRI, A29, EN 01053907.

³¹⁷² D219/62, PREAP Kap, WRI, A31, EN 01053907.

³¹⁷³ D219/62, PREAP Kap, WRI, A33, EN 01053908.

³¹⁷⁴ D219/62, PREAP Kap, WRI, A33, EN 01053908.

³¹⁷⁵ D219/62, PREAP Kap, WRI, A33-34, EN 01053908.

³¹⁷⁶ D219/62, PREAP Kap, WRI, A35-36, EN 01053908.

40 people to be sent to Samlaut District. At the time, Ta Mok did not give any other details.³¹⁷⁷

1526. PREAP Kap stated that during his stay in Battambang he did not meet 'Ta Tith'.³¹⁷⁸

1527. PREAP Kap stated that when they arrived in Samlaut District (on 20 August 1978), Ta Mok called a meeting and told them that he arranged the marriages for them and that the ceremony would be held in the afternoon.³¹⁷⁹ The ceremony was held in the Samlaut District office and couples were introduced immediately before the ceremony.³¹⁸⁰

1528. Regardless of the fact that at the time PREAP Kap was blind, he never knew or met 'Ta Tith',³¹⁸¹ and his wife, NOP Ngim (to whom he was introduced immediately before the ceremony³¹⁸²), told him at some point in time that 'Ta Tith' had attended their wedding ceremony,³¹⁸³ PREAP Kap provided a lot of detail in his statement about his wedding:

- Ta Mok and 'Ta Tith' arrived at the Samalut District in two different Chinese jeeps;
- Each of them had two bodyguards and a driver;
- 'Ta Tith' stayed there for one night and left next morning to Battambang Province;
- Ta Mok never introduced 'Ta Tith' to them, and 'Ta Tith' did not talk with them before wedding ceremony;
- Before the wedding he 'observed' that Ta Mok had higher authority than 'Ta Tith';
- Before the wedding Ta Mok gave orders to 'Ta Tith' to transport beds, mosquito nets and hammocks for the newlywed disabled persons. Three days later 'Ta Tith' had those things transported. He found this out because his wife allegedly found an envelope with the list of delivered items, and since she was illiterate, she gave him, although he was blind, the envelope to read. He read the letter and saw that it was sent from the Sector 1 Committee, 'Ta Tith,' and it had a signature beneath it.

³¹⁷⁷ D219/62, PREAP Kap, WRI, A38-A39, EN 01053909.

³¹⁷⁸ D219/62, PREAP Kap, WRI, A41, EN 01053909.

³¹⁷⁹ D219/62, PREAP Kap, WRI, A44, EN 01053909-10.

³¹⁸⁰ D219/62, PREAP Kap, WRI, A50-A51, EN 01053911-2.

³¹⁸¹ D219/62, PREAP Kap, WRI, A29-30, EN 01053907; A72, EN 01053915-6.

³¹⁸² D219/62, PREAP Kap, WRI, A50-A51, EN 01053911-2.

³¹⁸³ D219/62, PREAP Kap, WRI, A29, EN 01053907.

- At the end of the wedding ceremony, Ta Mok allegedly introduced ‘Ta Tith’ as a Sector 1 chairman, and invited him to give a speech.
- ‘Ta Tith’ stated that newlywed couples had to love each other, have solidarity, and try hard to do agricultural production.³¹⁸⁴

1529. The investigator did not try to verify the veracity of those statements even though it was obvious that PREAP Kap could not have had direct knowledge of these events as he was blind, could not read or write, move without help, see the faces of the people around him, and did not know ‘Ta Tith’ at the time.³¹⁸⁵ Furthermore, none of those statements were confirmed by his wife NOP Ngim.³¹⁸⁶

1530. PREAP Kap said that he never heard from anyone that the Khmer Rouge assigned eavesdroppers to spy on the newlywed couples and that that did not happen to him and his wife NOP Ngim.³¹⁸⁷ This statement was confirmed by NOP Ngim,³¹⁸⁸ though in her last statement to the OCIJ, she changed her statement with no explanation.³¹⁸⁹

1531. PREAP Kap’s evidence is devoid of probative value.

Conclusion

1532. Even taken at its highest, the evidence of two witnesses about one wedding ceremony administered on 20 August 1978 by Ta Mok and where Mr YIM Tith was allegedly present does not amount to a ‘contribution’ to CPK’s forced marriage policy.

1533. The ICP’s claim that Mr YIM Tith contributed to the implementation of the CPK’s forced marriage policy in the Northwest Zone, for which he cites the evidence of two witnesses, which relates to one wedding ceremony that was administered by Ta Mok at which Mr YIM Tith was allegedly present, is hollow.

³¹⁸⁴ D219/62, PREAP Kap, WRI, A44-A47, EN 01053909-11.

³¹⁸⁵ *Supra*, paras 1394 to 1397.

³¹⁸⁶ *Supra*, paras 1519 to 1521.

³¹⁸⁷ D219/62, PREAP Kap, WRI, A52, EN 01053912.

³¹⁸⁸ D118/285, NOP Ngim, WRI, A68-A71, EN 01044685-6.

³¹⁸⁹ D219/835, NOP Ngim, WRI, A146-148, EN 01432969; A155-157, EN 01432971.

(3) Mr YIM Tith did Not Contribute to the Implementation of the Alleged CPK Enslavement Policy

1534. The ICP claims that ‘YIM Tith made contributions to the agricultural and economic aspects of the common criminal plan, which amounted to and involved the commission of enslavement and other crimes, in both the Southwest Zone and Northwest Zone.’³¹⁹⁰ Yet, the ICP explicitly decided not to request Mr YIM Tith’s indictment for enslavement as a crime against humanity at three crime sites,³¹⁹¹ out of a total of seven crime sites for which Mr YIM Tith was charged.³¹⁹² In effect, the ICP asserts that Mr YIM Tith should not be indicted for alleged crimes of enslavement in Sector 13, Southwest Zone and Sector 3, Northwest Zone.

1535. Four of the crime sites for which the ICP requests an indictment against Mr YIM Tith are situated in different Sectors, all in the Northwest Zone: Sector 1, (Crime Site 9: Thipakdei cooperative (including at Wat Thipakdei security centre and Tuol Mtes security centre and worksite);³¹⁹³ Crime Site 10: Kanghat Dam worksite, Sangkae District),³¹⁹⁴ Sector 4 (Crime Site 27: Kampong Prieng commune Daun Try District 42),³¹⁹⁵ and Sector 7 (Crime Site 36: Prison No. 8, Kandieng District).³¹⁹⁶

- Sector 7

1536. The ICP cites no documentary or witness evidence in support of his claim that Mr YIM Tith contributed to the implementation of an alleged enslavement policy at Crime Site 36: Prison No. 8, Kandieng District, Sector 7.

³¹⁹⁰ ICP’s Final Submission, D378/2, para. 85.

³¹⁹¹ ICP is not asking for indictment for crimes against humanity: enslavement for **Crime Site 1:** Wat Pratheath security centre – Kirivong District, Takeo province, Sector 13, SWZ; See ICP’s Final Submission, D378/2, para.212. **Crime Site 12:** Khnang Kou security centre, Sangkae District, Sector 1, See ICP’s Final Submission, D378/2, para.537; and **Crime Site 22:** Wat Kirirum security centre, Phnom Sampeou District, Sector 3, See ICP’s Final Submission, D378/2, para. 556.

³¹⁹² YIM Tith was charged for crimes against humanity: enslavement for **Crime Site 1:** Wat Pratheath security centre – Kirivong District, Takeo province, Sector 13, SWZ; **Crime Site 9:** Thipakdei cooperative (including at Wat Thipakdei security centre and Tuol Mtes security centre and worksite); **Crime Site 10:** Kanghat Dam worksite, Sangkae District, Sector 1; **Crime Site 12:** Khnang Kou security centre, Sangkae District, Sector 1; **Crime Site 22:** Wat Kirirum security centre, Phnom Sampeou District, Sector 3. **Crime Site 27:** Kampong Prieng Commune Daun Try District 42, Sector 4; **Crime Site 36:** Prison No. 8, Kandieng District, Sector 7. See *supra*, paras 464 to 468.

³¹⁹³ ICP’s Final Submission, D378/2, para. 405.

³¹⁹⁴ ICP’s Final Submission, D378/2, para. 442.

³¹⁹⁵ ICP’s Final Submission, D378/2, para. 571.

³¹⁹⁶ ICP’s Final Submission, D378/2, para. 713.

- Sector 4

1537. The ICP cites evidence of only one witness from Sector 4, TOUCH Mary,³¹⁹⁷ who lived in Moung District,³¹⁹⁸ in support of his claim that Mr YIM Tith contributed to the implementation of an alleged enslavement policy at Crime Site 27: Kampong Prieng commune Daun Try, District 42. TOUCH Mary did not positively identify Mr YIM Tith's presence at any meetings she attended,³¹⁹⁹ yet she allegedly saw him once at the meeting she attended at Moung District.³²⁰⁰ Furthermore, TOUCH Mary did not give any evidence alleging Mr YIM Tith's contribution to an enslavement policy at Kampong Prieng Commune.

- Sector 1, Crime Site 9

1538. The ICP cites the evidence of two witnesses from Sector 1 in support of his claim that Mr YIM Tith contributed to the implementation of an alleged enslavement policy at Crime Site 9: Thipakdei cooperative (including at Wat Thipakdei security centre and Tuol Mtes security centre and worksite).

LAM Lin's evidence about Mr YIM Tith's alleged contribution to the the CPK's Alleged Enslavement Policy

1539. As already argued in this Response³²⁰¹, LAM Lin worked in the rice field at Tuol Mtes at the end of 1978 and at the beginning of 1979, stated that he saw 'Ta Tith' only once at a meeting 'near liberation time in 1979.'³²⁰² In the para. 93, footnote 209 the ICP cites the alleged words of 'Ta Tit' from answer A36: 'What Ta Tith say during the meeting? A36: He said that we had to strive hard to yield more rice produce so that army could be fed.' Even based on this quotation alone it is clear that the Vietnamese were invading and that a concern of the CPK was to ensure that its troops were being fed in order to protect against the invading force.

³¹⁹⁷ ICP's Final Submission, D378/2, para. 87. fn 193; para. 88, fn 197, 198 and 199.

³¹⁹⁸ D219/836, TOUCH Mary WRI, A16-A17, EN 01399399; A41, EN 01399402; A50, EN 01399404; A165, EN 01399421; D219/872, TOUCH Mary, WRI, A1-A14, EN 01375358-9.

³¹⁹⁹ *Supra*, paras 1418 to 1424.

³²⁰⁰ D219/836, TOUCH Mary WRI, A165, EN 01399421.

³²⁰¹ *Supra*, paras 1477 to 1479.

³²⁰² D219/943, LAM Lin, WRI, A10-A14, EN 01523944-5; A29-A31, EN 01523946; A34-A35, EN 01523946.

SOK Cheat's,³²⁰³ evidence about Mr YIM Tith's alleged contribution to the CPK's
Alleged Enslavement Policy

1540. As already argued in this Response,³²⁰⁴ SOK Cheat worked at Tuol Mtes, Koas Krala District, Sector 1,³²⁰⁵ did not positively identify Mr YIM Tith³²⁰⁶ and does not know when Mr YIM Tith arrived in the Northwest Zone.³²⁰⁷ As set out above SOK Cheat's evidence regarding Mr YIM Tith (working hours increased when Mr YIM Tith allegedly arrived in Tuol Mtes, as ICP is claiming) has no probative value.³²⁰⁸

1541. The evidence presented by the ICP is not sufficient to conclude that Mr YIM Tith contributed to the the CPK's alleged enslavement policy at Tuol Mtes and consequently at Thipakdei cooperative (Crime Site 9).

- Sector 1, Crime Site 10 Kanghat Dam worksite

1542. The ICP cites the evidence of six witnesses from Sector 1 in support of his claim that Mr YIM Tith contributed to the implementation of an alleged enslavement policy at Crime Site 10: Kanghat Dam worksite, Sangkae District, Sector 1.

VY Phann's evidence about Mr YIM Tith's alleged contribution to the CPK's Alleged
Enslavement Policy

1543. VY Phann who lived in Sangkae District, Sector 1,³²⁰⁹ stated that 'Ta Tith' arrived in the Northwest Zone in November 1978,³²¹⁰ and that he saw 'Ta Tith' only once, at one meeting at Kanghat Dam.³²¹¹ As already argued in this Response,³²¹² even if 'Ta Tith' and other speakers at this alleged meeting in November 1978 at Kanghat Dam talked about enemies, it was in the context of Cambodia being invaded at that time by the

³²⁰³ ICP's Final Submission, D378/2, para. 95, fn 217.

³²⁰⁴ *Supra*, paras 1274 to 1281.

³²⁰⁵ *Supra*, para. 1275.

³²⁰⁶ *Supra*, paras 1277 to 1281.

³²⁰⁷ D219/689, SOK Cheat, WRI A20, EN 01216244.

³²⁰⁸ *Supra*, para. 1274 to 1281.

³²⁰⁹ D219/85, VY Phann, WRI, A1, EN 01061167.

³²¹⁰ D219/85, VY Phann, WRI, A3, EN 01061168-9.

³²¹¹ D219/85, VY Phann, WRI, A3, EN 01061168-9.

³²¹² *Supra*, paras 1398 to 1406.

Vietnamese, and it does not constitute, as the ICP is claiming ‘an implicit threat regarding the failure to meet production goals.’³²¹³

TOP Seung’s evidence about Mr YIM Tith’s alleged contribution to the CPK’s Alleged Enslavement Policy

1544. As already argued in this Response, TOP Seung, who came from the Southwest Zone to the Northwest Zone in 1977 or 1978,³²¹⁴ did not know ‘Ta Tith’ while she was in the Southwest Zone.³²¹⁵ TOP Seung worked at Kanghat Dam in 1978.³²¹⁶ She saw ‘Ta Tith’ at Kanghat Dam for the first time in ‘the middle 1978,’ a few months before the Vietnamese arrived³²¹⁷ and after Ta Pet’s disappearance.³²¹⁸ Considering the evidence that Ta Pet was last seen at the meeting at Kanghat Dam in November 1978,³²¹⁹ that he was allegedly arrested also in November 1978³²²⁰ and that ‘Ta Tith’ allegedly arrived in this area in November or December 1978³²²¹, it appears that TOP Seung’s evidence, taken in context, also supports this timing. TOP Seung was never present at any meetings with ‘Ta Tith.’³²²² Yet, in support of his claim that Mr YIM Tith made implicit threats at the meetings to address topics related to the ‘enemies’ and to exhort workers to work harder, the ICP used TOP Seung’s evidence that ‘Ta Tith’ said that ‘we had to work hard to build dams and canals in order to supply enough food to people and not to let enemies to attack us or deprive us of rice.’³²²³ Even if TOP Seung heard these words from Mr YIM Tith, which she did not, those words have to be taken in the context of Cambodia being invaded at that time by the Vietnamese, and does not constitute, as the ICP is claiming, an ‘implicit threat regarding the failure to meet production goals.’

³²¹³ ICP’s Final Submission, D378/2, para. 87.

³²¹⁴ D219/117, TOP Seung, WRI, A4-A9, A14-A15, EN 01067699-700.

³²¹⁵ D219/117, TOP Seung, WRI, A17-A19, EN 01067701; A25, EN 01067702.

³²¹⁶ D219/117, TOP Seung, WRI, A17-A19, EN 01067701.

³²¹⁷ D219/117, TOP Seung, WRI, A68, EN 01067707; A85, EN 01067710.

³²¹⁸ D219/117, TOP Seung, WRI, A69, EN 01067708.

³²¹⁹ *Supra*, paras 170-172.

³²²⁰ *Supra*, para. 60.

³²²¹ *Supra*, para. 129.

³²²² D219/117, TOP Seung, WRI, A144-A147, EN 01067718.

³²²³ ICP’s Final Submission, D378/2, para. 87, fn 193.

NHEM Hean's evidence about Mr YIM Tith's alleged contribution to the CPK's Alleged Enslavement Policy

1545. As already argued in this Response, NHEM Hean was sent from the Southwest Zone to the Northwest Zone in late 1977 and worked at Kanghat Dam as a member of the children's unit.³²²⁴ He does not know who assigned him to work at Kanghat Dam.³²²⁵ He met 'Ta Tith' 'in late 1977; it was almost 1978,' but he did not work with him.³²²⁶ He assumed that 'Ta Tith' was the superior at Kanghat Dam because he saw him there³²²⁷ once in a while visiting NHEM Hean's group of 20 children,³²²⁸ but NHEM Hean did not know 'Ta Tith's' position at the time.³²²⁹ NHEM Hean was never present at any meetings with 'Ta Tith.' NHEM Hean only attended meetings with the children's chiefs.³²³⁰ Kanghat Dam was under the supervision of the Northwest Zone Cadre³²³¹ and NHEM Hean was present when Ta Pet presided over a group marriage ceremony³²³² where 'Ta Tith' was not present.³²³³ NHEM Hean received orders from his group leader.³²³⁴ NHEM Hean knew only his immediate superiors and he assumed that 'Uncle Tith' was also superior because he saw him coming at Kanghat Dam.³²³⁵ NHEM Hean got to know 'Ta Tith' at the time they fled in the same group of people to the Thai border in 1979, after the Vietnamese came.³²³⁶

1546. NHEM Hean's evidence about Mr YIM Tith's contribution to enslavement policy has no probative value.

³²²⁴ D219/928, NHEM Hean, WRI, A5-A9, EN 01451498;

³²²⁵ D219/928, NHEM Hean, WRI, A13, EN 01451498; A88-A89, EN 01451504-5.

³²²⁶ D219/928, NHEM Hean, WRI, A8-A9, EN 01451498.

³²²⁷ D219/928, NHEM Hean, WRI, A11, EN 01451498.

³²²⁸ D219/928, NHEM Hean, WRI, A14-18, EN 01451499.

³²²⁹ D219/928, NHEM Hean, WRI, A84-A89, EN 01451504-5.

³²³⁰ D219/928, NHEM Hean, WRI, A69, EN 01451503.

³²³¹ D219/928, NHEM Hean, WRI, A21, EN 01451499.

³²³² D219/928, NHEM Hean, WRI, A70-A77, EN 01451503-4.

³²³³ D219/928, NHEM Hean, WRI, A83, EN 01451504.

³²³⁴ D219/928, NHEM Hean, WRI, A59-A60, EN 01451502.

³²³⁵ D219/928, NHEM Hean, WRI, A11-A12, EN 01451498.

³²³⁶ D219/928, NHEM Hean, WRI, A20, EN 01451499; A91, EN 01451505.

CHHOEUNG Bean's evidence about Mr YIM Tith's alleged contribution to the CPK's
Alleged Enslavement Policy

1547. CHHOEUNG Bean³²³⁷ who worked at Kanghat Dam,³²³⁸ did not positively identify Mr YIM Tith,³²³⁹ but allegedly saw 'Ta Tith' once at a meeting at Kanghat Dam in September 1978.³²⁴⁰ As argued above, CHHOEUNG Bean's evidence has low probative value³²⁴¹ and this applies equally to his evidence cited in support of the ICP's claims that food rations at the Kanghat Dam decreased when Mr YIM Tith allegedly took over.³²⁴²

SORM Vanna's evidence about Mr YIM Tith's alleged contribution to the CPK's Alleged
Enslavement Policy

1548. SORM Vanna³²⁴³ is a Civil Party Applicant and she worked at Kanghat Dam.³²⁴⁴ She had heard 'Ta Tith's' name, but she never saw him³²⁴⁵ and did not know his position.³²⁴⁶ She never saw 'Ta Tith' participate in meetings at Kanghat Dam³²⁴⁷ and 'Ta Tith' never came to her worksite.³²⁴⁸ She did not know who the worksite chairperson was at Kanghat Dam.³²⁴⁹ Her evidence is based on rumours.³²⁵⁰

1549. SORM Vanna submitted her CPA on 21 July 2009³²⁵¹ and Supplementary Information on 4 August 2010.³²⁵² In neither document did SORM Vanna mention 'Ta Tith' or YIM Tith among the persons she considered responsible for her suffering. Yet, in 2014 and 2015 she gave two statements to the ICIJ where she suddenly gave extensive evidence about Mr YIM Tith although she never saw him at Kanghat Dam.³²⁵³ There is a likelihood that, due to the illegal leak of the ICP's Third Introductory Submission, she heard the

³²³⁷ ICP's Final Submission, D378/2, para. 95, fn 216.

³²³⁸ *Supra*, para. 1289.

³²³⁹ *Supra*, para. 1292-1294.

³²⁴⁰ D219/430, CHHOEUNG Bean, A128, EN 01128724.

³²⁴¹ *Supra*, paras 1288 to 1296 and 1410 to 1417.

³²⁴² ICP's Final Submission, D378/2, para. 95.

³²⁴³ ICP's Final Submission, D378/2, para. 89, footnote 202 and 203; para. 90, footnote 206; para. 93, footnote 212.

³²⁴⁴ D219/46, SORM Vanna, WRI, A25, EN 01050672.

³²⁴⁵ D219/46, SORM Vanna, WRI, A38-A40, EN 01050674.

³²⁴⁶ D219/46, SORM Vanna, WRI, A41, EN 01050674.

³²⁴⁷ D219/46, SORM Vanna, WRI, A31-A37 EN 01050673; A47, EN 01050675.

³²⁴⁸ D219/46, SORM Vanna, WRI, A42, EN 01050674.

³²⁴⁹ D219/46, SORM Vanna, WRI, A45, EN 01050675.

³²⁵⁰ D219/46, SORM Vanna, WRI, A43, EN 01050674.

³²⁵¹ D5/47, SORM Vanna, Civil party application, 21.07.2009; D5/47/3, SORM Vanna, Victim Unit's report on the civil party applicant, 30 April 2010.

³²⁵² D191.1.87, SORM Vanna, Summary of the supplementary information of civil party applicant, 4 August 2010.

