

BEFORE THE PRE-TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 004/07-09-2009-ECCC/OCIJ (PTC61) **Party Filing:** The Defence for YIM Tith**Filed to:** Pre-Trial Chamber**Original language:** ENGLISH**Date of document:** 2 December 2019**CLASSIFICATION****Classification of the document
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**YIM TITH'S APPEAL OF THE INTERNATIONAL CO-
INVESTIGATING JUDGE'S CLOSING ORDER IN CASE 004**

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INTRODUCTION

1. Mr YIM Tith, through his Co-Lawyers ('the Defence'), pursuant to Rules 21, 67(5) and 74(3)(a) of the Internal Rules ('Rules') hereby submits *Yim Tith's Appeal of the International Co-Investigating Judge's Closing Order in Case 004* ('Appeal of the ICIJ's Closing Order') requesting the Pre-Trial Chamber ('PTC') to dismiss the Indictment with full prejudice and dismiss the case against Mr YIM Tith. This Appeal is made necessary since the International Co-Investigating Judge ('ICIJ') erred in finding Mr YIM Tith 'most responsible' for the crimes of the Democratic Kampuchea ('DK') era. Specifically, the ICIJ: (i) erred in law by violating Mr YIM Tith's fundamental fair trial rights by conducting the judicial investigation and issuing an indictment in circumstances in which no fair trial is possible; (ii) erred in law by issuing an Indictment that is void for procedural defects due to his failure to correctly identify the law and refer to the evidentiary analysis in his findings on personal jurisdiction; (iii) erred in law by exceeding the factual scope of the investigation; (iv) erred in law by using JCE liability as a relevant consideration to assess personal jurisdiction; and (v) erred in fact and law in finding that Mr YIM Tith was 'most responsible' and thus within the ECCC's personal jurisdiction.

PROCEDURAL HISTORY

2. The Defence incorporates by reference the procedural history included in *Yim Tith's Combined Response to the National and International Co-Prosecutors' Final Submissions* ('Combined Response to the Final Submissions').¹

3. On 28 June 2019, the National Co-Investigating Judge ('NCIJ') issued his *Order Dismissing the Case against Yim Tith* ('NCIJ's Closing Order') in Khmer² and the ICIJ issued his *Closing Order* ('ICIJ's Closing Order') in English.³

4. An English translation of the NCIJ's Closing Order was issued on 5 September 2019. In view of 'palpable inaccuracies' in the translation, a revised version was notified on 16 October 2019.⁴

5. On 17 September 2019, in accordance with the extended notification period granted by

¹ *Yim Tith's Combined Response to the National and International Co-Prosecutors' Final Submissions*, 26 November 2018, D378/5, paras 14 to 105.

² *Order Dismissing the Case against Yim Tith*, 28 June 2019, D381 ('NCIJ's Closing Order').

³ *Closing Order*, 28 June 2019, D382 ('ICIJ's Closing Order').

⁴ *Decision on Yim Tith's Request that the Pre-Trial Chamber Order the Urgent Provision of an Accurate English Translation of the Order Dismissing the Case against Yim Tith and Suspend the Closing Order Appeal Time Limits*, 26 September 2019, D381/12 and D382/13, para. 8. See also: *Decision on Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004*, 30 October 2019, D381/16 and D382/19, pp. 4 to 5.

the PTC,⁵ the Defence filed its Notice of Appeal against the Closing Orders.⁶

6. On 17 September 2019, the Defence filed *Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*.⁷

7. On 25 September 2019, the ICP filed the *International Co-Prosecutor's Response to Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*.⁸

8. On 4 October 2019, the Defence filed *Yim Tith's Reply to the International Co-Prosecutor's Response to Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*.⁹

9. On 30 October 2019, the PTC issued its *Decision on Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004*, in which it granted the parties 45 days from the notification of the corrected English translation of the NCIJ's Closing Order to file their appeals and ordered the parties to file separate appeals against each Closing Order in separate documents.¹⁰

APPLICABLE LAW

10. The law applicable to each ground of appeal is incorporated below.

ADMISSIBILITY

11. The Appeal is admissible under Rule 21, Rule 67(5), and Rule 74.

12. Rule 67(5) states that the Closing Order is subject to appeal as provided in Rule 74. Rule 74(3) lists the orders and decisions of the Co-Investigating Judges ('CIJs') that may be appealed by the Defence. More specifically, Rule 74(3)(a) permits the Defence to appeal orders 'confirming the jurisdiction of the ECCC.' This extends to all decisions concerning personal, temporal and subject matter jurisdiction.

13. Rule 21 sets out fair trial requirements that the ECCC is duty-bound to apply pursuant to Article 13(1) of the *Agreement between the United Nations and the Royal Government of*

⁵ *Decision on Yim Tith's Request for Extension of Deadline for Notice of Appeal of Closing Orders in Case 004*, 19 July 2019, D381/3 and D382/3.

⁶ *Yim Tith's Notice of Appeal against the Closing Orders*, notified as: *Yim Tith's Notice of Appeal against the National Co-Investigating Judge's Order Dismissing the Case*, 17 September 2019, D381/7; and *Yim Tith's Notice of Appeal against the International Co-Investigating Judge's Closing Order*, 17 September 2019, D382/9.

⁷ *Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*, 17 September 2019, D381/8.

⁸ *International Co-Prosecutor's Response to Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*, 25 September 2019, D381/13.

⁹ *Yim Tith's Reply to the International Co-Prosecutor's Response to Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders*, 4 October 2019, D381/15.

¹⁰ *Decision on Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004*, 30 October 2019, D381/16 and D382/19, pp. 4 to 5.

Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ('UN-RGC Agreement').¹¹ While Rule 21 does not explicitly provide grounds for appeal, the PTC has held that it has 'competence to consider grounds raised by the Appellants that are not explicitly listed under Internal Rule 74(3) through a liberal interpretation of a charged person's right to appeal in light of Internal Rule 21,' in order to ensure that proceedings are fair and adversarial.¹² The PTC has found that Rule 21 may, on a case by case basis, broaden the scope of Rule 74 where: (i) the situation at issue is not contemplated by the Rules; (ii) appeals filed against an indictment raise matters that cannot be rectified by the Trial Chamber; and (iii) the particular circumstances of the case require the PTC's intervention to avoid irreparable harm to the Charged Person's fair trial rights.¹³ The Defence incorporates its submissions on breach of Article 21 into the relevant appeal grounds below.

14. The Defence files this separate *Appeal of the ICIJ's Closing Order* to address all grounds of appeal that are legally and procedurally separable from the NCIJ's Closing Order, as instructed by the PTC.¹⁴ Mindful of the concerns of the PTC for judicial and procedural efficiency, in particular that appeal submissions against the separate Closing Orders may require different procedural steps, the Defence respectfully submits its *Appeal of the Issuance of Two Closing Orders* containing the only appeal ground that relates to both Closing Orders.¹⁵ The error of law in the *Appeal of the Issuance of Two Closing Orders* arises equally from both Closing Orders, it supersedes the separation of the proceedings by the issuance of two Closing Orders, and it requires a conjoined remedy of the dismissal of both defective Closing Orders.

STANDARD OF REVIEW

15. The PTC has found it may reverse a discretionary decision of the CIJs that is: (i) based on an incorrect interpretation of the governing law, i.e. an error of law invalidating the

¹¹ See for example: *Considerations on Im Chaem's Appeal against the International Co-Investigating Judge's Decision to Charge Her In Absentia*, 1 March 2016, D239/1/8, para. 17; *Decision on Yim Tith's Appeal Against the Decision Denying His Request for Clarification*, 13 November 2014, D205/1/1/2, para. 7.

¹² Case 002, *Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order*, 15 February 2011, D427/2/15, para. 71; Case 002, *Decision on Khieu Samphan's Appeal against the Closing Order*, 21 January 2011, D427/4/15, para. 18.

¹³ Case 002, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, D427/1/30, para. 48; Case 002, *Decision on Khieu Samphan's Appeal against the Closing Order*, 21 January 2011, D427/4/15, para. 18; *Considerations on Im Chaem's Appeal against the International Co-Investigating Judge's Decision to Charge Her in Absentia*, 1 March 2016, D239/1/8, para. 17.

¹⁴ *Decision on Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004*, 30 October 2019, D381/16 and D382/19, p. 4.

¹⁵ *Decision on Yim Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004*, 30 October 2019, D381/16 and D382/19, para. 12.

decision; (ii) based on a patently incorrect conclusion of fact, i.e. an error of fact occasioning a miscarriage of justice; or (iii) so unfair or unreasonable as to constitute an abuse of the CIJs' discretion and to force the conclusion that they failed to exercise their discretion judiciously.¹⁶ As such, the PTC has found that 'it must be established that there was an error or abuse which was fundamentally determinative of the Co-Investigating Judges' exercise of discretion.'¹⁷

16. In line with established international jurisprudence, the PTC has found that 'alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct' and 'alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue.'¹⁸ This includes an assessment of whether the judge gave weight to extraneous or irrelevant considerations or failed to give sufficient weight to relevant considerations.¹⁹

17. When making the factual assessment as to whether Mr YIM Tith was a person 'most responsible' under the jurisdiction of the ECCC, the ICIJ was required to make such findings to the standard of proof of 'probability.'²⁰ The probability standard necessitates that evidentiary material in the Case File must be sufficiently serious and corroborative so as to provide a certain level of probative force.²¹ Therefore, the PTC must examine whether the CIJs applied the appropriate standard of evidence.²²

18. Where a finding on material facts is based on an inference drawn from circumstantial evidence, or where contradictory evidence exists, that finding must be the only reasonable conclusion that can be drawn from the evidence. The ICIJ cannot base his findings on a reasonable conclusion arising from the evidence; rather, the conclusions relevant to the ICIJ's assessment of Mr YIM Tith's status as a person 'most responsible' and within the jurisdiction of ECCC must be the *only* reasonable conclusion available on the basis of the evidence before the ICIJ.²³ If there is an alternative conclusion that can reasonably be deduced from the evidence, and which suggests that Mr YIM Tith was not 'most responsible,' the principle of

¹⁶ Case 004/1, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 21.

¹⁷ *Ibid.*, paras 20 to 22: These standards to apply to all discretionary decisions of the CIJs.

¹⁸ Case 002, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, D427/1/30, para. 113.

¹⁹ Case 002, *Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive*, 12 November 2009, D164/3/6, para. 25.

²⁰ ICIJ's Closing Order, para. 25.

²¹ Case 004/1, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 61.

²² *Ibid.*, para. 63.

²³ ICTY Appeals Chamber, *Prosecutor v. Stakić* (IT-97-24-A), Judgement, 22 March 2006, para. 219.

in dubio pro reo must be applied²⁴ and the case against Mr YIM Tith must be dismissed.

19. The PTC's assessment of the reasonableness of the ICIJ's factual findings²⁵ must take into account not only the evidence relied upon, but also the reasoning provided to explain the evidentiary analysis.²⁶ Where supporting evidence is inherently weak or contradicted by other evidence, the ICIJ is required to provide a full and cogent explanation as to how and why he considered it sufficiently persuasive to meet the 'probability standard.' Deficiencies in, or indeed the absence of, any such explanation demand the conclusion that no reasonable trier of fact could have made the ICIJ's finding. The PTC must be satisfied that factual findings based on the 'probability' standard are clear and sound, both in terms of evidence and rationale.²⁷

GROUND OF APPEAL

I. GROUND 1: THE ICIJ ERRED IN LAW BY VIOLATING MR YIM TITH'S FUNDAMENTAL FAIR TRIAL RIGHTS BY CONDUCTING THE JUDICIAL INVESTIGATION AND ISSUING AN INDICTMENT IN CIRCUMSTANCES IN WHICH NO FAIR TRIAL IS POSSIBLE

20. The ICIJ erred in law by failing to consider the validity of the Case 004 investigation, rendering a fair trial for Mr YIM Tith impossible due to both the effective interference with the administration of justice and undue delay. This ground of appeal raises issues that cannot be rectified by the Trial Chamber and the particular circumstances of Case 004 require the PTC's intervention to avoid further irreparable harm to Mr YIM Tith's fair trial rights. Articles 12 and 13 of the UN-RGC Agreement and Articles 33^{new} and 35^{new} of 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* ('Establishment Law'), demand the ECCC's constant adherence to the rights enshrined in Articles 14 and 15 of the International Covenant on Civil and Political Rights ('ICCPR'), to which Cambodia is party. These include being tried by a 'competent, independent and impartial tribunal' without undue delay. Rule 21 reflects the fundamental precepts of international fair trial rights and demands that 'ECCC proceedings shall be fair' and 'brought to a conclusion within a reasonable time.' In addition, by failing to consider Mr YIM Tith's arguments in this regard that were raised in

²⁴ Case 004/1, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 26 to 38. *See also*: Case 002, *Case 002/02 Judgement*, 16 November 2018, E465, paras 21 and 3014; Case 002, *Case 002/01 Judgment*, 7 August 2014, E313, para. 22; Case 002, *Decision on Immediate Appeal by Khieu Samphan on Application for Release*, 6 June 2011, E50/3/1/4, para. 31.

²⁵ *Supra*, para. 16.

²⁶ Rule 67(4); Case 004/1, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 29 June 2018, D308/3/1/20, para. 63.

²⁷ *Ibid.*

the Combined Response to the Final Submissions,²⁸ the ICIJ also violated his right to be heard at this stage of the proceedings, as previously recognised by the PTC.²⁹ Due to these violations of Mr YIM Tith's fair trial rights, this ground of appeal is admissible pursuant to Rule 21.³⁰

A. SUB-GROUND 1.1: THE ICIJ FAILED TO CONSIDER THE VALIDITY OF THE CASE 004 INVESTIGATION

21. In the Combined Response to the Final Submissions, the Defence argued that the CIJs were obliged to determine the validity of the ICP's Third Introductory Submission, and that, since the ICP's Third Introductory Submission and the ensuing investigation were invalid, Case 004 must be dismissed.³¹ The ICIJ had himself noted that '[t]he alleged lack of a properly filed IS remains nonetheless a matter which all judges would have to address *ex officio* and at any stage of the proceedings.'³² Similarly, the PTC majority has held that the 'consequences of such violation [of the Establishment Law, Agreement and the Internal Rules through the unilateral conduct of the preliminary investigation] may exist in the proceedings that follow.'³³ Contrary to his own and the PTC's findings, the ICIJ failed to address the issue of whether the CIJs were validly seised of an investigation in Case 004 and the PTC must now consider the legal consequences thereof.

22. Article 1 of the UN-RGC Agreement demands 'cooperation' between the national and international sides while Article 6 provides for cooperation between the Co-Prosecutors. The UN-RGC Agreement thus envisaged two-headed, but not separated, proceedings, in which the Co-Prosecutors must cooperate.³⁴

23. The ICP acted unilaterally in conducting his preliminary investigation and in filing the ICP's Third Introductory Submission.³⁵ By circumventing the procedure for settling

²⁸ Combined Response to the Final Submissions, paras 240 to 429.

²⁹ Case 002, *Decision on Ieng Sary's Appeal against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings*, 20 September 2010, D390/1/2/4, paras 16 to 18.

³⁰ *Supra*, para. 13.

³¹ *Yim Tith's Combined Response to the National and International Co-Prosecutors' Rule 66 Final Submissions*, 26 November 2019, D378/5, paras 240 to 258.

³² Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 41.

³³ *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.

³⁴ UN-RGC Agreement, Article 6(3) and (4).

³⁵ *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.

disagreements, he failed even to seek leave to proceed unilaterally.³⁶ A majority of the PTC held that the ICP's unilateral initiation of the preliminary investigation was illegal.³⁷ By excluding the NCP, his direct and equal counterpart,³⁸ the ICP permanently precluded cooperation and thwarted any possibility of the cooperative approach to prosecutions mandated by the UN-RGC Agreement and the Establishment Law.³⁹ In so doing, the ICP violated the object and purpose, the terms, and the spirit of the UN-RGC Agreement, Establishment Law, and the Rules.

24. The invalidity of the ICP's Third Introductory Submission was not remedied by the belated enactment of the disagreement procedure, nor by the issuance of the Closing Orders.⁴⁰ Further, the ICP's Third Introductory Submission is signed only by the Acting ICP, rendering it additionally procedurally void under Rule 53(3).⁴¹

Conclusion

25. 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.⁴² The ICIJ erred in law by proceeding with an investigation based on the invalid ICP's Third Introductory Submission. Case 004 is illegally founded and must now be dismissed.

B. SUB-GROUND 1.2: IMPOSSIBILITY OF A FAIR TRIAL

26. The CIJs previously noted that it would be morally wrong and legally impermissible to proceed to trial in circumstances in which the accused cannot be guaranteed a fair trial.⁴³ In the Combined Response to the Final Submissions, the Defence set out in detail the multiple

³⁶ UN-RGC Agreement, Article 6(4). This provision takes precedence over Rule 1(2).

³⁷ *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.

³⁸ UN-RGC Agreement, Articles 6(1), (4) and 2(1).

³⁹ *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.

⁴⁰ The ICIJ found a unilaterally filed supplementary submission to be invalid precisely because of the ICP's failure to comply with Rule 71: *Decision on Co-Prosecutors' Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, 28 June 2011, D27/3, para. 5: '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.'

⁴¹ Rule 53(1)(e) requires 'the date and signature of both Co-Prosecutors.'

⁴² UN-RGC Agreement, Articles 1, 6 and 7, Rule 53; 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.

⁴³ *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.

ways in which Mr YIM Tith's fundamental fair trial rights have already been irremediably violated.⁴⁴ The ICIJ dismissed or ignored these violations.⁴⁵ By issuing an indictment without demonstrating or even considering the sustained possibility of full and fair trial proceedings, the ICIJ failed to fulfil his most fundamental judicial obligation. This was so unreasonable and unfair as to constitute an abuse of his discretion. The PTC must now consider the impact of the vitiation of the fairness and integrity of the proceedings against Mr YIM Tith through (i) effective interference with the administration of justice, and (ii) undue delay.

i. Effective interference with the administration of justice

(a) Leaking of the ICP's Third Introductory Submission

27. By 26 May 2011, the ICP's Third Introductory Submission had been illegally published.⁴⁶ This highly prejudicial and partisan document accuses Mr YIM Tith of serious crimes. Its publication constitutes a flagrant violation of the presumption of innocence. This was clearly interference with the administration of justice.⁴⁷ Following this illegal publication, Mr YIM Tith was repeatedly named by the media,⁴⁸ 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.'⁴⁹

⁴⁴ Combined Response to the Final Submissions, paras 259 to 429.

⁴⁵ ICIJ's Closing Order, para. 24.

⁴⁶ D72/1.1.11, Written Record of Investigative Action, 2 September 2011: reporting that Ms Yuko Maeda, an ECCC Press Officer recalled that back to 26 May 2011 a freelance journalist had first published 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. Subsequent media reports quoted the accusing document *verbatim* and displayed confidential ECCC material. *ECCC Press Release*, 'Press Release by the Co-Investigating Judges,' 31 August 2011; 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, available at: <https://www.voacambodia.com/a/crime-sites-victim-information-released-in-pending-tribunal-case/1568123.html> (last accessed 22 November 2019).

⁴⁷ *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.

⁴⁸ Manning, S. and Thompson, A., 'Leaked Documents Suggest UN Backing Off Khmer Rouge Trials,' *Scoop Independent News*, 27 June 2011, available at, along with functioning hyperlinks to, *inter alia*, the ICP's Third Introductory Submission: <http://www.scoop.co.nz/stories/print.html?path=HL1106/S00165/leaked-documents-suggest-un-backing-off-khmer-rouge-trials.htm> (last accessed 22 November 2019), 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.

⁴⁹ Sok, K., 'Crime Sites, Victim Information Released in Pending Tribunal Case,' *VOA Khmer*, 20 December 2012, available at: <https://www.voacambodia.com/a/crime-sites-victim-information-released-in-pending-tribunal-case/1568123.html> (last accessed 22 November 2019).

28. The integrity of the investigation is wholly reliant on its confidentiality.⁵⁰ The CIJs held that the ‘endemic’ and ‘disgraceful’ leaking of confidential information in Case 004 threatened ‘the integrity of the proceedings.’⁵¹ As well as being a flagrant violation of the presumption of innocence, the publication of the ICP’s Third Introductory Submission fatally undermined the integrity of the judicial investigation by potentially contaminating all subsequent witness testimony. The provision of the ICP’s Third Introductory Submission to the media thus constituted wilful interference with the administration of justice, as emphasised by the CIJs.⁵²

29. The mere possibility of contamination renders the investigation unsound.⁵³ The procedural rules that regulate the integrity of evidence are independent from the CIJs’ assessments of probative value. Where such procedural rules are breached and the integrity of evidence jeopardised, serious prejudice to the proceedings is inevitable. The Defence cannot be expected to speculate as to how contaminated evidence might have differed from uncontaminated evidence. The loss of integrity of witness testimony is final and irremediable: the truth can never be known.

(b) Contamination of investigation through external parties

30. The leak of the ICP’s Third Introductory Submission to the public made it available to the Documentation-Center Cambodia (‘DC-Cam’), which conducted its own investigations outside the purview and beyond the accountability of the ECCC. DC-Cam was thus involved in the investigation of Case 004 alongside the illegal leak of the ICP’s Third Introductory Submission, and, in a rotten feedback loop, the ICIJ proceeded to rely heavily on its work.⁵⁴

31. The primary aim of DC-Cam’s Accountability Project is to ‘help to hold leaders accountable’ before the ECCC.⁵⁵ DC-Cam has openly admitted to investigating ECCC cases by visiting crime sites and interviewing people.⁵⁶

⁵⁰ Rules 54 and 56.

⁵¹ *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; ECCC, Statement of the Co-Prosecutors, 5 January 2009.

⁵² Prohibited by Rule 35(1). D72/1.1.11, Written Record of Investigative Action, 2 September 2011. 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.

⁵³ ECtHR, *Jaloud v. The Netherlands*, Application Number 47708/08, *Judgment*, 20 November 2014, para. 228.

⁵⁴ See for example D3/8, Tun Soun, WRI, EN 00622285.

⁵⁵ DC-Cam, ‘Our Mission,’ available at: <http://www.d.dccam.org/About/History/Histories.htm> (last accessed 22 November 2019) and ‘Promoting Accountability: 2000-present,’ available at http://www.d.dccam.org/Projects/Promoting/Promoting_Accountability.htm (last accessed 22 November 2019).

⁵⁶ 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

32. Once seised of the judicial investigations before the ECCC, validly or not, the CIJs, and they alone, were responsible for the judicial investigations and their confidentiality.⁵⁷ On 7 September 2009, the Acting ICP submitted the ICP's Third Introductory Submission to the CIJs seeking to open an investigation against individuals including Mr YIM Tith.⁵⁸ By 18 July 2010, DC-Cam had reactivated its field work and commenced investigations in Kirivong District (in DK's Sector 13).⁵⁹ DC-Cam's interview plan expressly sought to protect 'informants' by conserving their rights against self-incrimination,⁶⁰ revealing its ambitions as a targeted investigation rather than an effort to record full, truthful accounts for historical purposes as stated in their mission plan.⁶¹ The Case 002 judicial investigation was confidential, and in any event did not cover Kirivong District.⁶² Although 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, DC-Cam was actively searching for Mr YIM Tith in Kirivong District.⁶³

33. The ICP's Third Introductory Submission was illegally leaked shortly after the CIJs had issued a statement in which they explained that no field investigations had commenced in Cases 003 and 004.⁶⁴ However, 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. 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.⁶⁵ 50 DC-Cam statements were placed on Case File 004 between the closure of the Case 002 investigation and the publication of the ICP's Third Introductory Submission.⁶⁶ Many of these were used as the basis for questioning

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.'

⁵⁷ Rules 55, 56 and 60(2).

⁵⁸ *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.