³²⁵³ D219/46, SORM Vanna, WRI; D219/239, SORM Vanna, WRI.

information in the ICP's Third Introductory Submission and therefore that her speculation has been contaminated by this document.³²⁵⁴ SORM Vanna's evidence cited by the ICP in support of his claim about the 'effects of YIM Tith's presence in the minds of both workers and unit chiefs' at Kanghat Dam³²⁵⁵ has no probative value.

HAM Saom's evidence about Mr YIM Tith's alleged contribution to the CPK's Alleged Enslavement Policy

1550. HAM Saom³²⁵⁶, who worked at Kanghat Dam,³²⁵⁷ said that Southwest Zone people arrived in late 1978³²⁵⁸ after Ta Pet disappeared.³²⁵⁹ HAM Saom did not state that he saw 'Ta Tith' at Kanghat Dam, but after the Southwest Zone people arrived, he was present at two Sangkhae District level meetings where 'Ta Tith' was present or chaired meetings in which they only talked about farming.³²⁶⁰

1551. The ICP's claim that Mr YIM Tith's alleged 'active engagement' in setting and announcing production goals, which constituted a 'significant contribution to the common criminal plan,' is supported, according to the ICP, by the evidence of this witness. This claim has no merit. The ICP does not explain how one meeting at the district-level in Sangkhae District in late 1978, where the sole topic was farming, influenced events in Kanghat Dam which was, according to the ICP, sector-level worksite³²⁶¹ established early in the DK regime and start operating before dry season of 1977.³²⁶²

1552. SORM Vanna's evidence does not support the ICP's claim that Mr YIM Tith 'actively engaged' in setting and announcing production goals which constituted a 'significant contribution to the common criminal plan.'

³²⁵⁴ *Supra*, paras 262 to 276.

³²⁵⁵ *ICP's Final Submission*, D378/2, para. 89.

³²⁵⁶ *ICP's Final Submission*, D378/2, para. 93, fn 208 and 211.

³²⁵⁷ D118/149, HAM Saom, WRI, A5-A7, EN 00974994.

³²⁵⁸ D118/149, HAM Saom, WRI, A15-A16, EN 00974995.

³²⁵⁹ D118/149, HAM Saom, WRI, A32, EN 00974996.

³²⁶⁰ D118/149, HAM Saom, WRI, A17-A27, EN 00974995-6; A62 EN 00975000.

³²⁶¹ *ICP's Final Submission*, D378/2, para. 442.

³²⁶² *ICP's Final Submission*, D378/2, para. 445.

- Other witnesses from Sector 1

1553. In support of his claim that Mr YIM Tith contributed to the implementation of an alleged enslavement policy in Sector 1, the ICP cites five witnesses who gave no evidence about events at Crime Site 9 and Crime Site 10.

NOP Ngim's evidence about Mr YIM Tith's alleged contribution to the CPK's Alleged Enslavement Policy

1554. As already argued in the Response³²⁶³, NOP Ngim worked in Samlaut District, Sector 1.³²⁶⁴ No crime sites involved in the charge of the crime of enslavement are alleged in this District, NOP Ngim came from the Southwest Zone to the Northwest Zone in the middle of 1978.³²⁶⁵ She never attended any meetings with 'Ta Tith' in the Southwest Zone and did not know his position in the Southwest Zone.³²⁶⁶ The first time she saw 'Ta Tith' was in August 1978.³²⁶⁷

1555. NOP Ngim's evidence about meetings with 'Ta Tith' and his alleged words is far from clear as NOP Ngim retracted her evidence to the alleged meetings.³²⁶⁸

1556. The ICP misstates, and consequently misrepresents, NOP Ngim's evidence in which she described the alleged meeting at which 'Ta Tith' told his subordinates that they must first reeducate and then kill enemies. The ICP produces no evidence to support his incorrect interpretation of NOP Ngim's evidence.³²⁶⁹ Also, the ICP states part of NOP Ngim's evidence that she remembers that Mr YIM Tith 'encouraged us to manage our work smoothly, unite all of us and try to construct and develop country.'³²⁷⁰ The ICP's assertion, based on this part of NOP Ngim's evidence, that the connection between the discussion of smashing enemies and the discussion of achieving economic goals 'would have made it clear to everyone present that their safety depends on successful work performance,'³²⁷¹ has no bearing on events at Kanghat Dam. The ICP does not provide

³²⁶³ *Supra*, paras 1385 to 1393.

³²⁶⁴ D219/298, NOP Ngim, WRI, A6, EN 01111859; D219/835, NOP Ngim, WRI, A72-A76, EN 01432957.

³²⁶⁵ D118/285, NOP Ngim, WRI, A8, EN 01044675; A28, EN 01044678; A68, EN 01044685-6; D123/2/2.17a, NOP Ngim, DC-Cam Statement, EN 01155597.

³²⁶⁶ D118/285, NOP Ngim, WRI, A9-A12, EN 01044675; A18-A19, EN 01044676.

³²⁶⁷ D219/298, NOP Ngim, WRI, A33, EN 01111863; D219/835, NOP Ngim, WRI, A69-A70, EN 01432956-7.

³²⁶⁸ *Supra*, paras 1385 to 1393.

³²⁶⁹ *ICP's Final Submission*, D378/2, para. 87.

³²⁷⁰ *ICP's Final Submission*, D378/2, para. 87; D219/298, NOP Ngim, WRI, A15, EN 01111860.

³²⁷¹ *ICP's Final Submission*, D378/2, para. 87.

an explanation as to how words allegedly said at a Samlaut District level meeting or meetings, held in or after September 1978,³²⁷² influenced ‘everyone who was not present’ at those meetings, including workers at Kanghat Dam, at times prior to that.

1557. The ICP also claims, based on NOP Ngim’s evidence, that Mr YIM Tith ‘made sure his subordinates understood they were required to monitor their workers productivity.’ The ICP quotes one answer from one of her WRIs (D219/835, A33) in order to support this claim. The ICP is again bluntly misstating, and consequently misrepresenting, evidence. It seems that the ICP purposely avoids referring to the answers before and after A33 that make clear NOP Ngim is talking about a time when she worked in Srae Ambel salt fields³²⁷³ situated in Kampot province, Sector 35, Southwest Zone³²⁷⁴, a place which is out of the geographical scope of investigation.

1558. The ICP is making the same misrepresentation in claiming, based again on NOP Ngim’s evidence concerning the time when she worked in Srae Ambel salt fields, that Mr YIM Tith was well aware of dire conditions prevailing at worksites ‘under his control.’³²⁷⁵

1559. In conclusion, the ICP gives no explanation as to how NOP Ngim’s evidence, especially her evidence concerning the Srae Ambel salt fields, has any connection to the situation in Kanghat Dam.

PREAP Kap’s evidence about Mr YIM Tith’s alleged contribution to the CPK’s Alleged Enslavement Policy

1560. As already argued in this Response³²⁷⁶, PREAP Kap is NOP Ngim’s husband, who lived in Samlaut District, Sector 1.³²⁷⁷ No crime sites involved in the charge of the crime of enslavement are alleged in this District. PREAP Kap came from the Southwest Zone to the Northwest Zone in August 1978.³²⁷⁸ He did not know ‘Ta Tith’ while in the Southwest

³²⁷² *Supra*, paras 1185 and 1386.

³²⁷³ D219/835, NOP Ngim, WRI, A22-A35, EN EN 01432949-51.

³²⁷⁴ D118/285, NOP Ngim, WRI, A2, EN 01044673-4, D219/298, NOP Ngim, WRI, A2, EN 01111858; D219/835, WRI, A4-A9, EN 01432947. Also see Maps D347/2.1.55 and D1.3.27.1.

³²⁷⁵ *ICP’s Final Submission*, D378/2, para. 94, fn 212.

³²⁷⁶ *Supra*, paras 1395 to 1396.

³²⁷⁷ D219/62, PREAP Kap, WRI, A38-A39, EN 01053909.

³²⁷⁸ D219/62, PREAP Kap, WRI, A33-34, EN 01053908.

Zone.³²⁷⁹ At the time of his wedding in August 1978, he was blind and his wife told him that ‘Ta Tith’ was present.³²⁸⁰ He was not present at any other meetings with ‘Ta Tith.’³²⁸¹

1561. In support of his claim that ‘In addition to making threats, YIM Tith was also actively engaged in [...] exhorting exhausted workers to work even harder,’³²⁸² the ICP cites PREAP Kap’s evidence about Mr YIM Tith’s alleged words at a single wedding ceremony in Samlaut District on 20 August 1978, where according to PREAP Kap, ‘Ta Tith stated that the newly-wed couples had to love each other, have solidarity, and try hard to do agricultural production.’ Even if the words said by ‘Ta Tith’ were correctly recalled and conveyed by PREAP Kap, it could not be concluded from those words that ‘Ta Tith’ was ‘exhorting exhausted workers to work even harder’; the ICP is overreaching.

1562. Furthermore, PREAP Kap’s evidence is not supported by his wife, NOP Ngim.³²⁸³ NOP Ngim stated in her first interview that ‘Ta Tith’ did not attend the wedding, but that he came and talked to Ta Mok before the wedding started, although she does not know about what.³²⁸⁴ In her last interview, she changed her evidence and added that ‘Ta Tith’ told them after the wedding ‘Please, friends, do as the organization has organized things.’³²⁸⁵ PREAP Kap’s evidence has no probative value.

PEOU Koeun’s³²⁸⁶ evidence about Mr YIM Tith’s alleged contribution to the CPK’s Alleged Enslavement Policy

1563. PEOU Koeun lived in Ratanak Mondul District, Sector 1,³²⁸⁷ No crime sites involved in the charge of the crime of enslavement are alleged in this District. PEOU Koeun was a soldier stationed at O Ta Krey (Ou Ta Krei) from 1975 to late 1977³²⁸⁸ when he escaped to work at a cotton plantation at Chi Pang Mountain until the Vietnamese arrived.³²⁸⁹ He

³²⁷⁹ D219/62, PREAP Kap, WRI, A29-30, EN 01053907; A72, EN 01053915-6.

³²⁸⁰ D219/62, PREAP Kap, WRI, A29, EN 01053907.

³²⁸¹ *Supra*, paras 1522 to 1531.

³²⁸² *ICP’s Final Submission*, D378/2, para. 93, fn 209.

³²⁸³ *Supra*, paras 1519 to 1521.

³²⁸⁴ D118/285, NOP Ngim, WRI, A73, EN 01044686.

³²⁸⁵ D219/835, NOP Ngim, WRI, A149, EN 01432970.

³²⁸⁶ *ICP’s Final Submission*, D378/2, para. 87, footnote 192

³²⁸⁷ D219/64, PEOU Koeun, WRI, A8-A11, EN 01053945-6; D219/682, PEOU Koeun, WRI, A41, EN 01216221.

³²⁸⁸ D219/64, PEOU Koeun, WRI, A51-A53, EN 01053952-3; D219/682, PEOU Koeun, WRI, A11-A13, EN 01216218.

³²⁸⁹ D219/682, PEOU Koeun, WRI, A19, EN 01216219; A44-A47, EN 01216222; D219/64, PEOU Koeun, WRI, A8-A13, EN 01053945-6.

did not know any leaders who controlled zones and sectors.³²⁹⁰ He never met ‘Ta Tith,’ and had only heard his name.³²⁹¹ He does not know who the leaders of the Northwest Zone were when the Southwest Zone cadres arrived. He only knew the leaders at the cotton plantation who were Northwest Zone cadres.³²⁹²

1564. In support of his claim that ‘YIM Tith was instrumental in creating the climate of fear that allowed this system [to extract maximum productivity from its workforce at minimum costs] to function,’ the ICP states, based on PEOU Koeun’s evidence, that ‘regarding cotton production at a particular worksite’ (with no mention of which worksite the ICP is referring to), Mr YIM Tith is alleged to have said that ‘If cotton cannot be grown, if grubs eat cotton, then grubs will eat humans too.’ The ICP draws an overreaching conclusion from these alleged words, claiming that they were explicitly making a ‘clear threat that if the crop failed, the workers or supervisors might be killed.’³²⁹³

1565. It is clear from answer A30 of D219/64 that the words the ICP cites as Mr YIM Tith’s alleged words were not heard by PEOU Koeun himself. The evidence does not mention who those ‘others’ are and the evidence does not make reference to any ‘cotton production at the particular worksite’ as the ICP states. As a matter of fact, PEOU Koeun did not mention any worksite at all. It is not surprising, given his evidence, that PEOU Koeun never met ‘Ta Tith’ but only heard his name. The ICIJ investigator did not ask him any follow-up questions about Mr YIM Tith in his second interview (D219/682).

1566. The ICP’s claim has no merit.

NOM Phoun’s evidence about Mr YIM Tith’s alleged contribution to the CPK’s Alleged Enslavement Policy

1567. NOM Phoun, a Civil Party Applicant, lived in Krahat Village, Krahat Commune, and Thumnob Prayut Dam, Sangkhae District, Sector 1.³²⁹⁴ As already stated above, he did

³²⁹⁰ D219/682, PEOU Koeun, WRI, A17-A19, EN 01216219.

³²⁹¹ D219/64, PEOU Koeun, WRI, A31, EN 01053949.

³²⁹² D219/682, PEOU Koeun, WRI, A17, EN 01216218-9.

³²⁹³ *ICP’s Final Submission*, D378/2, para. 87.

³²⁹⁴ D219/268, NOM Phoun, WRI, A10, EN 01098481-2, A22, EN 01098483.

not positively identify Mr YIM Tith, and according to him, Ta Tith and Ta Pet were the same person.³²⁹⁵

1568. Based on evidence of NOM Phuon, ICP claims that Mr YIM Tith was ‘well aware of the dire conditions prevailing at worksites under his control.’³²⁹⁶ As already argued in this Response, NOP Phuon evidence about Mr YIM Tith is devoid of probative value.³²⁹⁷

SAO Chobb’s evidence about Mr YIM Tith’s alleged contribution to the CPK’s Alleged Enslavement Policy

1569. SAO Chobb was a member of the district military in Koas Krala District, Sector 1.³²⁹⁸ As already argued in this Response³²⁹⁹, he never positively identified Mr YIM Tith and his evidence relates to the time before the Southwest Zone cadres arrived in Koas Krala District.

1570. As with the evidence of NOM Phoun, the ICP is claiming, based on the evidence of SAO Chobb, that Mr YIM Tith was ‘well aware of the dire conditions prevailing at worksites under his control.’³³⁰⁰ The ICP is referring to SAO Chobb’s statement D219/981 where he gives evidence about ‘Ta Tith’ who was a supervisor of the lathing unit and who was a Northwest Zone cadre³³⁰¹ and who ‘took control of the region until Southwest Zone cadre arrived.’³³⁰² The ICP’s argument is not supported by evidence of this witness.

- Witnesses from Southwest Zone Witnesses regarding Mr YIM Tith’s alleged contribution to the CPK’s alleged enslavement policy

1571. In his attempt to give an appearance of weight to the evidence cited in support of the ICP’s claim that Mr YIM Tith contributed to the implementation of the CPK’s alleged enslavement policy in the Northwest Zone, the ICP refers to witnesses who lived in Kirivong District of the Southwest Zone. These witnesses never even gave evidence about enslavement at Wat Pratheat security centre in Kirivong District (and the ICP did not in any case request that Mr YIM Tith be indicted for enslavement in Kirivong District³³⁰³).

³²⁹⁵ *Supra*, paras 1199 to 1202.

³²⁹⁶ *ICP’s Final Submission*, D378/2, para. 94.

³²⁹⁷ *Supra*, paras 1197 to 1204.

³²⁹⁸ *Supra*, para. 1078 to 1079.

³²⁹⁹ *Supra*, paras 1076 to 1125.

³³⁰⁰ *ICP’s Final Submission*, D378/2, para. 94.

³³⁰¹ D219/763, SAO Chobb, A51-58, EN 01337024-5.

³³⁰² D219/763, SAO Chobb, A59, EN 01337025.

³³⁰³ *Supra*, paras 464 to 467.

Moreover, these witnesses certainly did not give evidence relating to enslavement at any of the alleged crime sites in the Northwest Zone. Hence the ICP's reliance on these witnesses is entirely misplaced, such that he misinterprets, and therefore misrepresents, their evidence.

AM Kun's evidence about Mr YIM Tith's alleged contribution to the CPK's Alleged Enslavement Policy

1572. The most obvious example of evidence that the ICP misinterprets as relevant to his allegations in the Northwest Zone regarding the CPK's alleged enslavement policy, comes from the witness AM Kun, whom the ICP cites to support his claim that 'YIM Tith was instrumental in creating the climate of fear that allowed this system to work' by 'making explicit threats regarding the failure to meet production goals.'³³⁰⁴ The ICP has cited this exact part of AM Kun's evidence in support of his claim that, through meetings, Mr YIM Tith contributed to the implementation of CPK's enemies policy in the Southwest Zone and that he shared the plan to identify and eliminate perceived enemies.³³⁰⁵ However, to suit his purposes, the ICP now twists this evidence in order to serve his goal in this part of his Final Submission regarding enslavement in the Northwest Zone.

1573. As already argued in this Response,³³⁰⁶ the ICP is misinterpreting AM Kun's evidence. In any case, the ICP makes no connection between, on the one hand, Mr YIM Tith's alleged words said at an unknown time in an Artisan Unit in Kirivong District, and on the other, the crimes he was charged with in the Northwest Zone.

1574. The other witnesses from the Southwest Zone who are cited by the ICP in support of enslavement in the Northwest Zone are:

- HEM Chhuon,³³⁰⁷ who worked in Prey Rumdeng Cooperative until 1977 after which he was sent to farm in Ta Khab Village, Samraong Commune, Tram Kak District (District 105).³³⁰⁸

³³⁰⁴ ICP's Final Submission, D378/2, para. 87.

³³⁰⁵ ICP's Final Submission, D378/2, para. 18-19, citing D118/33, AM Kun, WRI, A15, A28-30, A37-A38.

³³⁰⁶ *Supra*, paras 757 to 759 and 797 to 801.

³³⁰⁷ ICP's Final Submission, D378/2, para. 87. fn 193; para. 92, fn 208.

³³⁰⁸ D118/45, HEM Chhuon, WRI, A3-A5. EN00923039.

- YOU Phnom,³³⁰⁹ who was an education representative in different villages and communes in Kirivong District working with children's and youth's units. From 1977 to 1978, he was a militiaman in Kouk Prech Commune, after which he became district soldier for less than a year before the Vietnamese arrived.³³¹⁰
- MAO Chhorm,³³¹¹ who lived Kirivong District from 1975 to 1979 where he was in a mobile unit in Kirivong District.³³¹² He never went near Wat Pratheath during the DK regime.³³¹³
- MOENG Vet,³³¹⁴ who worked in Messenger Unit 160 in Sector 13 from 1975,³³¹⁵ had no connection to Wat Pratheath Security Office³³¹⁶ and moved to Kratie Province in March 1977.³³¹⁷ He was in Kirivong District from September 1975 to March 1977,³³¹⁸ and was chairman of the Messenger Unit of Regiment 13, whose commander was Phan.³³¹⁹ According to his evidence, the messenger office was in Sla Village, Ta Au Commune, Kirivong District.³³²⁰
- SOK Rom,³³²¹ who was 13 years old in 1975,³³²² was a member of the children's unit in Tram Kak District and worked along the Cambodia-Vietnam border for two years. Consequently, she does 'not remember any events that happened at the time.'³³²³ She later worked in District 105 (Koh Andet District) along the river bank also near Cambodia-Vietnam border,³³²⁴ and in 1977 she was sent to Svay Sisophon District (Sector 5 in the Northwest Zone).³³²⁵ She did not know 'Ta Tith,' did not meet him, and did not know his role.³³²⁶ She heard about 'Ta Tith' from her mother

³³⁰⁹ *ICP's Final Submission*, D378/2, para. 87, fn 193.

³³¹⁰ D219/108, YOU Phnom, WRI, A2, EN 01076890.

³³¹¹ *ICP's Final Submission*, D378/2, para. 87, fn 193; para. 93, fn 209.

³³¹² D219/111, MAO Chhorm, WRI, A22-A28, EN 01076905-6.

³³¹³ D219/111, MAO Chhorm, WRI, A98-A100, EN 01076914.

³³¹⁴ *ICP's Final Submission*, D378/2, para. 94, fn 215.

³³¹⁵ D119/83, MOENG Vet, WRI, A11, EN 00982070-1; A19, EN 00982073.

³³¹⁶ D119/85, MOENG Vet, WRI, A16-A20, EN 00982715.

³³¹⁷ D119/84, MOENG Vet, WRI, A6, EN 00982701; A35, EN 00982707.

³³¹⁸ D119/84, MOENG Vet, WRI, A34-A35, EN 00982707;

³³¹⁹ D119/84, MOENG Vet, WRI, A36-A38, EN 00982707-8.

³³²⁰ D119/85, MOENG Vet, WRI, A3-A5, EN 00982712-3; D119/84, MOENG Vet, WRI, A40, EN 00982708;

³³²¹ *ICP's Final Submission*, D378/2, para. 89, fn 204.

³³²² D119/108, SOK Rom, WRI, EN 00986246.

³³²³ D119/108, SOK Rom, WRI, A7-A8, EN 00986248; A13, EN 00986249.

³³²⁴ D119/108, SOK Rom, WRI, A13-A14, EN 00986249.

³³²⁵ D119/108, SOK Rom, WRI, A56-A62, EN 00986258-9.