⁵⁹ D65.1.2, DC-Cam, Project to promote accountability: A visit to District 109, Southwest Zone, 18 July 2010.

⁶⁰ D65.1.2, DC-Cam, Project to promote accountability: A visit to District 109, Southwest Zone, 18 July 2010.

⁶¹ DC-Cam, 'Our Mission,' available at: <http://www.d.dccam.org/About/History/Histories.htm> (last accessed 22 November 2019).

⁶² Case 002, *Closing Order*, 15 September 2010, D427.

⁶³ D65.1.2, DC-Cam, Project to promote accountability: A visit to District 109, Southwest Zone, 18 July 2010.

⁶⁴ *ECCC Press Release*, 'Statement from the Co-Investigating Judges,' 2 February 2011.

⁶⁵ Rule 56(1).

⁶⁶ 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-

conducted by judicial investigators.⁶⁷ After the illegal publication of the ICP's Third Introductory Submission, DC-Cam produced 85 statements that were placed on Case File 004.⁶⁸ Many of these interviewees were also then interviewed by judicial investigators.⁶⁹ The

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 Roeun, 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.

⁶⁷ 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.

⁶⁸ 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

potentially-contaminated testimony was placed on Case File 004 for the CIJs to consider in

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 Yoek, 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 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 Soheat, 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 Voern, 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.

⁶⁹ 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 Yoek, 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.

their assessment of the charges against Mr YIM Tith. It is impossible to be certain that those interviewed by DC-Cam's personnel were not told, nor had otherwise learned, of the ICP's Third Introductory Submission's allegations against Mr YIM Tith. It is thus impossible to hold any confidence in the confidentiality, integrity, fairness, or accuracy of the judicial investigation.

34. In frequently relying upon DC-Cam statements as a basis for their questioning of potential witnesses, judicial investigators often became frustrated when witnesses deviated from their previous statements.⁷⁰ Investigators opened interviews by referring to DC-Cam statements, confirming 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.⁷¹ Disclosure of such information constitutes interference with the administration of justice contrary to Rule 35(1)(a), yet the investigators seemed unconcerned.

35. The demonstrated contamination of the judicial investigation vitiates any prospect of a fair trial. The PTC must dismiss Case 004 in order to prevent a serious miscarriage of justice.

(c) Late admission of Mr YIM Tith to Case 004

36. Mr YIM Tith was granted access to Case 004 only at a very late stage of the long investigation, significantly later than his Co-Accused and Civil Party Applicants, and almost a decade after the ICP commenced his preliminary investigations.⁷² The importance of the accused's active participation in the investigation has been emphasised by the PTC minority.⁷³ The long exclusion of Mr YIM Tith, while he and potential witnesses aged and evidence deteriorated, while the Co-Prosecutors and Civil Parties could actively participate in

⁷⁰ See for example: D219/903.1, MA Sivorn, DC-CAM Interview, 18 August 2013. 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: 'First it is about the Court. I heard the news that your husband was charged. What do you know about it?' (at EN 01527548). MA Sivorn mentions a 'Ta Tith' who was, in 1990, deputy to SOU Met at checkpoint 404, located near to Pailin. She never provided this 'Ta Tith's' full name: '[My husband] was the commander and Ta Tith the deputy' (at EN 01527534 to 01527538).

⁷¹ See for example: D219/910, MA Sivorn, WRI, 30 September 2017, Q/A:1, at EN 01476056: '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.'

⁷² 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 004/1, *International Co-Prosecutor's Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7. Rule 23bis(2).

⁷³ 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.

Case 004, undermined the impartiality of the investigation.⁷⁴

ii. Undue delay

37. Mr YIM Tith's fundamental right to be tried without undue delay is unequivocally enshrined in Cambodian, ECCC, and international law.⁷⁵ In issuing his Closing Order, the ICIJ was obliged to consider whether Case 004 complies with Article 14(3)(c) of the ICCPR and Rule 21(4). The ICIJ committed a serious error of law by failing to take these minimum guarantees of expeditiousness into consideration, thereby invalidating the indictment.

38. The ICIJ failed to consider the Defence arguments on undue delay,⁷⁶ claiming that the issuance of the Closing Orders passes responsibility for the fairness of proceedings to the PTC, TC and SCC.⁷⁷ It now falls to the PTC, as 'the control body at the judicial investigation stage,'⁷⁸ to intervene to prevent a miscarriage of justice.

39. The ICCPR rights are minimum standards that both Cambodia and the UN agreed to observe.⁷⁹ Overload of the justice system, difficult economic circumstances, or the written

⁷⁴ Mr YIM Tith was able to challenge contentious actions and practices established at the ECCC only belatedly, often significantly after the event. Practices to which the Defence certainly would have – indeed *had tried to* – strongly objected prior to their inception had become normalised, and their entrenchment offered as grounds to dismiss the Defence's 'late in the day' objections. *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.

⁷⁵ 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). *See also*: European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Article 6(1); American Convention on Human Rights, 'Pact of San Jose,' Costa Rica, ETS 5, 22 November 1969, Article 8(2)(1); African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 7(1)(d); Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 ('Rome Statute'), Article 67(1)(c); Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 as updated ('ICTY Statute'), Articles 20(1) and 21(4)(c); Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 as amended ('ICTR Statute'), Articles 19(1) and 20(4)(c); Statute of the Special Court for Sierra Leone, 16 January 2002, Article 17(4)(c); Statute of the Special Tribunal for Lebanon, 10 June 2007, Article 16(4)(c).

⁷⁶ Combined Response to Final Submission, paras 352 to 429.

⁷⁷ ICIJ's Closing Order, para. 24.

⁷⁸ Case 004/1, *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 28.

⁷⁹ 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.

form of criminal proceedings do not permit a breach of Article 14(3)(c).⁸⁰ It is for the authorities to prove that the complexity of this case justifies the delays suffered.⁸¹ These standards are ‘designed to avoid that a person charged should remain too long in a state of uncertainty about his fate.’⁸²

40. The proceedings in Case 004 have been beset by woeful and unjustifiable delays. It has been over 13 years since the preliminary investigation was opened, and any trial and appellate proceedings would be likely to extend into several years.⁸³ During the investigation, the ICIJ noted the undue prolongation of the proceedings against Mr YIM Tith.⁸⁴ Continued extreme financial constraints on the proceedings spell further unacceptable delays.⁸⁵ These cannot be justified by reference to prevailing economic conditions since it is incumbent upon both Cambodia and the United Nations to order their affairs such that they can comply with their obligations under the treaty.

41. Serious prejudice inheres in the fact of unjustified delay in the first place, such that the accused need not demonstrate any additional prejudice. However, the delays suffered by Mr YIM Tith have indeed caused additional serious prejudice to him, as follows.

42. The preliminary investigation was opened against Mr YIM Tith on 10 July 2006.⁸⁶ The judicial investigation was triggered on 2 September 2009.⁸⁷ The ICP’s Third Introductory Submission was made public by 26 May 2011.⁸⁸ Mr YIM Tith was formally notified of his rights as a suspect in Case 004 only on 24 February 2012 (though he remained without

⁸⁰ 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; 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, paras 4.6 and 6.6.

⁸¹ 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. Mere affirmation that a delay was not excessive is not sufficient. 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.

⁸² ECtHR, *Stogmuller v. Austria*, Application Number 1602/62, Judgment, 10 November 1969, As to the Law, para. 5; ECtHR, *Stoianova and Nedelcu v. Romania*, Application Numbers 77517/01 and 77722/01, Judgment, 4 August 2005, para. 23.

⁸³ Case 004/1, *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.

⁸⁴ See Completion Plan, Revision 17, 30 June 2018, para. 20(c); Completion Plan, Revision 18, 30 September 2018, para. 19(b).

⁸⁵ *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.

⁸⁶ Case 004/1, *International Co-Prosecutor’s Rule 66 Final Submission against IM Chaem*, 27 October 2016, D304/2, para. 7.

⁸⁷ *Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission*, 7 September 2009, D1/1; *ICP’s Third Introductory Submission*, D1.

⁸⁸ D72/1.1.11, *Written Record of Investigation Action*, 2 September 2011. D72/1.1.3, Ferrie, J., ‘More Leaked Documents Highlight KR Tribunal Under Fire in Cambodia,’ *The Christian Science Monitor*, 15 June 2011.

individual legal representation or even access to the Case File).⁸⁹ While the judicial investigation concluded on 5 September 2017,⁹⁰ the two Closing Orders were not issued until 28 June 2019, after multiple extensions of the estimated completion date.⁹¹ The Defence conservatively estimates that full trial and appellate proceedings could very well extend beyond 2026.⁹² If proceedings were held in parallel with Cases 003 and 004/2, with one courtroom and single trial and appellate benches, the estimates would increase significantly.

43. Rule 21(4) dictates that '[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time.' The UN Human Rights Committee has determined that 'all stages [of proceedings] must take place "without undue delay."' ⁹³ Lengthy efforts to bolster a weak case are not tolerated. The period to be taken into consideration is from the beginning of the investigation – the point at which the situation of a suspect becomes 'substantially affected'⁹⁴ – until the conclusion of the final appellate pronouncement on the

⁸⁹ *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.

⁹⁰ *Second Notice of Conclusion of Judicial Investigation against Yim Tith*, 5 September 2017, D368.

⁹¹ Closing Orders, 28 June 2019, D381 and D382. Compare: Completion Plan, Revision 17, 30 June 2018, para. 11 with Completion Plan, Revision 15, 31 December 2017, para. 10 and Completion Plan, Revision 14, 30 September 2017, para. 8.

⁹² Pre-trial appeal proceedings may be expected to take one year. To the extent that it is possible to estimate, the Defence suggests that any trial hearings in Case 004 would be likely to last at least four years. The Defence bases this assessment on the CIJs' comparison of Case 004 with Case 002, and notes that the substantive trial hearings in Case 002/01 and 002/02 cumulatively lasted approximately four years. 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.' The relevant trial judgment could be expected to take at least one year, assuming the Trial Chamber were equipped with full and efficient resources. Supreme Court Chamber appellate proceedings could take two or three years. In Case 004/1, the CIJs issued the *Closing Order (Disposition)* [Case 004/1-D308] on 22 February 2017, and the *Closing Order (Reasons)* [Case 004/1-D308/3] on 10 July 2017. The PTC issued its *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)* [Case 004/1-D308/3/1/20] on 28 June 2018. The issues in Case 004/1 were discreet. In Case 004/2, the CIJs issued their respective Closing Orders on 16 August 2018 [Case 004/2-D359 and D360]. The PTC remains seised of the appellate proceedings in Case 004/2. The translations of the conflicting Closing Orders in Case 004 took over fifteen weeks in total. Completion Plan, Revision 11, 31 December 2016, 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. *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. Case 002, *Case 002/1 Judgement*, 7 August 2014, E313, para. 8. 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 was Case 002.

⁹³ UN HRC, *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; ECtHR, *Wemhoff v. Germany*, Application Number 2122/64, 27 June 1968, The Law, para. 18.

⁹⁴ ECtHR, *Eckle v. Germany*, Application Number 8130/78, Judgment, 15 July 1982, para. 73; ECtHR, *Kangasluoma v. Finland*, Application Number 48339/99, Judgment, 20 January 2004, para. 26; ECtHR, *Corigliano v. Italy*, Application Number 8304/78, Judgment, 15 10 December 1982, para. 34; ECtHR, *Coëme and Others v. Belgium*, Application Numbers 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment, 22 June 2000, para. 133; ECtHR, *Hozee v. The Netherlands*, Application Number 81/1997/865/1076, Judgment, 22 May 1998, para. 43; ECtHR, *Deweert v. Belgium*, Application Number 6903/75, Judgment, 27 February 1980, para. 46.

merits of the charges.⁹⁵ The NCIJ has rightly 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 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.’⁹⁶

44. Criteria relevant to the assessment of ‘reasonable time’ for proceedings – to be considered in their totality, include: (i) the length of delays; (ii) complexity of the proceedings; (iii) conduct of the parties; (iv) conduct of the relevant authorities; and (v) the burden upon and prejudice to the accused, if any.⁹⁷ Delays perhaps excusable in isolation are impermissible where they indicate a systemic issue in the functioning of the court.⁹⁸

45. By any assessment, 13 years is a very long time to be subject to investigation. Comparison with Case 002, similar to Case 004 in size and complexity, indicates that the proceedings could – and therefore *should* – have been completed far more swiftly.⁹⁹

46. Even in cases of high complexity, which do not automatically justify long proceedings,¹⁰⁰ lengthy periods of inactivity cannot be considered ‘reasonable.’¹⁰¹ Case 004 was protracted for reasons other than its complexity, including disputes, inactivity and mass resignation in the OCIJ,¹⁰² and the corrosive effects of lack of resources.¹⁰³

47. The unilateral and disputed initiation of the judicial investigation has undermined the jurisdiction and authority of the CIJs, and the investigations have drawn political resentment.¹⁰⁴ ICIJ Blunk, who was appointed soon after the submission of the ICP’s

⁹⁵ ECtHR, *Neumeister v. Austria*, Application Number 1936/63, Judgment, 27 June 1968, para. 19; ECtHR, *Wenhoff v. Germany*, Application Number 2122/64, 27 June 1968, The Law, para. 18.

⁹⁶ Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 8.

⁹⁷ ECtHR, *König v. Germany*, Application Number 6232/73, Judgment, 28 June 1978, para. 99; ECtHR, *Ringelsen v. Austria*, Application Number 2614/65, Judgment, 16 July 1971, para. 110; ECtHR, *Pélissier and Sassi v. France* [GC], Application Number 25444/94, Judgment, 25 March 1999, para. 67; ECtHR, *Pedersen and Baadsgaard v. Denmark*, Application Number 49017/99, Judgment, 17 December 2004, para. 45.

⁹⁸ ECtHR, *König v. Germany*, Application Number 6232/73, Judgment, 28 June 1978, para. 105; ECtHR, *Erkner and Hofauer v. Austria*, Application Number 9616/81, Judgment, 29 September 1987, paras 69 and 70; ECtHR, *Poiss v. Austria*, Application Number 9816/82, Judgment, 23 April 1987, para. 60.

⁹⁹ Case 002, *Case 002/01 Judgment*, 7 August 2014, E313, paras 2 to 8: The Case 002 Introductory Submission was filed on 18 July 2007 and the case is now in its final appellate stage.

¹⁰⁰ ECtHR, *Rutkowski and Others v. Poland*, Application Number 72287/10, 7 July 2015, para. 137.

¹⁰¹ ECtHR, *Adiletta and Others v. Italy*, Application Numbers 13978/88, 14236/88 and 14237/88, 19 February 1991, para. 17.

¹⁰² 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.

¹⁰³ Completion Plan, Revision 13, 30 June 2017, para. 25; Completion Plan, Revision 17, 30 June 2018, para. 21; Completion Plan, Revision 18, 30 September 2018, paras 20, 23(b), 24, 25.

¹⁰⁴ *Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission*, 7 September 2009, D1/1. ICP’s *Third Introductory Submission*, D1; Peter, Z. and Bopha, P., ‘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

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 Establishment Law.’¹⁰⁵ Following ICIJ Blunk’s resignation,¹⁰⁶ the 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 004.¹⁰⁷ After submitting records of disagreement regarding his competence to participate in the judicial investigation,¹⁰⁸ 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,¹⁰⁹ the RICIJ tendered his resignation.¹¹⁰

48. On 4 May 2012, RICIJ Kasper-Ansermet issued a press release in which he claimed that ‘the suspects were granted access to the case file,’ though, despite the exhaustive efforts of the Defence, Mr YIM Tith was not in fact granted access to Case File 004 until 4 December 2015.¹¹¹ The RICIJ noted that his work had been ‘severely impeded’ for ‘reasons which are manifestly more political and financial than strictly judicial.’¹¹² ICIJ Harmon, appointed on 20 June 2012,¹¹³ investigated Mr YIM Tith for the duration of his tenure, but refused to grant him access to Case File 004 and even revoked the nominal access granted by RICIJ Kasper-Ansermet.¹¹⁴ ICIJ Bohlander 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 002’¹¹⁵

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.’ Sokha, C. 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 ‘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.’ 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.’ Heng, C.L., ‘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.

¹⁰⁵ *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.

¹⁰⁶ *Press Release by the International Co-Investigating Judge*, 10 October 2011.

¹⁰⁷ *Press Release by the International Reserve Co-Investigating Judge*, 9 February 2012. [Emphasis added.]

¹⁰⁸ *Ibid.*

¹⁰⁹ *Notification of Suspect’s Rights [Rule 21(1)(D)]*, 24 February 2012, D109.

¹¹⁰ *Press Release by the International Reserve Co-Investigating Judge*, 19 March 2012.

¹¹¹ *Written Record of Initial Appearance*, 9 December 2015, D281.

¹¹² *Press Release by the Reserve International Co-Investigating Judge*, 4 May 2012.

¹¹³ *Deployment of New International Co-Investigating Judge*, 30 July 2012.

¹¹⁴ *Decision on Yim Tith’s Urgent Request for Relief Based on New Information*, 25 April 2014, D192/1, para. 7.

¹¹⁵ Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 33.

and ‘[t]his work detracted from the capacity available to progress the actual investigations.’¹¹⁶

49. The judicial investigation in Case 004 lasted almost nine years from 7 September 2009 to 5 September 2017,¹¹⁷ three times the length of the judicial investigation in Case 002. The Closing Order in Case 002 was issued eight months after the conclusion of the judicial investigation.¹¹⁸ The PTC found that the 18 months between the conclusion of the Case 004/1 investigation and the issuance of the Closing Order constituted undue delay.¹¹⁹ The Closing Orders in Case 004 were issued 21 months after the conclusion of the judicial investigation.¹²⁰ 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.

50. Late attempts to achieve expeditiousness cannot ameliorate the impact of the lengthy delays. The CIJs complaints that resource limitations and staff turnover impaired their ability to proceed expeditiously¹²¹ are not legitimate justifications.¹²² Any unjustified delay constitutes a violation of Mr YIM Tith’s right to be tried without undue delay.

51. Long periods between events and trial proceedings may so seriously erode the fairness of the proceedings that it would be oppressive to continue. Whether delays can be justified becomes moot: the question is whether a fair trial is possible. Forensic difficulties, shared by all parties, may be insurmountable. With the lapse of time, memories fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, the prospects that effective investigation can be undertaken will increasingly diminish and the Court’s own examination and judgment may be deprived of meaningfulness and effectiveness.¹²³

52. The judicial investigation into Mr YIM Tith’s alleged criminal activity took place between 34 and 44 years after the start of the relevant period.¹²⁴ The ICIJ’s charges are wholly

¹¹⁶ *Ibid.*

¹¹⁷ *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).

¹¹⁸ Case 002, *Notice of Conclusion of Judicial Investigation*, 14 January 2010, D317; Case 002, *Closing Order*, 15 September 2010, D427.

¹¹⁹ Case 004/1, *Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)*, 28 June 2018, D308/3/1/20, para. 31.

¹²⁰ *Second Notice of Conclusion of Judicial Investigation against Yim Tith*, 5 September 2017, D368.

¹²¹ Completion Plan, Revision 18, 30 September 2018, para. 19(b).

¹²² 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.

¹²³ Council of Europe, *International and national Courts confronting large scale violations of Human Rights – Genocide, Crimes against Humanity and war crimes*, 2016, p. 6.

¹²⁴ *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.

dependent on witness testimony.¹²⁵ The forensic deterioration of an already unreliable evidence base is inevitable. The additional 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 contaminating domestic and international political rhetoric surrounding the crimes of the Khmer Rouge, as well as the public litigation of Cases 001 and 002. While this is lamentable for all concerned, it is fatal to the ECCC's search for truth and incompatible with justice.¹²⁶

53. Evidential issues emanating from the passage of 40 years certainly cannot be 'laid at the feet of the Defence,' nor can the passage of time be considered a justification for ignoring significant limitations in the reliability of evidence.¹²⁷ Vague witness testimony is extraordinarily difficult, if not impossible, to refute.¹²⁸ 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).

C. CONCLUSION

54. The fundamental duty of the ECCC is to ensure a fair trial.¹²⁹ It cannot. Case 004 has suffered irremediable procedural damage such that it is now impossible to hold a fair trial and the continuation of the proceedings will constitute abuse of process. The integrity of Case 004 has been irremediably damaged as a result of breaches of its confidentiality.¹³⁰ In such circumstances, it would be offensive to notions of justice and propriety to try Mr YIM Tith¹³¹ and 'odious' or 'repugnant' to the administration of justice to allow the proceedings to

¹²⁵ ICIJ's Closing Order, 28 June 2019.

¹²⁶ *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.

¹²⁷ Case 004/1, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 36. 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.'

¹²⁸ 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.

¹²⁹ Constitution of Cambodia, Article 31. 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.

¹³⁰ *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.'

¹³¹ *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; UK, *R v. Horseferry Road Magistrates' Court* [1994] 1 A.C. 42 H.L.(E) 74G. See also: ICTR Appeals Chamber, *Barayagwiza v. The Prosecutor* (ICTR-97-19-AR72), 'Decision,' 3 November 1999, paras 74-75, 77.

continue.¹³² The principle that a court is obliged to discontinue irremediably vitiated proceedings before a final determination of a case has been resoundingly adopted by international tribunals, including the ECCC, as well as Cambodian law.¹³³

55. For the reasons set out above, the Defence submits that a fair trial is now impossible, and the PTC must reverse the ICIJ's serious error of law in issuing an indictment in violation of Mr YIM Tith's fundamental fair trial rights, therefore dismissing Case 004 in order to prevent a serious miscarriage of justice.

II. GROUND 2: THE ICIJ ERRED IN LAW BY ISSUING A CLOSING ORDER THAT IS VOID FOR PROCEDURAL DEFECTS DUE TO HIS FAILURE TO CORRECTLY IDENTIFY THE LAW AND REFER TO THE EVIDENTIARY ANALYSIS IN HIS FINDINGS ON PERSONAL JURISDICTION

56. The ICIJ grossly misconstrued the law by issuing a Closing Order that is so lacking in substance and form that it fails to meet the fundamental requirements of an indictment, which must set out the legal characterisation of the charges against the indicted person, the material facts on which they are based and the specific parts of the evidence underlying the factual findings. The ICIJ breached Rule 67(2) and erred in law by failing to: (i) properly set out the relevant considerations used to assess Mr YIM Tith's status as a 'most responsible' person; (ii) correctly identify the elements of genocide, the material facts, and the underlying evidence, with respect to his finding that the Khmer Krom were a 'distinct group' within the meaning of the *actus reus* of genocide and his finding that Mr YIM Tith had the required specific intent for genocide; (iii) correctly identify the elements of superior responsibility, the material facts and underlying evidence, with respect to the indicators of effective control and the requisite causal link between a superior's failure to exercise control over subordinates and

¹³² ICC Appeals Chamber, *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 20, 30, and 37.

¹³³ *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; 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. See for example: ICC Appeals Chamber, *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 Appeals Chamber, *Prosecutor v. Tadić* (IT-94-1-A), 'Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin,' 31 January 2000, para. 13; ICTY Appeals Chamber, *Prosecutor v. Stanišić and Župljanin* (IT-08-91-A), 'Decision on Mićo Stanišić's Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement,' 2 April 2014, para. 35; ICTY Appeals Chamber, *Prosecutor v. Karadžić* (IT-95-5/18-AR-73-4), 'Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement,' 12 October 2009, para. 45; ICTY Appeals Chamber, *Prosecutor v. Bobetko* (IT-02-62-AR54bis), 'Decision on Challenge by Croatia to Decision and Orders of Confirming Judge,' 29 November 2002, para. 15; ICTR Appeals Chamber, *Barayagwiza v. The Prosecutor* (ICTR-97-19-AR72), 'Decision,' 3 November 1999, paras 73 to 77.

the occurrence of crimes. The PTC must reverse the ICIJ's erroneous issuance of an improperly formed indictment that violates Mr YIM Tith's fundamental fair trial rights.

A. RULE 67(2) REQUIREMENTS FOR A VALID ECCC INDICTMENT

57. Rule 67(2) imposes strict requirements for the validity of the CIJs' indictment, which are subject to the PTC's review: the indictment shall be void for procedural defect unless it sets out a description of the material facts and their legal characterisation, including the relevant criminal provisions and the nature of the criminal responsibility.¹³⁴ These preconditions are designed to safeguard the accused's fundamental fair trial rights to be informed of the nature of the charges against him and to have adequate opportunity to prepare his defence.¹³⁵ Each charge must (i) clearly identify the applicable law, (ii) set out the elements of the crimes contained in the indictment, (iii) specify the factual basis of the charge, and (iv) refer directly to portions of the evidentiary analysis that set out the material facts.¹³⁶

58. Rule 74(3)(a) does not contemplate a Defence appeal of the validity of the indictment under Rule 67(2) and the issue is non-jurisdictional in nature.¹³⁷ However, as noted above, the PTC's liberal interpretation of Rule 21 expands the right of appeal.¹³⁸ The alleged breaches of Rule 67(2) fall within Rule 74(3)(a) read in light of Rule 21(1)(d), as they undermine Mr YIM Tith's fair trial rights to be informed of the basis of his status as 'most responsible' and to have adequate opportunity to prepare his defence.¹³⁹ An indictment that fails properly to set out the basis of the ECCC's purported jurisdiction is defective. This is a fundamental defect that requires the PTC, not the Trial Chamber, to declare the indictment void.¹⁴⁰

B. SUB-GROUND 2.1: THE ICIJ ERRED IN LAW BY FAILING TO PROPERLY SET OUT THE RELEVANT CONSIDERATIONS USED TO ASSESS MR YIM TITH'S STATUS AS A 'MOST RESPONSIBLE' PERSON

59. Rule 67(2) required the ICIJ to set out the relevant considerations used to assess

¹³⁴ The Trial Chamber in Case 002/02 found that the Closing Order set out 'neither a description of the material facts giving rise to [the] charges nor of the nature of the Accused's criminal responsibility alleged in relation to them,' meaning that the Chamber was unable to determine the exact nature of the crimes charged or the modes of liability applicable to them, consequently striking-out those charges. Case 002, *Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes)*, 22 September 2011, E122 ('Trial Chamber's Preliminary Objections Decision'), paras 14 to 23.

¹³⁵ *Ibid.*, para. 16.

¹³⁶ *Ibid.*, paras 14 to 23.

¹³⁷ Case 002, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 Apr 2011, D427/1/30, para. 47.

¹³⁸ *Supra*, para. 13. *Considerations on Im Chaem's Appeal against the International Co-Investigating Judge's Decision to Charge Her In Absentia*, 1 March 2016, D239/1/8, para. 17.

¹³⁹ *Trial Chamber's Preliminary Objections Decision*, paras 17 to 20.

¹⁴⁰ Case 002, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise*, 20 May 2010, D97/14/15, para. 34: the PTC has previously found it in the interest of fairness to declare admissible grounds of appeal that raise the issue of notice of the indictment.

personal jurisdiction in order to inform Mr YIM Tith of the basis of the assessment.¹⁴¹

60. The ICIJ identified the law applicable to personal jurisdiction by referring to the text of Article 1 of the UN-RGC Agreement and Articles 1 and 2 of the Establishment Law.¹⁴² However, the ICIJ did not set out the relevant considerations used to assess Mr YIM Tith's status as a 'most responsible person.'¹⁴³ 'Incorporation by reference' of parts of an order in a severed ECCC case does not constitute adequate notice to Mr YIM Tith.¹⁴⁴ Notice is not an abstract concept and the indictment, a self-contained document whose primary purpose is to protect the accused's fair trial rights to be informed of the basis of the criminal complaint and to have adequate opportunity to prepare his defence,¹⁴⁵ has a strict form and must be sufficiently specific.¹⁴⁶

61. The ICIJ further failed to set out the factual basis of the finding that Mr YIM Tith is one of those 'most responsible' and to refer directly to portions of the evidentiary analysis on which he established those facts.¹⁴⁷

Conclusion

62. The failure of the ICIJ to set out the relevant considerations, the factual basis, and the supporting evidence used to determine that Mr YIM Tith was 'most responsible' are defects on the face of the indictment.¹⁴⁸ The ICIJ thus erred in law by making a personal jurisdiction finding without properly setting out the considerations relevant to the assessment of personal responsibility, as required by Rule 67(2), in violation of Mr YIM Tith's fundamental fair trial rights to be informed of the case against him and to prepare his defence as secured by Rule 21(1)(d). The ICIJ's indictment of Mr YIM Tith as a person within the jurisdiction of the tribunal was so unfair and unreasonable as to constitute an abuse of discretion. Since the validity of all of the charges against Mr YIM Tith are contingent on a valid finding of personal jurisdiction, the case must be dismissed in its entirety.

C. SUB-GROUND 2.2: THE ICIJ ERRED IN LAW BY FAILING TO CORRECTLY IDENTIFY THE ELEMENTS OF GENOCIDE AND TO REFER TO

¹⁴¹ Trial Chamber's Preliminary Objections Decision, paras 14 to 23.

¹⁴² ICIJ's Closing Order, paras 27 to 29.

¹⁴³ *Ibid.*, paras 27 to 34.

¹⁴⁴ *Ibid.*, paras 33 to 34.

¹⁴⁵ Trial Chamber's Preliminary Objections Decision, paras 17 to 20.

¹⁴⁶ *Ibid.*, paras 21 to 23.

¹⁴⁷ ICIJ's Closing Order, paras 992 to 999. The ICIJ's obiter dicta opinions about the nature of 'the CPK's political vision,' his reliance on inappropriate factual comparison with Nazi concentration camps, his views on what constitutes 'the horror' or 'disdain for human dignity,' and his unsupported description of the effects of the CPK's alleged policy on forced marriage, do not fulfill the Rule 67(2) requirement to set out the material facts.

¹⁴⁸ *Ibid.*, paras 27 to 34, 992.

THE EVIDENTIARY ANALYSIS IN HIS LEGAL FINDINGS ON PERSONAL JURISDICTION

63. The ICIJ indicted Mr YIM Tith for the crime of genocide against the Khmer Krom by killing members of the group in Sector 13 of the Southwest Zone and Sectors 2 and 4 of the Northwest Zone on the basis of liability under JCE1, JCE2, planning, ordering, instigating and superior responsibility.¹⁴⁹ The ICIJ's findings on genocide were essential to his overall conclusion that Mr YIM Tith was 'most responsible,' the ICIJ reasoning that 'this alone placed him solidly within the bracket of personal jurisdiction.'¹⁵⁰ The following sub-ground is hence admissible as a jurisdictional matter pursuant to Rule 74(3)(a).

64. The ICIJ identified the applicable law as Article 4 of the Establishment Law.¹⁵¹ The ICIJ failed, however, to set out the legal elements of the crimes, the factual basis of the charges, and the supporting portions of evidentiary analysis, with respect to, firstly, his finding that the 'Khmer Krom' were a distinct group within the meaning of an act of genocide, and secondly, his finding that Mr YIM Tith held the requisite 'special intent' for genocide. The ICIJ's failure to set out the elements of the crime constitutes an error of law.

i. The ICIJ failed to comply with Rule 67(2) in finding that the Khmer Krom were a 'distinct group' within the meaning of the *actus reus* of genocide

(a) Requirement under Rule 67(2) to set out legal elements

65. The ICIJ failed to define the 'national, ethnical, racial or religious group' as a legal element of genocide.¹⁵² The ICIJ's hollow description of a 'hybrid, case-by-case test' that assesses the 'particular positive identity' of the group based on 'objective particulars' of the 'relevant political, social, historical and cultural context' and 'subjective perceptions' of victims and the perpetrators is so broadly construed that it does not adequately inform Mr

¹⁴⁹ *Ibid.*, pp. 475 to 476.

¹⁵⁰ *Ibid.*, para. 996.

¹⁵¹ *Ibid.*, paras 59 to 72. The Trial Chamber held in Case 002/02 that Article 4 of the ECCC Establishment Law provides that the Court has jurisdiction over 'genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 ('Genocide Convention') and which were committed during the period from 17 April 1975 to 6 January 1979.' Article 4 lists 'killing members of the group' as one of the acts which may constitute genocide within this definition. The Trial Chamber also found that by 1975 it was both foreseeable and accessible in general that genocide as defined in the Genocide Convention was punishable as a crime. Case 002, *Case 002/02 Judgement*, 16 November 2018, E465, paras 782 to 804.

¹⁵² ICIJ's Closing Order, paras 61 to 63. *See also*: para. 59, citing Case 002, *Closing Order*, 15 September 2010, D427, para. 1312; ICTR Trial Chamber, *Prosecutor v. Rutaganda*, Judgement, (ICTR-96-3-T), 6 December 1999, para. 49; ICTR Trial Chamber, *Prosecutor v. Akayesu*, Judgement, (ICTR-96-4-T), 2 September 1998, paras 498-499; ICTY Trial Chamber, *Prosecutor v. Krstić*, Judgement, (IT-98-33-T), 2 August 2001, para. 542; ECCC Establishment Law, Article 4; Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'), approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948, Article 2.

YIM Tith of the nature of the charges against him.¹⁵³

66. The ICIJ failed to set out the requirement for the human ‘group’ to possess common characteristics protected under the Genocide Convention that are demonstrably grounded in objective reality, irrespective of whether objective and subjective criteria are both taken into consideration in the assessment.¹⁵⁴ Significantly, it is not possible to adopt a *purely* subjective approach to the protected group definition,¹⁵⁵ even in cases where there is evidence that the individual accused was subjectively stigmatising the group.¹⁵⁶ The ICIJ thus ignored that 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.’¹⁵⁷ Without this weighting in objective reality, a solely subjective approach ‘leads to a theoretical absurdity [in which the] perpetrator could define virtually any group [...], irrespective of its objective attributes, and be held guilty of genocide.’¹⁵⁸

67. The ICIJ failed to set out the requirement that, in circumstances where multiple national and ethnic groups are considered to have been targeted, each of which may be distinguishable on more than one basis, it is inappropriate to legally characterize a single

¹⁵³ ICIJ’s Closing Order, paras 61 to 63.

¹⁵⁴ ICTY 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; ICTR Trial Chamber III, *Prosecutor v. Semanza* (ICTR-97-20-T), Judgement and Sentence, 15 May 2003, para. 317.

¹⁵⁵ 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 *Statić* decided directly and resolutely that subjective criteria alone cannot be used to define a protected group. As the only appellant body to directly address this question, the Chamber reviewed prior Trial Chamber decisions from the ICTY/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 Appeals Chamber, *Prosecutor v. Stakić* (IT-97-24-A), Judgement, 22 March 2006, para. 25. *See also*: ICTY Trial Chamber II, *Prosecutor v. Brđanin* (IT-99-36-T), Judgement, 1 September 2004, para. 685.

¹⁵⁶ The consequence of a purely subjective approach, based on a perpetrator’s perception, is well articulated by Kreß, C., ‘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.’

¹⁵⁷ ICTR Trial Chamber I, *Prosecutor v. 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.

¹⁵⁸ Akhavan, P., ‘The Crime of Genocide in the ICTR Jurisprudence’ (2005) *Journal of International Criminal Justice* 989, p. 1002.

‘ethnic group’ in general terms.¹⁵⁹ The threshold for assimilating two or more discernible groups is high.¹⁶⁰ Furthermore, the ICIJ made no reference to the need to show the characteristics commonly possessed by the group’s constituent members, reflecting the core object and purpose of the Genocide Convention, which is to protect unique human groups and ensure their continued contribution to a pluralistic world.¹⁶¹

68. The ICIJ failed to set out the legal distinction between ‘part of a group’ and a group that is identified by reference to another group. This has been described as follows:

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.¹⁶²

(b) Requirement under Rule 67(2) to identify material facts and underlying evidence

69. In the parts of the ICIJ’s Closing Order entitled ‘targeting the Khmer Krom’¹⁶³ and ‘findings on genocide of the Khmer Krom,’ the material facts cannot be identified.¹⁶⁴ The ICIJ failed to specify the factual basis underlying the Khmer Krom’s alleged status as a ‘group’ under the Genocide Convention, nor did he substantiate his ‘Legal Findings’ on genocide by reference to pertinent witness or documentary Case File evidence.¹⁶⁵

70. The ICIJ’s findings on the CPK’s policy towards the Khmer Krom ethnic group failed to positively identify the nature of the group.¹⁶⁶ While providing an extended socio-historical analysis of Khmer Krom identity from the 17th century onwards,¹⁶⁷ the ICIJ did not explain which of his observations about Khmer Krom ethnic distinctiveness, Vietnamese nationality and ethnic traits, Kampuchea Krom geographical origin in Southern Vietnam, Khmer

¹⁵⁹ ICTY Trial Chamber II, *Prosecutor v. Stakić* (IT-97-24-T), Judgement, 31 July 2003, para. 512; ICTY Appeals Chamber, *Prosecutor v. Stakić* (IT-97-24-A), Judgement, 22 March 2006, paras 19, 28.

¹⁶⁰ See ICTY Appeals Chamber, *Prosecutor v. Stakić* (IT-97-24-A), Judgement, 22 March 2006, para. 28; ICTY Trial Chamber II, *Prosecutor v. Brđanin* (IT-99-36-T) Judgement, 1 September 2004, para. 686; ICTY Trial Chamber, *Prosecutor v. Karadžić* (IT-95-5/18T), Judgement, 25 March 2016, para. 541.

¹⁶¹ Lemkin, R., *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. 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.’

¹⁶² Behrens, P., ‘Genocide and the Question of Motives’ (2012) *Journal of International Criminal Justice* (10) 501, p. 505.

¹⁶³ ICIJ’s Closing Order, paras 187 to 205.

¹⁶⁴ *Ibid.*, paras 1008 to 1018.

¹⁶⁵ *Ibid.*, paras 1008 to 1018.

¹⁶⁶ *Ibid.*, paras 196 to 203.

¹⁶⁷ *Ibid.*, paras 186 to 195.

ethnicity, and the identification of individuals as ‘former Lon Nol’ or as spies, are definitive of the ‘group.’¹⁶⁸

71. In particular, the ICIJ failed to set out the factual basis for distinguishing the targeting of the Khmer Krom from other groups that he considered to have been targeted by the CPK. The ICIJ repeatedly relied on the CPK’s alleged policies towards the Vietnamese, stating: ‘the CPK’s policy towards the Khmer Krom was largely rooted in animosity towards the Vietnamese over previous “acts of aggression and annexation” and a continual fear that Vietnam held territorial ambitions over DK,’ yet the ICIJ did not make a clear finding as to whether the Khmer Krom were members of the Vietnamese group.¹⁶⁹ The ICIJ further failed to explain how he distinguished between the subjective and objective parameters of the ‘group’ element.¹⁷⁰

ii. The ICIJ failed to identify the material facts and their legal characterisation to substantiate the element of specific intent

(a) Requirement under Rule 67(2) to set out legal elements

72. The ICIJ failed to distinguish the *mens rea* of the crime of persecution from the specific intent required for genocide, according to which the perpetrator must be shown to have intended not only that the overall objective of destroying the protected group be carried out, but that the intention was to destroy the group *as such*.¹⁷¹ The ‘as such’ requirement means there must be a causal relationship between the overall objective to destroy a protected group and the grounds on which the group are protected, i.e. it must be established that the objective to destroy the Khmer Krom was due to their membership of the group rather than for some other reason such as their perceived or real membership of a political category.

73. The ICIJ failed to recognise the distinctive mental requirements of the crime of genocide by failing to set out that a mere discriminatory intent is insufficient for *mens rea*, unlike other crimes such as persecution.¹⁷² The ICIJ erroneously conflated, quote: ‘*discriminatory intent for genocide and persecution*.’¹⁷³

¹⁶⁸ *Ibid.*, paras 196 to 203.

¹⁶⁹ *Ibid.*, para. 197.

¹⁷⁰ *Ibid.*, paras 186 to 195.

¹⁷¹ ICTY Trial Chamber, *Prosecutor v. Sikirica et al* (IT-95-8-T), Judgement on Defence Motions to Acquit, 3 September 2001, para. 61: ‘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.’

¹⁷² 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.

¹⁷³ ICIJ’s Closing Order, para. 1040. [Emphasis added].

74. The ICIJ further failed to set out the requirement that genocide is only committed where the *ultimate goal* of the perpetrators is to destroy the group.¹⁷⁴ Thus the perpetrator must want to bring about the destruction of the group itself, not merely to destroy certain individuals by reason of their membership of the same group. The ICIJ failed to distinguish this legal element of genocidal intent from cases where the *mens rea* results in the incidental targeting of an ethnic group, in other words, the distinction between acts committed with mere discriminatory intent or knowledge, and acts committed with the higher *specific intent* to destroy a protected group of which the individual is a member.¹⁷⁵ The ICIJ failed to recognize that through committing the acts alleged, the perpetrator must have *sought to achieve* the destruction of the protected group; as opposed to having incidentally targeted individuals in furtherance of an ulterior goal.¹⁷⁶

75. Fundamentally, the ICIJ failed to set out the special character of the crucial ‘as such’ element in requiring a nexus between the intent to destroy a protected group and the enumerated grounds on which the group is protected i.e. intention to destroy *on account of* their national, ethnical, racial or religious characteristics. A strict interpretation of the ‘as such’ requirement is demanded by the clear and ordinary meaning of the Genocide Convention, the historical development of the crime of genocide,¹⁷⁷ and relevant jurisprudence.¹⁷⁸ Importantly, the perpetrator must be *motivated* to target the group based on one of the discriminatory grounds and seek to destroy the group based on its protected identity, since genocide, as a crime of specific intent, deviates from the general criminal law principle that personal motive is irrelevant *per se*.¹⁷⁹ Of course, the perpetrator may have

¹⁷⁴ Case 002/2, Trial Judgment, para. 798; *See*: 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).’

¹⁷⁵ *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.’

¹⁷⁶ ICTR Trial Chamber I, *Prosecutor v. Bagilishema* (ICTR-95-1A-T), Judgment, 7 June 2001, para. 61; ICTY Trial Chamber, *Prosecutor v. Kupreškić et al* (IT-95-16-T), Judgment, 14 January 2000, para. 636.

¹⁷⁷ For a detailed articulation of the drafting history, *see*: Schabas, W., *Genocide in International Law*, Cambridge, 2009, pp. 294-302.

¹⁷⁸ Genocide Convention, Article 2.

¹⁷⁹ ICTY Appeals Chamber, *Prosecutor v. Blaškić* (IT-95-14-A), Judgment, 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 [...]’

other motives that are irrelevant to *mens rea*.¹⁸⁰

(b) Requirement under Rule 67(2) to identify material facts and underlying evidence

76. The ICIJ failed to set out the material facts underlying his findings regarding Mr YIM Tith's individual intent, by failing to specify which facts relate to Mr YIM Tith and which relate to the CPK's policies, referring collectively to 'the intent of the CPK, Yim Tith, and those he collaborated with'¹⁸¹ as well as the intent of 'Yim Tith and those he cooperated with on all levels of the CPK hierarchy.'¹⁸² The ICIJ failed to provide sufficient factual basis for his finding that Mr YIM Tith personally desired the overall objective of destroying the protected group.¹⁸³

77. The ICIJ did not indicate the material significance of his finding that Khmer Krom individuals were targeted after the Communist Party of Kampuchea ('CPK') took power on 17 April 1975 and began to arrest and kill those associated with the former Lon Nol regime, including MIKE forces and White Scarves who had been used by Lon Nol in the past.¹⁸⁴ The ICIJ recognised a political, rather than ethnical, basis for the targeting of the Khmer Krom group yet failed to set out whether these facts and circumstances underscored his finding that Mr YIM Tith held the specific intent to destroy the Khmer Krom ethnic group in whole or in part, as such.¹⁸⁵

78. The ICIJ failed to set out, anywhere in the ICIJ's Order, any direct evidence that Mr YIM Tith held a specific intention to destroy the Khmer Krom group in whole or in part, as such. The ICIJ nonetheless found that Mr YIM Tith 'shared the special intent to destroy the Khmer Krom through the underlying acts of killing members of the Khmer Krom population.'¹⁸⁶ In this single sentence, which lacks any reference to the evidence on which it

¹⁸⁰ ICTR Appeals Chamber, *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.'

¹⁸¹ ICIJ's Closing Order, para. 1011.

¹⁸² *Ibid.*, para. 1040.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*, para. 195.

¹⁸⁵ *Ibid.*, para. 1040.

¹⁸⁶ *Ibid.*, para. 1023.

is based, the ICIJ purported to establish Mr YIM Tith's special intent, leaving no explanation as to the material facts relied on or their legal characterisation.¹⁸⁷

Conclusion

79. The total lack of specificity as to the material factual basis and legal characterisation of the portions of the ICIJ's Closing Order pertaining to the 'group' element of genocide or the 'specific intent' element of genocide makes it impossible to discern the content of the charges and leaves no adequate basis for a trial on these parts of the indictment, violating Mr YIM Tith's fundamental fair trial rights to be informed of the case against him and to prepare his defence, in breach of Rule 21(1)(d). The ICIJ erred in law by setting out genocide charges that do not comply with Rule 67(2). The ICIJ's indictment of Mr YIM Tith for genocide was thus so unfair and unreasonable as to constitute an abuse of discretion. The only remedy in these circumstances is dismissal of the genocide charges in their entirety.

D. SUB-GROUND 2.3: THE ICIJ ERRED IN LAW BY FAILING TO CORRECTLY IDENTIFY THE ELEMENTS OF SUPERIOR RESPONSIBILITY AND TO REFER TO THE EVIDENTIARY ANALYSIS IN HIS LEGAL FINDINGS ON PERSONAL JURISDICTION

80. In his Legal Findings on Personal Jurisdiction, the ICIJ found that Mr YIM Tith 'was the *de facto* second-in-command of Ta Mok, and, [...] he also retained *de facto* authority over his previous area of activity in the Southwest Zone, even after moving to the Northwest Zone.'¹⁸⁸ The ICIJ indicted Mr YIM Tith for alleged crimes of genocide, crimes against humanity, and war crimes based on liability under the doctrine of superior responsibility.¹⁸⁹

81. The ICIJ identified the applicable law for superior responsibility as Article 29 of the Establishment Law,¹⁹⁰ and defined its elements using ECCC and *ad hoc* tribunal jurisprudence.¹⁹¹ However, the ICIJ failed to set out the correct legal elements of this mode of liability as required by Rule 67(2) and thus erred in law by misconstruing Article 29. The ICIJ further failed to set out the factual basis of the charges, and the supporting portions of evidentiary analysis. First, the ICIJ failed to set out the requisite indicators of effective control.¹⁹² Second, the ICIJ failed to set out the requirement for proof of a causal link between

¹⁸⁷ *Ibid.*, para. 1023. *See also*: paras 1011 and 1040.

¹⁸⁸ *Ibid.*, para. 994.

¹⁸⁹ *Ibid.*, pp. 475 to 484.

¹⁹⁰ *Ibid.*, para. 92.

¹⁹¹ *Ibid.*, paras 97 to 103.

¹⁹² *Ibid.*, para. 98.

a superior's failure to prevent the subordinate's crime and the occurrence of crimes.¹⁹³ As a result of these deficiencies, the ICIJ failed to demonstrate that Mr YIM Tith was a *de facto* leader, in any sense, who can be held liable through superior responsibility, and consequently his Legal Findings on Personal Jurisdiction are flawed. In sum, the ICIJ erred in law by failing to correctly define and apply Article 29 of the Establishment Law and by failing to meet the requirements in Rule 67(2) for a valid ECCC indictment. These errors of law are so unfair and unreasonable as to constitute an abuse of the ICIJ's discretion.

i. The ICIJ failed to set out the requisite indicators of effective control

(a) Requirement under Rule 67(2) to set out legal elements

82. The ICIJ failed to set out the applicable law on command responsibility as a mode of criminal liability provided by Article 29 of the Establishment Law. The ICIJ stated that: 'The superior, whether military or civilian, must have had effective control which is material ability to prevent and/or punish the crimes of the subordinate-perpetrator.'¹⁹⁴ This is an inadequate description of effective control. Specifically, the ICIJ did not set out the requirements of the 'effective control' criterion, crucial to the existence of a superior-subordinate relationship.