³³²⁶ D119/108, SOK Rom, WRI, A40-A43, EN 00986254-5.

while she was in the Southwest Zone, but never heard of him while she was in the Northwest Zone.³³²⁷

- KHUN Samoeun,³³²⁸ who was sent to work at Kampong Kandal Salt Field Worksite (Kampot Province,³³²⁹ State Salt Field worksite³³³⁰) in late 1975 and stayed there for 2 years.³³³¹ She heard ‘Ta Tith’s’ name when she was in Sector 13, but never saw him.³³³² She was sent to the Northwest Zone in 1978 together with her chiefs from the salt field: *Yeay Nan*, *Yeay Rim* and *Yeay Roeun*, and she was assigned to be *Yeay Nan*’s bodyguard.³³³³ She was assigned to stay in Bakan District³³³⁴ until December 1978.³³³⁵ She does not mention anything about Mr YIM Tith nor ‘Ta Tith’ in the Northwest Zone.

- Conclusion regarding the alleged CPK Enslavement Policy

1575. The ICP presents insufficient evidence to support his claim that Mr YIM Tith contributed to the implementation of alleged enslavement policy, even if evidence of the witnesses who are not giving evidence about Crime Site 9 and Crime Site 10 were taken into consideration.

1576. The ICP fails to show how the alleged words and actions, assuming *arguendo* that the Southwest Zone witnesses’ evidence is correct –which it is not –had any influence on people and events in the Northwest Zone. Effectively, the ICP is suggesting that criminal responsibility should be attached to Mr YIM Tith based on the evidence of alleged events in a distant location at unknown times, not because Mr YIM Tith was involved in enslavement in the Southwest Zone, but because there is not sufficient evidence that he contributed to the alleged CPK policy of enslavement in the Northwest Zone in Sectors 1, 4 and 7.³³³⁶ This unusual, indeed unprincipled, approach of guilt by analogy and

³³²⁷ D119/108, SOK Rom, WRI, A136-A137, EN 00986275.

³³²⁸ *ICP’s Final Submission*, D378/2, para. 91, fn 207.

³³²⁹ D219/5, CHEAM Nhor, WRI, A16-A18, EN 01045124.

³³³⁰ D219/5, CHEAM Nhor, WRI, A20, EN 01045124-5.

³³³¹ D219/9, KHUN Samoeun, WRI, A33-A35, EN 01047799.

³³³² D219/9, KHUN Samoeun, WRI, A23-A32, EN 01047798-9.

³³³³ D219/9, KHUN Samoeun, WRI, A52-A54, EN 01047802.

³³³⁴ D219/9, KHUN Samoeun, WRI, A56-A57, EN 01047803.

³³³⁵ D219/9, KHUN Samoeun, WRI, A77, EN 01047806.

³³³⁶ ICP does not request the indictment of Mr YIM Tith for the crime against humanity-enslavement in Sector 3, Wat Kirirum Security Centre.

supposition, is in contradiction with the principle of strict construction of criminal law and it cannot be applied to indict Mr YIM Tith.

(c) Mr YIM Tith's other alleged acts and conducts in the Northwest Zone

1577. Under the title 'other acts and conducts' in his Final Submission,³³³⁷ the ICP cites evidence regarding alleged sporadic events that he is apparently unable to contort under any alleged CPK policy for which Mr YIM Tith is charged.

1578. The ICP is claiming, based on the uncorroborated hearsay evidence of one witness, CHHOEUNG Bean, that Mr YIM Tith 'during at least part of the period to his appointment as Sector 1 Secretary' was 'based in Tuol Andaet' where Mr YIM Tith 'occupied a building there with an office and a meeting room' and that he worked there with 'incumbent Sector 1 Secretary, Ta Pet.'³³³⁸ But, ICP conveniently ignores the totality of evidence of this witness, according to which he never entered the alleged 'office' of 'Ta Tith,' that he 'only ever saw the building from the distance' and that he got this information from his cousin 'Ta Roeun. He has already died.'³³³⁹

1579. The ICP also claims, that 'Ta Pet oriented Yim Tith to the structure and work at the Kanghat Dam,' and he bases this claim only on the evidence of the same single witness, CHHOEUNG Bean, who allegedly saw Ta Pet and 'Ta Tith' in April of May 1978 at Kanghat Dam and said that he saw 'Ta Pet pointing to different places whilst talking to Ta Tith. He was there only one or two minutes.'³³⁴⁰ The ICP reads too much into the evidence he is citing. As already argued in this Response, CHHOEUNG Bean's evidence about the time of Mr YIM Tith's arrival in the Northwest Zone is unreliable.³³⁴¹

1580. The ICP claims that Mr YIM Tith 'also gathered information about Northwest Zone cadres from Ta Pet during this period,' and again relies on CHHOEUNG Bean's uncorroborated hearsay evidence that 'Suy told me that Ta Tith was trying to get

³³³⁷ ICP's Final Submission, D378/2, paras 101 to 109.

³³³⁸ ICP's Final Submission, D378/2, para 101.

³³³⁹ D219/368, CHHOEUNG Bean, WRI, A84-A86, EN 01117722.

³³⁴⁰ ICP's Final Submission, D378/2, para. 101, fn 242.

³³⁴¹ *Supra*, paras 1292 to 1293.

information from Ta Pet.³³⁴² According to CHHOEUNG Bean, Suy 'is now deceased.'³³⁴³

1581. The ICP claims, based on evidence of one witness, LEK Phiv, that 'Ta Pet and Yim Tith were seen travelling around the sector together in their Jeep' and that Ta Pet 'during this period...gave lists of people to be arrested and reeducated to his subordinate'³³⁴⁴ insinuating that Mr YIM Tith was somehow involved in Ta Pet's activity. The ICP misstated LEK Phiv's evidence from his answers A17 and A19 by disregarding his evidence from A18 of the same statement, where LEK Phiv stated that he 'only recall[ed] one letter which they sent me.'³³⁴⁵ The ICP ignores LEK Phiv's evidence that he 'received advisory letters from Ta Pet. I never received any letters from Ta Tith.'³³⁴⁶

1582. The ICP further claims, based on the uncorroborated evidence of one witness, CHHORN Vorn, (who was 15 years old in 1975³³⁴⁷) that Mr YIM Tith 'regularly met with Ros Nhim at Ros Nhim's residence for a period of about a year prior to Ros Nhim's arrest.'³³⁴⁸ For the following reasons, the evidence of this witness is not reliable.

1583. CHHORN Vorn stated that Ta Nhim stayed in Ampil Prahaong where he had a house and office at the same place.³³⁴⁹ He first stated that he worked in Kanghat Dam until 1976 when Ta Nhim selected him to be his bodyguard.³³⁵⁰ He then changed his evidence and stated that when Ta Nhim selected him to be his bodyguard, he was a soldier based in Pailin Province, but he does not remember number of his division.³³⁵¹ He stated that he was Ta Nhim's bodyguard until Ta Nhim was arrested³³⁵² four months before the Vietnamese army arrived³³⁵³ and that during that time he escorted Ta Nhim and secured his safety everywhere he went but never drove in the same car with Ta Nhim.³³⁵⁴ He then changed his evidence and said that he was Ta Nhim's driver.³³⁵⁵ He said that his only duty

³³⁴² ICP's Final Submission, D378/2, para. 201, fn 234.

³³⁴³ D219/430, CHHOEUNG Bean, WRI, A90, EN 01128719-20.

³³⁴⁴ ICP's Final Submission, D378/2, para.101, fn 244.

³³⁴⁵ D219/292, LEK Phiv, WRI, A18, EN 01111808.

³³⁴⁶ D219/292, LEK Phiv, WRI, A29, EN 01111810.

³³⁴⁷ D118/137, CHHORN Vorn, WRI, EN 00970078.

³³⁴⁸ ICP's Final Submission, D378/2, para.101, fn 245.

³³⁴⁹ D118/137, CHHORN Vorn, WRI, A5, EN 00970080.

³³⁵⁰ D118/137, CHHORN Vorn, WRI, A5, EN 00970080; D219/237, CHHORN Vorn, A1, EN 01092935.

³³⁵¹ D219/505, CHHORN Vorn, WRI, A5-6, EN 01154853.

³³⁵² D118/137, CHHORN Vorn, WRI, A3, EN 00970079-80.

³³⁵³ D219/505, CHHORN Vorn, WRI, A17, EN 01154855.

³³⁵⁴ D118/137, CHHORN Vorn, WRI, A3, EN 00970079-80.

³³⁵⁵ D219/505, CHHORN Vorn, WRI, A1, EN 01154852.

was to drive Ta Nhim³³⁵⁶ to Phnum Den Mountain³³⁵⁷ at the Vietnamese border to get military uniforms.³³⁵⁸ He does not know even how many sectors there were in the Northwest Zone because he never drove Ta Nhim to visit sectors.³³⁵⁹ He said that he never saw any Sector or District Committee members coming to meet Ta Nhim because he was not his bodyguard, but he and his driver did not stay at this working location.³³⁶⁰ CHHORN Vorn then changed his evidence again and said that he did not know who governed some sectors in the Northwest Zone, because 'they did not allow me to go outside as I please. I was just responsible for inside his house.'³³⁶¹

1584. Considering CHHORN Vorn's contradictory evidence, his statement about the visits of 'Ta Tith' to Ta Nhim is not reliable. Taking into consideration CHHORN Vorn's evidence that for 3 years of work with Ta Nhim, he never found out the names of Northwest Zone cadres governing sectors and districts in the Northwest Zone (except Ta Pet who had position in the Zone and Sector, and Ta Vanh who was in charge of Sector 1³³⁶²) and he never saw any of those cadres visiting Ta Nhim in his office or house, it is very unlikely that the only person who he knew and saw visiting Ta Nhim was Mr YIM Tith. Furthermore, CHHORN Vorn's identification of Mr YIM Tith is unreliable. When asked by the investigator how he knew that the person visiting Ta Nhim was 'Ta Tit,' he explained that 'Ta Tit came to my place, and he frequently chatted with me and trusted me....He was fairly tall with a large face'³³⁶³, yet, CHHORN Vorn also said that did not know what 'Ta Tit' did in Battambang 'because he never told me' and, in direct contradiction to this explanation, he said that he did not see 'Ta Tit' anywhere else besides Ta Nhim's house.³³⁶⁴

1585. CHHORN Vorn's evidence that Mr YIM Tith visited Ta Nhim has no probative value.

1586. The ICP attempts to associate Mr YIM Tith with Northwest Zone cadre Ta Saman, referred to as an 'executioner,' based on the sole basis of CHHOEUNG Bean's evidence.

³³⁵⁶ D219/505, CHHORN Vorn, WRI, A9, EN 01154853.

³³⁵⁷ D219/505, CHHORN Vorn, WRI, A10-12, EN 01154854.

³³⁵⁸ D219/505, CHHORN Vorn, WRI, A7, EN 01154853.

³³⁵⁹ D219/505, CHHORN Vorn, WRI, A12, EN 01154854.

³³⁶⁰ D219/505, CHHORN Vorn, WRI, A20-A21, EN 01154855.

³³⁶¹ D219/505, CHHORN Vorn, WRI, A30, EN 01154857.

³³⁶² D118/137, CHHORN Vorn, WRI, A50-A51, EN 00970086.

³³⁶³ D118/137, CHHORN Vorn, WRI, A29-A30, EN 00970083.

³³⁶⁴ D118/137, CHHORN Vorn, WRI, A32-A34, EN 00970084.

As already argued above, CHHOEUNG Bean's evidence is not reliable and has no probative value.³³⁶⁵

1587. The ICP first claims that Ta Saman was described as an 'executioner' who was involved 'in mass killings and the harvesting of human gallbladders from prisoners.'³³⁶⁶ The ICP cherry-picks from CHHOEUNG Bean's evidence³³⁶⁷ and disregards his statements that he never saw Ta Saman personally kill anyone,³³⁶⁸ that he heard about this from 'a woman who served in the women's unit,'³³⁶⁹ that this event allegedly happened before Ta Vanh's arrest, during the time when, according to the witness, Ta Saman was militiamen chief.³³⁷⁰ CHHOEUNG Bean stated that 'Ta Tith' did not arrive in the Northwest Zone at time of this event,³³⁷¹ assuming *arguendo* that this event happened.

1588. Following this claim, the ICP states that Ta Saman provided Mr YIM Tith with information about the geography and organizational structure of the Northwest Zone, received orientation and guidance from Ta Saman, and again bases this claim on CHHOEUNG Bean's evidence. The ICP relies upon a part of A21 from CHHOEUNG Bean's statement, ignoring the last sentence of A21: 'I reached that conclusion because Ta Saman was alive until after 1979, whilst many of his colleagues had been taken to be killed.'³³⁷²

1589. The ICP also claims that Mr YIM Tith 'later promoted Ta Saman' and again relies on a collage of CHHOEUNG Bean's answers A31 and A35 from his statement D219/465,³³⁷³ skipping A32 in which CHHOEUNG Bean explained that he heard this information from Ta Yaun who 'whispered to me about these matters.'³³⁷⁴ In his analysis of evidence, the

³³⁶⁵ *Supra*, paras 1288 to 1296, 1410 to 1417 and 1461 to 1409.

³³⁶⁶ *ICP's Final Submission*, D378/2, para. 102.

³³⁶⁷ *ICP's Final Submission*, D378/2, para. 102, fn 246 and 247.

³³⁶⁸ D219/465, CHHOEUNG Bean, WRI, A24, EN 01139585.

³³⁶⁹ D219/430, CHHOEUNG Bean, WRI, A76-A77, EN 01128717-8.

³³⁷⁰ D219/430, CHHOEUNG Bean, WRI, A78, EN 01128718. This contradicts his statement that Ta Saman was Regiment Commander of a mobile unit comprising of more than 1000 workers, and that he was one of the tree men in charge of Kanghat Dam D219/368, CHHOEUNG Bean, WRI, Q/A1, EN 01117714—5; A70, EN 01117720.

³³⁷¹ D219/465, CHHOEUNG Bean, WRI, A22, EN 01139585.

³³⁷² D219/430, CHHOEUNG Bean, WRI, A21, EN 01128710-11.

³³⁷³ *ICP's Final Submission*, D378/2, para. 102, fn 249.

³³⁷⁴ D219/465, CHHOEUNG Bean, WRI, A32, EN 01139588.

ICP disregards the contradicting evidence that Ta Saman, who was ‘manager of decisive mobile unit,’ escaped to the forest when Southwest Zone cadres arrived.³³⁷⁵

1590. The ICP makes the sweeping claim that Mr YIM Tith ‘was well-acquainted with the living conditions of the population in the areas under his control’ and repeats evidence of NOP Ngim about so-called ‘large meetings,’ ‘discussion of demographic and economic information’³³⁷⁶ alleged ‘monthly written reports’ regarding the size of the population, the number of sick people, the availability and sufficiency of clothes and food, and occurrences of conflict within the population.³³⁷⁷ The reliability of NOP Ngim’s evidence is already argued in this Response in detail.³³⁷⁸ The Defence will only emphasize again that NOP Ngim was deputy secretary of Samlaut District in September 1978³³⁷⁹ and because she was illiterate, she was only assigned to inspect the work in communes of Samlaut District,³³⁸⁰ one of the three districts included in Sector 1.³³⁸¹ Assuming *arguendo* that NOP Ngim’s evidence is reliable, which it is not, her evidence in any case covers only one of the three districts in Sector 1 and only from September 1978 onwards.

1591. The ICP’s claim, based on NOP Ngim’s evidence, that Mr YIM Tith ‘regularly provided handwritten instructions to his subordinates in Samlaut District’³³⁸² and that he ‘instructed the Samlaut District authorities to build a new security office in the district in late 1978’ (which, according to the ICP demonstrate Mr YIM Tith’s ‘responsibilities in Sector 1’ including ‘oversight of security throughout the sector’)³³⁸³ is misleading.

1592. The ICP disregards NOP Ngim evidence that she was illiterate,³³⁸⁴ and that, when questioned by the investigator specifically about this issue of ‘written reports’ and her illiteracy, she did not confirm that she knew the alleged instructions were hand-written by ‘Ta Tith’³³⁸⁵ and that actually she heard from Bang Leng that they were about to construct a security office and she did not mention the letter as the source of he

³³⁷⁵ D219/538, SOEUN Mat, WRI, A20, EN 01173575-6.

³³⁷⁶ ICP’s Final Submission, D378/2, para. 103.

³³⁷⁷ ICP’s Final Submission, D378/2, para. 104.

³³⁷⁸ Supra, paras 1184 to 1187, 1297 to 1301, 1385 to 1393 and 1554 to 1559.

³³⁷⁹ D219/835, NOP Ngim, WRI, A72-A76, EN 01432957.

³³⁸⁰ D118/285, NOP Ngim, WRI, A36, EN 01044679.

³³⁸¹ ICP’s Final Submission, D378/2, para. 147.

³³⁸² ICP’s Final Submission, D378/2, para. 104.

³³⁸³ ICP’s Final Submission, D378/2, para. 107.

³³⁸⁴ D118/285, NOP Ngim, WRI, A36, EN 01044679.

³³⁸⁵ D118/285, Nop Ngim, WRI, A82, EN 01044688; D219/835, Nop Ngim, WRI, A134-A135, EN 01432967.

knowledge.³³⁸⁶ According to her understanding, this prison was meant to be built for the persons who robbed, plundered and alike³³⁸⁷, but it was never built, since they ‘ran away’ from the Vietnamese.³³⁸⁸

1593. The ICP claims that Mr YIM Tith ‘demonstrated and exercised his authority as the Sector 1 Secretary by presiding over meetings of cadres at which he discussed Party policies’ and relies on the evidence of only one witness, LEK Phiv. The ICP also claims that Mr YIM Tith ‘presided over meeting at Kangaht Dam worksite on a regular basis,’ which demonstrates that Mr YIM Tith has ‘authority over the entire sector’³³⁸⁹ and that Mr YIM Tith, together with Ta Mok and Ta Pet, spoke at the meeting convened at Wat Ta Moem.³³⁹⁰ For this sweeping claim, the ICP is again citing the evidence of the same witness, LEK Phiv.³³⁹¹ The complete lack of reliability of LEK Phiv’s evidence, specifically the parts of his evidence cited by the ICP here, is already argued in this Response in detail.³³⁹²

1594. The ICP also claims, based only on SOK Cheat’s evidence, that Mr YIM Tith demonstrated his ‘power’ over Sector 1 by addressing ‘a meeting attended by hundreds of cadres’ in Banan near the end of 1977.³³⁹³ The complete lack of reliability of SOK Cheat’s evidence is already argued in this Response,³³⁹⁴ especially the lack of reliable identification of Mr YIM Tith at this particular meeting.³³⁹⁵

1595. Based on the evidence of MOUL En, the ICP makes sweeping claim that Mr YIM Tith had ‘authority to make arrests and to resolve security problems in Sector 3,’³³⁹⁶ that he was in control of sector military,³³⁹⁷ that he ‘visited the secretary of Bavel District in Sector 3 to inspect the rice field and other crops, ensure that the district was following its plan, and give instructions regarding enemies,’³³⁹⁸ and that he ‘regularly communicated

³³⁸⁶ D219/835, Nop Ngim, WRI, A137, EN 01432967-8.

³³⁸⁷ D219/835, Nop Ngim, WRI, A138-A139, EN 01432968.

³³⁸⁸ D219/835, Nop Ngim, WRI, A137, EN 01432967-8.

³³⁸⁹ *ICP’s Final Submission*, D378/2, para. 105.

³³⁹⁰ *ICP’s Final Submission*, D378/2,

³³⁹¹ *ICP’s Final Submission*, D378/2, para. 105, fn 255 and 259.

³³⁹² *Supra*, paras 1264 to 1273 and 1495 to 1496.

³³⁹³ *ICP’s Final Submission*, D378/2, para. 105, fn 256 to 258.

³³⁹⁴ *Supra*, paras 1274 to 1281.

³³⁹⁵ *Supra*, para. 1277.

³³⁹⁶ *ICP’s Final Submission*, D378/2, para. 107.

³³⁹⁷ *ICP’s Final Submission*, D378/2, para. 107.

³³⁹⁸ *ICP’s Final Submission*, D378/2, para. 108.

with Bavel District Secretary through his messengers.³³⁹⁹ The Defence has already presented its analysis of MOUL En's evidence above.³⁴⁰⁰ He was appointed as a Secretary of Bavel District one month after Ta Nhim's arrest,³⁴⁰¹ and stayed in this position until December 1978,³⁴⁰² that 'Ta Tith' came for the first time in Bavel District in September or October 1978³⁴⁰³ and that he last saw 'Ta Tith' in November or early December 1979.³⁴⁰⁴

1596. The ICP also repeats his claim, based on HEM Moeun's uncorroborated hearsay evidence about an alleged meeting held in the rainy season of 1978,³⁴⁰⁵ that Mr YIM Tith 'exercised his authority as deputy zone secretary by summoning military leaders to meetings at Battambang University.'³⁴⁰⁶ The Defence's analysis of reliability of HEM Moeun's evidence about this alleged meeting is already argued in this Response,³⁴⁰⁷ and it will not be repeated here.

(d) Mr YIM Tith was Not Involved in Crimes in the Northwest Zone

(1) Mr YIM Tith was Not Involved in Purges in the Northwest Zone

- Mr YIM Tith did not send Southwest Zone cadres to take control over the Northwest Zone

1597. The ICP claims that 'thousands of Southwest Zone cadres, combatants and soldiers were sent by Ta Mok and YIM Tith to the Northwest Zone' to 'get rid of the Northwest Zone cadres' and take control over the Northwest Zone.³⁴⁰⁸ The ICP selectively relies on evidence of HEM Moeun, NOP Ngim, NHEM En, MOUL En and CHHORN Vorn. When carefully assessed, the evidence does not support the the ICP's claims.

³³⁹⁹ ICP's Final Submission, D378/2, para. 108.

³⁴⁰⁰ *Supra*, paras 1320 to 1324, 1430 to 1438 and 1484 to 1486.

³⁴⁰¹ D219/294, MOUL En, WRI, A36, EN 01111830; A43, A46, EN 01111831.

³⁴⁰² D219/294, MOUL En, WRI, A52, EN 01111832.

³⁴⁰³ D219/294, MOUL En, WRI, A47-A48, EN 01111831.

³⁴⁰⁴ D219/294, MOUL En, WRI, A99, EN 01111836-7.

³⁴⁰⁵ D118/222, HEM Moeun, WRI, A14, EN 00988134; A17, EN 00988135.

³⁴⁰⁶ ICP's Final Submission, D378/2, para. 109, fn 268.

³⁴⁰⁷ *Supra*, paras 1129 to 1134.

³⁴⁰⁸ ICP's Final Submission, D378/2, para. 324.

HEM Moeun's evidence about the alleged role of Mr YIM Tith in purges

1598. In support of his claim, the ICP cherry-picks from HEM Moeun's evidence and cites one sentence from one answer from one of his statements, in which where he said that 'Ta Tit brought his forces from Takeo with Ta Mok,'³⁴⁰⁹ and based on this one sentence the ICP implicates Mr YIM Tith in purges, which according to the ICP, started in mid-1977.³⁴¹⁰

1599. The ICP disregards the evidence of HEM Moeun seen in its totality. As presented above,³⁴¹¹ HEM Moeun was a soldier in the Southwest Zone army in Division 10,³⁴¹² and worked in Ta Mok's office,³⁴¹³ where Ta Mok sometimes treated him as a messenger and sometimes as his guard.³⁴¹⁴ HEM Moeun did not know 'Ta Tit' during the time when he worked in the Southwest Zone in Ta Mok's office,³⁴¹⁵ and he met 'Ta Tith' for the first time in Battambang at some point after the witness arrived there in the rainy season in 1978.³⁴¹⁶ Besides the fact that his identification of Mr YIM Tith is questionable,³⁴¹⁷ his evidence that 'Ta Tit brought his forces from Takeo with Ta Mok' is not reliable, when seen in view of the totality of his evidence. In addition, his claim that 'Ta Tith' allegedly 'brought' his 'forces' is not clear and is not supported by any other evidence in the Case File. He was never questioned by the investigator to clarify this statement.

1600. No other witness is cited by the ICP to support his claim that Mr YIM Tith was the person who sent them to the Northwest Zone. Contrary to the ICP's assertion stand the following witness evidence:

- NOP Ngim worked in Srae Ambel salt field situated in Kampot Province, Sector 35, Southwest Zone,³⁴¹⁸ until 1978 when she said Ta Mok sent her to the Northwest Zone.³⁴¹⁹

³⁴⁰⁹ ICP's Final Submission, D378/2, para. 324, fn 1052.

³⁴¹⁰ ICP's Final Submission, D378/2, para. 325.

³⁴¹¹ *Supra*, para. 1130.

³⁴¹² D118/150, HEM Moeun, WRI, A2, EN 00975006-7; A10, EN 00975008; D118/222, HEM Moeun, WRI, A26, EN 00988136.

³⁴¹³ D118/150, HEM Moeun, WRI, A6, EN 00975007.

³⁴¹⁴ D118/150, HEM Moeun, WRI, A7, EN 00975007.

³⁴¹⁵ D118/150, HEM Moeun, WRI, A63, A67, EN 00975015; A78, EN 00975017.

³⁴¹⁶ D118/222, HEM Moeun, WRI, A15-A17, EN 00988134-5.

³⁴¹⁷ *Supra*, para. 1130 to 1133.

³⁴¹⁸ D118/285, NOP Ngim, WRI, A2, EN 01044673-4, D219/298, NOP Ngim, WRI, A2, EN 01111858; D219/835, WRI, A4-A9, EN 01432947. *See also*: Maps D347/2.1.55 and D1.3.27.1.

³⁴¹⁹ D118/285, NOP Ngim, WRI, A8, EN 01044675; A28, EN 01044678; D219/835, NOP Ngim, WRI, A50-A53, EN 01432954.

- NHEM En lived in Kampong Chhnang in 1975 (when he was 14 years old³⁴²⁰), where he was a member of the Child Pioneer Unit.³⁴²¹ After this NHEM En worked in Office 870 and was then assigned to be photographer for the Tuol Sleng Office³⁴²² and, by Son Sen's approval, to other Zones.³⁴²³ He worked there from mid-1976 until the end of the Khmer Rouge regime,³⁴²⁴ and there he met the leaders of Zones and sectors and 'took photographs of all activities at the worksites, dam constructions, dike building, and activities in cooperative, including activities of national construction and national achievement.'³⁴²⁵ He stated that he heard of 'Ta Tith' but 'never knew him.'³⁴²⁶

- MOUL En was a soldier in Takeo Province, Sector 13, Southwest Zone, under the command of Ta Mok until the middle of 1977³⁴²⁷ when he was assigned to go to the Northwest Zone by Ta Mok.³⁴²⁸ He did not know Ta Tith while he was in the Southwest Zone and that he got to know him only after Ta Nhim's arrest³⁴²⁹ and the purges were stopped.³⁴³⁰

- CHHORN Vorn did not know what 'Ta Tith' did in the Northwest Zone, and according to his evidence, he saw 'Ta Tith' only when he allegedly visited Ta Nhim in his house.³⁴³¹

- Mr YIM Tith did not lead the purge campaign ordered by the Party Centre

1601. The ICP claims that Ta Mok and Mr YIM Tith 'led the purge campaign ordered by the Party Centre,' and in support of this claim he cherry-picks from several witness

³⁴²⁰ D119/124, NHEM En, WRI, EN 01055646.

³⁴²¹ D119/124, NHEM En, WRI, A1, EN 01055648.

³⁴²² D119/124, NHEM En, WRI, A6, EN 01055649.

³⁴²³ D119/124, NHEM En, WRI, A8, EN 01055649.

³⁴²⁴ D119/124, NHEM En, WRI, A9, EN 01055650.

³⁴²⁵ D119/124, NHEM En, WRI, A13, EN 01055650.

³⁴²⁶ D119/124, NHEM En, WRI, A39, EN 01055656.

³⁴²⁷ D219/294, MOUL En, WRI, A6-A8, EN 01111827-8; D219/900, MOUL En, WRI, A48, EN 01517477.

³⁴²⁸ D219/294, MOUL En, WRI, A15-A17, EN 01111828; A33, EN 01111830.

³⁴²⁹ D219/294, MOUL En, WRI, A30, EN 01111829.

³⁴³⁰ D219/900, MOUL En, WRI, A30-A39, EN 01517476-7. See also, D6.1.141, SAO Sarun, WRI, EN 00278694 and EN00278697; D118/259, PECH Chim, WRI, A188-A190, EN 01000689; D219/627, LOCH Eng, WRI, A18-A22, EN 01187741-2.

³⁴³¹ D118/137, CHHORN Vorn, WRI, A32-A36, EN 00970084. For witness credibility See Supra.

statements and cites the opinions, hearsay and unreliable evidence of several witnesses.³⁴³²

NHOEK Ly's Evidence Regarding the Purge Campaign Allegedly Ordered by the Party Centre

1602. In support of his claim, the ICP cites one answer (A4) from one WRI of NHOEK Ly, which states that in July 1978, Ta Nhim and several other Northwest Zone cadres were arrested by Ta Mok, 'Ta Tith' 'with a big head,' and other Southwest Zone cadres.³⁴³³ The ICP disregards the following evidence of NHOEK Ly in A5, which he explained that he did not meet 'Ta Tith,' and he heard this information from Ta Chong, a Southwest Zone cadre.³⁴³⁴ The investigator did not make further enquiries about the identity of Ta Chong. This statement from NHOEK Ly is unsubstantiated hearsay and has no probative value. An analysis of the reliability of NHOEK Ly's evidence is already presented in this Response³⁴³⁵, and it will not be repeated here.

NUON Muon's Evidence Regarding the Purge Campaign Allegedly Ordered by the Party Centre

1603. In support of his claim, the ICP also cites hearsay evidence from NUON Muon where he said that he 'heard' that 'Ta Mok and Ta Tith' arrested all the Northwest Zone cadre from Zone level down to Sector level and 'all the way through cooperative level' from which he further concluded, having been fed information by the investigator's questions that arrests were made under the authority of Ta Mok and Ta Tith.³⁴³⁶ NUON Muon never clarified from whom he heard this information. The ICP ignores the totality of the evidence of this witness. NUON Muon was a Northwest Zone cadre who was arrested in 1977 and sent to a Tuol Mtes 'tempering place'; he fled from Tuol Mtes to the forest in June or July 1977³⁴³⁷ and remained there until late 1978.³⁴³⁸ NUON Muon's evidence is a combination of unsubstantiated hearsay and the witness's opinions, and it has no probative value.

³⁴³² ICP's Final Submission, D378/2, para. 324, fn 1054.

³⁴³³ ICP's Final Submission, D378/2, para. 324, fn 1054.

³⁴³⁴ D118/86, NHOEK Ly, WRI, A5, EN 00976959.

³⁴³⁵ *Supra*, paras 1160 to 1165.

³⁴³⁶ ICP's Final Submission, D378/2, para. 324, fn 1054.

³⁴³⁷ *Supra*, para. 1144.

³⁴³⁸ D118/69, NUON Muon, WRI, A22, EN 00950728.

HAN Thy's Evidence Regarding the Purge Campaign Allegedly Ordered by the Party Centre

1604. In support of his claim, the ICP cherry-picks from HAN Thy's evidence and cites HAN Thy's explanation from one WRI about a meeting where 'Ta Tith' allegedly talked about the 'purge of traitorous cadres.'³⁴³⁹ The ICP ignores the totality of HAN Thy's evidence. HAN Thy was appointed as chief of Kantueu Commune after April 1975 by Ta Pet, who was, at the time, responsible for Sector 1.³⁴⁴⁰ He stayed in the same position until days before the Vietnamese arrived.³⁴⁴¹ The ICP cites HAN Thy's evidence about this meeting in support of his argument and ignores his evidence about 'Ta Tith' that is contradictory. HAN Thy stated that he did not know 'Ta Tith' and that he never met him³⁴⁴² but then stated that he attended a meeting in Battambang in 1978 immediately prior to the arrival of the Vietnamese. HAN Thy stated that many people attended this meeting and HAN Thy initially stated that out of all the participants present he only knew 'three of them – Ta Paet, Ta Nhoem and myself,'³⁴⁴³ only to change his statements two answers later and say that Ta Tith chaired Namthe meeting and talked about 'plans and resolved to attack Vietnam.'³⁴⁴⁴ When talking about this same meeting in his statement given to the ICP, HAN Thy stated that he saw Ta Tith for the first time at the end of 1978. Although he is not sure of the time, he stated that three days after this meeting the Vietnamese army arrived in Battambang.³⁴⁴⁵ HAN Thy repeated this in his statement to the ICJ.³⁴⁴⁶

1605. In accordance with the above, it is obvious that the evidence of HAN Thy is not relevant to purges and does not support the ICP's claim that Mr YIM Tith led the purge campaign.

³⁴³⁹ ICP's Final Submission, D378/2, para. 324, fn 1054.

³⁴⁴⁰ D1.3.11.55, HAN Thy, ICP statement, EN 00221577.

³⁴⁴¹ D1.3.11.55, HAN Thy, ICP statement, EN 00221584-5.

³⁴⁴² D105/8, HAN Thy, WRI, A9, EN 00803455.

³⁴⁴³ D105/8, HAN Thy, WRI, A13-A16, EN 00803456.

³⁴⁴⁴ D105/8, HAN Thy, WRI, A18, EN 00803456.

³⁴⁴⁵ D1.3.11.55, HAN Thy, ICP statement, EN 00221584-5, EN 00221587.

³⁴⁴⁶ D20, HAN Thy, WRI, EN 00710285-6.

SOK Cheat's Evidence Regarding the Purge Campaign Allegedly Ordered by the Party Centre

1606. In support of his claim, the ICP cites the opinion evidence of the witness SOK Cheat that 'it was notorious that after Ta Tith entered, many people disappeared.'³⁴⁴⁷ The ICP is disregarding the totality of SOK Cheat evidence, which shows that he is not a reliable witness and his evidence about Mr YIM Tith's acts and conducts has no probative value.³⁴⁴⁸

HEM Moeun's Evidence Regarding the Purge Campaign Allegedly Ordered by the Party Centre

1607. In support of his claim that Mr YIM Tith 'led the purge campaign ordered by the Party Centre,' the ICP cites the same sentence from HEM Moeun's one statement that he cited in support of his claim that Mr YIM Tith 'sent thousands of Southwest Zone cadres, combatants and soldiers' to the Northwest Zone.³⁴⁴⁹ As argued before, HEM Moeun's evidence is not reliable and has no probative value.³⁴⁵⁰

The Evidence of NHEM En, HUY Krim, VOR RUOM and CHHEAN Hea Regarding the Alleged Purge Campaign Ordered by the Party Centre

1608. In support of his claim that Mr YIM Tith 'led the purge campaign ordered by the Party Centre,' the ICP cites evidence of four witnesses, who in reality did not give evidence about Mr YIM Tith's alleged involvement in purges.

1609. NHEM En lived in Kampong Chhnang in 1975 (he was 14 years old³⁴⁵¹), where he was a member of the Child Pioneer Unit³⁴⁵² after which he worked in Office 870 and then assigned to be photographer for the Tuol Sleng Office³⁴⁵³ and, by Son Sen's approval, to other Zones³⁴⁵⁴ from mid-1976 until the end of the Khmer Rouge regime³⁴⁵⁵, where he met the leaders of Zones and sectors and 'took photographs of all activities at the

³⁴⁴⁷ ICP's Final Submission, D378/2, D378/2, para. 324, fn 1054.

³⁴⁴⁸ *Supra*, paras 1274 to 1281.

³⁴⁴⁹ ICP's Final Submission, D378/2, para. 324, fn 1052 and 1054.

³⁴⁵⁰ *Supra*, paras 1129 to 1134.

³⁴⁵¹ D119/124, NHEM En, WRI, EN 01055646.

³⁴⁵² D119/124, NHEM En, WRI, A1, EN 01055648.

³⁴⁵³ D119/124, NHEM En, WRI, A6, EN 01055649.

³⁴⁵⁴ D119/124, NHEM En, WRI, A8, EN 01055649.

³⁴⁵⁵ D119/124, NHEM En, WRI, A9, EN 01055650.

worksites, dam constructions, dike building, and activities in cooperative, including activities of national construction and national achievement³⁴⁵⁶ stated that he heard of ‘Ta Tith’ but ‘never knew him.’³⁴⁵⁷

1610. HUY Krim was evacuated from Phnom Penh after 17 April 1975 to the Northwest Zone, where he worked as an ordinary worker, first in Mreah Prov Cooperative, and then in Ream Kun, MOUNG RUSSEI District, Sector 4, where he stayed until May 1979 together with the Khmer Rouge.³⁴⁵⁸ He never saw ‘Ta Tith.’³⁴⁵⁹

1611. VOR Ruom was a soldier in Sangkae District until January 1976 when he was assigned to guard the Wat Kraom Prison.³⁴⁶⁰ He went back to his unit before the Southwest Zone cadres arrived in Sangkae District³⁴⁶¹ and closed the prison.³⁴⁶² He never saw Mr YIM Tith during the Khmer Rouge period³⁴⁶³ and he got to know him between 1979 and 1982 at the Thai border.³⁴⁶⁴

1612. CHHEAN Hea, was Ta Pet’s bodyguard and messenger from 17 April 1975³⁴⁶⁵ ‘until the Vietnamese almost arrived.’³⁴⁶⁶ He stated that he saw Ta Tith only once, before Ta Pet’s alleged arrest, when Ta Pet came to Ta Tith’s place for a meeting and stayed with him for an hour.³⁴⁶⁷ This meeting took place three to four months before the Vietnamese arrived.³⁴⁶⁸

Conclusion

1613. The evidence presented by the ICP does not support his claim that Mr YIM Tith lead the purge campaign ordered by the Party Centre.

³⁴⁵⁶ D119/124, NHEM En, WRI, A13, EN 01055650.

³⁴⁵⁷ D119/124, NHEM En, WRI, A39, EN 01055656.

³⁴⁵⁸ D118/75, HUY Krim, WRI, A1-A5, EN 00976613-4; A42, EN 00976620; A35, EN 00976619 Huy Krim confirmed that he was detained at Thomayuth Pagoda at the end of 1978.

³⁴⁵⁹ D118/75, HUY Krim, WRI, A25, EN 00976618. *See also supra* 118 to 1192.

³⁴⁶⁰ D219/751, VOR Ruom, A2, EN 01305918-9.

³⁴⁶¹ D219/751, VOR Ruom, A12, EN 01305920.

³⁴⁶² D219/751, VOR Ruom, A15, EN 01305921.

³⁴⁶³ D219/751, VOR Ruom, A45, EN 01305925.

³⁴⁶⁴ D219/944, VOR Ruom, A16, EN 01502646.

³⁴⁶⁵ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

³⁴⁶⁶ D118/136, CHHEAN Hea, WRI, A3, EN 00969637.

³⁴⁶⁷ D118/271, CHHEAN Hea, WRI, A25-A26, EN 01029420-1.

³⁴⁶⁸ D118/271, CHHEAN Hea, WRI, A24, EN 01029420.

- Mr YIM Tith did not ‘himself order the purge of specific groups of persons’

1614. The ICP claims that Mr YIM Tith ‘himself ordered the purge of specific groups of persons’ and in support of this claim he cherry-picks several answers of five witnesses, disregarding their evidence seen in its entirety.

CHHOEUNG Bean’s Evidence Regarding the Alleged Purge Orders

1615. In support of his claim ICP cites a collage of several answers from one WRI of CHHOEUNG Bean.³⁴⁶⁹ Regarding the alleged arrest of Ta Prum, the ICP cites A26-A28 and A34, but skips A31, where CHHOEUNG Bean stated that ‘Ta Tith’ was not in charge of Kanghat Dam at the time when Ta Prum was arrested.³⁴⁷⁰

1616. As argued before, CHHUONG Bean’s evidence about the time of Mr YIM Tith’s arrival in the Northeast Zone is unreliable³⁴⁷¹ and his evidence of ‘Ta Tith’s involvement in Ta Prum’s arrest has no probative value.³⁴⁷² Also, his evidence about that ‘Ta Tith’ alleged order to kill CHHUONG Bean’s unit chief and persons named Rim and Poch is uncorroborated hearsay evidence. CHHOUNG Bean said he found out about this alleged event from Bav whom he met ‘five or six years ago,’ before he gave the statement to the ICIJ (D219/368, WRI dated 17 June 2015), when he met Bav in Prey Svay Commune.³⁴⁷³ This part of the witness’s answer is conveniently skipped in the ICP’s citation of A144.³⁴⁷⁴

CHHAM Luy’s Evidence Regarding the Alleged Purge Orders

1617. In support of his claim, the ICP is cherry-picking answers from CHHAM Luy, ignoring the totality of his evidence. He cites A30, 33-34, 41-42, 45, 47-49, 58 from one of CHHAM Luy’s statements and claims that the witness stated that ‘YIM Tith, chief of Sector 1, ordered the killing of people’ and how Nim, direct subordinate of Yim Tith, arrested and beats and shot death around 50 people in field during night time.’³⁴⁷⁵ The ICP is cherry-picking from CHHAM Luy’s evidence, ignoring relevant answers regarding the

³⁴⁶⁹ ICP’s Final Submission, D378/2, para. 324, fn 1055.

³⁴⁷⁰ D219/368, Chhoeung Bean, WRI, A31, EN 01117717.

³⁴⁷¹ *Supra*, paras 1289 to 1296.

³⁴⁷² *Supra*, paras 1615 to 1616.

³⁴⁷³ D219/368, Chhoeung Bean, WRI, A141, EN 01117730.

³⁴⁷⁴ ICP’s Final Submission, D378/2, para. 324, fn 1055.

³⁴⁷⁵ ICP’s Final Submission, D378/2, para. 324, fn 1055.

timing of events he is describing and disregarding the totality of the evidence of this witness.

1618. CHHAM Luy was a Khmer Rouge soldier in Sector 1 in Pailin, who lived next to the Khmer-Thai border until 1978 when he escaped and came to Boh Khnor Village³⁴⁷⁶ in Banan District.³⁴⁷⁷ The Vietnamese arrived two or three months after he came to Boh Khnor Village.³⁴⁷⁸ Accordingly, his evidence about events in Boh Khnor Village covers the period from approximately October-November 1978.³⁴⁷⁹ He stated that he remembered that ‘Ta Tith’ from the Southwest Zone controlled Sector 1, and he explained that he heard this from the people who attended a meeting in the cooperative – he does not give the names of those people, he does not mention which cooperative he is talking about, and he never met ‘Ta Tith.’³⁴⁸⁰

1619. Consequently, CHHAM Luy’s statements about ‘Ta Tith’s’ involvement in killings in Boh Khnor Village are based on his own assumptions and on hearsay evidence. This evidence has no probative value. Also, his statement that Nim was ‘Ta Tith’s staff’ is not supported by any other evidence in the Case File.

CHHEAN Hea’s Evidence Regarding the Alleged Purge Orders

1620. In support of his claim, the ICP cites three answers from one of CHHEAN Hea’s WRIs, disregarding the totality of his evidence.³⁴⁸¹

1621. Source of CHHEAN Hea’s statements that ‘Ta Tith and Ta Nim came to stay at Kanghat dam’ and that ‘both of them arrested and killed many people from cooperatives in Sangkae District and Battambang District’ and that ‘he ordered to have my relatives arrested’ is not explored by the investigators. The reliability of these statements is undermined also by the fact that, as Ta Pet’s bodyguard and messenger,³⁴⁸² CHHEAN Hea had an interest in protecting his former superior, Ta Pet, who was, as a Secretary of Sector 1 and subordinate to the Secretary of the Northwest Zone (Ta Nhim), heavily

³⁴⁷⁶ D118/243, CHHAM Luy, A2-A4, EN 01029399-400.

³⁴⁷⁷ D219/263, CHHAM Luy, A26, EN 01097409.

³⁴⁷⁸ D118/243, CHHAM Luy, A6, EN 01029400.