83. Effective control is 'the actual possession, or non-possession, of powers of control over the actions of subordinates.'¹⁹⁵ The ICIJ must be satisfied that Mr YIM Tith indeed held effective control over the criminal actions of subordinates in order to indict him under this mode of liability. Yet, the ICIJ failed to set out the indicators of effective control upon which he relied, if any. The indicators necessary for consideration in order to determine the required threshold of effective control are well established in the relevant case law.¹⁹⁶ These are:

- (i) Accused's position: The actual position of the accused must be assessed.¹⁹⁷ 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.¹⁹⁸

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), Judgment, 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), Judgment, 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.

¹⁹⁶ Case 001, *Judgement*, 26 July 2010, E188, paras 541 to 542.

¹⁹⁷ 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), Judgment, 15 September 2008, para. 62; ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), Judgment, 16 October 2007, paras 58, 68, 70, 139.

¹⁹⁸ *Ibid.*

- (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 perpetrators of the alleged crime.¹⁹⁹ 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.'²⁰⁰ Since effective control can exist outside formal structures, it cannot be inferred solely on the basis of a formal structure.²⁰¹
- (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.'²⁰²
- (v) Material ability to prevent and punish: As the only indicator recognised by the ICIJ, effective control demands the material ability to prevent and punish criminal behaviour.²⁰³ This demands consideration of the accused's capacity to apply disciplinary measures, including the authority to promote, demote, and remove subordinates.²⁰⁴
- (vi) Reporting to competent authorities is 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.²⁰⁵

¹⁹⁹ ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), Judgement, 16 October 2007, paras 68, 70, 139.

²⁰⁰ 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.

²⁰¹ ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('Čelebići'), Judgement, 20 February 2001, paras 193, 248 to 268.

²⁰² 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.

²⁰³ 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; ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), Judgement, 16 October 2007, para. 59.

²⁰⁴ ICTY Trial Chamber, *Prosecutor v. Delić* (IT-04-83-T), Judgement, 15 September 2008, para. 62.

²⁰⁵ ICTY Appeals Chamber, *Prosecutor v. Blaškić* (IT-95-14-A), Judgement, 29 July 2004, para. 499.

- (vii) Actual tasks performed: It is necessary to analyse the actual tasks performed by the accused.²⁰⁶
- (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.²⁰⁷ In other words, proof is required that the superior was not only able to issue orders but that his orders were actually followed.²⁰⁸ 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.²⁰⁹
- (ix) Substantial influence does not amount to effective control: 'Effective control' cannot be equated with, nor substituted by, 'substantial influence.'²¹⁰ Only proof of effective control suffices for criminal liability.²¹¹
- (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.²¹² It must be proven that he had effective control at the time the offence was committed.²¹³

84. The ICIJ fails to explicate the threshold requirement for establishing command responsibility.²¹⁴ It is unclear what legal basis, if any, the ICIJ relied upon to determine that Mr YIM Tith had effective control over the alleged subordinates.

(b) Requirement under Rule 67(2) to identify material facts and underlying evidence

85. The ICIJ failed to set out the indicators of effective control and to identify what

²⁰⁶ ICTY Appeals Chamber, *Prosecutor v. Halilović* (IT-01-48-A), Judgement, 16 October 2007, para. 66; ICTY Trial Chamber I, *Prosecutor v. Perišić* (IT-04-81-T), Judgement, 6 September 2011, para. 148.

²⁰⁷ ICTY Trial Chamber II, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, paras 419 to 424.

²⁰⁸ ICTY Trial Chamber II, *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; ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 421.

²⁰⁹ ICTY Trial Chamber, *Prosecutor v. Perišić* (IT-04-81-T), Judgement, 6 September 2011, para. 148; ICTY Trial Chamber, *Prosecutor v. Strugar* (IT-01-42-T), Judgement, 31 January 2005, paras 393 to 397.

²¹⁰ ICTY Appeals Chamber, *Prosecutor v. Mucić et al.* (IT-96-21-A) ('*Čelebići*'), Judgement, 20 February 2001, paras 266 and 303. *See also*: ICTY Trial Chamber, *Prosecutor v. Krnojelac* (IT-97-25-T), Judgement, Case No. 15 March 2002, para. 93; ICTY Trial Chamber, *Prosecutor v. Stakić*, (IT-97-24-T), Judgement, 31 July 2003, para. 459; ICTR Trial Chamber, *Prosecutor v. Karera* (ICTR-01-74-T), Judgement, 7 December 2007, para. 564.

²¹¹ ICTY Trial Chamber, *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-T), Judgment, 26 February 2001, para. 415 to 416.

²¹² ICTY Trial Chamber, *Prosecutor v. Popović et al* (IT-05-88-T), Judgement, 10 June 2010, para. 1039.

²¹³ 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.

²¹⁴ ICIJ's Closing Order, paras 97 to 103.

material facts, if any, demonstrated the existence of such indicators. As a result of this failure, the ICIJ's findings that Mr YIM Tith was '*de facto* second-in-command of Ta Mok, and [...] retained *de facto* authority over his previous area of activity in the Southwest Zone'²¹⁵ and 'exercised effective control over civilian and military cadres subordinate to him'²¹⁶ are unsupported and defunct.

86. Material facts and underlying evidence must support the existence of effective control. In this regard, indicators of effective control are crucial probative factors which must be considered.²¹⁷ This is particularly important where the superior-subordinate relationship exists *de facto*, as is alleged in the ICIJ's Closing Order.²¹⁸ However, the ICIJ's legal findings that Mr YIM Tith had effective control over subordinates are unsupported by any such material facts or underlying evidence.²¹⁹ The ICIJ failed to set out what indicators, if any, he relied upon in concluding Mr YIM Tith had effective control over subordinates, and thus failed to set out what material facts, if any, he considered probative for his ultimate finding that effective control existed. In his Legal Findings on Personal Jurisdiction and superior responsibility, the ICIJ does not mention any indicators of effective control, nor does he cite any factual basis that could support the existence of such.²²⁰

87. The ICIJ failed to set out the correct threshold requirement for establishing superior responsibility, the factual basis and supporting evidence used to determine that Mr YIM Tith was second-in-command of the Southwest Zone and Northwest Zone, and thus a 'most responsible person,' resulting in defects on the face of the indictment.²²¹ Since all charges against Mr YIM Tith are contingent on a valid finding of personal jurisdiction and his status as a 'most responsible person,' the case must be dismissed in its entirety.

ii. The ICIJ failed to set out the requirement for proof of a causal link between a superior's failure to exercise control over subordinates and the occurrence of crimes

(a) Requirement under Rule 67(2) to set out legal elements

88. Relying solely on the jurisprudence of the *ad hoc* tribunals, the ICIJ erroneously stated 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.'²²² In rejecting the causation

²¹⁵ *Ibid.*, para. 994.

²¹⁶ *Ibid.*, para. 1033.

²¹⁷ *Supra*, para. 83.

²¹⁸ ICIJ's Closing Order, para. 994.

²¹⁹ *Ibid.*, paras 994, 1033.

²²⁰ *Ibid.*

²²¹ *Ibid.*, para. 994.

²²² *Ibid.*, para. 98.

requirement, the ICIJ erroneously relied upon ICTY case law that does not represent customary international law during 1975-1979.²²³ The Defence contends that it was necessary during 1975-1979 to prove a causal link between a superior's failure to exercise control properly over subordinates and the occurrence of crimes committed by subordinates.

89. 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.²²⁴

90. Notably, this articulation is mirrored in Article 28 of the Rome Statute,²²⁵ and there is, whatever may have been held at the *ad hoc* tribunals, very recent international judicial determination, dating from 2018, that the causation requirement remains a constituent of the customary international norm even today.²²⁶ As recognised by ICC Appeals Chamber Judges Monageng and Hofmański, 'holding a commander "criminally 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.'²²⁷

91. Even if the causation requirement was not customary international law during 1975-1979, it has indisputably crystallised as such in recent years.²²⁸ Thus, the ICIJ was required to apply the principle of *lex mitior* and apply the law requiring causation.²²⁹

(b) Requirement under Rule 67(2) to identify material facts and underlying evidence

92. The ICIJ failed to identify the material facts and underlying evidence of a causal link between Mr YIM Tith's alleged failure, as an alleged superior, to exercise control properly

²²³ *Ibid.*, para. 98, citing: ICTY Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura* (IT-01-47-A), Judgement, 22 April 2008, para. 40.

²²⁴ Protocol I Additional to the Geneva Conventions etc., Article 86(1). [Emphasis added.]

²²⁵ Rome Statute, Article 28.

²²⁶ ICC Appeals Chamber, *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.

²²⁷ ICC Appeals Chamber, *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.

²²⁸ Rome Statute, Article 28.

²²⁹ Case 002, *Case 002/2 Trial Judgment*, 16 November 2018, E465, para. 333, fn. 905.

over subordinates and the occurrence of crimes at the hands of those subordinates. The ICIJ erred in law by failing to acknowledge this critical causation requirement and by failing to provide an evidentiary basis for the causal link. It is indiscernible from the ICIJ's Legal Findings on Personal Jurisdiction and superior responsibility how Mr YIM Tith's alleged failures as a superior caused, or even relate to, each of the numerous alleged crimes of his subordinates. As a corollary of this failure, the ICIJ made no effort to distinguish between crimes arising under the 'legally and factually distinct modes of liability' of failure to prevent and punish.²³⁰

Conclusion

93. The ICIJ erred in law by failing to set out the legal elements of Article 29 and further failed to meet the requirements of Rule 67(2) by insufficiently specifying the material facts and evidence pertaining to the indicators of effective control for superior responsibility and the causation requirement, making it impossible for the Defence to discern the content of the charges and leaves no adequate basis for a trial on these parts of the indictment. This violated Mr YIM Tith's fundamental fair trial rights to be informed of the case against him and to prepare his defence, in breach of Rule 21(1)(d).

E. CONCLUSION

94. For the reasons stated above, the Indictment does not meet the basic requirements of Rule 67(2) and violates Mr YIM Tith's fair trial rights. The charges of genocide and those based on superior responsibility must be dismissed on the basis of procedural defects in those counts on the Indictment. The non-conformity with Rule 67(2) of the finding of 'most responsible' necessitates that all remaining charges be dismissed. The ICIJ's indictment of Mr YIM Tith as a person within the jurisdiction of the tribunal was so unfair and unreasonable as to constitute an abuse of discretion. Since the validity of all of the charges against Mr YIM Tith are contingent on a valid finding of personal jurisdiction, the case must be dismissed in its entirety.

III. GROUND 3: THE ICIJ ERRED IN LAW BY EXCEEDING THE FACTUAL SCOPE OF THE INVESTIGATION

A. RULE 55(2) LIMITS THE SCOPE OF THE INDICTMENT

95. Rule 55(2) provides: 'The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.' The CIJs are permitted to indict only on the basis of investigations into the seised facts, i.e. facts alleged in an

²³⁰ ICIJ's Closing Order, paras 100, 1033.

Introductory and any Supplementary Submissions.²³¹ It is clear from Rule 55(2) that the CIJs have no jurisdiction to indict on facts outside the judicial investigation.²³² The sole exception in Rule 55(3) concerns aggravating circumstances and does not cover the individual's criminal conduct.²³³

96. Rule 67(1) states that the CIJs '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.' The CIJs and PTC have held that only facts charged in accordance with Rule 67(1) can be considered for indictment.²³⁴ The PTC has held that the 'Co-Investigating Judges remain seised of all facts and can modify the charges up until the closing order.'²³⁵ As such, while the indictment must be based on prior charging, the scope of indictable facts continues to be restricted by the Introductory and Supplementary Submissions until the Closing Order is issued.²³⁶

B. THE ICIJ'S CLOSING ORDER EXCEEDS THE PERMISSIBLE SCOPE OF THE INDICTMENT

97. The Introductory and Supplementary Submissions delimited the temporal and geographical scope of the investigation:

- a. Allegations in the Southwest Zone from 1976 until early 1978.²³⁷
- b. Allegations in the Northwest Zone from mid-1977 to 6 January 1979.²³⁸

²³¹ Case 004/1, *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.

²³² Case 001, *Decision on Appeal against Closing Order indicting Kaing Guek Eav alias "Duch"*, 5 December 2008, D99/3/42, para. 36: 'The Co-Investigating Judges have no jurisdiction to investigate acts unless they are requested to do so by the Co-Prosecutors.'

²³³ Rule 55(3): provides that facts that are limited to 'aggravating circumstances' related to an existing submission may not require a supplementary submission.

²³⁴ Case 004/1, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 245. Case 004/2, *Closing Order (Indictment)*, 16 August 2018, D360, para. 47. Case 004/2, *Order Dismissing the Case against Ao An*, 16 August 2018, D359, para. 74. *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: 'In a civil law system, only facts which have been charged beforehand can be considered for indictment. [...] the Co-Investigating Judges indeed made extremely clear 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, according to which only a person charged beforehand can be indicted and sent for trial.'

²³⁵ *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.

²³⁶ Rule 57(1) provides that the CIJs must notify and charge Mr YIM Tith of new facts before indicting him, requiring the CIJs to reopen the investigation to afford Mr YIM Tith the opportunity to prepare a defence and exercise his rights. See *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.

²³⁷ *ICP's Third Introductory Submission*, D1, 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.'

98. The Supplementary Submissions did not expand the temporal or geographical scope of the investigation beyond these parameters.²³⁹

i. After ‘early 1978’ in the Southwest Zone

99. The ICIJ erred in law by indicting Mr YIM Tith for crimes in the Southwest Zone on the basis that his responsibility as a member of ‘JCE B’ and ‘JCE C’ continued to 6 January 1979.²⁴⁰ This exceeds the temporal limit of ‘until early 1978’ in the Southwest Zone.²⁴¹

100. The ICIJ found Mr YIM Tith’s ‘authority over his previous areas in the Southwest Zone continued after his move to the Northwest Zone’²⁴² (a finding relied upon by the ICIJ to assess personal jurisdiction²⁴³). The ICIJ recognised the illegality of relying on these facts, which post-date ‘early 1978,’ yet abused his discretion by taking them into consideration.²⁴⁴ He was never permitted to do so.

ii. Prior to the end of 1975 at Wat Pratheat Security Centre of the Southwest Zone

101. The ICIJ erred in law by indicting Mr YIM Tith for his responsibility pursuant to ‘JCE C’ from September 1975 ‘when he took office in various functions in Kirivong District’ over crimes committed at Wat Pratheat Security Centre²⁴⁵ (a finding that was relied upon by the ICIJ to assess personal jurisdiction²⁴⁶). The factual scope of the investigation into Mr YIM Tith’s responsibility for crimes at Wat Pratheat, located in the Southwest Zone, was fixed by the ICP as ‘from 1976 onwards.’²⁴⁷

iii. Prior to ‘mid-1977’ in the Northwest Zone

102. The ICIJ erred in law by indicting Mr YIM Tith for crimes in the Northwest Zone from ‘at least early 1977’ as a member of ‘JCE A’ even before his alleged formal installation in Northwest Zone positions²⁴⁸ (a finding relied upon by the ICIJ to assess personal jurisdiction²⁴⁹). The ICIJ stated that Mr YIM Tith’s ‘*de facto* authority went beyond that

²³⁸ ICP’s Third Introductory Submission, D1, para. 94. ‘In mid-1977, Ta Mok, TA Tith and other senior CPK leaders planned and initiated a massive purge of the Northwest Zone [...]’

²³⁹ Co-Prosecutors Supplementary Submission regarding Sector 1 crime sites and persecution of Khmer Krom, 18 July 2011, D65, para. 13: ‘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 forced marriage and sexual or gender based violence, 24 April 2014, D191, para. 8: ‘Yim Tith became a member of the Northwest Zone Committee in mid-1978 [...]’

²⁴⁰ ICIJ’s Closing Order, paras 1016(ii) and (iii) and 1018.

²⁴¹ ICP’s Third Introductory Submission, D1, para. 93.

²⁴² ICIJ’s Closing Order, para. 1020: ‘[I]t bears mentioning, although it was not charged as such [...]’

²⁴³ *Ibid.*, paras 994, 996.

²⁴⁴ *Ibid.*, para. 1020.

²⁴⁵ *Ibid.*, paras 1016(iii) and 1017(iii).

²⁴⁶ *Ibid.*, paras 994, 997.

²⁴⁷ ICP’s Third Introductory Submission, D1, para. 93.

²⁴⁸ ICIJ’s Closing Order, paras 1016(i) and 1017(i).

²⁴⁹ *Ibid.*, paras 994, 998.

formally given to him through his official appointments but arose from his close personal relationship with Ta Mok, who was at the apex of operations in both Zones.’²⁵⁰ The ICIJ recognised the illegality of investigating or indicting Mr YIM Tith for his responsibility in the Northwest Zone prior to ‘mid-1977,’ yet abused his discretion by taking them into consideration.²⁵¹

C. CONCLUSION

103. The ICIJ incorrectly interpreted Rule 55(2) and exceeded the factual scope of the judicial investigation by indicting Mr YIM Tith on the basis of allegations about his conduct in the Southwest Zone and Northwest Zone of which the ICIJ was never formally seised.²⁵² This error of law was so unfair and unreasonable as to constitute an abuse of discretion. The PTC must therefore invalidate all of the ICIJ’s charges that are based on:

- Mr YIM Tith’s responsibility after ‘early 1978’ for crimes committed in the Southwest Zone, including at Wat Pratheat Security Centre.
- In addition, Mr YIM Tith’s responsibility prior to 1 January 1976 for crimes committed at Wat Pratheat Security Centre.
- Mr YIM Tith’s responsibility prior to ‘mid-1977’ for crimes committed in the Northwest Zone.

IV. GROUND 4: THE ICIJ ERRED IN LAW BY USING JCE LIABILITY AS A RELEVANT CONSIDERATION TO ASSESS PERSONAL JURISDICTION

104. The best efforts of the Defence to understand the ICIJ’s Legal Findings on Personal Jurisdiction suggest that JCE liability was used as a relevant consideration to show that Mr YIM Tith was most responsible.²⁵³ The language employed by the ICIJ in his legal findings, together with the structure of the ICIJ’s Closing Order as a whole, suggests that the ICIJ had in mind JCE liability when assessing personal jurisdiction.²⁵⁴ The Defence is under a due

²⁵⁰ *Ibid.*, para. 1020.

²⁵¹ *ICP’s Third Introductory Submission*, D1, para. 94. The Supplementary Submissions do not expand the scope of the investigation in this regard.

²⁵² Case 004/1, *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.

²⁵³ ICIJ’s Closing Order, paras 992 to 999.

²⁵⁴ *Ibid.*, paras 992 to 999. The ICIJ appeared to base his finding on Mr YIM Tith’s ‘very far’ geographical and hierarchical authority, Mr YIM Tith’s family relationship to Ta Mok with whom he was allegedly ‘travelling all over’ and ‘attending meetings *etc.*’ [sic, emphasis added], Mr YIM Tith’s responsibility for ‘genocide over extermination’ [sic] and ‘a wide array of other crimes against humanity, war crimes and homicide under domestic law,’ Mr YIM Tith’s responsibility for the targeting of the Khmer Krom (which ‘alone places him solidly within the bracket of personal jurisdiction’), Mr YIM Tith’s responsibility over the individuals operating DK security centres and worksites, whose conduct was in the OCIJ’s view comparable to the horror of the concentration camps in Nazi Germany, and the implementation of CPK’s policy on forced marriages. These

diligence obligation to address what it believes to be the ICIJ's erroneous reliance on JCE liability.

A. ADMISSIBILITY PURSUANT TO RULE 74(3)(A) AND RULE 21

105. Further to the Defence's submission on admissibility above,²⁵⁵ this ground of appeal is admissible since the ICIJ's assessment of personal jurisdiction (including the legal definitions and factual findings) are within the category of issues appealable by the defence under Rule 74(3)(a) (personal jurisdiction is a 'matter confirming the jurisdiction of the ECCC').²⁵⁶

106. The right of the Defence to appeal under Rule 74(3)(a) is further secured by Rule 21. As the central jurisdictional issue in Mr YIM Tith's case, his status as 'most responsible' for the crimes of the DK period is a matter which, determined erroneously, will cause irreparable harm to his fair trial rights that will not be open to rectification by the Trial Chamber.²⁵⁷

107. The ICIJ's improper reliance on JCE liability as a relevant consideration to assess personal jurisdiction breached Mr YIM Tith's right to be tried in accordance with law and to be treated equally to other defendants, as guaranteed by Article 31(2) of the Constitution of Cambodia,²⁵⁸ Article 14(1) of the ICCPR,²⁵⁹ (applicable at the ECCC through Article 13(1) of the UN-RGC Agreement),²⁶⁰ and Article 33^{new} of the Establishment Law, stating that the trials must be fair and expeditious and conducted in accordance with existing procedures in force, with full respect for the rights of the accused.²⁶¹ Rule 21(1)(b) provides that '[p]ersons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules.' The failure to apply these considerations in Case 004 was

factual descriptions do not refer to Mr YIM Tith's personal conduct, but rather to his criminal responsibility under the theory of JCE liability.

²⁵⁵ *Supra*, para. 13.

²⁵⁶ The PTC considered the determination of personal jurisdiction to be reviewable. Case 004/1, *Considerations on the International Co-Prosecutor's Appeal of Closing Order Reasons*, D308/3/1/20, 28 June 2018, para. 26

²⁵⁷ Case 004/1, PTC, *Considerations on IM Chaem's Appeal against the International Co-Investigating Judge's Decision to Charge Her In Absentia*, 1 March 2016, D239/1/8, para. 17.

²⁵⁸ Constitution of Cambodia, Article 31(2) provides that citizens are equal before the law, enjoying the same rights, liberties and duties regardless of race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, wealth or other situations.

²⁵⁹ ICCPR, Article 14(1) provides that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

²⁶⁰ UN-RGC Agreement, Article 13(1) provides for the protection of the rights of the accused in accordance with Articles 14 and 15 of the ICCPR. *See also*: Establishment Law, Article 35 new, which provides for the applicability of minimum guarantees in Article 14 of the ICCPR: 'In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.'

²⁶¹ Establishment Law, Article 33 new is reinforced by the rights of a charged person under Rule 21, which reads: 'The applicable Establishment 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 Establishment Law and the UN-RGC Agreement.'

an unacceptable departure from the CIJ's precedent in Case 004/1 that also causes legal uncertainty violating Rule 21.²⁶²

B. THE ICIJ ERRED IN USING JCE TO ESTABLISH PERSONAL JURISDICTION

108. The ICIJ inappropriately relied on Mr YIM Tith's alleged responsibility as a JCE member as a relevant consideration to find that Mr YIM Tith was 'most responsible.' The ICIJ failed to assess personal jurisdiction over Mr YIM Tith's in an equal manner to the accused in Case 004/1.²⁶³

109. Case 004/1 was the first case in which the CIJs were called to specify the legal basis for their personal jurisdiction finding by setting out the relevant considerations necessary to make such determinations.²⁶⁴ The CIJs analysed the applicable law and scrutinised the relevant provisions of the UN-RGC Agreement, Establishment Law and SCC case law,²⁶⁵ taking into consideration the position of the ECCC within the Cambodian legal system²⁶⁶ and the effects of *in dubio pro reo*, strict construction, selective jurisdiction and selective prosecution as factors influencing the exercise of the CIJs' discretion when determining who was 'most responsible.'²⁶⁷ The CIJs set out a formulation of the criteria for the exercise of their discretion.²⁶⁸

110. The CIJs declared in Case 004/1 that an 'automatic presumption of senior responsibility' for those who are brought before the court by allegations of the CPs 'must not and cannot equate to a presumption of guilt'²⁶⁹ and any such presumption 'must operate the other way.'²⁷⁰ The CIJs reasoned:

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 become 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.²⁷¹

111. The CIJs further considered in Case 004/1 that the accused 'is entitled to a dispassionate evaluation of the evidence and interpretation of the law at all levels of the

²⁶² Case 004/1, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 37 to 41.