³⁴⁷⁹ D219/263, CHHAM Luy, A32, EN 01097409.

³⁴⁸⁰ D118/243, CHHAM Luy, A10-A13, EN 01029401.

³⁴⁸¹ *ICP’s Final Submission*, D378/2, para. 324, fn 1055.

³⁴⁸² D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

involved in the purges in the Northwest Zone.³⁴⁸³ According to CHHEAN Hea, Ta Pet stayed in the Northwest Zone until at least November 1978.³⁴⁸⁴

1622. Also, the ICP ignores the evidence of this witness that he saw ‘Ta Tith’ only once, before Ta Pet’s alleged arrested, when Ta Pet came to Ta Tith’s place for a meeting and stayed with him for an hour,³⁴⁸⁵ and that this meeting took place three to four months before the Vietnamese arrived.³⁴⁸⁶

1623. CHHEAN Hea’s evidence about ‘Ta Tith’s’ alleged involvement in killings in Sector 1 is based on his own assumptions and has no probative value.

NANG Ny’s Evidence Regarding the Alleged Purge Orders

1624. In support of his claim, the ICP is cherry-picking from NANG Ny’s evidence and he cites two answers from his only WRI dated 23 June 2013.³⁴⁸⁷

1625. The ICP disregards the totality of the evidence of this witness. During the Khmer Rouge regime, NANG Ny was a mobile unit worker in Sector 1 and in 1977, before the Southwest Zone cadre arrived, he was sent to work at the Kanghat Dam.³⁴⁸⁸ He allegedly saw ‘Ta Tith’ for the first and only time³⁴⁸⁹ at the meeting in Baydamram three months before the Vietnamese arrived,³⁴⁹⁰ which dates this alleged meeting to approximately October 1978. NANG Ny assumes that ‘Ta Tith,’ Sector Committee, was at this meeting because he thought he held a microphone and made an announcement.³⁴⁹¹ The basis for his general statements and opinions about ‘Ta Tith’ was not explored by the investigator. As already argued in this Response, NANG Ny’s evidence about his alleged recognition of Mr YIM Tith, and the words assigned to him, have no probative value.

³⁴⁸³ ICP’s Final Submission, D378/2 paras 331 and 333, Supra

³⁴⁸⁴ D118/136, CHHEAN Hea, WRI, A20, EN 00969640-1. “Q: When you knew Ta Pet was arrested, how long did you escape to the cooperative before you fled into the jungle? A:20 I stayed at the cooperative of Sang Rang Village for two months before I escaped to Tradak Pong jungle; I stayed in the jungle for more than a month before the Vietnamese came in. The Vietnamese arrived in Battambang around February 1979.

³⁴⁸⁵ D118/271, CHHEAN Hea, WRI, A25-A26, EN 01029420-1.

³⁴⁸⁶ D118/271, CHHEAN Hea, WRI, A24, EN 01029420.

³⁴⁸⁷ ICP’s Final Submission, D378/2, para. 324, fn 1055. NB: This is one of the rare witnesses who was interviewed by the ICIJ only once.

³⁴⁸⁸ D118/77, NANG Ny, A1, EN 00970451.

³⁴⁸⁹ D118/77, NANG Ny, A29, EN 00970456.

³⁴⁹⁰ D118/77, NANG Ny, A25, EN 00970456.

³⁴⁹¹ D118/77, NANG Ny, A23-A24, EN 0097045-6.

1626. Consequently, NANG Ny's evidence does not support the ICP's claim that 'YIM Tith himself ordered the purges.'

SOK Cheat's Evidence Regarding the Alleged Purge Orders

1627. The ICP cites SOK Cheat's evidence in support of his claim that that Mr YIM Tith 'himself ordered the purge of specific groups of persons.'³⁴⁹² SOK Cheat's evidence is not relevant as it does not relate to purges.

- Claims of Mr YIM Tith's involvement in purges by the ICP in 'Mechanism of the purges' are unsupported by the evidence

1628. In paragraphs in the ICP's Final Submission under the title 'Mechanism of the purges,' the ICP is supporting his claims about Mr YIM Tith's alleged involvement in purges in the Northwest Zone in the same manner, and citing the same evidence from the same group of witnesses as in this one paragraph analysed by the defence and in the part of the ICP's Final Submission with the title 'YIM Tith's positions, acts and conducts.'³⁴⁹³ Defence already analysed this evidence in a detail.³⁴⁹⁴

- The ICP Disregards the Evidence in the Case File that Contradicts his Claim

1629. The ICP seeks to diminish Ta Nhim's involvement in purges by stating that 'until at latest late 1977, Ros Nhim regularly received S-21 confessions and he used these to identify and/or order the arrests of the persons denounced by the S-21 prisoners.'³⁴⁹⁵ The ICP is misstating the evidence in the Case File. Last Report about progress of purges send by Ta Nhim to 'respected Angkar 870' available in the Case File has a date 17 May 1978.³⁴⁹⁶

1630. ICP claims that Ta Mok received direct orders from POL Pot at the meeting in Phnom Penh to organize the transfer of Southwest Zone cadres to the Northwest Zone to deal with traitors and cites evidence of PECH Chim, PHY Phuon and NOP Ngim, but ignores their evidence about Mr YIM Tith's involvement, or lack of it, in this meeting and entire

³⁴⁹² ICP's Final Submission, D378/2, para. 324, fn 1055, citing D219/654, Sok Cheat alias Khom, WRI, A75, EN 01207519.

³⁴⁹³ ICP's Final Submission, D378/2, paras 324 to 332 and paras 45 to 109.

³⁴⁹⁴ *Supra*, paras 1075 to 1379.

³⁴⁹⁵ ICP's Final Submission, D378/2, para. 331.

³⁴⁹⁶ D1.3.27.4a, Report from Northwest Zone Secretary Nhim to Angkar 870, 17 May 1978; Internal enemies: EN 00183653.

campaign which led to the transfer of cadres and their acts and conducts in the Northwest Zone from middle of 1977 until the time purges stopped in the August of 1978.³⁴⁹⁷

1631. The ICP disregards evidence contradicting his claim:

- PECH Chim who testified in length about this meeting in Phnom Penh where Ta Mok allegedly received the orders for purges³⁴⁹⁸, that he knew 'Ta Tith' at the time, but he did not know when he was transferred in Battambang,³⁴⁹⁹ that he did not hear that 'Ta Tith' replaced Ta Mok when Ta Mok was on mission to other zones because Ta Mok did not have a habit of assigning someone to replace him³⁵⁰⁰ 'Ta Tith' did not join in organising the transfer because he was far away from Takeo Town³⁵⁰¹ and he did not know what was 'Ta Tith's' position when he transferred to the Northwest Zone,³⁵⁰²

- NOP Ngim worked at the Srea Ambel salt field situated in Kampot Province, Sector 35, Southwest Zone.³⁵⁰³ She was sent to Samlaut District in the Northwest Zone in early 1978³⁵⁰⁴ by Ta Mok,³⁵⁰⁵ and who first time saw Ta Tith in the Northwest Zone in August 1978.³⁵⁰⁶

- IM Chaem who was, according to her own statement, Ta Mok's trusted and close aid,³⁵⁰⁷ who in mid-1977 led the group of Southwest Zone cadre to the Northwest Zone³⁵⁰⁸ and was present at the meeting with POL Pot when they

³⁴⁹⁷ D118/259, PECH Chim, WRI, A188-A190, EN 01000689. See also, D219/294, MOUL En, WRI, A68, EN 01111833-4; D6.1.141, SAO Sarun, WRI, EN 00278694 and EN00278697; D219/627, LOCH Eng, WRI, A18-A22, EN 01187741-2.

³⁴⁹⁸ D6.1.650, D6.1.651, D6.1.652, D6.1.653, D6.1.690, D117/18, D118/79, D118/259, PECH Chim, WRIs. D267.1.80, D315.1.19, D219/702.1.99, D219/702.1.101 and D219/702.1.103, Case 002, PECH Chim, Transcripts of Trial Proceedings.

³⁴⁹⁹ D118/259, PECH Chim, WRI, A128-A130, EN 01000682.

³⁵⁰⁰ D118/259, PECH Chim, WRI, A142, EN 01000684.

³⁵⁰¹ D118/259, PECH Chim, WRI, A150, EN 01000684-5.

³⁵⁰² D118/259, PECH Chim, WRI, A151, EN 01000685.

³⁵⁰³ D118/285, NOP Ngim, WRI, A2, EN 01044673-4, D219/298, NOP Ngim, WRI, A2, EN 01111858; D219/835, NOP Ngim, WRI, A4-A9, EN 01432947. See also: Maps D347/2.1.55 and D1.3.27.1.

³⁵⁰⁴ D118/285, NOP Ngim, WRI, A8, EN 01044675; A28, EN 01044678.

³⁵⁰⁵ D118/285, NOP Ngim, WRI, A8, EN 01044675; A28, EN 01044678; D219/835, NOP Ngim, WRI, A50-A53, EN 01432954.

³⁵⁰⁶ D219/298, NOP Ngim, WRI, A33, EN 01111863; D219/835, NOP Ngim, WRI, A69-A70, EN 01432956-7.

³⁵⁰⁷ D119/124, Nhem En, WRI, A22, EN 01055652; A35, EN 01055655; A38, EN 01055656, D219/294, Muol Eng, WRI, A63 and A65, EN 01111833; D123/ 1/5.1b, IM Chaem, DC-Cam Transcript of Interview, EN 00951812.

³⁵⁰⁸ D123/ 1/5.1b, IM Chaem, DC-Cam Transcript of interview, EN 00951798-9; D123/ 1/5.1c, IM Chaem, DC-Cam Transcript of interview, EN 00951852; D219/264.1, IM Chaem, Transcript of Interview of IM Chaem by Youth for Peace.

stopped in Phnom Penh before reaching Northwest Zone³⁵⁰⁹ never mentioned Mr YIM Tith in the context of purges.³⁵¹⁰

- MOUL En who was a soldier in Takeo Province, Sector 13, Southwest Zone, under the command of Ta Mok until the middle of 1977³⁵¹¹ when he was assigned to go to Northwest Zone by Ta Mok.³⁵¹² MOUL En states that he did not know 'Ta Tith' while he was in the Southwest Zone and that he got to know him only after Ta Nhim's arrest³⁵¹³ and the purges were stopped³⁵¹⁴.

- PHY Phuon, who worked in Foreign Ministry from 1975³⁵¹⁵ and whose task was 'to bring delegations from various countries to visit different zones'³⁵¹⁶ and who, through his work, knew 'almost all of the people through the zones in Cambodia at the time'³⁵¹⁷ never mentioned Mr YIM Tith in the context of purges or for that matter in any other context;

Conclusion

1632. The ICP claims that Mr YIM Tith was involved in the Northwest purges – in whatever capacity – is without foundation and is not supported by any evidence meriting consideration or weight. The ICP's thesis that 'Ta Mok and YIM Tith managed to entirely sweep clean and take charge of the Northwest Zone,'³⁵¹⁸ that 'Ta Mok and YIM Tith largely controlled the Northwest Zone,'³⁵¹⁹ that 'Ta Mok and YIM Tith exercised influence and control over Ros Nhim and his deputies,'³⁵²⁰ that 'YIM Tith and Ta Mok assessed the progress of purging enemies burrowing inside'³⁵²¹, that arrests were mostly carried out 'by Southwest Zone soldiers under the supervision of Ta Mok and YIM

³⁵⁰⁹ D119/65, TUM Soeun, WRI, A47 and A50, EN 00966784-5; D219/37, SUON Mot, WRI, A33, EN 01053617.

³⁵¹⁰ D123/1/5.1a, D123/1/5.1b and D123/1/5.1c, IM Chaem, DC-Cam Transcripts of interviews; D1.3.12.1, IM Chaem, Interview by Smiling Toad Production. D219/264.1, IM Chaem, Transcript of Interview of IM Chaem by Youth for Peace.

³⁵¹¹ D219/294, MOUL En, WRI, A6-A8, EN 01111827-8; D219/900, MOUL En, WRI, A48, EN 01517477.

³⁵¹² D219/294, MOUL En, WRI, A15-A17, EN 01111828; A33, EN 01111830.

³⁵¹³ D219/294, MOUL En, WRI, A30, EN 01111829.

³⁵¹⁴ D219/900, MOUL En, WRI, A30-A39, EN 01517476-7. See also, D6.1.141, SAO Sarun, WRI, EN 00278694 and EN00278697; D118/259, PECH Chim, WRI, A188-A190, EN 01000689; D219/627, LOCH Eng, WRI, A18-A22, EN 01187741-2.

³⁵¹⁵ D6.1.1074, PHY Phuon, WRI, EN 00223583.

³⁵¹⁶ D119/68, PHY Phuon, WRI, A3, EN 00975045.

³⁵¹⁷ D119/68, PHY Phuon, WRI, A4, EN 00975045-6.

³⁵¹⁸ *ICP's Final Submission*, D378/2, para. 325.

³⁵¹⁹ *ICP's Final Submission*, D378/2, para. 328.

³⁵²⁰ *ICP's Final Submission*, D378/2, para. 329.

³⁵²¹ *ICP's Final Submission*, D378/2, para. 329.

Tith³⁵²² is hollow. Nothing that the ICP relies on shows a connection between Ta Mok and Mr Yim Tith in connection to any crimes, let alone purges: there are no orders, reports, telegrams or exchanges between Ta Mok and Mr YIM Tith. As he did in the Southwest Zone,³⁵²³ the ICP seeks to implicate Mr YIM Tith with the purges in Northwest Zone, and indeed claims that he is one of the most responsible for the tragic events during the DK period because he was married to Ta Mok's sister. This exemplifies 'guilt by association,' or worst yet, guilt by relations.

(2) Mr YIM Tith was Not Involved in Crimes in Koas Krala Security Centre

1633. The ICP claims that Mr YIM Tith is criminally responsible for the charged crimes at the Koas Krala Security Centre as a result of his 'influence over officials in Koas Krala District even prior to the arrival of Southwest Zone cadres and the establishment of the security centre' and his alleged position as Secretary of Sector 1, and the basis for his claim is the evidence of witnesses SAO Chobb and LEK Phiv.³⁵²⁴

1634. As already argued in the Response, the ICP did not present sufficient evidence that Mr YIM Tith had influence over officials in Koas Krala District prior to the arrival of Southwest Zone cadres in the Northwest Zone in mid-1977,³⁵²⁵ nor that Mr YIM Tith held the position of Secretary of Sector 1 in any *de jure* or *de facto* capacity.³⁵²⁶ The evidence of SAO Chobb³⁵²⁷ and LEK Phiv³⁵²⁸ has no probative value.

1635. The ICP does not present any evidence that Mr YIM Tith received any orders from a higher echelon, that he disseminated or implemented those orders in Koas Krala District or Koas Krala security center, that he issued orders to the Koas Krala District Committee or the Koas Krala security centre concerning extermination, imprisonment and persecution through murder, extermination and imprisonment. The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in

³⁵²² ICP's Final Submission, D378/2, para. 331.

³⁵²³ *Supra*, paras 951 to 981.

³⁵²⁴ ICP's Final Submission, D378/2, paras 381 to 391.

³⁵²⁵ *Supra*, paras 1076 to 1125.

³⁵²⁶ *Supra*, paras 1237 to 1310.

³⁵²⁷ *Supra*, paras 1076 to 1125.

³⁵²⁸ *Supra*, paras 1264 to 1273 and 1495 to 1496.

activities in Koas Krala security centre during its operation from the beginning of 1978 until the end of the regime³⁵²⁹ and during the temporal scope of the investigation.³⁵³⁰

1636. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Koas Krala security center staff, that he planned, ordered, instigated, and committed charged crimes at the Koas Krala security centre.³⁵³¹

(3) Mr YIM Tith was not involved in crimes in Thipakdei cooperative

1637. The ICP claims that Mr YIM Tith is criminally responsible for the charged crimes at the Thipakdei cooperative as a result of his ‘influence and power over officials in Koas Krala District even prior to the arrival of Southwest Zone cadres,’ which includes inspecting cooperatives, and relies on evidence of SAO Chobb, LEK Phiv and SOK Cheat.³⁵³²

1638. As already argued in this Response, the evidence of SAO Chobb³⁵³³, LEK Phiv³⁵³⁴ and SOK Cheat³⁵³⁵ has no probative value.

1639. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Koas Krala District or Thipakdei cooperative, that he issued orders to Koas Krala District Committee or Thipakdei cooperative concerning enslavement, imprisonment, torture, persecution through murder, extermination, enslavement, imprisonment, torture and other inhuman acts (confinement/working in inhumane conditions). ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Thipakdei cooperative during its operation³⁵³⁶ or during the temporal scope of investigation.³⁵³⁷

³⁵²⁹ ICP's Final Submission, D378/2, para. 384.

³⁵³⁰ *Supra*, paras 436 to 446.

³⁵³¹ Notification of Amended Charges, D350.1, p. 7, para. 9, Crime Site 7: Koas Krala security centre.

³⁵³² ICP's Final Submission, D378/2, paras 405 to 416.

³⁵³³ *Supra*, paras 1076 to 1125.

³⁵³⁴ *Supra*, paras 1264 to 1273 and 1495 to 1496.

³⁵³⁵ *Supra*, paras 1274 to 1281.

³⁵³⁶ ICP's Final Submission, D378/2, paras 408 to 410.

³⁵³⁷ *Supra*, paras 436 to 446.

1640. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Thipakdei cooperative staff, that he planned, ordered, instigated, and committed charged crimes at the Thipakdei cooperative.³⁵³⁸

(4) Mr YIM Tith was Not Involved in Crimes in Kanghat Dam Worksite

1641. The ICP claims that Mr YIM Tith is criminally responsible for the charged crimes at the Kanghat Dam worksite as a result of his ‘influence and power over officials at that site before and after he was formally appointed Sector 1 Secretary,’ that ‘he worked with Northwest Zone cadres on the Sector 1 Committee before they were arrested, imprisoned, and/or killed,’ he chose the Northwest Zone cadres to be in charge at dam site,’ that he, ‘as early as 1976,’ ‘was at the dam site lecturing to Northwest Zone soldiers and providing a guided tour of the worksite to showcase what was and what was not working in accordance with CPK plans,’ ‘he instructed officials to defend against internal enemies and encouraged labors to work hard despite the patently inhumane conditions under which they labored’ and that from mid-1977 ‘arrests and disappearances of people coincide with Yim Tith’s visits to the site.’³⁵³⁹

1642. As already argued in this Response, the ICP did not present sufficient evidence that Mr YIM Tith held the position of Secretary of Sector 1 in a *de jure* or *de facto* capacity.³⁵⁴⁰

- Mr YIM Tith did not exercise influence and power over officials at Kanghat Dam

1643. In support of his claim that Mr YIM Tith exercised influence and power over officials at the Kanghat Dam and that he worked with Sector 1 Secretary Ta Vanh, Ta Vanh’s deputy Ta Prum, and Ta Vanh’s replacement Ta Pet before they were removed from their posts, the ICP cites an OCIJ S-21 Prisoner List, where ‘Chea Huon alias Vanh’ was noted under the Number 913, and then adds evidence of several witnesses who are contradicting his claim and do not mention Mr YIM Tith’s name in this context.³⁵⁴¹ It should be obvious, even to the ICP, that his claim has no support in evidence.

³⁵³⁸ *Notification of Amended Charges*, D350.1, p. 7, para. 9, Crime Site 9: Thipakdei cooperative (including at Wat Thipakdei security centre and Tuol Mtes security centre and worksite).

³⁵³⁹ *ICP’s Final Submission*, D378/2, paras 442 to 456.

³⁵⁴⁰ *Supra*, paras 1237 to 1310.

³⁵⁴¹ *ICP’s Final Submission*, D378/2, para.448, fn 1561.

1644. In addition, the ICP states that ‘that one worker stated that Yim Tith was more senior than Ta Vanh because Yim Tith was introduced as deputy secretary of the Northwest Zone at the meeting led by both cadres near Kanghat Dam’ and cites evidence of NOM Phoun, a Civil Party Applicant.³⁵⁴² As already argued in this Response,³⁵⁴³ NOM Phoun actually never saw or knew Mr YIM Tith – he mixed-up ‘Ta Tith’ with Ta Pet. He stated that ‘he saw Ta Tith who was called Ta Pet’³⁵⁴⁴ and that ‘Ta Tith was a well-built man with curly hair.’³⁵⁴⁵

1645. The ICP makes a broad statement that ‘witnesses who had been Northwest Zone cadres or had worked closely with CPK Leaders provided evidence to the ICIJ’s investigators that after Ta Pet replaced Ta Vanh at the worksite in 1977, Mr Yim Tith held similar power to Ta Pet or moreover those at the site’³⁵⁴⁶, and then refers to the evidence of witnesses:

- SAO Chobb, who was a member of Unit 22, Division 3, battalion 2³⁵⁴⁷ under the command of Koas Krala District,³⁵⁴⁸ and who after the arrival of Southwest Zone cadres in mid-1977 was no longer a soldier,—was assigned to do farming.³⁵⁴⁹ He stated that at the time he was a soldier, Ta Vanh was a Secretary of Sector 1,³⁵⁵⁰ and that ‘Ta Tith,’ Ta Pet and Ta Sou were cadres who ‘supervised [the] lathing unit’ in Kanghat Dam.³⁵⁵¹
- CHHEAN Hea, who was, according to his evidence, Ta Pet’s bodyguard and messenger from 17 April 1975³⁵⁵² until the Vietnamese had almost arrived,³⁵⁵³ who saw ‘Ta Tith’ only once,³⁵⁵⁴ three to four months before the Vietnamese arrived,³⁵⁵⁵ and who admitted that at the relevant time, he was too young to understand what

³⁵⁴² *ICP’s Final Submission*, D378/2, para.448, fn 1562.

³⁵⁴³ *Supra*, paras 1197 to 1204.

³⁵⁴⁴ D219/268, NOM Phuon, WRI, A45, EN 01098485.