²⁶³ ICIJ's Closing Order, paras 992 to 999.

²⁶⁴ Case 004/1, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 37 to 41.

²⁶⁵ *Ibid.*, paras 3 to 10.

²⁶⁶ *Ibid.*, paras 11 to 25.

²⁶⁷ *Ibid.*, paras 26 to 36.

²⁶⁸ *Ibid.*, paras 37 to 41.

²⁶⁹ *Ibid.*, para. 35.

²⁷⁰ *Ibid.*, para. 36.

²⁷¹ *Ibid.*

ECCC's judicial hierarchy.²⁷²

112. According to the CIJs' criteria for the exercise of judicial discretion in Case 004/1, the relevant considerations to be employed for the question of personal jurisdiction are similar to those one would use for sentencing purposes.²⁷³ The CIJs set out the following relevant considerations:

- The person's formal position in the hierarchy.²⁷⁴
- The degree to which the accused was able to contribute to or even determine policies and/or their implementation.²⁷⁵
- The relative gravity of the person's own actions and their effects.²⁷⁶

113. The CIJs further found that some general facts must be borne in mind, such as:

- Decision-making in DK was not a formal democratic process with the possibility for input from lower levels. Decisions were made at the top and then implemented by the lower levels on pain of personal consequences at any level if the orders were not adhered to. At all times, the ultimate definition of the content of policies and the means of their implementation rested with the top echelons, which could interfere at will.
- A person's own initiative in these circumstances is not in and of itself a criterion that would elevate them into the category of those most responsible. The ultimate definition of the content of policies and means of their implementation rested with the top echelons, which could always interfere at will.²⁷⁷
- The pervasive use of vertical lines of communication in the chain of command and secrecy did not permit horizontal exchange of tactical and operational information to the levels below the top leadership, and openly discussing instructions from *Angkar* could easily have been considered by superior levels as insubordination and reported with adverse effect for persons discussing it; 'no-one could be safe.'²⁷⁸

114. In the case against Mr YIM Tim, the NCIJ stayed faithful to the joint analysis presented in Case 004/1,²⁷⁹ employing the same relevant considerations in his determination

²⁷² *Ibid.*, para. 36.

²⁷³ *Ibid.*, para. 38.

²⁷⁴ *Ibid.*, para. 39.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*, para. 38.

²⁷⁷ *Ibid.*, para. 40.

²⁷⁸ *Ibid.*, para. 41. The PTC in Case 004/1 emphasised the importance of assessing the gravity of the accused's actions, their criminal conduct considered in full, their level of participation in the crimes, and their role and responsibilities during the DK regime. Case 004/1, *Considerations on the International Co-Prosecutor's Appeal of Closing Order Reasons*, D308/3/1/20, 28 June 2018, paras 328 to 332, 339.

²⁷⁹ NCIJ's Closing Order, paras 598 to 631.

of personal jurisdiction as he had established in the prior case.²⁸⁰ Applying the same criteria to Mr YIM Tith, the NCIJ found ‘no evidence showing that YIM Tith was a senior leader or one of the most responsible person in the DK period,’²⁸¹ determined that the ECCC had no personal jurisdiction over him,²⁸² and dismissed the charges against him.²⁸³

115. Instead of following the criteria developed with his fellow judge in Case 004/1, the ICIJ turned to the JCE doctrine to justify his finding that Mr YIM Tith was ‘most responsible.’²⁸⁴ Controversially, JCE does not require the accused to have performed any part of the *actus reus* of the perpetrated crime to be found guilty (JCE does not require the accused to commit, order, or instigate a crime).²⁸⁵ A conviction under JCE liability therefore provides no distinction between JCE members based on the level of their contribution to a crime²⁸⁶ and the only safeguard against JCE overreaching or lapsing into guilt by association is at the sentencing stage of the case.²⁸⁷

116. Most importantly, the ICIJ failed to use the relevant consideration from Case 004/1 that the accused’s contribution to the crimes of the DK period must be assessed with reference to ‘the relative gravity of the person’s own actions and their effect,’²⁸⁸ instead improperly relying on JCE, a mode of liability which, according to the jurisprudence of international tribunals, is well established as holding the accused responsible for crimes even though he may not have performed any part of the *actus reus*.²⁸⁹ It is fundamental to JCE that the accused may be held liable not only for his own contribution but also for the actions of his fellow JCE members that further the crime.²⁹⁰ As the ICTY recognised in *Brđanin*, the effect of these requirements is that JCE liability ‘offers no formal distinction between JCE members who make overwhelmingly large contributions and the JCE members whose contributions, though significant, are not as great.’²⁹¹

²⁸⁰ *Ibid.*, paras 639 to 665.

²⁸¹ *Ibid.*, paras 666 to 684.

²⁸² *Ibid.*, para. 686.

²⁸³ *Ibid.*, para. 687.

²⁸⁴ Case 004/1, *Closing Order (Reasons)*, 10 July 2017, D308/3, paras 36 to 41.

²⁸⁵ ICTY Appeals Chamber, *Prosecutor v. Brđanin* (IT-99-36-A), Judgement, 3 April 2007 (‘Brđanin Appeals Judgment’), para. 427.

²⁸⁶ *Ibid.*, para 432.

²⁸⁷ *Ibid.*, paras 426 and 432.

²⁸⁸ Case 004/1, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 38.

²⁸⁹ Brđanin Appeals Judgment, para. 427.

²⁹⁰ *Ibid.*, para. 431.

²⁹¹ *Ibid.*, para. 431. JCE holds the accused responsible for the substantive crime or underlying offence committed, regardless of the role that he or she played in the enterprise. The relative significance of a particular accused’s role in the JCE is therefore not reflected at the level of attribution of responsibility, even if it is taken into account when determining the sentence. See ICTY Trial Chamber, *Prosecutor v. Milutinovic et al.* (IT-05-87-

117. In *Brđanin*, the Appeals Chamber held that any disparity between JCE members who make overwhelmingly large contributions and JCE members who make lesser contributions ‘is adequately dealt with at the sentencing stage.’²⁹² It is axiomatic that an individual’s responsibility under a JCE will be refined at the sentencing stage of proceedings by referring to his or her culpability, requiring a ‘proportionate and individualised’ sentence that is based on ‘an objective, reasoned and measured analysis of the accused’s conduct and its consequential harm,’ including the form and degree of the participation of the accused in the crime.²⁹³

118. JCE is thus fundamentally flawed as a relevant consideration for finding Mr YIM Tith ‘most responsible’ because it is a mode of liability that does not discriminate degrees of responsibility. The ill-suited nature of JCE is especially forceful where a JCE is broadly construed to cover a vast range of members of the DK hierarchy. In Mr YIM Tith’s case, the alleged JCEs extend from the highest to the lowest levels of Southwest Zone cadres and security centre personnel.²⁹⁴ In AO An’s hearing on the appeals of closing orders, the ICP explicitly accepted the vast breadth of the JCEs:

[...] certainly, many individuals were involved, from Pol Pot because this was -- many of these policies came from the Centre, that's our position -- and including the driver of Ao An who did play a key role -- the evidence would show -- in carrying messages, in carrying those orders about people to be killed.²⁹⁵

119. The CIJs recognised in Case 004/1 that the drafters of the law governing the ECCC did not envisage that personal jurisdiction would cover a ‘massive category of perpetrators’ of soldiers and officers who ‘each alone could have been responsible for hundreds of thousands of deaths’²⁹⁶ and recognised the ‘massive impunity gap for crimes committed during the DK era.’²⁹⁷ In Case 004/1, the CIJs agreed that the relevant considerations for determining personal jurisdiction were analogous to the indicators of individual culpability that are used for sentencing purposes.²⁹⁸ In Case 004, the ICIJ failed to provide reasons for his departure from this approach, and instead, he based his assessment of ‘most responsible’ on a broadly-

T), Judgment, 26 February 2009, para. 106. It is imperative that each sentence is individualised. ICTY Appeals Chamber, *Prosecutor v. Šainović et al.* (IT-05-87-A), Judgement, 23 January 2014, para. 1839..

²⁹² *Brđanin Appeals Judgment*, para. 431.

²⁹³ Case 002, *Case 002/01 Trial Judgment*, 7 August 2014, E313, paras 1067 to 1068.

²⁹⁴ ICIJ’s Closing Order, para. 1016. A broad JCE ‘from Pol Pot to Ao An’s driver’ was construed by the ICP in Case 004/2. Case 004/2, *Transcript of Appeals Hearing*, 21 June 2019, D360/19.1, p. 23, lines 4 to 12.

²⁹⁵ *Ibid.*

²⁹⁶ Case 004/1, *Closing Order (Reasons)*, paras 18 to 19.

²⁹⁷ *Ibid.*, para. 25.

²⁹⁸ *Ibid.*, para. 38.

construed ‘drag-net’ of JCE liability, in effect expanding the scope of personal jurisdiction to the massive category of perpetrators that the CIJs were wary of in Case 004/1.

C. CONCLUSION

120. The ICIJ erred in law by using Mr YIM Tith’s alleged responsibility as a member of a JCE as a foundation for establishing personal jurisdiction. The ICIJ’s reliance on JCE caused irreparable harm to Mr YIM Tith’s fair trial right to be treated equally to other ECCC defendants and to be held responsible only for his own conduct, as encapsulated in the principle of personal culpability, *nulla poena sine culpa*, protected by Article 38 of the Constitution of Cambodia, Article 24 of the Criminal Code of Cambodia, and Article 15(1) of the ICCPR.²⁹⁹ On the basis of Mr YIM Tith’s alleged responsibility under JCE liability, no reasonable trier of fact could have reached the conclusion that he was ‘most responsible.’ The ICIJ’s reliance on JCE liability was so unfair and unreasonable as to constitute an abuse of his discretion. The only remedy for the ICIJ’s error of law in relying on an improper consideration for personal jurisdiction is to dismiss the Indictment.

V. GROUND 5: THE ICIJ ERRED IN FACT AND LAW IN FINDING THAT MR YIM TITH WAS ‘MOST RESPONSIBLE’ AND THUS WITHIN THE ECCC’S PERSONAL JURISDICTION

121. In the Legal Findings on Personal Jurisdiction, the ICIJ erred in finding that Mr YIM Tith ‘rose very quickly from the position of a deputy district secretary in the Southwest Zone to that of a deputy zone secretary and, towards the end of DK, possibly even full zone secretary in the Northwest Zone.’³⁰⁰

122. The ICIJ erred in finding that Mr YIM Tith’s ‘meteoric rise’ was ‘supported by his close family ties’ with Ta Mok ‘whose brother-in-law he was’ and that Mr YIM Tith was ‘*de facto* second-in-command of Ta Mok’ in both the Southwest Zone and in the Northwest Zone.³⁰¹

123. The ICIJ’s finding on ‘close family ties’ between Mr YIM Tith and Ta Mok are based on witnesses’ observations of interactions between Mr YIM Tith and Ta Mok in Sector 13,³⁰² together with the finding that Mr YIM Tith and Ta Mok ‘could be seen travelling together ‘all over’ the Northwest Zone, ‘attending meetings etc’ which was ‘even before his [Mr YIM

²⁹⁹ Case 002, *Case 002/01 Trial Judgment*, 7 August 2014, E313, para. 16; Case 002, *Case 002/02 Trial Judgment*, 16 November 2018, E465, para. 21. An ICTY Appeals Chamber described the principle as ‘the foundation of criminal responsibility’. ICTY Appeal Chamber, *Prosecutor v. Tadić* (IT-94-1-A), Appeal Judgement, 15 July 1999, para. 186.

³⁰⁰ ICIJ’s Closing Order, para. 993.

³⁰¹ *Ibid.*, para. 994.

³⁰² *Ibid.*, paras 348 to 351.

Tiths's] formal installation in the Northwest Zone.'³⁰³ In his Legal Findings on Personal Jurisdiction, the ICIJ did not point to any evidence indicative of Mr YIM Tith's exercise of alleged *de facto* powers in the Southwest Zone, nor in the Northwest Zone.³⁰⁴

A. SUB-GROUND 5.1: THE ICIJ ERRED IN FINDING THAT MR YIM TITH'S FAMILY RELATIONSHIP WITH TA MOK AMOUNTED TO A FINDING OF *DE FACTO* AUTHORITY IN THE SOUTHWEST ZONE AND NORTHWEST ZONE AND THAT MR YIM TITH WAS 'MOST RESPONSIBLE'

124. As the Defence analysis of the ICIJ's factual findings on Mr YIM Tith's alleged *de jure* position in Sector 13 will show, there is insufficient evidence that Mr YIM Tith was appointed as a member of the Sector 13 Committee of the Southwest Zone.³⁰⁵ Faced with this insufficient evidence, the ICIJ gave excessive prominence to Mr YIM Tith's family association with Ta Mok³⁰⁶ and he found that Mr YIM Tith held *de facto* authority in Sector 13 based on this family association.³⁰⁷

125. The ICIJ based this finding on witness evidence that Mr YIM Tith and Ta Mok were 'like father and son,' that they travelled together throughout the Southwest Zone inspecting worksites, that their offices were located close to each other, that Mr YIM Tith was seen attending meetings with Ta Mok and working at the Southwest Zone Office, that Ta Mok and YIM Tith 'lived together in a large compound west of the old provincial hall.'³⁰⁸ None of these observations are relevant for the assessment of Mr YIM Tith's *de facto* authority and his effective command and control.³⁰⁹

126. In addition to the ICIJ's reliance on irrelevant factors in finding Mr YIM Tith's *de facto* authority, the ICIJ abused his discretion by unfairly and unreasonably relying upon parts of the evidence to support his finding about 'close ties' between Ta Mok and Mr YIM Tith while disregarding parts of the evidence that contradicted his finding. The most telling examples are:

- RIEL Son stated that he had no contact with Mr YIM Tith during the Khmer Rouge regime but believed that Mr YIM Tith had 'worked in an office in Phnom Penh with POL Pot' during the Khmer Rouge regime and passed away before RIEL Son gave this

³⁰³ *Supra*, para. 102 *Infra*, para. 223.

³⁰⁴ ICIJ's Closing Order, paras 992 to 999.

³⁰⁵ *Infra*, paras 153 to 163.

³⁰⁶ ICIJ's Closing Order, paras 349 to 352.

³⁰⁷ *Ibid.*, para. 348.

³⁰⁸ *Ibid.*, para. 349.

³⁰⁹ *Supra*, para. 83.

interview (18 February 2014).³¹⁰ RIEL Son also explained that ‘*Ta Tith* was not very active’ and he ‘was not cruel, because he once was a monk.’³¹¹ RIEL Son never mentioned Mr YIM Tith in his early interviews with the OCIJ³¹² or his Case 002 testimony, including when he was asked about issues relevant to the structure of Sector 13.³¹³

- SANN Lorn repeated several times that he did not know anything about Ta Mok’s relationship to Mr YIM Tith³¹⁴ and that he did not know anything about Mr YIM Tith and just ‘heard of his name,’ without specifying the circumstances in which, or time when, he heard it.³¹⁵
- NOP Ngim stated that Ta Mok and ‘[Ta Tith] got along well with each other’³¹⁶ but she did not know ‘Ta Tith’s’ position in the Southwest Zone³¹⁷ nor was she familiar with the Southwest Zone structure except that Ta Mok was the Southwest Zone Secretary.³¹⁸

127. The ICIJ found, based on the evidence of CHAN Vichet, that: Mr YIM Tith and Ta Mok were responsible for the ‘whole of Takeo Province and the entire zone,’ Mr YIM Tith was specifically ‘responsible for the entire western part of Takeo Province,’ and acted as ‘Ta Mok’s representative,’ even in various military and internal security matters, and that Mr YIM Tith’s position was ‘higher than the sector level’ because of his close relationship to Ta Mok. The ICIJ observed that the witness spent four months in Takeo but that the witness ‘does not specify a certain time period.’³¹⁹

128. First, the ICIJ was wrong in claiming that CHAN Vichet did not specify the time when he was in Takeo. He was very clear that he was:

- A messenger in Division 2, Regiment 11 since 1973.³²⁰
- Stationed in Kampot Province 1974.³²¹
- Involved in the attack on Phnom Penh in April 1975.³²²
- With his unit in Wat Trakeath Pagoda near Tuol Krei (currently located at National Road

³¹⁰ D118/181, RIEL Son, WRI, A70-73, EN 00982643-4.

³¹¹ D118/181, RIEL Son, WRI, A81, EN 00982644.

³¹² D6.1.671, RIEL Son, WRI.

³¹³ D315.2.6, RIEL Son, Transcript; D315.2.7, RIEL Son, Transcript; D315.2.8, RIEL Son, Transcript ; D315.1.17, RIEL Son, Transcript, 10.48.42-10.54.07, p. 32, l.16-p. 33, l.16, EN 01076506-7.

³¹⁴ D219/19, SANN Lorn, WRI, A188, A192, A195, A196. 01050357-8.

³¹⁵ D219/19, SANN Lorn, WRI, A165-166, EN 01050354-5, A187, EN 01050357.

³¹⁶ D118/285, NOP Ngim, WRI, A16, EN 01044676.

³¹⁷ D118/285, NOP Ngim, WRI, A9-A12, EN 01044675; A18-A19, EN 01044676.

³¹⁸ D118/285, NOP Ngim, WRI, A14-A15, EN 01044675-6.

³¹⁹ ICIJ’s Closing Order, para. 350.

³²⁰ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344865, EN 01344871, EN 01344873-4,

³²¹ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344868.

³²² D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344868.

- Number 3, Khan Mean Chey, Phnom Penh) where he stayed for one year.³²³
- Transferred to Takeo Province after a year but his military base and logistics stayed in Tuol Krei.³²⁴
 - Moved with his Division 2 in Anlog Tean border, Koh Andaet District, Takeo Province to defend the border from Vietnamese attacks in April 1977.³²⁵
 - Ta Mok recruited him in July 1977 as a soldier and moved to Svay Reing in The East Zone where he was in charge of a Regiment.³²⁶
 - Wounded in September 1977 and sent to Phnom Penh, in a hospital.³²⁷
 - Stayed in the hospital until the Vietnamese attacked Phnom Penh in 1979.³²⁸
 - In February 1979 defected to the Vietnamese side.³²⁹

129. CHAN Vichet also stated that he did not know ‘Ta Tith’ before he came to Anlong Tean, Takeo Province in April 1977,³³⁰ that he did not see ‘Ta Tith’ again after he left³³¹ for Svay Rieng in East Zone in July 1977³³² and that when he departed for the East Zone ‘Ta Tith’ stayed in Takeo Province.³³³ It is reasonable to conclude that CHAN Vichet spent 4 months in Takeo Province from April to July 1977. It is worth noting that CHAN Vichet also stated that during these four months he saw ‘Ta Tith’ almost every day³³⁴ and that, if ‘Ta Tith’ travelled, he would bring with him two children who lived with him.³³⁵ This is exactly the time when SAO Chobb allegedly saw ‘Ta Tith’ in the Northwest Zone and, based on which, the ICIJ found in his Legal Findings on Personal Jurisdiction that Mr YIM Tith travelled ‘all over’ the Northwest Zone with Ta Mok ‘even before his formal installation in the Northwest Zone.’³³⁶ There is nothing in the ICIJ’s Closing Order to suggest that the ICIJ took into consideration this part of the evidence as contradictory to SAO Chobb’s.

130. Further, regarding Mr YIM Tith’s status as ‘most responsible,’ the ICIJ failed to take into account CHAN Vichet’s contradictory evidence and evidence that he gave trying to

³²³ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344872.

³²⁴ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344872.

³²⁵ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344874, EN 01344875. D219/853, CHAN Vicheth, WRI, A9-A11, EN 101375337.

³²⁶ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344876.

³²⁷ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344877-78.

³²⁸ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344879.

³²⁹ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344880.

³³⁰ D219/853, CHAN Vicheth, WRI, A19, EN 01375337.

³³¹ D219/853, CHAN Vicheth, WRI, A178, A181, EN 01375354.

³³² D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344876.

³³³ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344885.

³³⁴ D219/853, CHAN Vicheth, WRI, A9-A15, EN 01375336-7; A20, EN 01375338.

³³⁵ D219/853, CHAN Vicheth, WRI, WRI, A72, EN 01375342, A105, EN 01375346. D219/853.1, CHAN Vicheth, Annex A: Sketch of Places; A107, EN 01375346.

³³⁶ ICIJ’s Closing Order, para. 994.

clarify his evidence. CHAN Vichet stated that:

- He did not know that ‘Ta Tith’ and Ta Mok were relatives and what relationship they had.³³⁷
- ‘Ta Tith’s’ office was under the Zone’s supervision and ‘Ta Tith’ educated children there³³⁸ he observed ‘Ta Tith’ working with Ta Mok but he did not know the relationship between them.³³⁹
- He clarified that ‘Ta Tith’ became Ta Mok’s representative in military matters only after the war ended, and that he was not ‘the representative during the war’ when he was in fact the representative of the rice production in Kirivong District.³⁴⁰
- That ‘Ta Tith’s’ responsibilities were not fixed and ‘if one was assigned to work in Kirivong District in the morning, his responsibility could be ended when he returned in the afternoon.’³⁴¹
- ‘Ta Tith’ was not District Secretary but Ta Mok’s representative for a particular task for a short while. After completing the work, that task was dissolved.³⁴²
- ‘Ta Tith’ had no official position,³⁴³ was never on any sector committee,³⁴⁴ had no history of becoming a great commander, he would just be working alongside others,³⁴⁵ and he never held a position on the district committee.³⁴⁶
- When Ta Mok was absent from the Takeo Province, Ta Bith, who was a secretary of Sector 35 supervised ‘bases,’³⁴⁷ and ‘Ta Tith’ would be responsible only for one small part of the ‘bases’ work but never military.³⁴⁸
- ‘Ta Tith’ did not work for the military, he was with the base, he did not have influence over the soldiers.³⁴⁹

131. CHAN Vichet’s evidence in this regard is corroborated by the evidence of VANN Kosal, another soldier who was a Platoon Commander in Regiment 12, Division 2, from 1976

³³⁷ D219/853, CHAN Vicheth, WRI, A9-A11, EN 01375337; D219/853, CHAN Vicheth, WRI, A143, EN 01375350.

³³⁸ D219/853, CHAN Vicheth, WRI, A17, EN 01375337.

³³⁹ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344885.

³⁴⁰ D219/853, CHAN Vicheth, WRI, A59-A60, EN 01375341.

³⁴¹ D219/853, CHAN Vicheth, WRI, A61, EN 01375341.

³⁴² D219/853, CHAN Vicheth, WRI, A62, EN 01375341-2.

³⁴³ D219/853, CHAN Vicheth, WRI, A171, EN 01375353.

³⁴⁴ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344885.

³⁴⁵ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344885.

³⁴⁶ D219/815.1, CHAN Vicheth, DC-Cam Interview, p. EN 01344885.

³⁴⁷ D219/853, CHAN Vicheth, WRI, A148, EN 01375350.

³⁴⁸ D219/853, CHAN Vicheth, WRI, A150-A151, A153, EN 01375351.

³⁴⁹ D219/853, CHAN Vicheth, WRI, A88, EN 01375344; D219/853, CHAN Vicheth, WRI, A131, EN 01375348

to 1978.³⁵⁰ VANN Kosal was in Takeo province at the same time as CHAN Vichet before he was transferred in Svay Rieng in the East Zone in 1978³⁵¹ and he did not know Ta Tith at the time, but had heard that he worked ‘at the base’ and he did not know which Sector.³⁵²

132. The ICIJ also found, based on the evidence of CHAN Vichet, that Mr YIM Tith attended a meeting with district committee representatives at the Zone Office.³⁵³ The ICIJ also failed to take into account CHAN Vichet’s contradictory evidence and evidence he gave trying to clarify his statements. CHAN Vichet stated that:

- ‘Ta Tith’ had a house, not office³⁵⁴ and that his children and his wife lived with him.³⁵⁵
- He never went inside ‘Ta Tith’s’ office and he did not know whether he received guests in his office.³⁵⁶
- He did not know anything about ‘Ta Tith’s’ work³⁵⁷ but once saw that some people came to see him and he assumed that they were from district committees because they had bicycles³⁵⁸ but later clarified that the people who came to see ‘Ta Tith’ were his relatives from Tram Kak District.³⁵⁹

133. Finally, the ICIJ found, based on the evidence of this witness, that Mr YIM Tith ordered people to carry out tasks and inspect worksites throughout the zone. The ICIJ misinterpreted the evidence and failed to take into account exculpatory evidence from CHAN Vichet, who stated that:

- He did not know what tasks ‘Ta Tith’ had when he travelled to the districts,³⁶⁰ but ‘Ta Tith’ would take two small children when he travelled to the districts.³⁶¹
- He did not understand well the organization of ‘base’ work because he was only involved in military matters.³⁶²
- He heard that ‘Ta Tith’ ordered people to cut down trees and bamboos to produce fish traps,³⁶³ or to bring the heads of the dry salty fish to the people who cut bamboos on the

³⁵⁰ D219/901, VANN Kosal, WRI, A3, EN 01517485, A12-A16 EN 01517486.

³⁵¹ D219/901, VANN Kosal, WRI, A9-A11, EN 01517486.

³⁵² D219/901, VANN Kosal, WRI, A35-A40, EN 01517487-8.

³⁵³ ICIJ’s Closing Order, para. 350.

³⁵⁴ D219/853, CHAN Vicheth, WRI, A26, EN 01375338.

³⁵⁵ D219/853, CHAN Vicheth, WRI, A105, EN 01375346. D219/853.1, CHAN Vicheth, WRI, Annex A.; A107, EN 101375346

³⁵⁶ D219/853, CHAN Vicheth, WRI, A31-A32, EN 01375339.

³⁵⁷ D219/853, CHAN Vicheth, WRI, A31-A32, EN 01375339.

³⁵⁸ D219/853, CHAN Vicheth, WRI, A34-A37, EN 01375339.

³⁵⁹ D219/853, CHAN Vicheth, WRI, A107-A112, EN 01375346, A152, EN 01375351.

³⁶⁰ D219/853, CHAN Vicheth, WRI, A66, EN 01375342.

³⁶¹ D219/853, CHAN Vicheth, WRI, A72, EN 01375342.

³⁶² D219/853, CHAN Vicheth, WRI, A129-A130, EN 01375348.

³⁶³ D219/853, CHAN Vicheth, WRI, A67, EN 01375342.

mountain, or to a truck driver to deliver bamboos somewhere.³⁶⁴

- The people whom ‘Ta Tith’ gave orders to had minor positions in the districts.³⁶⁵

134. The ICIJ also took into consideration MOENG Vet’s observations from this one meeting which he attended that Mr YIM Tith was ‘more powerful’ than Ta Phen, who was allegedly then Deputy Sector 13 Secretary, because of his age and family connection with Ta Mok.³⁶⁶ The ICIJ disregarded the fact that there is no evidence in the Case File that Ta Phen was Deputy Sector 13 Secretary in 1976 or how old he was, and disregarded that MOENG Vet gave no explanation as to why he felt the seating position meant that ‘Ta Tith’ held a sector-level role and was ‘more powerful than the Sector Deputy Secretary,’ nor how he was able to identify Mr YIM Tith, especially because ‘Ta Tith’ never gave any speech at this meeting,³⁶⁷ nor how he knew ‘Ta Tith’s’ official capacity at this meeting. The ICIJ provided no reason as to how ‘Ta Tith’s’ mute presence on stage in the end of 1976 coupled with his family relationship with Ta Mok amounted to evidence that Mr YIM Tith held *de facto* authority in Sector 13.

Concurrent authority and responsibility in both zones ‘similar to Ta Mok’

135. The ICIJ found that several witnesses stated that Mr YIM Tith continued to travel back and forth to the Southwest Zone even after his alleged ‘formal appointment’ in the Northwest Zone, and that the evidence of those witnesses corroborated ‘the testimony of witnesses that he had concurrent authority and responsibilities in both zones’ similar to Ta Mok’s.³⁶⁸

136. None of the witnesses the ICIJ relied on in making this finding gave evidence about Mr YIM Tith’s *de facto* or *de jure* authority in both zones after June 1978, and it is not clear how this evidence is corroborative. In particular:

- SANN Lorn did not know anything about Mr YIM Tith’s position and had only ‘heard of his name’ not specifying the time when he heard it.³⁶⁹
- PECH Chim spoke about an alleged radio broadcast about Sector 13 in the late part of 1978, only to later change his evidence when he said that he no longer believed he heard the broadcast himself.³⁷⁰
- SOEUM Chhoeun said that he believed that ‘Ta Tith’ never left Kirivong District during

³⁶⁴ D219/853, CHAN Vicheth, WRI, A154, EN 01375351, A158, EN 01375352.

³⁶⁵ D219/853, CHAN Vicheth, WRI, A158, EN 01375352.

³⁶⁶ ICIJ’s Closing Order, para. 351.

³⁶⁷ D219/488, MOENG Vet, WRI, A46-51, EN 01170588.

³⁶⁸ ICIJ’s Closing Order, para. 352.

³⁶⁹ D219/19, SANN Lorn, WRI, A165-174, EN 01050354-5, A187-A188, EN 01050357.

³⁷⁰ D118/259, PECH Chim, WRI, A136-137, EN 01000683.

- the DK period because he never heard that he moved away, though he did not see him.³⁷¹
- PANN Sarou stated that ‘Ta Tith’ was ‘Kirivong District Committee’ until the end of the DK period, but then he changed his testimony and said that he ‘concluded based on his observations’ that at the end of Khmer Rouge regime ‘Ta Tith’ was promoted to be a member of the National Assembly because he was family to Ta Mok.³⁷²
 - HUY Krim’s evidence concerns events in 1976 and 1977 and is not relevant to this issue.

Conclusion

137. The ICIJ failed to show that Mr YIM Tith’s family relationship with Ta Mok amounted to Mr YIM Tith’s *de facto* authority in Sector 13 of the Southwest Zone and in the Northwest Zone and that Mr YIM Tith was Ta Mok’s second-in-command in both Zones. Neither the fact that a family relationship existed, nor the opinion evidence of witnesses regarding the effect of this relationship on the actual authority of Mr YIM Tith is a basis to conclude that Mr YIM Tith was Ta Mok’s second-in-command. There is no evidence on the Case File attesting to such a significance to their family relationship, nor any legal source such as the case law of the ECCC or other international tribunals to suggest that ‘family relationships’ are indicative of effective command and control. The ICIJ failed to provide the reasoning behind this conclusion that would enable a proper assessment of the reasonableness of this conclusion.

138. At the same time, the ICIJ disregarded a critical criterion of effective control that is well-established in the case law of international tribunals: the actual possession, or non-possession, of powers of control over the actions of subordinates,³⁷³ the ICIJ thereby failing to adequately set out the applicable law on command responsibility and to specify the factual basis of his legal assessment of personal jurisdiction and failing to properly inform Mr YIM Tith about the charges against him.³⁷⁴

139. The ICIJ failed to show that Mr YIM Tith actually had any subordinates, let alone that he possessed a power of control over the actions of even one single person.

140. The above analysis shows that the ICIJ’s preoccupation with Mr YIM Tith’s family relationship with Ta Mok had a direct impact on his assessment of Mr YIM Tith’s alleged *de facto* authority and his effective command and control in the Northwest Zone and in the Southwest Zone. The ICIJ disregarded contradictory evidence, failed to take into account

³⁷¹ D219/189, SOEUM Chhoeun, WRI, A23-A27, EN 01079818-9.

³⁷² D118/302, PANN Sarou, WRI, A26, EN 01045473; A46-A52, EN 01045475-6.

³⁷³ *Supra*, paras 82 to 84.

³⁷⁴ *Supra*, paras 80 to 94.

relevant considerations and took into account irrelevant or unreasonable considerations to distort otherwise exculpatory evidence. The ICIJ also failed to give a reasoned opinion as to why he found that evidence was such that no reasonable trier of fact could not reach any other conclusion in applying a ‘probability’ standard.³⁷⁵

141. The ICIJ’s preoccupation with Mr YIM Tith’s family relationship with Ta Mok went beyond his assessment of Mr YIM Tith’s *de facto* authority and his effective command and control. The Defence analysis of the ICIJ’s assessment of facts will also show that this preoccupation with Ta Mok coloured his entire assessment of Mr YIM Tith’s functions during the DK regime and tainted his conclusions about Mr YIM Tith’s conduct and his membership of and contribution to the three alleged JCEs, the only named members of which were, according to the ICIJ, Ta Mok and Mr YIM Tith.³⁷⁶ The ICIJ afforded other accused a dispassionate evaluation of the evidence and interpretation of the law,³⁷⁷ but inexplicably, he did not grant Mr YIM Tith the same benefit.

B. SUB-GROUND 5.2: THE ICIJ ERRED IN FACT AND LAW BY FINDING THAT MR YIM TITH HAD OFFICIAL POSITIONS OR HELD *DE FACTO* AUTHORITY IN THE SOUTHWEST ZONE AND NORTHWEST ZONE DURING THE DK REGIME AND THAT HE WAS A MEMBER OF THE JCES

i. The ICIJ erred in finding that Mr YIM Tith was ‘leader’ of Kirivong District

142. The ICIJ found that Mr YIM Tith was ‘leader of Kirivong District’ during the DK regime.³⁷⁸ This finding is erroneous.

The ICIJ erred with respect to Mr YIM Tith’s alleged de jure positions on the Kirivong District Committee

143. The ICIJ failed to make findings about the *de jure* positions of Mr YIM Tith on the Kirivong District Committee and their durations. The ICIJ found ‘it is unclear when Yim Tith was appointed to the Kirivong District Committee,³⁷⁹ his membership may have been as brief as October 1975 to January 1976,³⁸⁰ and he left Kirivong District as early as January 1976.³⁸¹ In contradiction to this finding, the ICIJ then concluded that Mr YIM Tith ‘became the Kirivong District Secretary after Ta Tom’s removal,’ which by the ICIJ’s own reckoning was ‘at some point between late 1976 and September 1977’ or that Mr YIM Tith possibly held this

³⁷⁵ *Supra*, paras. 17 to 19.

³⁷⁶ ICIJ’s Closing Order, para. 1016i and ii.

³⁷⁷ Case 004/1, Closing Order (Reasons), 10 July 2017, D308/3, para. 36.

³⁷⁸ ICIJ’s Closing Order, paras 328 to 342, 463 to 469.

³⁷⁹ *Ibid.*, para. 328.

³⁸⁰ *Ibid.*, paras 328 to 331, 342.

³⁸¹ *Ibid.*, para. 342. ‘Yim Tith left Kirivong District in either 1976 or 1977.’

role after ‘Ta Sieng first held the role for some time.’³⁸²

144. The ICIJ made no finding about any time period when Mr YIM Tith was appointed as District Secretary while he was in Kirivong District and failed to account for contradictory evidence:

- TOP Phan ‘did not know Mr YIM Tith’s position.’³⁸³
- MOENG Vet stated that ‘Ta Tith did not do the district work directly.’³⁸⁴

145. The ICIJ relied on witness testimony of Mr YIM Tith’s alleged mere presence in Kirivong District during 1972, 1973 and 1974.³⁸⁵ This is not evidence that Mr YIM Tith held a *de jure* position at any relevant time.

146. No reasonable trier of fact could possibly reach the ICIJ’s conclusion about Mr YIM Tith’s ‘leadership’ of Kirivong District on evidence so inadequate. Indeed, in his Closing Order, the NCIJ was unable to reach a firm conclusion as to whether Mr YIM Tith had been Secretary of Kirivong District from June 1976 to 1977.³⁸⁶ The NCIJ did not find that Mr YIM Tith may have been on the Committee prior to January 1976 and his findings do no support those of the ICIJ on this point.³⁸⁷

The ICIJ erred in finding that Mr YIM Tith held ‘de facto authority’ in Kirivong District

147. The ICIJ erred in finding that Mr YIM Tith held *de facto* authority in Kirivong District throughout the period.³⁸⁸ The ICIJ misinterpreted witness evidence and failed to account for contradictory and exculpatory evidence.

148. TIM Phuon stated that:

- he did not know Mr YIM Tith was on the District Committee,³⁸⁹ that ‘he did not know Ta Tit’s role,’³⁹⁰ that he did not know if ‘Ta Tit’ was a high-ranking cadre³⁹¹ and that ‘[a]t 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.’³⁹²

³⁸² *Ibid.*, paras 330 to 331.

³⁸³ D118/305, TOP Phan, WRI, A27-28, EN 01045521.

³⁸⁴ D119/85, MOENG Vet, WRI, A23-24, EN 00982715-6.

³⁸⁵ ICIJ’s Closing Order, para. 328.

³⁸⁶ NCIJ’s Closing Order, para. 667.

³⁸⁷ ICIJ’s Closing Order, paras 328 to 331, 342.

³⁸⁸ *Ibid.*, paras 332 to 342, 463 to 469.

³⁸⁹ D11, TIM Phuon, WRI, EN 00698806. ‘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.’

³⁹⁰ D118/20, TIM Phuon, WRI, A7, EN 00911425. ‘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.’

³⁹¹ D118/20, TIM Phuon, WRI, A8, EN 00911425. ‘Q: Did you know if Ta Tit was a high-ranking cadre? A8: I did not know about that either.’

³⁹² D118/20, TIM Phuon, WRI, A9, EN 00911425.

- he did not know what position Mr YIM Tith held in '1976 or 1977.'³⁹³
- he 'did not know Ta Tith's position.'³⁹⁴

149. NGET Ngay stated that he knew nothing about Mr YIM Tith from his own direct experience³⁹⁵ and did not provide clear dates for when Mr YIM Tith was Secretary of Kirivong District.³⁹⁶ The ICIJ incorrectly relied upon NGET Ngay as the source of the finding that Mr YIM Tith was Ta Tom's 'superior.'³⁹⁷

150. MOENG Vet's evidence concerned a short period from 'maybe in late 1976' until, at the latest, January 1977³⁹⁸ and the source of his knowledge was his mother, who in turn heard about 'Ta Tith' from 'her relatives and friends' in 'different places,' or so MOENG Vet thought.³⁹⁹

Conclusion on Kirivong District

151. The ICIJ failed to account for evidence that contradicts his finding that Mr YIM Tith was 'leader of Kirivong District.' In addition to the lack of clarity as to when Mr YIM Tith exercised control in Kirivong District, there is insufficient evidence that he carried out or effectively performed his duties and responsibilities, or even of what these duties and responsibilities were specifically. The ICIJ failed to provide adequate reasoning for his finding that that Mr YIM Tith had general authority over Kirivong District.

152. On such weak and unreliable evidence of the Committee's *de facto* operation and the ICIJ's finding that 'unclear' evidence suggests Mr YIM Tith may have been *de jure* appointed to some role on the District Committee for a few months between October 1975 to January 1976,⁴⁰⁰ no reasonable trier of fact could possibly reach the conclusion that Mr YIM Tith was 'leader of Kirivong District' without specifying a precise period of time.⁴⁰¹ The ICIJ failed to take into account contradictions and uncertainties in the Case File evidence and failed to

³⁹³ D219/466, TIM Phuon WRI, A93, 103, EN 01152280-1.

³⁹⁴ D118/305, TOP Phan, WRI, A27-28, EN 01045521.

³⁹⁵ D118/44, NGET Ngay, WRI, A9, EN 00920579.

³⁹⁶ D118/44, NGET Ngay, WRI, A4-5, 9, EN 00920579.

³⁹⁷ ICIJ's Closing Order, fn. 869.

³⁹⁸ D119/85, MOENG Vet, WRI, A7, EN 00982713; D219/488, MOENG Vet, WRI, A41, 46, 93-95, 103, 106, EN 01170587-8, 92-4

³⁹⁹ D119/85, MOENG Vet, WRI, A28, 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.')

⁴⁰⁰ ICIJ's Closing Order, paras 328, 342.

⁴⁰¹ *Ibid.*, para. 332. The ICIJ obfuscated the dates, but referred nonetheless to *de facto* authority throughout the DK period, stating '[i]rrespective of his precise official position on the Kirivong Committee, several witnesses make clear that Yim Tith was in fact the leader of the district even throughout the period when both Yim Tith and Ta Tom still sat together on the District Committee.'

provide reasoned findings, impacting the overall credibility of the ICIJ's assessment of the Case File. The errors invalidate the Closing Order findings about Kirivong District and effect a miscarriage of justice that requires the PTC to reverse the ICIJ's findings.

ii. The ICIJ erred in finding that Mr YIM Tith held 'major factual authority' throughout Sector 13

153. The ICIJ found that Mr YIM Tith held 'major factual authority' throughout Sector 13 and the wider Southwest Zone.⁴⁰² The ICIJ, finding insufficient evidence of Mr YIM Tith's *de jure* formal appointment to the Sector 13 Committee, based his conclusions on an erroneous finding of Mr YIM Tith's *de facto* authority.⁴⁰³

The ICIJ erred with respect to Mr YIM Tith's alleged de jure appointment to the Sector 13 Committee

154. The ICIJ was unable to make clear findings about Mr YIM Tith's alleged appointment to the Sector 13 Committee.⁴⁰⁴ The ICIJ stated '[s]everal witnesses provide evidence that Yim Tith was on the Sector 13 Committee as early as 1976,'⁴⁰⁵ referring to evidence of other Committee members and their possible periods of tenure, including five possible alternative individuals who may have been Secretary Sector 13 instead of Mr YIM Tith.⁴⁰⁶ The ICIJ found that there were three Sector Committee positions each with its own responsibilities: 'a secretary, a deputy usually responsible for security, and a member usually responsible for economics.'⁴⁰⁷ The ICIJ failed to specify whether Mr YIM Tith held the alleged positions of Secretary, Deputy Secretary or Member at specific times in the DK period or what were his alleged responsibilities such as making appointments on the Committee, security, or economics.

155. The ICIJ found insufficient evidence of Mr YIM Tith's appointment as Sector 13 Secretary.⁴⁰⁸ It was 'impossible to determine the exact dates or duration of his tenure.'⁴⁰⁹ The ICIJ considered the evidence of Ul Hoeun, NUT Nov, MOENG Vet, SANN Lorn, PECH Chim, VANN Yann and NOP Nan and found himself unable to make a finding that Mr YIM Tith served as Sector 13 Secretary⁴¹⁰ or held any other legal authority on the Committee for

⁴⁰² ICIJ's Closing Order, paras 348 to 352.

⁴⁰³ *Ibid.*, paras 348 to 352.

⁴⁰⁴ *Ibid.*, paras 343 to 345.

⁴⁰⁵ *Ibid.*, para. 343.

⁴⁰⁶ *Ibid.*, paras 344 to 345.

⁴⁰⁷ *Ibid.*, paras 171, 178.

⁴⁰⁸ *Ibid.*, paras 344 to 347.

⁴⁰⁹ *Ibid.*, para. 346.

⁴¹⁰ *Ibid.*, paras 346 to 347.

any specific period of time.⁴¹¹

The ICIJ erred in finding that Mr YIM Tith held ‘de facto authority’ in Sector 13

156. As set out in detail above, the ICIJ based his assessment of Mr YIM Tith’s ‘de facto authority’ in Sector 13 on erroneous findings about the relationship between Mr YIM Tith and Ta Mok.⁴¹² The ICIJ relied on findings of guilt by association with Ta Mok in order to compensate for the lack of evidence of Mr YIM Tith’s acts and conduct.⁴¹³

157. The ICIJ made the unreasonable conclusion that Mr YIM Tith ‘held meetings and received guests at the Sector 13 Office on a regular basis,’⁴¹⁴ based on PECH Chim’s unsupported evidence that he heard one radio broadcast in late 1978 that ‘Ta Tith was greeting guests at Sector 13 office.’⁴¹⁵ Moreover, the ICIJ failed to take into account that PECH Chim later changed his evidence by saying that he no longer believed he had heard the broadcast himself but instead was told about the broadcast on a subsequent date by his messenger, without specifying the circumstances or time.⁴¹⁶

158. The ICIJ also relied upon extracts of uncorroborated and contradictory opinions and hearsay evidence of the low-level cadre MOENG Vet⁴¹⁷ to conclude that Mr YIM Tith had *de facto* authority in Sector 13.⁴¹⁸ The ICIJ relied on MOENG Vet’s statements that:

- ‘Ta Tith’ initially served as the ‘sector assistant to Ta Saom and managed the work of the messenger unit in Sector 13, that MOENG Vet heard from unknown sources⁴¹⁹ but disregarded contradictory witness evidence that MOENG Vet ‘did not know much’ about Mr YIM Tith and the Sector 13 Committee⁴²⁰ and disregarded that his entire evidence about ‘Ta Tith’s’ role is conflicting hearsay evidence.⁴²¹
- He saw ‘Ta Tith’ at the meeting in Sector 13 in late 1976 seated on stage at the right-hand side of Ta Saom, then Secretary of Sector 13,⁴²² which was, according to his opinion, the

⁴¹¹ *Ibid.*, paras 344 to 345.

⁴¹² *Supra*, paras 124 to 141.

⁴¹³ ICIJ’s Closing Order, para. 348.

⁴¹⁴ ICIJ’s Closing Order, para. 349.

⁴¹⁵ D118/79, PECH Chim, WRI, A18-20, EN 00947190.

⁴¹⁶ D118/259, PECH Chim, WRI, A136-137, EN 01000683.

⁴¹⁷ D219/899.1.4, MOENG Vet, Transcript, EN 01346505-6, 11.12.05-11.16.10, p. 41, l.5-p. 42, l.22.

⁴¹⁸ ICIJ’s Closing Order, para. 351.

⁴¹⁹ D119/84, MOENG Vet, WRI, A34, EN 00982707.

⁴²⁰ 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.’)

⁴²¹ D119/84, MOENG Vet, WRI, A34, EN 00982707; D119/85, MOENG Vet, WRI, A21, EN 00982715; D219/488, MOENG Vet, WRI, A34-37, 40-41, EN 01170586-7; D119/84.2, MOENG Vet, DC-Cam Statement, EN 00992987-8.

⁴²² ICIJ’s Closing Order, para. 344.

side of the Sector secretary reserved for the Deputy Secretary. The ICIJ did not, however, account for the witness's conflicting evidence that he had been mistaken or had exaggerated his own knowledge of the seating arrangements,⁴²³ and that 'Ta Tith' was sitting 'at the same place' as Ta Tom, which was 'maybe' with the members of the district committees.⁴²⁴

159. The ICIJ made no findings about the '*de facto* authority' of other individuals alleged to have been on the Sector 13 Committee relative to the '*de facto* authority' of Mr YIM Tith and provided no reason for finding that Mr YIM Tith's '*de facto* authority' was greater than that of others. For example, the documentary evidence of Timothy Carney states that a Southwest Zone cadre called RANH Bith 'probably ran day-to-day operations in the Southwest Zone.'⁴²⁵ RANH 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. RANH Bith became a member of the State Presidium 'in the wake of purges,'⁴²⁶ around the same time that CHONG alias Prasith was in charge of Sector 11 of the West Zone.⁴²⁷

160. The ICIJ failed to take into account the evidence of 36 witnesses interviewed by the OCIJ stating that they had never heard of Mr YIM Tith, despite the fact that the witnesses lived and worked in Sector 13 during the DK period: 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.⁴²⁸ This list does not include individuals whom the OCIJ contacted in the course of the

⁴²³ D119/85, MOENG Vet, WRI, A11-12, EN 00982714; D219/488, MOENG Vet, WRI, A40, EN 01170587.