³⁵⁴⁵ D219/268, NOM Phuon, WRI, A47, EN 01098485.

³⁵⁴⁶ *ICP’s Final Submission*, D378/2, para. 449.

³⁵⁴⁷ D219/763, SAO Chobb, WRI, A7-A17, EN 01337018-9.

³⁵⁴⁸ D219/763, SAO Chobb, WRI, A27-A28, EN 01337020-1.

³⁵⁴⁹ D219/763, SAO Chobb, WRI, A35-A38, EN 01337022.

³⁵⁵⁰ D219/956, SAO Chobb, WRI, A28-A30, EN 01456266.

³⁵⁵¹ D219/763, SAO Chobb, WRI, A49-A52, EN 01337023-4.

³⁵⁵² D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

³⁵⁵³ D118/136, CHHEAN Hea, WRI, A3, EN 00969637.

³⁵⁵⁴ D118/271, CHHEAN Hea, WRI, A25-A26, EN 01029420-1.

³⁵⁵⁵ D118/271, CHHEAN Hea, WRI, A24, EN 01029420.

positions Ta Nhim and Ta Keu held,³⁵⁵⁶ regardless of the fact that he worked for Ta Pet since 1975; and

- CHHOEUNG Bean, who was 15 years old when the Khmer Rouge took power in 1975,³⁵⁵⁷ who was a mobile worker,³⁵⁵⁸ who learned relevant information he gave to the ICIJ from other people, mostly after the fall of the DK regime from people who, according to the witness are now dead or he does not know where they are.³⁵⁵⁹

The ICP tries to give more significance to the witnesses he is relying on than they deserve. The probative value of SAO Chobb's, CHHEAN Hea's and CHHOEUNG Bean's evidence is discussed at length in this Response,³⁵⁶⁰ and it will not be repeated here.

1646. The ICP correctly noted the evidence of VY Phann that 'in 1978, Ta Pet publicly announced' that 'Ta Tith, who was from the Southwest Zone, had come to help govern Sector 1'³⁵⁶¹ but failed to emphasize that this announcement, according to VY Phan, was made in November 1978³⁵⁶², less than two months before the fall of the DK regime. In comparison with this evidence, the ICP claims, based only on the late Ta Pet's out-of-court interviews from 1990³⁵⁶³, that at unknown dates after the arrest of Ta Nhim, subsequent to June 1978, Mr YIM Tith became *de jure* secretary of Sector 1 and Ta Pet was officially Mr YIM Tith's deputy,³⁵⁶⁴ has no merit.

³⁵⁵⁶ D118/271, CHHEAN Hea, WRI, A44-A45, EN 01029424.

³⁵⁵⁷ D219/368, CHHOEUNG Bean, WRI EN 01117714.

³⁵⁵⁸ D219/368, CHHOEUNG Bean, WRI, Q/A1, EN 01117714-5; A6-A7, EN 01117715-6; D219/430, CHHOEUNG Bean, A1, EN 01128708.

³⁵⁵⁹ D219/430, CHHOEUNG Bean, A28, EN 01128711-2; A30, A32, EN 01128712; A59, EN 01128715-6; A77, A79, EN 01128718; A80, EN 01128718-9; A117, EN 01128723; D219/465, CHHOEUNG Bean, A16, EN 01139583-4; A32, EN 01139588; A38, EN 01139589-90; A40, EN 01139590-1; A47, EN 01139593; A61, EN 01139597; D219/533, CHHOEUNG Bean, A69, EN 01178481; A76-A81, EN 01178482-3 ('forced' marriage); A93-A96, EN 01178485; A99, EN 01178486; A109-A111, EN 01178488; A113, EN 01178489; A129-A131, EN 01178492; A133-A137, EN 01178493-4; A148, EN 01178497; A156, EN 01178499; A172, EN 01178502; A201, EN 01178506; A217, EN 01178509;

³⁵⁶⁰ *Supra*, paras 1076 to 1125, 1135 to 1142, 1262, 1487 to 1488, 1288 to 1296, 1410 to 1417, 1461 to 1462 and 1615 to 1616.

³⁵⁶¹ *ICP's Final Submission*, D378/2, para. 450, fn 1572.

³⁵⁶² D219/85, VY Phann, WRI, A3, EN 01061168-9. See also *Supra*...

³⁵⁶³ *Supra*, paras 1238 to 1252.

³⁵⁶⁴ *ICP's Final Submission*, D378/2, para. 451.

- Mr YIM Tith did not lead meetings at or near Kanghat Dam about CPK's perceived enemies

1647. The ICP claims that 'from approximately 1976' Mr YIM Tith 'led meetings at the forced labour site or near it about the CPK's perceived enemies and instructed attendees on what actions to undertake.'³⁵⁶⁵ In support of this claim the ICP cites evidence of:

- SAO Chobb, who never positively identify Mr YIM Tith, and whose evidence concerns events before Southwest Zone cadre arrived in the Northwest Zone in mid-1977,³⁵⁶⁶ and evidence of TOP Seung who allegedly saw 'Ta Tith' at the Kanghat Dam for the first time in 'the middle of 1978,' few months before the Vietnamese arrived,³⁵⁶⁷
- VY Phann who for the first time saw 'Ta Tith' in November 1978,³⁵⁶⁸ and
- CHHOENG Chhoeuth who talked about the meeting held late during the DK period west of Kangchrong Village, 'under the mango trees,'³⁵⁶⁹ not at Kanghat Dam, and who did not see Ta Tith with his own eyes because he was sitting at the back,³⁵⁷⁰ he could not describe his face,³⁵⁷¹ and he 'could not listen to his voice clearly as there were too many people. I heard people calling him *Ta*.'³⁵⁷²

1648. The ICP fails to present any evidence about Mr YIM Tith's alleged involvement in Kanghat Dam from mid-1977 until late 1978.³⁵⁷³

Mr YIM Tith did not lead meetings at or near Kanghat Dam regarding agricultural and construction work 'in pursuit of CPK goals'

1649. The ICP is also claiming that 'from about 1976' Mr YIM Tith was 'leading meetings regarding agricultural and construction work, emphasizing the need to work hard and to

³⁵⁶⁵ ICP's Final Submission, D378/2, para. 452.

³⁵⁶⁶ *Supra*, paras 1076 to 1125.

³⁵⁶⁷ D219/117, TOP Seung, WRI, A68, EN 01067707; A85, EN 01067710.

³⁵⁶⁸ D219/85, VY Phann, WRI, A3, EN 01061168-9.

³⁵⁶⁹ D219/953, CHHOENG Chhoeuth WRI, A16, EN 01451712; A65-A66, EN 01451717.

³⁵⁷⁰ D219/953, CHHOENG Chhoeuth WRI, A69, EN 01451717.

³⁵⁷¹ D219/953, CHHOENG Chhoeuth WRI, A79, EN 01451718.

³⁵⁷² D219/953, CHHOENG Chhoeuth WRI, A69, EN 01451717.

³⁵⁷³ *Supra*, paras 436 to 446.

cooperate in pursuit of CPK goals.’ In support of this claim the ICP again relies on the evidence of:

- SAO Chobb, who never positively identified Mr YIM Tith, and whose evidence concerns events before Southwest Zone cadre arrived in the Northwest Zone in mid-1977;³⁵⁷⁴
- SORM Vanna who had heard ‘Ta Tith’s’ name, but she never saw him,³⁵⁷⁵ did not know his position,³⁵⁷⁶ never saw ‘Ta Tith’ participate in meetings at Kanghat Dam.³⁵⁷⁷ She said that ‘Ta Tith’ never came to the worksite at which she worked³⁵⁷⁸ and did not know who the worksite chairperson was at Kanghat Dam;³⁵⁷⁹
- TOP Seung who allegedly saw ‘Ta Tith’ at the Kanghat Dam for the first time in ‘the middle of 1978,’ a few months before the Vietnamese arrived;³⁵⁸⁰ and
- CHHEUN Chhuoy who, as a member of a mobile unit worked at Kanghat Dam for three months in early 1977, following which he worked in Kantueu Commune until the end of DK regime,³⁵⁸¹ is not sure in which Sector he worked, he only remembers that it was in the Northwest Zone.³⁵⁸² He stated that ‘Ta Tith’ arrived in his area ‘in late 1978 in the cold season – in November or December 1978.’³⁵⁸³

1650. The ICP fails to present any evidence about Mr YIM Tith’s alleged involvement in Kanghat Dam from mid-1977 until late 1978.

Mr YIM Tith did not ‘inspect’ Kanghat Dam ‘on countless occasions’

1651. The ICP claims that Mr YIM Tith ‘inspected’ Kanghat Dam on ‘countless occasions, sometimes in the company of Ta Mok, Ta Pet and Ta Vanh.’ In the support of this claim the ICP cites evidence of:

³⁵⁷⁴ *Supra*, paras 1076 to 1125.

³⁵⁷⁵ D219/46, SORM Vanna, WRI, A38-A40, EN 01050674.

³⁵⁷⁶ D219/46, SORM Vanna, WRI, A41, EN 01050674.

³⁵⁷⁷ D219/46, SORM Vanna, WRI, A31-A37 EN 01050673; A47, EN 01050675.

³⁵⁷⁸ D219/46, SORM Vanna, WRI, A42, EN 01050674.

³⁵⁷⁹ D219/46, SORM Vanna, WRI, A45, EN 01050675.

³⁵⁸⁰ D219/117, TOP Seung, WRI, A68, EN 01067707; A85, EN 01067710.

³⁵⁸¹ D219/515, CHHEUN Chhuoy, WRI, A4-6, EN 01156938, A10, EN 01156939, A51, EN 01156948.

³⁵⁸² D219/515, CHHEUN Chhuoy, WRI, A3, EN 01156937-8.

³⁵⁸³ D219/515, CHHEUN Chhuoy, WRI, A27, EN 01156943. See also *Supra*.

- CHHOEUNG Bean who was 15 years old when the Khmer Rouge took power in 1975,³⁵⁸⁴ who was a mobile worker³⁵⁸⁵ and whose evidence about 'Ta Tith's' first appearance in Kanghat Dam is contradictory and confusing, ranging from July or August 1977 when according to this witness 'Ta Tith' replaced Ta Pet,³⁵⁸⁶ late 1977 or early 1978 when according to this witness 'Ta Tith' replaced Ta Vanh and visited Kanghat Dam,³⁵⁸⁷ and September 1978;³⁵⁸⁸
- TOP Seung who allegedly saw 'Ta Tith' at the Kanghat Dam for the first time in 'the middle of 1978,' a few months before the Vietnamese arrived;³⁵⁸⁹
- HAM Saom who worked at Kanghat Dam³⁵⁹⁰, allegedly saw 'Ta Tith' in late 1978³⁵⁹¹ at two Sangkae District level meetings where 'Ta Tith' was present or chaired meetings at which they only talked about farming³⁵⁹² and who did not state that he saw Ta Tith at Kanghat Dam;
- NHEM Hean who was 13 or 14 years old in 1975,³⁵⁹³ was sent from the Southwest Zone to the Northwest Zone in late 1977 and worked at Kanghat Dam as a member of the children's unit,³⁵⁹⁴ does not know who assigned him to work at Kanghat Dam³⁵⁹⁵ did not know Mr YIM Tith's position at the time,³⁵⁹⁶ was never present at any meetings with Mr YIM Tith - only attended meetings with the children's chiefs,³⁵⁹⁷ stated that Kanghat Dam was under the supervision of the Northwest Zone Cadre³⁵⁹⁸ saw Mr YIM Tith once in a while visiting NHEM Hean's group of 20 children;³⁵⁹⁹ and

³⁵⁸⁴ D219/368, CHHOEUNG Bean, WRI EN 01117714.

³⁵⁸⁵ D219/368, CHHOEUNG Bean, WRI, Q/A1, EN 01117714-5, A6-A7, EN 01117715-6; D219/430, CHHOEUNG Bean, A1, EN 01128708.

³⁵⁸⁶ D219/368, CHHOEUNG Bean, WRI, A40-A41, EN 01117718.

³⁵⁸⁷ D219/368, CHHOEUNG Bean, WRI, A14-A17, EN 01117716.

³⁵⁸⁸ D219/368, CHHOEUNG Bean, WRI, A36, EN 011177118; D219/430, CHHOEUNG Bean, A128, EN 01128724.

³⁵⁸⁹ D219/117, TOP Seung, WRI, A68, EN 01067707; A85, EN 01067710.

³⁵⁹⁰ D118/149, HAM Saom, WRI, A5-A7, EN 00974994.

³⁵⁹¹ D118/149, HAM Saom, WRI, A15-A16, EN 00974995.

³⁵⁹² D118/149, HAM Saom, WRI, A17-A27, EN 00974995-6; A62 EN 00975000.

³⁵⁹³ D219/928, NHEM Hean, WRI, A5, A7, EN 01451498.

³⁵⁹⁴ D219/928, NHEM Hean, WRI, A5-A9, EN 01451498;

³⁵⁹⁵ D219/928, NHEM Hean, WRI, A13, EN 01451498; A88-A89, EN 01451504-5.

³⁵⁹⁶ D219/928, NHEM Hean, WRI, A84-A89, EN 01451504-5.

³⁵⁹⁷ D219/928, NHEM Hean, WRI, A69, EN 01451503.

³⁵⁹⁸ D219/928, NHEM Hean, WRI, A21, EN 01451499.

³⁵⁹⁹ D219/928, NHEM Hean, WRI, A14-18, EN 01451499.

- NOM Phoun, a Civil Party Applicant who never saw or knew Mr YIM Tith – he mixed ‘Ta Tith’ with Ta Pet. He stated that ‘he saw Ta Tith who was called Ta Pet’³⁶⁰⁰ and that ‘Ta Tith was a well-built man with curly hair.’³⁶⁰¹

1652. The ICP fails to present probative evidence that Mr YIM Tith’s ‘inspected’ Kanghat Dam in any period of time.

- Mr YIM Tith was not assisted by supervisors of Kanghat Dam

1653. The ICP claims that Mr YIM Tith ‘was assisted by supervisors of Kanghat Dam and Regiment chairs of mobile units’ and in support of his claim he cites evidence of CHHOEUNG Bean, TOP Soeung and SOK Cheat.³⁶⁰² The ICP’s claim is misrepresentation. None of the cited evidence establishes any connection between ‘supervisors of Kanghat Dam and Regiment chairs of mobile units’ and Mr YIM Tith, let alone their ‘assistance’ to Mr YIM Tith.

1654. The ICP claims that ‘in particular,’ Mr YIM Tith ‘put Ta Saman in charge of the economy, food supplies, members of the militia, and soldiers at the dam’ and in support of this claim he cites evidence of CHHOEUNG Bean and NHEM Hean.³⁶⁰³ The ICP’s claim is misrepresentation. None of the cited evidence establishes that Mr YIM Tith ‘put Ta Saman in charge of the economy, good supplies, members of the militia, and soldiers at the dam.’ Also, the ICP is not taking in consideration evidence that Ta Saman, who was ‘manager of decisive mobile unit’ escaped to the forest when Southwest Zone cadres arrived.³⁶⁰⁴

- Mr YIM Tith did not ‘issue work plans to his subordinates’

1655. The ICP claims that Mr YIM Tith ‘issued work plans to his subordinates’ and in support of this claim he cites evidence of CHHOEUNG Bean and LAM Lin.³⁶⁰⁵ The ICP’s claim is misrepresentation. The part of CHHOEUNG Bean’s evidence cited by the ICP is his assumption.. He stated that in July 1978, at the time when he did not know ‘whether Ta Tith’s position had been announced, ‘Ta Yaun attended a meeting with Ta Tith and Ta

³⁶⁰⁰ D219/268, NOM Phuon, WRI, A45, EN 01098485.

³⁶⁰¹ D219/268, NOM Phuon, WRI, A47, EN 01098485.

³⁶⁰² *ICP’s Final Submission*, D378/2, para. 454, fn 1595.

³⁶⁰³ *ICP’s Final Submission*, D378/2, para. 454, fn 1596.

³⁶⁰⁴ D219/538, SOEUN Mat, WRI, A20, EN 01173575-6.

³⁶⁰⁵ *ICP’s Final Submission*, D378/2, para. 454, fn 1597.

Pet at their place at Tuol Andaet to receive work plans from them'; he was not present at that alleged meeting.³⁶⁰⁶ The cited evidence of LAM Lindoes not mention work plans; it does say that LAM Lin saw 'Ta Tith' once 'near the liberation time in 1979.'³⁶⁰⁷

- Mr YIM Tith was not 'in charge of military'

1656. The ICP claims that Mr YIM Tith was 'in charge of the military and known to be a strong military leader' and cites evidence of only one witness, SOEUN Mat.³⁶⁰⁸ As already argued in this Response, SOEUN Mat's evidence about Mr YIM Tith has no probative value,³⁶⁰⁹ and analysis of his only statement he provided to the ICIJ will not be repeated here, except to note that the first time he saw clearly 'Ta Tith' was at the meeting in Banan pagoda in 1979.³⁶¹⁰

1657. The ICP claims that Mr YIM Tith 'visited the 40-pilar house where soldiers were stationed' and to support this claim he misstates, and consequently misrepresents, NHEM Hean's evidence.³⁶¹¹ NHEM Hean's evidence is that Mr YIM Tith visited 'once in a while' NHEM Hean's group of 20 children,³⁶¹² not that he visited soldiers at a '40-pillar house.' Also, the ICP disregards the evidence of CHHOEUNG Bean, which he cites extensively in his Final Submission,³⁶¹³ and who worked in the '40-pilar house' until August 1978³⁶¹⁴ that he never saw 'Ta Tith' in '40-pilar house.'³⁶¹⁵

- Mr YIM Tith did not 'determined which cadres to promote and demote'

1658. The ICP claims that Mr YIM Tith 'determined which cadres to promote and demote at Kanghat Dam and as a support he repeats evidence of CHHOEUNG Bean about Ta Saman 'whom Ta Tith decided to keep alive.'³⁶¹⁶ CHHOUNG Beans evidence is discussed at length previously in this Response.³⁶¹⁷ It is worth repeating that the ICP relies

³⁶⁰⁶ D219/465, CHHOEUNG Bean, WRI, A40, EN 01139590.

³⁶⁰⁷ D219/943, LAM Lin, WRI, A14, EN 01523945.

³⁶⁰⁸ *ICP's Final Submission*, D378/2, para. 455, fn 1598.

³⁶⁰⁹ *Supra*, paras 1439 to 1454.

³⁶¹⁰ D219/538, SOEUN Mat, WRI, A50, EN 01173581; A72, EN 01173586; A79-A83, EN 01173587-8; A93, EN 01173590.

³⁶¹¹ *ICP's Final Submission*, D378/2, para. 455, fn 1601.

³⁶¹² D219/928, NHEM Hean, WRI, A14-18, EN 01451499.

³⁶¹³ 104 times in total.

³⁶¹⁴ D219/368, CHHOEUNG Bean, A144, EN 01117731.

³⁶¹⁵ D219/465, CHHOEUNG Bean, A12, EN 01139582.

³⁶¹⁶ *ICP's Final Submission*, D378/2, para. 455.

³⁶¹⁷ *Supra*, paras 1288 to 1296, 1410 to 1417, 1461 to 1463 and 1615 to 1616.

on answers A31 and A35, disregards A32, where witness explained that he heard this information from Ta Yaun who 'whispered to me about these matters.'³⁶¹⁸

1659. The ICP claims that Mr YIM Tith 'issued orders to and received reports from officials at the labor site' and cites evidence of TOP Seung, SOK Cheat, and CHHOEUNG Bean.³⁶¹⁹ The ICP's claim is misrepresentation.

1660. None of the cited evidence mentions that Mr YIM Tith 'issued orders to and received reports from officials at the labor site.'

- Conclusion

1661. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders at the Kanghat Dam worksite, that he issued orders to Kanghat Dam worksite officials concerning extermination, enslavement, imprisonment, persecution through murder, extermination and imprisonment, and other inhuman acts (confinement/working in inhumane conditions). The ICP does not present sufficient evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities at Kanghat dam during its operation³⁶²⁰ and during the temporal scope of the investigation.³⁶²¹

1662. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Kanghat Dam worksite staff, or that he planned, ordered, instigated, and committed charged crimes at the Kanghat Dam worksite.³⁶²²

(5) Mr YIM Tith was Not Involved in Crimes in Kampong Kol Sugar Factory

1663. The ICP claims that the 'sugar factory was a zone-level facility under Ta Mok's and Yim Tith's authority in their respective capacities as secretary and deputy secretary of the Northwest Zone.'³⁶²³ As already argued in this Response, there is not sufficient evidence

³⁶¹⁸ D219/465 CHHOEUNG Bean WRI, A31 and 35; A32, EN 01139587-8.

³⁶¹⁹ ICP's Final Submission, D378/2, para. 465, fn 1608.

³⁶²⁰ ICP's Final Submission, D378/2, paras 408 to 410.

³⁶²¹ *Supra*, paras 436 to 446.

³⁶²² *Notification of Amended Charges*, D350.1, p. 7-8, para. 9, Crime Site 10: Kanghat Dam worksite.

³⁶²³ ICP's Final Submission, D378/2, para. 483.

to conclude that Mr YIM Tith was *de jure* or *de facto* Deputy Secretary of the Northwest Zone.³⁶²⁴

1664. The ICP claims that ‘in early to mid-1978,’ Mr YIM Tith and Ta Mok spoke at the meeting in Battambang Town to workers and personnel at the factory on the security situation in the area’ and for this claim he cites only one witness, LOEM Tim.³⁶²⁵ The ICP also adds in the same paragraph LOEM Tim’s evidence about the same meeting but falsely gives appearance that LOEM Tim is now talking about different meetings.³⁶²⁶ Also, the ICP is cherry-picking LOEM Tim’s evidence and consequently misrepresenting it.