⁴²⁴ D219/488, MOENG Vet, WRI, A56-A57, EN 01170588-9.

⁴²⁵ D1.3.15.2, Timothy Carney, Chapter: 'The Organisation of Power,' in Book edited by Karl Jackson entitled 'Cambodia 1975-1978: Rendezvous with Death,' 1989, Princeton University Press. EN 00105142 to 00105143.

⁴²⁶ D1.3.15.2, Timothy Carney, Chapter: 'The Organisation of Power,' in Book edited by Karl Jackson entitled 'Cambodia 1975-1978: Rendezvous with Death,' 1989, Princeton University Press. EN 00105142 to 00105143.

⁴²⁷ D1.3.15.2, Timothy Carney, Chapter: 'The Organisation of Power,' in Book edited by Karl Jackson entitled 'Cambodia 1975-1978: Rendezvous with Death,' 1989, Princeton University Press. EN 00105152.

⁴²⁸ See See Annex A: Witnesses Who Had Never Heard of YIM Tith. 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

investigation who had never heard of Mr YIM Tith and were not interviewed. The ICIJ ignored that the evidence of these witnesses, taken together, severely undermines his finding that Mr YIM Tith held major authority throughout the Sector.

Conclusion on Sector 13

161. The ICIJ's findings on 'major factual' authority in Sector 13 and the so-called 'wider Southwest Zone' lack reasoning. The ICIJ failed to explain how Mr YIM Tith could have held 'de facto authority' given the lack of evidence of a *de jure* position on the Sector Committee and the extensive witness evidence of individuals who had never heard of Mr YIM Tith doing anything in Sector 13.⁴²⁹ As argued above, the ICIJ failed to identify evidence to support the existence of the 'close relationship' between Ta Mok and Mr YIM Tith and failed to explain how a family relationship granted Mr YIM Tith an increased level of authority.

162. The ICIJ failed to take into account contradictory evidence from the same witnesses that he relied upon, as well as contradictory and exculpatory evidence from other witnesses. The ICIJ provided no reason for the lack of reference to this evidence.

163. By failing to take into consideration important witness evidence, the ICIJ erred in law by applying an incorrect legal standard in the assessment of evidence and failed to provide reasoned findings, impacting the overall credibility of the ICIJ's assessment of the Case File and invalidating the Closing Order. The ICIJ erred in fact by drawing patently incorrect conclusions about Mr YIM Tith's alleged 'de facto' authority throughout Sector 13, resulting in a miscarriage of justice that requires the PTC to reverse the ICIJ's findings.

iii. The ICIJ erred in finding that Mr YIM Tith was Secretary of Sector 1

The ICIJ erred in finding that Mr YIM Tith was appointed as the Secretary of Sector 1 in June 1978

164. The ICIJ erred in finding that Mr YIM Tith became Secretary of Sector 1 in June 1978 and exercised his authority until the end of the regime.⁴³⁰ In making this conclusion, the ICIJ

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.

⁴²⁹ See Annex A: Witnesses Who Had Never Heard of YIM Tith.

⁴³⁰ ICIJ's Closing Order, paras 360 to 371, 993. While the Defence supports the NCIJ's conclusions that Mr YIM Tith is not within the parameters of the ECCC's personal jurisdiction, for the reasons set out hereunder, the

relied on the alleged demotion and arrest of Ta Paet, who was the officially appointed Secretary of Sector 1,⁴³¹ and concluded that Mr YIM Tith replaced him.⁴³² This conclusion was erroneous and unsupported by the evidence.

165. The ICIJ found that Mr YIM Tith replaced Ta Paet after the latter was demoted from his role as Secretary of Sector 1 in June 1978.⁴³³ However, none of the witnesses cited by the ICIJ in support of this finding gave direct evidence regarding Mr YIM Tith's alleged appointment in June 1978.

- TOP Seung came to the Northwest Zone from the Southwest Zone,⁴³⁴ but she did not know 'Ta Tith' while she was there.⁴³⁵ She allegedly saw 'Ta Tith' at Kanghat Dam for the first time in 'the middle of 1978,' a few months before the Vietnamese arrived,⁴³⁶ but she never attended the meeting with 'Ta Tith'⁴³⁷ and found out about 'Ta Tith's' alleged position from her unit chairperson.⁴³⁸ TOP Seung did not positively identify Mr YIM Tith.
- LEK Phiv was 'not certain of the roles of Ta Pet and Ta Tith,'⁴³⁹ and she did not positively identify Mr YIM Tith.
- CHHAM Luy never met 'Ta Tith'⁴⁴⁰ and he never heard of him before he escaped from his military unit back to his village, Boh Khnor, in November or December 1978.⁴⁴¹ Only when he arrived in his village did he hear from the people in the village that 'Ta Tith' was the chairman of Sector 1.⁴⁴²
- CHUON Than referred to 'Ta Tith' as a person who allegedly replaced Ta Vanh in June 1977.⁴⁴³ He stated that he saw 'Ta Tith' only once,⁴⁴⁴ sometime in 1978,⁴⁴⁵ at the meeting in Phnom Sampov in Sector 3⁴⁴⁶ where somebody introduced 'Ta Tith,' but he did not

Defence respectfully disagrees with the NCIJ's findings on Mr YIM Tith's appointment to the Sector 1 Committee, as per NCIJ's Closing Order, paras 669, 673, 680.

⁴³¹ *Ibid.*, para. 361. See also: 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.

⁴³² ICIJ's Closing Order, para. 361.

⁴³³ ICIJ's Closing Order, paras 360 to 362.

⁴³⁴ D219/117, TOP Seung, WRI, A4-A9, A14-A15, EN 01067699-700.

⁴³⁵ D219/117, TOP Seung, WRI, A25, EN 01067702.

⁴³⁶ D219/117, TOP Seung, WRI, A68, EN 01067707; A85, EN 01067710.

⁴³⁷ D219/117, TOP Seung, WRI, A144-A147, EN 01067718.

⁴³⁸ D219/117, TOP Seung, WRI, A79-A80, EN 01067709.

⁴³⁹ D219/236, LEK Phiv, WRI, A18, EN 01092932.

⁴⁴⁰ D118/243, CHHAM Luy, WRI, A13, EN 01029401.

⁴⁴¹ D219/263, CHHAM Luy, WRI, A62-A63, EN 01097412; D118/243, CHHAM Luy, WRI, A6, EN 01029400; D219/263, CHHAM Luy, WRI, A109, EN 01097415 ; D219/263, CHHAM Luy, WRI, A109, EN 01097415.

⁴⁴² D118/243, CHHAM Luy, (ChhaimLuy), WRI, A10-A11, EN 01029401;

⁴⁴³ D118/245, CHUON Than, WRI, A5, EN 01029379.

⁴⁴⁴ D118/299, CHUON Than, WRI, A26, EN 01044757.

⁴⁴⁵ D118/245, CHUON Than, WRI, A12, EN 01029380.

⁴⁴⁶ D118/245, CHUON Than, WRI, A13, EN 01029381; D118/299, CHUON Than, WRI, A13, EN 01044754.

remember the name of the person who introduced him⁴⁴⁷ nor can he remember a single name of any of the other 100 participants present at this meeting.⁴⁴⁸ CHUON Than was not familiar with the administrative structures of Sector 1 or Sector 3,⁴⁴⁹ he never saw anybody from the Zone committee, and he never attended any meetings conducted by the Sector cadres.⁴⁵⁰ There is no corroborating evidence in the Case File of this alleged meeting in Phnom Sampov.

- VY Phann stated that ‘Ta Tith’ arrived in his area around November 1978⁴⁵¹ and the first time he saw ‘Ta Tith’ and Ta Pet was at a meeting in Kanghat Dam, during which ‘Ta Pet’ announced that ‘Ta Tith,’ who was from the Southwest Zone, had come ‘to help govern Sector 1.’⁴⁵²
- NOP Ngim never heard a formal announcement of ‘Ta Tith’s’ position,⁴⁵³ but she assumed ‘Ta Tith’ was ‘Sector 1 Committee’ in 1978⁴⁵⁴ and she was not aware that ‘Ta Tith’ had any other positions.⁴⁵⁵
- NANG Ny and LIES Kung saw ‘Ta Tith’ only once,⁴⁵⁶ at a meeting in Bay Damram. According to NANG Ny this meeting was held around October 1978,⁴⁵⁷ however, LIES Kung placed this meeting in July 1978.⁴⁵⁸ NANG Ny assumed that ‘Ta Tith was Sector Committee’ because he ‘held the microphone and made announcements’ during this meeting⁴⁵⁹ but LIES Kung stated that ‘Ta Tith’ announced that he was Sector Committee.⁴⁶⁰ NANG Ny described ‘Ta Tith’ as a big person with light skin,⁴⁶¹ but according to LIES Kung ‘Ta Tith’ was tall and had dark skin.⁴⁶² The ICIJ failed to account for these contradictions in the witness evidence.
- NUON Muon heard that ‘Ta Tith’ replaced Ta Paet⁴⁶³ after Ta Paet was ‘transferred out’

⁴⁴⁷ D118/245, CHUON Than, WRI, A18, EN 01029382; D118/299, CHUON Than, WRI, A23-A24, EN 01044756-7.

⁴⁴⁸ D118/245, CHUON Than, WRI, A16, EN 01029381-2; D118/299, CHUON Than, WRI, A20, EN 01044756.

⁴⁴⁹ D118/299, CHUON Than, WRI, A16-A19, EN 01044755-6.

⁴⁵⁰ D118/245, CHUON Than, WRI, A5-A6, EN 01029379.

⁴⁵¹ D219/85, VY Phann, WRI, A2-A3, EN 01061168-9.

⁴⁵² D219/85, VY Phann, WRI, A2-A3, EN 01061168-9; D219/245, VY Phann, WRIA, EN 01080973.

⁴⁵³ D118/285, NOP Ngim, WRI, A10, EN 01044675.

⁴⁵⁴ D118/285, NOP Ngim, WRI, A7 ERN 01044674-001044675.

⁴⁵⁵ D118/285, NOP Ngim, WRI, A60-A64, EN 01044684-5; D219/835, NOP Ngim, WRI, A92-A93, EN 01432960.

⁴⁵⁶ D118/77, NANG Ny, A29, EN 00970456; D219/416, LIES Kung, A13, EN 01135077.

⁴⁵⁷ D118/77, NANG Ny, A25, EN 00970456.

⁴⁵⁸ D219/416, LIES Kung, A11-A12, EN 01135076-7

⁴⁵⁹ D118/77, NANG Ny, A24, EN 00970455-6.

⁴⁶⁰ D219/416, LIES Kung, A11, EN 01135076.

⁴⁶¹ D118/77, NANG Ny, A24, EN 00970455-6.

⁴⁶² D219/416, LIES Kung, Q/A1, EN 01135073.

⁴⁶³ D118/69, NUON Muon, WRI, A12-A13, EN 00950727.

in October or November 1977.⁴⁶⁴

- The ICIJ also cited CHHOEUNG Bean's evidence that 'Ta Tith' came to replace Ta Prum and Ta Vanh,⁴⁶⁵ in late 1977 or early 1978,⁴⁶⁶ which is irrelevant to Mr YIM Tith's position in June 1978 and contrary to the ICIJ's own finding that Ta Vanh was replaced as Secretary of Sector 1 in June 1977 by Ta Paet,⁴⁶⁷ at the time when Ta Nhim was Northwest Zone Secretary.⁴⁶⁸

166. Additionally, the ICIJ found, based on the uncorroborated evidence of only one witness, CHHEAN Hea, that Ta Paet was arrested after the arrival of Mr YIM Tith, around August 1978, and that 'two messengers of Ta Mok and Yim Tith' were involved in his 'removal.'⁴⁶⁹

167. The ICIJ failed to take into account that CHHEAN Hea did not know 'Ta Tith's' bodyguard, messenger, or driver and only stated that Ta Mok's messenger 'came to tell Ta Pet to prepare his belongings to move to another location'⁴⁷⁰ not that Ta Pet was arrested.

168. The ICIJ also disregarded contradictory and exculpatory evidence provided by this witness. CHHEAN Hea escaped to the Sang Rang Cooperative and then to the jungle,⁴⁷¹ as soon as Ta Mok's messengers came to see Ta Paet⁴⁷² in November 1978,⁴⁷³ and he did not witness Ta Paet's alleged arrest. This timing is corroborated by VY Phann who stated that 'Ta Tith' arrived in his area around November 1978⁴⁷⁴ and 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.'⁴⁷⁵ CHHEAN Hea also stated that, after 1979, he met 'Ta Pet' who told him that he 'had been assigned to cut a clump of bamboo per day in Oral Mountain, Kampong Speu Province'⁴⁷⁶ not that he was arrested.

169. Moreover, the ICIJ disregarded other contradictory evidence:

- HAN Thy attended a meeting in Battambang in 1978, three days before the arrival of the

⁴⁶⁴ D118/69, NUON Muon, WRI, A11, EN 00950726-7.

⁴⁶⁵ D219/368, CHHOEUNG Bean, WRI, A10-A14, EN 01117716.

⁴⁶⁶ D219/368, CHHOEUNG Bean, WRI, A14-A17, EN 01117716.

⁴⁶⁷ ICIJ's Closing Order, para. 361.

⁴⁶⁸ *Ibid.*, paras 295 and 382.

⁴⁶⁹ *Ibid.*, para. 362.

⁴⁷⁰ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

⁴⁷¹ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

⁴⁷² D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

⁴⁷³ The witness escaped to Sang Rang three months before the Vietnamese arrived (D118/136, CHHEAN Hea, WRI, A20, EN 00969641). The Vietnamese army arrived in Battambang in February 1979 (D118/136, CHHEAN Hea, WRI, A20, EN 00969641).

⁴⁷⁴ D219/85, VY Phann, WRI, A2-A3, EN 01061168-9.

⁴⁷⁵ D219/85, VY Phann, WRI, A2-A3, EN 01061168-9; D219/245, VY Phann, WRIA, EN 01080973.

⁴⁷⁶ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

Vietnamese⁴⁷⁷ at which Ta Paet was present.⁴⁷⁸

- documentary evidence in the Case File titled ‘The Organization of Power’ shows that in August 1978⁴⁷⁹ Heng Teav, alias ‘Ta Pet,’ was a Member of the Standing Committee, a Member of the Central Committee, and a Member of the regional Party Committee in August 1978.⁴⁸⁰ Mr YIM Tith’s name is not mentioned in this document.

The ICIJ erred in finding that Mr. YIM Tith exercised authority in Sector 1 (as de facto Secretary of Sector 1)

170. The ICIJ erred in finding that Mr YIM Tith exercised various kinds of authority in Sector 1.⁴⁸¹

171. The ICIJ found, based on the uncorroborated evidence of only one witness, SOEUN Mat, that Mr YIM Tith had authority and direct control over the military in Sector 1.⁴⁸² The ICIJ failed to take into consideration SOEUN Mat’s evidence that he did not know who was in charge of Sector 1 at the time⁴⁸³ and that he believed that ‘Ta Tith’ was a military commander because he overheard ‘the village chief and the unit chairman mentioned Ta Tith’s soldiers.’⁴⁸⁴ SOEUN Mat did not provide a timeframe for his evidence nor was he asked to provide one. No other witness or document exists in the Case File to confirm the conclusions drawn by the ICIJ from SOEUN Mat’s evidence.

172. The ICIJ found that Mr YIM Tith had authority over ‘personal matters within the sector’ but failed to explain what the notion of ‘personal matters’ encompassed.⁴⁸⁵ The ICIJ supported this finding with the evidence of two witnesses:

- VY Phann, who gave evidence about the one and only meeting he had with ‘Ta Tith’ in November 1978 where ‘Ta Tith’ ‘talked about fighting the Yuon,’⁴⁸⁶ and
- CHUON Than, who gave evidence about one meeting in Sector 3 in 1978,⁴⁸⁷ at which he

⁴⁷⁷ D1.3.11.55, HAN Thy, ICP statement, EN 00221584-5, EN 00221587; D20, HAN Thy, WRI, EN 00710285-6.

⁴⁷⁸ D105/8, HAN Thy, WRI, A13-A16, EN 00803456.

⁴⁷⁹ 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.

⁴⁸⁰ 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.

⁴⁸¹ ICIJ’s Closing Order, paras 364 to 371.

⁴⁸² *Ibid.*, para. 364.i.

⁴⁸³ D219/538, SOEUN Mat, WRI, A55, EN 01173580-1.

⁴⁸⁴ D219/538, SOEUN Mat, WRI, A54-A56, EN 01173582-3.

⁴⁸⁵ ICIJ’s Closing Order, para. 364.i. fn. 954.

⁴⁸⁶ D219/85, VY Phann, WRI, A2-A5, EN 01061168-9; D219/245, VY Phann, WRIA, EN 01080973.

⁴⁸⁷ D118/245, CHUON Than, WRI, A13, EN 01029381; D118/299, CHUON Than, WRI, A13, EN 01044754.

allegedly heard ‘Ta Tith’ speaking about thefts and the enemy’s activities.⁴⁸⁸

173. From the evidence cited in the ICIJ’s Closing Order, it is impossible to discern what the ICIJ meant when he referred to ‘personal matters’ or how speaking in a meeting in Sector 3 was relevant to someone’s authority in Sector 1.

174. The ICIJ found that Mr YIM Tith had authority over his subordinates in matters of security within the Sector, instructed them to report on enemies’ activities and to ‘re-educate’ or ‘smash,’⁴⁸⁹ and chaired and convened meetings with the representatives from the districts, communes and cooperatives, including militiamen and mobile units, during which he gave instructions to those in attendance on security matters and told them to report enemy activities, ‘re-educate’ or ‘smash.’⁴⁹⁰ The ICIJ relied on the statements of several witnesses, failing to account for contradictory evidence and other relevant considerations.⁴⁹¹

- VY Phann’s evidence concerns the meeting he had with ‘Ta Tith’ in November 1978, during which ‘Ta Tith’ ‘talked about fighting the Yuon.’⁴⁹²
- CHUON Than’s evidence is irrelevant to Sector 1 as he only talks about one meeting in Sector 3.⁴⁹³
- NOP Ngim’s evidence concerns one meeting in Battambang in September 1978,⁴⁹⁴ and she could not remember what ‘Ta Tith’ discussed during this meeting.⁴⁹⁵
- CHHOEUNG Bean’s evidence concerns a meeting held in September or October 1978⁴⁹⁶ and ‘Ta Tith was not introduced at this meeting.’⁴⁹⁷
- CHHOENG Chhoeuth allegedly saw ‘Ta Tith’ only once at a meeting that occurred late in the DK period when, according to him, the overall situation was chaotic.⁴⁹⁸ He did not actually see ‘Ta Tith,’⁴⁹⁹ he could not describe his face,⁵⁰⁰ and he ‘could not listen to his voice clearly’ as there were too many people; rather, he just ‘heard people calling him

⁴⁸⁸ ICIJ’s Closing Order, para. 364.i, fn. 954.

⁴⁸⁹ *Ibid.*, para. 364.ii.

⁴⁹⁰ *Ibid.*, para. 365.

⁴⁹¹ *Ibid.*, para. 364.ii, fn. 955.

⁴⁹² D219/85, VY Phann, WRI, A2-A5, EN 01061168-9; D219/245, VY Phann, WRIA, EN 01080973.

⁴⁹³ ICIJ’s Closing Order, para 364.i, fn. 954.

⁴⁹⁴ D219/835, NOP Ngim, WRI, A85, EN 01432959; 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 ; D118/285, NOP Ngim, WRI, A83, EN 01044688; A68, EN 01044685-6; D219/835, NOP Ngim, WRI, A79-A80, EN 01432958.

⁴⁹⁵ D118/285, NOP Ngim, WRI, A86, EN 01044689.

⁴⁹⁶ D219/368, CHHOEUNG Bean, WRI, A87-A95, EN 01117722-3,

⁴⁹⁷ D219/430, CHHOEUNG Bean, WRI, A128, EN 01128724.

⁴⁹⁸ D219/953, CHHOENG Chhoeuth WRI, A20, EN 01451712; A55-A58, EN 01451716-7.

⁴⁹⁹ D219/953, CHHOENG Chhoeuth WRI, A69, EN 01451717.

⁵⁰⁰ D219/953, CHHOENG Chhoeuth WRI, A79, EN 01451718.

*Ta.*⁵⁰¹

- NANG Ny's evidence concerns a meeting in Bay Damram three months before the Vietnamese arrived,⁵⁰² approximately October 1978, during which he allegedly saw 'Ta Tith' for the first and only time,⁵⁰³ although he did not positively identify Mr YIM Tith.

175. None of the cited witnesses relied on by the ICIJ stated that 'Ta Tith' issued any orders or that any of the participants of those meetings submitted reports to 'Ta Tith' on any issues discussed during those meetings or that 'Ta Tith' gave instructions to 're-educate' or to 'smash,' as claimed by the ICIJ.⁵⁰⁴ The ICIJ failed to give reasoning as to how he found from this evidence that Mr YIM Tith had subordinates, nor did the ICIJ identify the subordinates or explain how exactly Mr YIM Tith exercised his effective control over them in matters of security within Sector 1. The ICIJ's failure to take into consideration the timing of the meetings was so unfair and unreasonable as to constitute an abuse of his discretion.

176. The ICIJ found, based on the unsupported evidence of one single witness, PHAR Pet, that Mr YIM Tith had the power to shield individuals from arrest and execution⁵⁰⁵ because Mr YIM Tith 'ordered the release of several soldiers detained at Wat Prey Touch who had been accused of shooting a Southwest Zone cadre.'⁵⁰⁶ The ICIJ misstated the evidence. For the PTC's benefit, the exact quotation of the relevant section of PHAR Pet's evidence is stated here:

I knew Ta Tith. I would like to tell you when I met Ta Tith. At first, they dispatched my unit to Kanghat. Next, they sent us to Prey Touch. When we arrived in Prey Touch, the Khmer Rouge military there took us to Wat Prey Touch pagoda. They disarmed us all then, and they called us to attend a meeting at Wat Prey Touch pagoda. At that time, a man named Nen arrived, and he announced, 'You guys were not brought here for fun. We have brought you all to be killed.' While Nen was making the announcement, Ta Tith arrived, and he spoke to Nen, 'If you, Nen, kill these people, who will protect you, Nen?' Then Nen handed back the guns to us, and he ordered a vehicle to truck us to work at the Tonle Sap river. I saw Ta Tith only that once.⁵⁰⁷

177. No reasonable trier of fact would conclude from this evidence that Mr YIM Tith 'ordered' the release of detained soldiers, even assuming that the 'Ta Tith' mentioned by PHAR Pet was Mr YIM Tith, since he did not positively identify him in his statement.

⁵⁰¹ D219/953, CHHOENG Chhoeuth WRI, A69, EN 01451717.

⁵⁰² D118/77, NANG Ny, WRI, A25, EN 00970456.

⁵⁰³ D118/77, NANG Ny, WRI, A29, EN 00970456.

⁵⁰⁴ ICIJ's Closing Order, para. 365, fns 971 and 972.

⁵⁰⁵ *Ibid.*, para. 364.iii. fn. 956, citing D118/244, PHAR Pet, WRI, A5, EN 01029410.