1665. As already argued in this Response,³⁶²⁷ LOEM Tim can only remember that a man called ‘Ta Tith’ was introduced at an assembly,³⁶²⁸ a man he only saw once.³⁶²⁹ He cannot remember anybody else who was present at the assembly, or the time when the assembly took place.³⁶³⁰ Placed in context, the evidence suggests that this assembly took place at the very end of the DK regime when the Vietnamese army was already within Cambodia, in November 1978.³⁶³¹ He also stated that ‘Ta Tith’ never came to Kampong Kol Sugar Factory.³⁶³²

1666. The ICP also stated that, in another meeting, the ‘witness heard that Ta Mok discuss with factory workers the alleged betrayal of the Northwest Zone cadres’ and in support of this claim the ICP cites the evidence of PRAK Soeun,³⁶³³ but ignores relevant evidence from this same witness who worked in Kampong Kol Sugar Factory from early 1978³⁶³⁴ that he never saw ‘Ta Tith’ in Kampong Kol Sugar Factory, nor at the big meeting in Battambang at which Ta Mok gave a speech.³⁶³⁵

1667. The ICP claims that Mr YIM Tith ‘personally led his forces’ to take control of the sugar factory and appointed Southwest Zone cadre Yan as a chief of the factory, and he supports

³⁶²⁴ *Supra*, paras 1128 to 1236.

³⁶²⁵ *ICP’s Final Submission*, D378/2, para. 483, fn 1703.

³⁶²⁶ *ICP’s Final Submission*, D378/2, para. 483, fn 1705.

³⁶²⁷ *Supra*

³⁶²⁸ D219/649, LOEM Tim, WRI, A37, EN 01207436.

³⁶²⁹ D118/108, LOEM Tim, WRI, A23, EN 00976925; D219/649, LOEM Tim, WRI, A51, A55, EN 01207438-9.

³⁶³⁰ D219/649, LOEM Tim, WRI, A40, EN 01207436.

³⁶³¹ *Supra*, paras 1149 to 1153.

³⁶³² D118/108, LOEM Tim, WRI, A16, EN 00976924.

³⁶³³ *ICP’s Final Submission*, D378/2 para. 483, fn 1704.

³⁶³⁴ D219/931, PRAK Soeun, WRI, A10-12, EN 01492929; A31-A33, EN 01492932.

³⁶³⁵ D219/931, PRAK Soeun, WRI, A74-A78, EN 01492937.

this claim with evidence of one witness, HUON Choeum³⁶³⁶ who heard from an unnamed Zone soldier that ‘Ta Tit had personally led his forces to see the situation at the Kampong Kol white sugar refinery’ and that Mr YIM Tith appointed Southwest Zone cadre Yan as the chief of the factory.³⁶³⁷ The ICP cherry-picks the evidence of this witness.

1668. HUON Choeum was a Chairman of Logistics and Economics of the Northwest Military Zone until 17 April 1975 after which he worked in the fishing unit of the Zone Military at Tonle Sap Lake in Sector 4 where he stayed until November 1978 when he escaped to Snoeng.³⁶³⁸ HUON Choeum never worked at Kampong Kol Sugar factory. The ICP disregards HUON Choeum’s beginning of the same answer (A12) he is citing, where he stated that that he never saw ‘Ta Tit’ in person,³⁶³⁹ and he never heard about any other event involving ‘Ta Tit.’³⁶⁴⁰ The evidence of HUON Choeum is anonymous, unsupported hearsay evidence. Interestingly, HUON Choeum gave a 90-page statement to DC-Cam on 17 July 2006 where he did not mention ‘Ta Tit,’ but 8 years later, on the 22 September 2013, after the ICP’s Third Introductory Submission was illegally released to the public, he suddenly, 35 years after the end of DK regime, remembers that he heard something about ‘Ta Tith.’

1669. HUON Choeum’s evidence about Mr YIM Tith is devoid of probative value.

Conclusion

1670. The ICP does not present any evidence that Mr YIM Tith received any orders from a higher echelon, that he disseminated or implemented those orders in Kampong Kol Sugar Factory, that he issued orders to factory officials concerning murder, extermination, persecution against Vietnamese and the Khmer Krom through murder and extermination. The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Kampong Kol Sugar Factory during its operation³⁶⁴¹ and during the temporal scope of the investigation.³⁶⁴²

³⁶³⁶ *ICP’s Final Submission*, D378/2, para. 484, fn 1706.

³⁶³⁷ D118/106, HUON Choeum, WRI, A12, EN 00978419.

³⁶³⁸ D118/106, HUON Choeum, WRI, A2, EN 00978417-8.

³⁶³⁹ D118/106, HUON Choeum, WRI, A12, EN 00978419.

³⁶⁴⁰ D118/106, HUON Choeum, WRI, A19, EN 00978421.

³⁶⁴¹ *ICP’s Final Submission*, D378/2, para. 482.

³⁶⁴² *Supra*, paras 436 to 446.

1671. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Kampong Kol Sugar Factory staff, that he planned, ordered, instigated, and committed charged crimes at the Kampong Kol Sugar Factory.³⁶⁴³

(6) Mr YIM Tith was Not Involved in Crimes in Banan Security Centre

1672. The ICP claims, based on one WRI of witness VOR Ruom, that Mr YIM Tith ‘inspected’ Banan security centre ‘two months before the arrival of the Southwest Zone group’ and that ‘Southwest Zone cadres took control of the security centre probably in early 1977.’³⁶⁴⁴ The ICP cherry-picks from VOR Ruom’s evidence.

1673. VOR Ruom was 16 years old in 1975.³⁶⁴⁵ He was a member of the district military in Sangkae District until January 1976 when he was assigned to guard Wat Kraom Prison, opposite Banan pagoda.³⁶⁴⁶ He stated that he was too young to even know that this was a prison, and he guarded it together with four or five other children.³⁶⁴⁷ He stated that when Southwest Zone cadre arrived, the prison stopped operating and prisoners were moved to Khang Kou³⁶⁴⁸ which was a district prison.³⁶⁴⁹ He was transferred to Khnang Kou and stayed there for one month³⁶⁵⁰ when he left for Phnom Penh and worked ‘for Chinese people’ until 1979.³⁶⁵¹ In answering the investigator’s question ‘Did you hear of cadre named YIM Tith or Ta Tith,’ he answered that ‘Ta Tith’ came from the Southwest Zone but he never saw him.³⁶⁵²

1674. The ICP is cherry-picking from VOR Rum’s evidence and consequently misrepresenting it, claiming that he ‘knew Ta Tith came from Southwest Zone and was a high, provincial-level, Zone-level echelon.’³⁶⁵³ From VOR Rum’s answer to the investigator’s question ‘How did you know that?’ it is clear that he did not ‘know’ where ‘Ta Tith’ came from and he assumed what position ‘Ta Tith’ allegedly held. His answer is telling:

Q: How did you know that?

³⁶⁴³ *Notification of Amended Charges*, D350.1, p. 8, para. 9, Crime Site 13: Kampong Kol sugar factory; p. 5, para. 9, Crime Site 13: Kampong Kol sugar factory.

³⁶⁴⁴ *ICP’s Final Submission*, D378/2, 497.

³⁶⁴⁵ D219/751, VOR Ruom, WRI, EN 01305917.

³⁶⁴⁶ D219/751, VOR Ruom, WRI, A1, EN 01305918.

³⁶⁴⁷ D219/751, VOR Ruom, WRI, A8, EN 01305919-20.

³⁶⁴⁸ D219/751, VOR Ruom, WRI, A15-A17, EN 01305921.

³⁶⁴⁹ D219/751, VOR Ruom, WRI, A28, EN 01305923.

³⁶⁵⁰ D219/751, VOR Ruom, WRI, A18, EN 01305921, A26, EN 01305923.

³⁶⁵¹ D219/751, VOR Ruom, WRI, A41, EN 01305925.

³⁶⁵² D219/751, VOR Ruom, WRI, A45, EN 01305925.

³⁶⁵³ *ICP’s Final Submission*, D378/2, para. 497.

A47: At that time, I saw him in a vehicle driven towards the prison, but I did not pay much attention to it. I saw him walking upstairs briefly and then he disappeared. I got to know him at that time because his chief told me that *Ta Tith* was a new committee member. The former chief there was ROS Nhim, but when the Southwest Zone group came to power, all of the chiefs, including ROS Nhim, were arrested and taken away. ROS Nhim had been on the committee before.³⁶⁵⁴

1675. Given that *Ta Nhim* was arrested in the middle of 1978, at a time when VOR Rum allegedly ‘briefly’ saw a person he thought was ‘*Ta Tith*’ is questionable, especially because he said first that he never saw ‘*Ta Tith*’.³⁶⁵⁵

1676. The evidence of VOR Ruom is unsubstantiated hearsay and has no probative value.

1677. The ICP is trying to present this evidence of VOR Ruom in support of SAO Chobb’s evidence about Mr YIM Tith’s alleged presence in Koas Krala District and Kanhath dam.³⁶⁵⁶ SAO Chobb’s evidence and evidence of other witnesses mentioned in paragraphs 498 and 499 of the ICP’s Final Submission has been analysed at length in this Response³⁶⁵⁷ and this analysis will not be repeated here.

1678. The unreliable nature of the self-serving, unsupported out-of-court statements of the late *Ta Pet* given to Stephen Heder in 1990 and which the ICP is using to support his claim that Mr YIM Tith ‘exercised power over prisoners’³⁶⁵⁸ has been analysed at length in this Response³⁶⁵⁹ and this analysis will not be repeated here.

1679. It is worth noting that the ICP, although aware that witness DOS Doeun’s evidence concerns person named ‘*Ta Tith*’ who was Northwest Zone cadre in charge of Kanteu Muoy Commune in Banan district,³⁶⁶⁰ still using this witness in support of his claim that Mr YIM Tith ‘held meetings in the vicinity of the security centre and exercised power over prisoners’ liberty at the site before and after he was formally appointed Sector 1 Secretary.’³⁶⁶¹

³⁶⁵⁴ D219/751, VOR Ruom, WRI, A47, EN 01305925-6.

³⁶⁵⁵ D219/751, VOR Ruom, WRI, A45, EN 01305925.

³⁶⁵⁶ *ICP’s Final Submission*, D378/2, para. 498.

³⁶⁵⁷ *Supra*, paras 1237 to 1310.

³⁶⁵⁸ *ICP’s Final Submission*, D378/2, para. 499.

³⁶⁵⁹ *Supra*, paras 1238 to 1252.

³⁶⁶⁰ *ICP’s Final Submission*, D378/2, para. 499, fn 1746.

³⁶⁶¹ *ICP’s Final Submission*, D378/2, para. 499.

1680. The ICP cites the same, unreliable evidence in paragraphs 500 to 502 and 504. The Defence will not repeat analysis of this evidence here.

Conclusion

1681. The ICP fails to present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders to Banan Security Centre, that he issued orders to prison officials concerning murder, extermination, imprisonment, torture, persecution against Northwest Zone cadres through murder, extermination, imprisonment torture and other inhuman acts (confinement in inhumane conditions). The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Banan Security Centre during its operation³⁶⁶² and during the temporal scope of the investigation.³⁶⁶³

1682. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Banan Security Centre staff, nor that he planned, ordered, instigated, and committed charged crimes at the Banan Security Centre.³⁶⁶⁴

(7) Mr YIM Tith was Not Involved in Crimes in Khnang Kou Security Centre

1683. The ICP claims that Mr YIM Tith ‘held authority over Khnang Kou Security Centre’ which was controlled by Sector 1.³⁶⁶⁵

1684. As it was argued before, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Secretary of Sector 1.³⁶⁶⁶

1685. The arguments the ICP is presenting in this part of the Final Submission³⁶⁶⁷ are similar to arguments he presented in the part of the ICP’s Final Submission regarding Banan Security Centre.³⁶⁶⁸ The evidence which the ICP cites to support his arguments are almost identical to evidence presented in part of the Final Submission dealing with Banan

³⁶⁶² ICP’s Final Submission, D378/2, paras 495 to 496.

³⁶⁶³ *Supra*, paras 436 to 446.

³⁶⁶⁴ Notification of Amended Charges, D350.1, p. 8, para. 9, Crime Site 11: Banan security centre.

³⁶⁶⁵ ICP’s Final Submission, D378/2, para. 521.

³⁶⁶⁶ *Supra*, paras 1237 to 1310.

³⁶⁶⁷ ICP’s Final Submission, D378/2, paras 521 to 522.

³⁶⁶⁸ ICP’s Final Submission, D378/2, paras 497 to 502 and 504.

Security Centre. All this evidence is previously at length analyzed in this Response³⁶⁶⁹ and this analysis will not be repeated here.

Conclusion

1686. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Khnang Kou Security Centre, that he issued orders to prison officials concerning murder, extermination, enslavement, imprisonment, torture, persecution against Northwest Zone cadre through murder, extermination, enslavement, imprisonment, torture and other inhuman acts (confinement in inhumane conditions). The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Khnang Kou Security Centre during its operation³⁶⁷⁰ and during the temporal scope of the investigation.³⁶⁷¹

1687. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Khnang Kou Security Centre staff, and that he planned, ordered, instigated, and committed charged crimes at the Banan Security Center.³⁶⁷²

(8) Mr YIM Tith was Not Involved in Crimes in Wat Kirirum Security Centre

1688. The ICP claims that Mr YIM Tith ‘was responsible for Wat Kirirum through his leadership roles at Sector 3 and zone level,’ and that ‘he lived in a house close to Wat Kirirum and was frequently seen in the area.’³⁶⁷³

1689. As already argued in this Response, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Secretary of Sector 3 nor Deputy Secretary of the Northwest Zone.³⁶⁷⁴

1690. The ICP claims that Mr YIM Tith was ‘seen daily at Kouk Amply Village worksite in Phnom Sampeou, and lived in what had previously been Ta Rak’s house’ rest on evidence

³⁶⁶⁹ *Supra*, paras 1672 to 1682.

³⁶⁷⁰ *ICP’s Final Submission*, D378/2, para. 519.

³⁶⁷¹ *Supra*, paras 436 to 446.

³⁶⁷² *Notification of Amended Charges*, D350.1, p. 8, para. 9, Crime Site 12: Khnang Kou security centre.

³⁶⁷³ *ICP’s Final Submission*, D378/2, para. 539.

³⁶⁷⁴ *Supra*, paras 1128 to 1236 and 1320 to 1358.

of one witness, CHUCH Punlork.³⁶⁷⁵ The ICP cherry-picks from this witness's evidence and consequently misrepresents it.

1691. The ICP cites parts of three answers from one of CHUCH Punlork's WRIs (out of three he gave to the ICIJ³⁶⁷⁶) and disregards the totality of his evidence. In his first WRI he gave to the ICIJ in 2008, CHUCH Punlork is not mentioning Mr YIM Tith, nor 'Ta Tith'.³⁶⁷⁷ In his second WRI he gave to the ICIJ on 22 May 2011, he stated that 'Ta Tith did farming like others. He went to the fields, planting and replanting rice. He was working like ordinarily people.'³⁶⁷⁸ In response to the ICIJ's question 'Did Ta Tith commit any crimes here?' the witness responded 'As far as I know, he never did anything bad.'³⁶⁷⁹ CHUCH Punlork also stated that he thinks that 'Ta Tith' 'is not a leader of any kind, but he was just known to people there.'³⁶⁸⁰

1692. From CHUCH Punlork's third WRI, the ICP cites parts of three answers (A34, A36 and A42), thereby disregarding answers A37-A41 where witnesses explained that 'Ta Tith' 'and his wife did farming with families of weaving labourers located somewhere around the state worksite in Kouk Ampli Village, Phnum Sampov Commune. During the Khmer Rouge regime, it was called Phnum Sampov District, not Battambang District,' that he met him at the farming fields, that he did not see him doing anything else besides farming and that 'Ta Tith' travelled in a vehicle which was 'for carrying the labourers' not 'a Jeep like Ta Chham's vehicle.'³⁶⁸¹ Ta Chham was a district committee member.³⁶⁸²

Conclusion

1693. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Wat Kirirum Security Centre, that he issued orders to prison officials concerning murder, extermination, enslavement, imprisonment, persecution against Northwest Zone cadre through murder, extermination, enslavement, imprisonment, and other inhuman acts (confinement in inhumane conditions). The ICP does not present any evidence that Mr YIM Tith visited,

³⁶⁷⁵ ICP's Final Submission, D378/2, para. 544.

³⁶⁷⁶ D6.1.155, D22 and D118/76, CHUCH Punlork, WRIs.

³⁶⁷⁷ D6.1.155, CHUCH Punlork, WRI.

³⁶⁷⁸ D22, CHUCH Punlork, WRI, EN 00707678.

³⁶⁷⁹ D22, CHUCH Punlork, WRI, EN 00707678.

³⁶⁸⁰ D22, CHUCH Punlork, WRI, EN 00707678.

³⁶⁸¹ D118/76, CHUCH Punlork, WRI, A37-41, EN 00976629.

³⁶⁸² D118/76, CHUCH Punlork, WRI, A13, EN 00976625-26.

held meetings at, or otherwise engaged in activities in Wat Kirirum Security Centre during its operation³⁶⁸³ and during the temporal scope of the investigation.³⁶⁸⁴

1694. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Wat Kirirum Security Centre staff, that he planned, ordered, instigated, and committed charged crimes at the Wat Kirirum Security Centre.³⁶⁸⁵

(9) Mr YIM Tith was Not Involved in Crimes in Reang Ksei Commune

1695. The ICP claims that Mr YIM Tith is responsible for the crimes in Reang Ksei Commune located in Sector 4 as a 'leading member of the JCE.'³⁶⁸⁶

1696. As already argued in this Response, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Secretary of Sector 4, Deputy Secretary of the Northwest Zone³⁶⁸⁷ nor a leading member of the alleged JCE.³⁶⁸⁸

1697. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Reang Ksei Commune, that he issued orders to commune officials concerning murder, extermination, persecution against Khmer Krom through murder and extermination, and other inhuman acts (forced marriage). The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Reang Ksei Commune from late 1977³⁶⁸⁹ and during the temporal scope of the investigation.³⁶⁹⁰

1698. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Reang Ksei Commune officials, that he planned, ordered, instigated, and committed charged crimes at the Reang Ksei Commune.³⁶⁹¹

³⁶⁸³ ICP's Final Submission, D378/2, paras 541 to 543.

³⁶⁸⁴ *Supra*, paras 436 to 446.

³⁶⁸⁵ Notification of Amended Charges, D350.1, p. 9, para. 9, Crime Site 22: Wat Kirirum security centre.

³⁶⁸⁶ ICP's Final Submission, D378/2, para. 557.

³⁶⁸⁷ *Supra*, paras 1360 to 1379 and 1128 to 1236.

³⁶⁸⁸ *Supra*, paras 1075 to 1379.

³⁶⁸⁹ ICP's Final Submission, D378/2, para. 559.

³⁶⁹⁰ *Supra*, paras 436 to 446.

³⁶⁹¹ Notification of Amended Charges, D350.1, p. 11, para. 9, Crime Site 28: Reang Ksei commune.

(10) Mr YIM Tith was Not Involved in Crimes in Kampong Prieng Commune

1699. The ICP claims that Mr YIM Tith is responsible for the crimes in Kampong Prieng Commune located in Sector 4 as a ‘leading member of the JCE’ who was ‘acting in furtherance of the joint criminal enterprise.’³⁶⁹²

1700. As already argued in this Response, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Secretary of Sector 4, Deputy Secretary of the Northwest Zone³⁶⁹³ nor a leading member of the JCE.³⁶⁹⁴

1701. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Kampong Prieng Commune, that he issued orders to commune officials concerning murder, extermination, enslavement, imprisonment, torture, persecution against Northwest Zone cadre through murder, extermination, enslavement, imprisonment, torture and other inhuman acts (confinement/working in inhumane conditions), persecution against Khmer Krom through murder and extermination and other inhumane acts (confinement in inhumane conditions and forced marriage). The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Kampong Prieng Commune from 1977³⁶⁹⁵ and during the temporal scope of the investigation.³⁶⁹⁶

1702. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Kampong Prieng Commune officials, that he planned, ordered, instigated, and committed charged crimes at the Kampong Prieng Commune.³⁶⁹⁷

³⁶⁹² ICP’s Final Submission, D378/2, para. 571.

³⁶⁹³ *Supra*, paras 1360 to 1379 and 1128 to 1236.

³⁶⁹⁴ *Supra*, paras 1075 to 1379.

³⁶⁹⁵ ICP’s Final Submission, D378/2, para. 573.

³⁶⁹⁶ *Supra*, paras 436 to 446.

³⁶⁹⁷ Notification of Amended Charges, D350.1, pp. 10-11, para. 9, Crime Site 27: Kampong Prieng commune.

(11) Mr YIM Tith was Not Involved in Crimes in Wat Samdech Security Centre

1703. The ICP claims that Mr YIM Tith is responsible for the crimes in Wat Samdech Security Centre located in Sector 4 as a ‘leading member of the JCE’ who was ‘acting in furtherance of the joint criminal enterprise.’³⁶⁹⁸

1704. As already argued in this Response, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Secretary of Sector 4, Deputy Secretary of the Northwest Zone³⁶⁹⁹ nor a leading member of the JCE.³⁷⁰⁰

1705. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Wat Samdech Security Centre, that he issued orders to security centre officials concerning murder, extermination, persecution against Northwest Zone cadre through murder and extermination. The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Wat Samdech Security Centre during its operation³⁷⁰¹ and during the temporal scope of the investigation.³⁷⁰²

1706. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Wat Samdech Security Centre officials, that he planned, ordered, instigated, and committed charged crimes at the Wat Samdech Security Centre.³⁷⁰³

(12) Mr YIM Tith was Not Involved in Crimes in Phum Veal Security Centre

1707. The ICP claims that Mr YIM Tith is responsible for crimes in Phum Veal Security Centre located in Sector 2 as a leading member of the JCE.³⁷⁰⁴

1708. As already argued in this Response, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Secretary of Sector 2, Deputy Secretary of the Northwest Zone³⁷⁰⁵ nor a leading member of the JCE.³⁷⁰⁶

³⁶⁹⁸ ICP’s Final Submission, D378/2, para. 599.

³⁶⁹⁹ *Supra*, paras 1360 to 1379 and 1128 to 1236.

³⁷⁰⁰ *Supra*, paras 1075 to 1379.

³⁷⁰¹ ICP’s Final Submission, D378/2, para. 599.

³⁷⁰² *Supra*. 436 to 446.

³⁷⁰³ Notification of Amended Charges, D350.1, p. 10, para. 9, Crime Site 26: Wat Samdech security centre.

³⁷⁰⁴ ICP’s Final Submission, D378/2, para. 615.

³⁷⁰⁵ *Supra*, paras 1311 to 1319 and 1128 to 1236.

³⁷⁰⁶ *Supra*. paras 1075 to 1379.

1709. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Phum Veal Security Centre, that he issued orders to security centre officials concerning murder, extermination, imprisonment, torture, persecution against Khmer Krom through murder, extermination, imprisonment and other inhumane acts (confinement in inhumane conditions). The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Phum Veal Security Centre during its operation³⁷⁰⁷ and during the temporal scope of the investigation.³⁷⁰⁸

1710. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Phum Veal Security Centre officials, that he planned, ordered, instigated, and committed charged crimes at the Phum Veal Security Centre.³⁷⁰⁹

(13) Mr YIM Tith was Not Involved in Crimes in Svay Chrum Security Centre

1711. The ICP claims that Mr YIM Tith is responsible for crimes in Svay Chrum Security Centre located in Sector 2 as a leading member of the JCE.³⁷¹⁰

1712. As already argued in this Response, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Secretary of Sector 2, Deputy Secretary of the Northwest Zone³⁷¹¹ nor a leading member of the JCE.³⁷¹²

1713. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Svay Chrum Security Centre, that he issued orders to security centre officials concerning murder, imprisonment, persecution against Khmer Krom through murder, imprisonment and other inhumane acts (confinement in inhumane conditions). The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities

³⁷⁰⁷ ICP's Final Submission, D378/2, para. 615.

³⁷⁰⁸ *Supra*, paras 436 to 446.

³⁷⁰⁹ Notification of Amended Charges, D350.1, p. 5, para. 9, Crime Site 17: Phum Veal security centre; p. 9, para. 9, Crime Site 17: Phum Veal security centre.

³⁷¹⁰ ICP's Final Submission, D378/2, para. 636.

³⁷¹¹ *Supra*, paras 1311 to 1319 and 1128 to 1236.

³⁷¹² *Supra*, paras 1175 to 1379.

in Svay Chrum Security Centre during its operation³⁷¹³ and during the temporal scope of the investigation.³⁷¹⁴

1714. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Svay Chrum Security Centre officials, that he planned, ordered, instigated, and committed charged crimes at the Svay Chrum Security Centre.³⁷¹⁵

(14) Mr YIM Tith was Not Involved in Crimes in Tuol Seh Nhauv and Prey Krabau Execution Sites

1715. The ICP claims that Mr YIM Tith is responsible for crimes in Tuol She Nhauv and Prey Krabau execution sites located in Sector 2 as a leading member of the JCE.³⁷¹⁶

1716. As already argued in this Response, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Secretary of Sector 2, Deputy Secretary of the Northwest Zone³⁷¹⁷ nor a leading member of the JCE.³⁷¹⁸

1717. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders to Southwest Zone and West Zone cadres who allegedly committed crimes at Tuol She Nhauv and Prey Krabau execution sites, that he issued orders to Southwest Zone and West Zone cadres concerning murder, extermination, persecution against Khmer Krom through murder and extermination at Tuol Seh Nhauv execution site and issued orders to Southwest Zone and West Zone cadres concerning murder, extermination, persecution against Khmer Krom through murder and extermination at Prey Krabau execution sites. The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities with Southwest Zone and West Zone cadres who allegedly committed crimes at Tuol She Nhauv and Prey Krabau execution sites at a relevant time³⁷¹⁹ and during the temporal scope of the investigation.³⁷²⁰

³⁷¹³ ICP's Final Submission, D378/2, para. 638.

³⁷¹⁴ *Supra*, paras 436 to 446.

³⁷¹⁵ Notification of Amended Charges, D350.1, p. 5, para. 9, Crime Site 18: Svay Chrum security centre; p. 9, para. 9, Crime Site 18: Svay Chrum security centre.

³⁷¹⁶ ICP's Final Submission, D378/2, para. 636.

³⁷¹⁷ *Supra*, paras 1311 to 1319 and 1128 to 1236.

³⁷¹⁸ *Supra*, paras 1075 to 1379.

³⁷¹⁹ ICP's Final Submission, D378/2, para. 660.

³⁷²⁰ *Supra*, paras 436 to 446.

1718. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Southwest Zone and West Zone cadres who allegedly committed crimes at Tuol Seh Nhauv and Prey Krabau execution sites, nor that he planned, ordered, instigated, and committed charged crimes at the Tuol Seh Nhauv and Prey Krabau Execution Sites.³⁷²¹

(15) Mr YIM Tith was Not Involved in Crimes in Wat Chanreangsei Execution Site

1719. The ICP stated that Mr YIM Tith is ‘responsible for and had authority over events at and arising out Wat Chanreangsei execution site, which was under the authority of Bakan District³⁷²² ‘as the deputy secretary and *de facto* leader of the Northwest Zone and a leading member of the JCE.’³⁷²³

1720. As already argued in this Response, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Secretary of Sector 2, *de facto* leader of the Northwest Zone, *de jure* or *de facto* Deputy Secretary of the Northwest Zone³⁷²⁴ nor a leading member of the JCE.³⁷²⁵

1721. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Bakan District, that he issued orders to Bakan District officials concerning murder, extermination, persecution against East Zone evacuees through murder and extermination allegedly committed at Wat Chanreangsei. The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Bakan District or Wat Chanreangsei before, during or after the time alleged crimes happened at Wat Chanreangsei,³⁷²⁶ and during the temporal scope of the investigation.³⁷²⁷

1722. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Bakan District officials who allegedly committed crimes at Wat Chanreangsei or any

³⁷²¹ *Notification of Amended Charges*, D350.1, p. 5, para. 9, Crime Site 19: Tuol Seh Nhauv execution site and Crime Site 20: Prey Krabau execution site; p. 9, para. 9, Crime Site 19: Tuol Seh Nhauv execution site and Crime Site 20: Prey Krabau execution site.

³⁷²² *ICP's Final Submission*, D378/2, para. 629.

³⁷²³ *ICP's Final Submission*, D378/2, para. 688.

³⁷²⁴ *Supra*, paras 1311 to 1319 and 1128 to 1236.

³⁷²⁵ *Supra*, paras 1075 to 1379.

³⁷²⁶ *ICP's Final Submission*, D378/2, para. 690.

³⁷²⁷ *Supra*, paras 436 to 446.

other Bakan District officials, that he planned, ordered, instigated, and committed charged crimes at the Wat Chanreangsei execution site.³⁷²⁸

(16) Mr YIM Tith was Not Involved in Crimes in Prison No. 8

1723. The ICP claims that Mr YIM Tith is responsible for crimes in Prison No. 8 located in Sector 7 and under the control of Kandieng District,³⁷²⁹ ‘as a deputy secretary of the Northwest Zone from July 1978 and a leading JCE member.’³⁷³⁰

1724. As already argued in this Response, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Deputy Secretary of the Northwest Zone³⁷³¹ nor a leading member of the JCE.³⁷³²

1725. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Kandieng District or in Prison No. 8, that he issued orders to Kandieng District or Prison No. 8 officials concerning murder, extermination, enslavement, imprisonment, torture, persecution against ‘East Zone Evacuees’ through enslavement, imprisonment torture and other inhumane acts (confinement/working in inhumane conditions). The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Kandieng District or Prison No. 8 during its operation³⁷³³ and during the temporal scope of the investigation.³⁷³⁴

1726. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Kandieng District and/or Prison No. 8 officials, that he planned, ordered, instigated, and committed charged crimes at Prison No. 8.³⁷³⁵

³⁷²⁸ *Notification of Amended Charges*, D350.1, p. 9, para. 9, Crime Site 21: Chanreangsei pagoda execution site.

³⁷²⁹ *ICP’s Final Submission*, D378/2, para. 718.

³⁷³⁰ *ICP’s Final Submission*, D378/2, para. 714.

³⁷³¹ *Supra*, paras 1128 to 1236.

³⁷³² *Supra*, paras 1075 to 1379.

³⁷³³ *ICP’s Final Submission*, D378/2, para. 716.

³⁷³⁴ *Supra*, 436 to 446.

³⁷³⁵ *Notification of Amended Charges*, D350.1, p. 12, para. 9, Crime Site 36: Prison No. 8.

(17) Mr YIM Tith was Not Involved in Crimes at Veal Bak Chunching Execution Site

1727. The ICP claims that Mr YIM Tith ‘was responsible for and had authority over events as Veal Bak Chunching execution site’ located in Kandieng District, Sector 7 ‘as a deputy secretary of the Northwest Zone Committee and a leading JCE member.’³⁷³⁶

1728. As already argued in this Response, there is no sufficient evidence to conclude that Mr YIM Tith was *de jure* or *de facto* Deputy Secretary of the Northwest Zone³⁷³⁷ nor a leading member of the JCE.³⁷³⁸

1729. The ICP does not present any evidence that Mr YIM Tith received any orders from higher echelons, that he disseminated or implemented those orders in Kandieng District, that he issued orders to Kandieng District officials concerning murder, extermination, persecution against ‘East Zone Evacuees’ through murder and extermination, crimes allegedly committed at Veal Bak Chunching execution site. The ICP does not present any evidence that Mr YIM Tith visited, held meetings at, or otherwise engaged in activities in Kandieng District before, during or after events at Veal Bak Chunching execution site 745³⁷³⁹ and during the temporal scope of the investigation.³⁷⁴⁰

1730. Thus, it is not reasonable to conclude that Mr YIM Tith had superior responsibility over Kandieng District officials, that he planned, ordered, instigated, and committed charged crimes at the Veal Bak Chunching execution site.³⁷⁴¹

(e) Conclusion

1731. The evidence in the Northwest Zone analysed above is insufficient to support the ICP’s sweeping allegations that through his positions, acts and conduct, Mr YIM Tith participated in the alleged common criminal plan across the seven sectors of the Northwest Zone.

³⁷³⁶ ICP’s Final Submission, D378/2, paras 742-743.

³⁷³⁷ *Supra*, paras 1128 to 1236.

³⁷³⁸ *Supra*, paras 1075 to 1379.

³⁷³⁹ ICP’s Final Submission, D378/2, para. 716.

³⁷⁴⁰ *Supra*, paras 436 to 446.

³⁷⁴¹ Notification of Amended Charges, D350.1, p. 12, para. 9, Crime Site 37: Veal Bak Chunching execution site.

1732. The ICP's claim that Mr YIM Tith was '*de facto* leader in the Northwest Zone' as early as 1976 is based on the evidence of one witness, SAO Chobb, who was unable to positively identify Mr YIM Tith.³⁷⁴² It exemplifies the weaknesses in the ICP's case against Mr YIM Tith that he makes allegations regarding *de facto* leadership on the basis of a single unreliable and uncorroborated witness. There is insufficient evidence that Mr YIM Tith held any other Northwest Zone positions on any dates as alleged by the ICP. As argued above, there is no reliable direct evidence of Mr YIM Tith's acts and conduct in any of these capacities.³⁷⁴³ The ICP relies on a sheer quantity of hearsay evidence, irrespective of the quality of the evidence in supporting his claims, despite the abundance of exculpatory evidence of witnesses who lived and worked in the Northwest Zone but had never heard of Mr YIM Tith.³⁷⁴⁴

1733. The ICP methodically misstates, and therefore misrepresents, the Case File evidence in the Northwest Zone. Where the testimony of witness's does not fit the ICP's preordained narrative, he disregards it or advocates for a teleological reinterpretation of the evidence. The witness VY Phann, for example, stated that a meeting was held in November 1978, and the ICP argues that 'several factors make it more likely that it occurred in November 1977'.³⁷⁴⁵ At the same time, the ICP ignores the abundance of other contradictions and uncertainties regarding the dates of events, and this is a misguided and disingenuous approach to handling uncertainties in witness testimony.

1734. As already argued above, there is insufficient evidence to find that Mr YIM Tith contributed to the alleged implementation of a CPK enemies policy including his alleged contribution at so-called 'large public meetings',³⁷⁴⁶ or through his alleged personal involvement in arrests, imprisonments or killings;³⁷⁴⁷ that he contributed to the alleged implementation of CPK policies regarding enemies³⁷⁴⁸, forced marriage³⁷⁴⁹, or enslavement;³⁷⁵⁰ that he had specific intent to destroy the Vietnamese and Khmer Krom;³⁷⁵¹ or was otherwise involved in the Northwest Zone as alleged by the ICP.³⁷⁵²

³⁷⁴² *Supra*, paras 1076 to 1125.

³⁷⁴³ *Supra*, paras. 1075 to 1379.

³⁷⁴⁴ *Supra*, para. 1127.

³⁷⁴⁵ *ICP's Final Submission*, D387/2, para. 58.

³⁷⁴⁶ *Supra*, paras 1386 to 1455.

³⁷⁴⁷ *Supra*, paras 1456 to 1463.

³⁷⁴⁸ *Supra*, paras 1383 to 1471.

³⁷⁴⁹ *Supra*, paras 1517 to 1533.

³⁷⁵⁰ *Supra*, paras 1534 to 1576.

³⁷⁵¹ *Supra*, paras 1474 to 1516.

³⁷⁵² *Supra*, paras 1577 to 1596.

Throughout these allegations, the ICP relies on unreliable witness testimony that is of low or no probative value, and is frequently nothing more than the opinions of witnesses that are based on information from unknown sources.

1735. An obvious lacuna in the evidence cited in support of the ICP's case theory in the Northwest Zone is that none of the evidence analysed above refers to the content of any communication between Mr YIM Tith and any of the other Khmer Rouge cadres that the ICP effusively claims were his superiors and subordinates in the CPK hierarchy. This is because there is no evidence. There is not a single item of contemporaneous documentary evidence on Case File 004 bearing Mr YIM Tith's name.

1736. On the basis of the foregoing analysis, the Defence respectfully submits that the evidence on Case File 004 is not sufficient to find that Mr YIM Tith participated in the alleged common criminal plan in the Northwest Zone.

H. OTHER MODES OF LIABILITY

1737. Mr YIM Tith cannot be indicted upon any of the crimes for which he has been charged on the basis of JCE.³⁷⁵³ There is no evidence on the Case File demonstrating that Mr YIM Tith was a member of the CPK Central Committee, and/or Standing Committee. Further, there is no evidence demonstrating that Mr YIM Tith was involved in creating or disseminating policies and plans originating from either the Central Committee or the Standing Committee, or that he shared any common criminal plan. There is no evidence on the Case File of any communications between either the Central Committee or Standing Committee and Mr YIM Tith. Mr YIM Tith's family connection to Ta Mok, who was a member of the CPK Standing Committee, does not constitute a basis to consider Mr YIM Tith to be a member of any JCE. There is no evidence on the Case File that Ta Mok issued orders to Mr YIM Tith to disseminate CPK policies or that Mr YIM Tith acted upon any order in furtherance of the common criminal plan. There is insufficient evidence on the Case File to demonstrate that Mr YIM Tith participated and contributed to the common criminal plan which allegedly resulted in and/or involved the commission of a crime. There is no evidence on the Case File demonstrating Mr YIM Tith's intent to commit any crimes encompassed by any such common criminal plan.

³⁷⁵³ *Notification of Amended Charges*, D350.1, pp. 15-16, paras 13, 15 and 17.

1738. Mr YIM Tith cannot be indicted upon any of the crimes for which he has been charged on the basis of direct commission. There is insufficient evidence that Mr YIM Tith physically perpetrated any of the crimes with which he is charged.

1739. Mr YIM Tith cannot be indicted upon any of the crimes for which he has been charged on the basis of planning, ordering or instigating. There is no evidence demonstrating that Mr YIM Tith designed any criminal conduct constituting a crime which was later perpetrated. There is no evidence demonstrating that Mr YIM Tith instructed another, or through intermediaries, to commit crimes. There is no evidence demonstrating that Mr YIM Tith, through an act or an omission, prompted another person to commit a crime.

1740. Mr YIM Tith cannot be indicted upon any of the crimes for which he has been charged on the basis of superior responsibility. There is insufficient evidence to demonstrate that Mr YIM Tith held any of the positions for which he was charged, namely: the member and Secretary of Kirivong District; Sector 13 Committee member; Secretary of Sector 1; Secretary of Sector 3; Secretary of Sector 4; and Deputy Secretary of the Northwest Zone of DK.³⁷⁵⁴ There is no evidence identifying any subordinates of Mr YIM Tith over whom he exercised effective control in a superior-subordinate relationship. There is no evidence that Mr YIM Tith had the material ability to prevent and punish criminal behaviour, including a lack of evidence that Mr YIM Tith ever appointed, promoted, demoted, or dismissed subordinates. There is no evidence that Mr YIM Tith received any orders from higher echelons, disseminated or implemented those orders. There is insufficient evidence that Mr YIM Tith, for any alleged position, disseminated or implemented orders to subordinates, or that he visited, held meetings at, or otherwise engaged in activities at any crime site.

1741. There is no evidence demonstrating that Mr YIM Tith wilfully participated, directly or indirectly, in any crime as a co-perpetrator.

³⁷⁵⁴ *Notification of Amended Charges*, D350.1, p. 3, para. 6.

IV. MR YIM YITH IS NEITHER A ‘SENIOR LEADER OF DEMOCRATIC KAMPUCHEA’ NOR ‘MOST RESPONSIBLE’ FOR CRIMES COMMITTED DURING THE PERIOD FROM 17 APRIL 1975 TO 6 JANUARY 1979

1742. The ICP’s claim that Mr YIM Tith was both a ‘senior leader’ and one of those ‘most responsible’ is premised wholly on his factual allegations regarding JCE. The ICP makes legal submissions on the application of a range of relevant factors for determining if Mr YIM Tith falls within the ECCC’s personal jurisdiction,³⁷⁵⁵ yet ultimately, his claim about personal jurisdiction depends on the allegation that Mr YIM Tith was a member of an all-encompassing JCE and contributed to the common criminal plan in the Southwest Zone³⁷⁵⁶ and Northwest Zone.³⁷⁵⁷

1743. The ICP’s allegations regarding JCE are unfounded. The ICP asserts that ‘highly consistent evidence from independent witnesses’ establishes that Mr YIM Tith made significant contributions to all aspects of the joint criminal enterprise spanning the Southwest Zone and the Northwest Zone.³⁷⁵⁸ The Defence’s detailed analysis of Case File 004 in this Response has shown it to be a hollow claim, founded upon the ICP’s methodical approach to misinterpreting, and therefore misrepresenting, the evidence. The evidence is not sufficient to find that, through his alleged positions, acts and conduct as an alleged member of the alleged JCE during the DK period, Mr YIM Tith participated in the alleged common criminal plan across the Southwest Zone and the Northwest Zone.

1744. On the basis of the foregoing analysis, there is no evidence that Mr YIM Tith falls, or has ever fallen, within the intended meaning of a ‘senior leader of Democratic Kampuchea’ nor ‘those who were most responsible’, as defined by the UN-RGC Agreement and the Establishment Law interpreted in light of their extensive negotiation history.

³⁷⁵⁵ ICP’s Final Submission, D378/2, paras 1125 to 1149.

³⁷⁵⁶ ICP’s Final Submission, D378/2, paras 10 to 40.

³⁷⁵⁷ ICP’s Final Submission, D378/2, paras 49 to 109.

³⁷⁵⁸ ICP’s Final Submission, D378/2, para. 110.

CONCLUSION

1745. An accused has a fundamental right (not obligation) to answer the case against him.³⁷⁵⁹

This does not translate to a requirement that a weak and flawed case be sent to trial. The ICP has advanced arguments as to the credibility of his case and the consistency of the evidence upon which he seeks to rely while in possession of contradictory evidence. Neither he, nor anyone else, can be confident in the integrity of his case.

1746. Mr YIM Tith does not fall within the personal jurisdiction of the ECCC as he was not a ‘senior leader’ and does not fall within the category of ‘those who were most responsible’ and thus the case must be dismissed.

1747. Further, no fair trial is now possible. It is therefore imperative that the CIJs order a stay of Case 004 with full prejudice under their inherent powers to prevent a miscarriage of justice.


1748. In any event, there is insufficient evidence to support indictment, requiring the dismissal of the case pursuant to Rule 67(3).

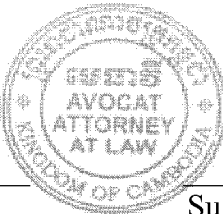
³⁷⁵⁹ ICCPR, Article 14(1) and (3).

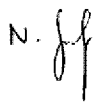
WHEREFORE, for all the reasons stated herein, the Defence respectfully requests that, in the exercise of their discretion and in the interests of justice, the Co-Investigating Judges:

- (1) **Find** that Mr YIM Tith does not fall within the personal jurisdiction of the ECCC; *or*
- (2) **Find** that the fairness and integrity of the proceedings against Mr YIM Tith have been irremediably vitiated such that neither fair nor expeditious proceedings are now possible; *or*
- (3) **Find** that there is insufficient evidence to indict and send Mr YIM Tith to trial for the charged crimes; *and, accordingly*
- (4) **Dismiss** the case against Mr YIM Tith.

Respectfully submitted,


SO Mosseny


Suzana TOMANOVIĆ


Neville SORAB

Co-Lawyers for Mr YIM Tith

Signed in Phnom Penh, Kingdom of Cambodia on this 26th day of November 2018.