⁵⁰⁶ *Ibid.*, para. 364.iii. fn. 956, citing D118/244, PHAR Pet, WRI, A5, EN 01029410.

⁵⁰⁷ D118/244, PHAR Pet, WRI, A5, EN 01029410.

178. Further, the ICIJ failed to take into consideration PHAR Pet's evidence that he believed Ta Nen was on a district committee (although he did not know which one),⁵⁰⁸ he did not know whether 'Ta Tith' or Ta Nen held a higher position,⁵⁰⁹ he knew nothing about members of the Zone, Sector and District, he had never heard about Ta Vanh, Ta Nhim or 'Ta Pet,' and he heard about Ta Mok only after he was arrested.⁵¹⁰ No reasonable trier of fact would conclude from this evidence that Mr YIM Tith 'ordered the release of several soldiers' or had the power to shield individuals from arrest and execution.

179. The ICIJ also found that Mr YIM Tith 'spared a Northwest Zone cadre (Ta Saman) because he was useful to the incoming Southwest Zone cadre,'⁵¹¹ basing this finding on the unsupported evidence of CHHOEUNG Bean who saw Ta Saman after 1979 and concluded that Ta Saman was alive because 'Ta Tith' spared him.⁵¹² The ICIJ failed to provide reasoning as to why he found CHHOEUNG Bean's opinion so persuasive that he need not consider any other possible reasons for Ta Saman being alive after 1979 besides this allegation that Mr YIM Tith had spared him.

180. The ICIJ found that Mr YIM Tith was 'in charge' of economics in Sector 1 (while not providing any explanation for what 'in charge' means in terms of a person's criminal responsibility) and based this conclusion only on alleged speeches made by Mr YIM Tith concerning irrigation, agricultural production and 'regular visits' to Kanghat Dam.⁵¹³ Even assuming *arguendo* that all the cited evidence is reliable, which it is not (as submitted above), the ICIJ failed to provide reasoning as to why, without evidence of either direct orders from or reports sent to Mr YIM Tith, he was nonetheless able to find that Mr YIM Tith was 'in charge' of economics in Sector 1 based solely on a few speeches he gave in the months before the arrival of Vietnamese.⁵¹⁴

181. The ICIJ found that Mr YIM Tith had *de jure* authority over the district and commune level cadres in Sector 1.⁵¹⁵ First, as previously discussed,⁵¹⁶ the ICIJ failed to establish that Mr YIM Tith was appointed as Secretary of Sector 1, which would have given him '*de jure*' authority over the district and commune level cadres in Sector 1.⁵¹⁷ Further, none of the

⁵⁰⁸ D118/244, PHAR Pet, WRI, A9, EN 01029411.

⁵⁰⁹ D219/546, PHAR Pet, WRI, A52, EN 01172555.

⁵¹⁰ D219/545, PHAR Pet, WRI, A6-A8, EN 01178529; D219/546, PHAR Pet, WRI, A65, EN 01172557.

⁵¹¹ ICIJ's Closing Order, para. 364.iii.

⁵¹² D219/430, CHHOEUNG Bean, WRI, A20-A21, ERN 01128710-11.

⁵¹³ ICIJ's Closing Order, para. 364.iv.

⁵¹⁴ *Ibid.*

⁵¹⁵ ICIJ's Closing Order, para. 364.v.

⁵¹⁶ *Supra*, paras 164 to 169.

⁵¹⁷ ICIJ's Closing Order, para. 178.

evidence cited by the ICIJ in footnote 962, comprised of 14 witnesses⁵¹⁸ and the CPK Statute,⁵¹⁹ refers to Mr YIM Tith's appointment as Secretary of Sector 1 and, as such, does not establish his *de jure* authority over the district and commune level cadres in Sector 1.⁵²⁰ The ICIJ failed to provide any reasoning as to why he found this evidence relevant to establishing that Mr YIM Tith held *de jure* authority. The ICIJ's finding was unreasonable.

182. The ICIJ found, based on the evidence of one witness, NOP Ngim, that 'meetings with representatives from sectors and districts were chaired by Yim Tith and Ta Mok on a monthly basis in Battambang Town,' where Mr YIM Tith and Ta Mok allegedly co-chaired the meetings, gave instructions, reminded the audience to 'smash' any enemy, and addressed the birth rates and production targets.⁵²¹ The ICIJ also inferred that these were Zone level meetings.⁵²² The ICIJ failed to differentiate between the roles and actions of Mr YIM Tith and Ta Mok at these alleged meetings.

183. While the ICIJ took into consideration that, in a later interview, NOP Ngim revoked her evidence and stated that she was only summoned once to a meeting with 'Ta Tith' in his house (no other attendees or Ta Mok were mentioned as being present), he found this change of evidence lacked credibility because NOP Ngim was, according to the ICIJ, 'clearly' intended to protect her own position and because her husband, PREAP Kap, stated that he accompanied her to five or six of such meetings⁵²³ as her messenger.⁵²⁴

184. The ICIJ unreasonably concluded that NOP Ngim's revocation of evidence lacked credibility. On 21 April 2014, before NOP Ngim recounted her evidence, the ICIJ issued a Letter of Assurance to NOP Ngim promising that her statement to the ICIJ would not, under any circumstances, ever be used against her, directly or indirectly, as part of any prosecution.⁵²⁵ With this letter in her possession, NOP Ngim did not need to protect her own position, as the ICIJ unreasonably suggested. Furthermore, the ICIJ failed to take into consideration that PREAP Kap was blind and could not move around without help,⁵²⁶ making him unfit for a job as messenger. The ICIJ also failed to take into consideration PREAP Kap's contradictory evidence that his wife NOP Ngim never allowed him to be involved in her work

⁵¹⁸ TEP Sien, Craig Etcheson, PAN Chhuong, BUN Thoeun, TEM Phal, PECH Chim, KHOEM Boeun, TUM Soeun, SOU Nan, SAO Phen, BUN Loeng Chauy, SAO Sarun, NANG Ny, CHHOENG Choeun.

⁵¹⁹ D1.3.20.1. Communist Party of Kampuchea Statue, January 1976.

⁵²⁰ ICIJ's Closing Order, para. 364.v.

⁵²¹ *Ibid.*, paras 366 to 367.

⁵²² *Ibid.*

⁵²³ *Ibid.*, para. 366.

⁵²⁴ D219/62, PREAP Kap, WRI, A64, EN 01053914.

⁵²⁵ D118/285/1, ICIJ's Letter of Assurance to NOP Ngim, 21 April 2014.

⁵²⁶ D219/62, PREAP Kap, WRI, A14-17, EN 01053903-4.

and that he knew nothing related to her work.⁵²⁷ Moreover, NOP Ngim did not confirm in her numerous statements that her husband PREAP Kap ever accompanied her to any meetings or that she ever talked with him about her work as deputy District Secretary.⁵²⁸

185. The ICIJ failed to take into consideration that this one alleged meeting between NOP Ngim and Mr YIM Tith could only have happened after September 1978 when she was assigned to be the deputy Secretary of Samlaut District of Sector 1.⁵²⁹

186. The ICIJ erroneously found, based on the evidence of NOP Ngim, that ‘then deputy secretary of Samlaut District recalls that the district received instructions, hand-written by Yim Tith from the sector.’⁵³⁰ The ICIJ misrepresented NOP Ngim’s evidence: She never stated that the instructions were hand-written by Mr YIM Tith,⁵³¹ and, in any event, due to her illiteracy she would have been unable to read or recognise anyone’s hand-writing.⁵³²

Conclusion on Sector 1

187. The ICIJ erred in fact and law in finding that Mr YIM Tith was *de jure* and/or *de facto* Secretary of Sector 1 of the Northwest Zone at any point in time during the DK regime. There is no evidence in the Case File that Mr YIM Tith was appointed as the Secretary of Sector 1. Mr YIM Tith’s mere presence at a few meetings in the final few months of the Khmer Rouge regime in Sector 1 and his family relationship with Ta Mok cannot amount to a finding that Mr YIM Tith held *de facto* authority as Sector 1 Secretary.⁵³³

188. The ICIJ failed to accurately assess witness statements, to take into consideration contradictory and exculpatory evidence, and to provide reasoning as to why he found the evidence he relied on so persuasive that no reasonable trier of fact could have reached any other conclusion, thereby erring in law by failing to apply the standard of ‘probability.’⁵³⁴ By relying on Mr YIM Tith’s family relationship with Ta Mok and not taking into consideration relevant contradictory evidence in making this finding, the ICIJ failed to apply the principle *in dubio pro reo*.⁵³⁵ Thus, the ICIJ erred in law and fact by drawing patently incorrect conclusions that Mr YIM Tith was *de jure* and *de facto* Secretary of Sector 1, thereby effecting a miscarriage of justice that requires the PTC to reverse these findings.

⁵²⁷ D219/62, PREAP Kap, WRI, A55-A60, EN 01053912-3.

⁵²⁸ D123/2/2.17a, NOP Ngim, DC-Cam Statement; D118/285, D219/298, D219/835, NOP Ngim, WRI; D219/974.1.2, NOP Ngim, T. 5 Sep 2016.

⁵²⁹ D219/298, NOP Ngim, WRI, A6, EN 01111859; D219/835, NOP Ngim, WRI, A72-A76, EN 01432957.

⁵³⁰ ICIJ’s Closing Order, paras 369 to 370.

⁵³¹ D118/285, NOP Ngim, WRI, A82, EN 01044688.

⁵³² D118/285, NOP Ngim, WRI, A36 EN 01044679.

⁵³³ *Supra*, paras 83 and 124 to 143.

⁵³⁴ *Supra*, paras 17 to 19.

⁵³⁵ *Ibid*.

iv. The ICIJ erred in finding that Mr YIM Tith was Secretary of Sector 3

189. The ICIJ erred in finding that ‘in the second half of 1978 Yim Tith also assumed the role of secretary of Sector 3.’⁵³⁶ First, the ICIJ did not explain what the term ‘assume’ means in terms of Mr YIM Tith’s role and responsibility and, most importantly, he did not conclude that Mr YIM Tith had *de jure* or *de facto* authority in Sector 3. He could not do so, because the only witness who spoke about ‘Ta Tith’s’ presence in Sector 3, MOUL Eng, never heard about ‘Ta Tith’s’ appointment at this position.⁵³⁷ MOUL Eng made the assumption that ‘Ta Tith’ held the Sector Secretary position because Mr YIM Tith came once in late September or early October 1978 ‘to inspect my rice fields’⁵³⁸ and he heard later that that Ta Mok ‘ceded Bavel to be under Yim Tith,’⁵³⁹ although he was unsure whether he had heard that ‘Ta Tith’ was Sector 3 or Sector 2 Secretary.⁵⁴⁰

190. The ICIJ erred in finding that Mr YIM Tith chaired meetings in Sector 3 and appointed cadres to positions in Sector 3 from as early as June 1978.⁵⁴¹ The ICIJ relied on evidence of two witnesses, IM An and KEO Phy⁵⁴² which he misrepresented. IM An clearly stated that he heard ‘Ta Tith’s’ name but he never saw him,⁵⁴³ that ‘Ta Tith’ was not senior cadre in Sector 3,⁵⁴⁴ and that he did not know who was ‘Sector 3 committee’ after 1977.⁵⁴⁵ KEO Phy stated that he occasionally saw ‘Ta Tith’ driving from Pailin, but then also stated that he was not sure whether the person he saw driving from Pailin was ‘Ta Tith,’⁵⁴⁶ that he did not know ‘Ta Tith’s’ position, and that he never attended a meeting with him.⁵⁴⁷ The ICIJ’s misrepresentation of the evidence of these two witnesses to support the findings that Mr YIM Tith was chairing meetings and appointing cadres to positions in Sector 3 was so unfair and unreasonable as to constitute an abuse of the ICIJ’s discretion.

191. The ICIJ erred in finding that Mr YIM Tith, as secretary of Sector 3, ‘sent and received written communications to the district level on matters relating to both security and the economy,’ and ‘appointed people to positions within the administrative structure of Sector

⁵³⁶ ICIJ’s Closing Order, para. 372.

⁵³⁷ D219/294, MOUL En, WRI, A61-A62, EN 01111833; A68-A73, EN 01111833-4.

⁵³⁸ D219/294, MOUL En, WRI, A75, EN 01111834; A47-A48, EN 01111831.

⁵³⁹ D219/294, MOUL En, WRI, A112, EN 01111838; A127, EN 01111839-40.

⁵⁴⁰ D219/294, MOUL En, WRI, A110, EN 01111838; A157-A158, EN 01111842-3.

⁵⁴¹ ICIJ’s Closing Order, para. 372.

⁵⁴² *Ibid.*, para. 372, fn. 990.

⁵⁴³ D118/66, IM An, WRI, A15, ERN 00954058;

⁵⁴⁴ D118/66, IM An, WRI, A20, ERN 00954059;

⁵⁴⁵ D118/66, IM An, WRI, A13, ERN 00954058;

⁵⁴⁶ D118/94, KEO Phay, WRI, A20, ERN 00967050.

⁵⁴⁷ D118/94, KEO Phay, WRI, A21-A23, ERN 00967050.

3.⁵⁴⁸

192. None of the witnesses cited by the ICIJ⁵⁴⁹ stated that Mr YIM Tith sent and received written communications to the district level in Sector 3 on matters relating to both security and the economy.

193. Additionally, none of the cited witnesses⁵⁵⁰ stated that Mr YIM Tith appointed people to positions within the administrative structure of Sector 3. Most importantly, the ICIJ misrepresented evidence by concluding that this ‘general finding is not contradicted by the testimony of KEO Phy who made two divergent statements about who appointed him personally to a commune post i.e. Yim Tith or Ta Mok.’⁵⁵¹ There is no evidence in any of KEO Phy’s statements that Mr YIM Tith ever personally appointed him to a commune post or any other post whatsoever.⁵⁵² The ICIJ’s conclusion regarding KEO Phy’s evidence was so unfair and unreasonable as to constitute an abuse of his discretion.

194. The ICIJ erred in finding that Mr YIM Tith, ‘as secretary of Sector 3, held meetings where workers and district level cadres from Sector 3 were in attendance.’⁵⁵³ The ICIJ cited evidence of six witnesses as support for this finding.⁵⁵⁴ The evidence of five of these witnesses is irrelevant to this finding and unreliable as they did not positively identify Mr YIM Tith, were never present at a meeting with Mr YIM Tith, or meet Mr YIM Tith in Sector 3.

- NOP Nan was a Southwest Zone cadre who was sent to the Northwest Zone in May or June 1978.⁵⁵⁵ He did not know the position of ‘Ta Tith’ in the Northwest Zone and never met ‘Ta Tith’ in the Northwest Zone.⁵⁵⁶ He had only heard that ‘Ta Tith’ was ‘Governor of Battambang’ at the time when he was ‘on the run to the Cambodian border with Thailand,’⁵⁵⁷ which must have been sometime in approximately January or February 1979.⁵⁵⁸
- KEO Phy stated that he occasionally saw ‘Ta Tit’ driving from Pailin, however, he was unsure whether this was, in fact, ‘Ta Tith,’⁵⁵⁹ he did not know ‘Ta Tith’s’ position, and he

⁵⁴⁸ ICIJ’s Closing Order, para. 375.

⁵⁴⁹ *Ibid.*, para. 374, fn. 997.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.* para. 375.

⁵⁵² D118/94, KEO Phay, WRI; D123/1/2.19a KEO Phy, DC-Cam Interview.

⁵⁵³ ICIJ’s Closing Order, para. 375, fn. 997.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ D118/92, NOP Nan, WRI, A3-A5, EN 00967025-6.

⁵⁵⁶ D118/92, NOP Nan, WRI, A16, EN 00967028.

⁵⁵⁷ D118/92, NOP Nan, WRI, A12, EN 00967028.

⁵⁵⁸ D118/92, NOP Nan, WRI, A16, EN 00967028.

⁵⁵⁹ D118/94, KEO Phay, WRI, A20, EN 00967050.

never attended a meeting with him.⁵⁶⁰

- TEP Sien was a Southwest Zone cadre who was sent to Battambang Province, Northwest Zone in 1978 and he did not know the name of the District and Sector where he was sent.⁵⁶¹ TEP Sien did not know ‘Ta Tit’ before he came to Battambang or where ‘Ta Tit’ was from.⁵⁶² He allegedly saw ‘Ta Tit’ only once in 1978 and he never positively identified him.⁵⁶³
- CHUON Than was a low-level cadre in the Treang Cooperative, Ratanak Mondul District, Sector 1,⁵⁶⁴ who was allegedly invited to attend a meeting in Phnom Sampov situated in Sector 3.⁵⁶⁵ He cannot remember a single name of any of the almost 100 people who he said attended the meeting,⁵⁶⁶ except for one name, ‘Ta Tith.’⁵⁶⁷ He did not positively identify Mr YIM Tith.
- VY Phann’s evidence is about one meeting at Kanghat Dam, Sector 1 in November 1978 and this evidence is not relevant to Sector 3.⁵⁶⁸

195. The only witness relevant to the events in Sector 3 and cited by the ICIJ⁵⁶⁹ is MUOL En, Bavel District Secretary, whose exculpatory evidence the ICIJ disregarded. MUOL En stated that he communicated with ‘Ta Tith’ from September or October when ‘Ta Tith’ first came to his office⁵⁷⁰ until November or December when they had a second and last meeting.⁵⁷¹ During this short period, MUOL En said they communicated ‘through his messenger once a week, or sometimes once a month’ and that they communicated about ‘rice production and output or issues arising in relation to other crops such as sugar cane.’⁵⁷² Neither MUOL En nor any other witnesses cited by the ICIJ mentioned written communications about security or Mr YIM Tith’s appointment of the people within the administrative structure of Sector 3 in 1978, and there is no evidence that Mr YIM Tith visited any other district offices in Sector 3, as found by the ICIJ.⁵⁷³

⁵⁶⁰ D118/94, KEO Phay, WRI, A21-A23, EN 00967050.

⁵⁶¹ D118/87, TEP Sien, WRI, A7, EN 00976971.

⁵⁶² D118/87, TEP Sien, WRI, A27, EN 00976974.

⁵⁶³ D118/87, TEP Sien, WRI, A28, EN 00976974.

⁵⁶⁴ D118/245, CHUON Than, WRI, A4, EN 01029378-9.

⁵⁶⁵ D118/245, CHUON Than, WRI, A13, EN 01029381; D118/299, CHUON Than, WRI, A13, EN 01044754.

⁵⁶⁶ D118/245, CHUON Than, WRI, A16, EN 01029381-2; D118/299, CHUON Than, WRI, A20, EN 01044756.

⁵⁶⁷ D118/245, CHUON Than, WRI, A18, EN 01029382; D118/299, CHUON Than, WRI, A23-A24, EN 01044756-7.

⁵⁶⁸ D219/85, VY Phann, WRI, A1-A6, EN 01061167-69.

⁵⁶⁹ ICIJ’s Closing Order, para. 375, fn. 997.

⁵⁷⁰ D219/294, MOUL En, WRI, A75, EN 01111834.

⁵⁷¹ D219/294, MOUL En, WRI, A99-A101, EN 01111837.

⁵⁷² D219/294, MOUL En, WRI, A98, EN 01111836.

⁵⁷³ ICIJ’s Closing Order, paras 374 to 376.

Conclusion on Sector 3

196. The ICIJ erred in fact and law in finding that Mr YIM Tith ‘assumed the role of secretary of Sector 3’ in the second half of 1978. There is no evidence in the Case File that Mr YIM Tith was appointed as the Secretary of Sector 3. Mr YIM Tith’s communication with the Bavel District Secretary about rice production, only lasting two months before collapse of DK regime, and his family relationship with Ta Mok do not amount to a finding that Mr YIM Tith held *de facto* authority as Sector 3 Secretary.⁵⁷⁴

197. The ICIJ failed to accurately assess witness statements, to take into consideration contradictory and exculpatory evidence, and to provide reasoning as to why he found the evidence that he relied on so persuasive that no reasonable trier of fact could have reached any other conclusion, thereby erring in law through his failure to apply the standard of ‘probability.’⁵⁷⁵ The ICIJ also made his conclusions by misinterpreting witness evidence in a manner that was so unfair and unreasonable as to constitute an abuse of his discretion.⁵⁷⁶ By relying on Mr YIM Tith’s family relationship with Ta Mok and not taking into consideration relevant contradictory evidence when making his finding, the ICIJ failed to apply the principle *in dubio pro reo*.⁵⁷⁷ Thus, the ICIJ erred in law and fact when drawing the patently incorrect conclusion that Mr YIM Tith ‘assumed the role of secretary of Sector 3,’ effecting a miscarriage of justice that requires the PTC to reverse the these findings.

v. The ICIJ erred in finding that Mr YIM Tith was Secretary of Sector 4

198. The ICIJ erred in finding that Mr YIM Tith was appointed as Sector 4 Secretary in mid-1978.⁵⁷⁸ The ICIJ based this finding on the evidence of only one witness, LOCH Eng,⁵⁷⁹ a cadre from Samraong District, Southwest Zone, who came to Battambang Province in July 1978⁵⁸⁰ where he was assigned by Ta Rin,⁵⁸¹ who was Sector 5 Secretary,⁵⁸² to work as a member of the Cooperative in Boeng Prey Commune located in Doun Teav District⁵⁸³ of Sector 4.⁵⁸⁴

⁵⁷⁴ *Supra*, paras 83 and 124 to 143.

⁵⁷⁵ *Supra*, paras 17 to 19.

⁵⁷⁶ *Ibid*.

⁵⁷⁷ *Ibid*.

⁵⁷⁸ ICIJ’s Closing Order, para. 377.

⁵⁷⁹ *Ibid*, para. 377, fn. 1001.

⁵⁸⁰ D118/96, LOCH Eng, WRI, A4, EN 00974055.

⁵⁸¹ D118/96, LOCH Eng, WRI, A8, EN 00974056.

⁵⁸² D119/65, TUM Soeun, WRI, A224 EN 00966813.

⁵⁸³ D118/96, LOCH Eng, WRI, A4-A6, EN 00974055.

⁵⁸⁴ 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, this district belonged to Sector 4).

199. In concluding that Mr YIM Tith was appointed Sector 4 Secretary, the ICIJ failed to take into consideration other evidence from LOCH Eng and evidence of other witnesses which is contradictory to this finding and exculpatory. LOCH Eng first stated that ‘Ta Tith’ arrived after him (after July 1978) to replace Ta Rin.⁵⁸⁵ Contrary to this statement, TUM Soeun provided evidence that Rin was Sector 5 Secretary until the end of the regime.⁵⁸⁶ LOCH Eng subsequently changed his evidence and stated that he did not know ‘Ta Tith’s’ position well, because ‘it was 1978 or 1979 already’⁵⁸⁷ and ‘Ta Tith’ was never introduced as the Sector Secretary in Sector 4.⁵⁸⁸ LOCH Eng also stated that the first time he heard ‘Ta Tith’s’ name was half a month after he arrived in Boeng Prey Commune,⁵⁸⁹ but he attended only one meeting where ‘Ta Tith’ was present⁵⁹⁰ in late 1978,⁵⁹¹ close to the end of the regime.⁵⁹² LOCH Eng referred to the location of this meeting as ‘at the worksite, attended by mobile groups who grew rice there.’⁵⁹³ There is insufficient information to conclude how LOCH Eng was able to identify ‘Ta Tith’ at the alleged meeting given that this was the first and last time he saw him.

200. No other evidence exists regarding Mr YIM Tith’s presence in Sector 4. The ICIJ failed to take into consideration that no evidence exists in the Case File that Mr YIM Tith exercised his alleged power as a Sector 4 Secretary. The ICIJ also failed to take into consideration his own finding that there is no evidence in the Case File that Mr YIM Tith visited any of the crime sites in Sector 4, Wat Samdech Security Centre,⁵⁹⁴ Wat Po Laingka/Kach Roteh Security Centre⁵⁹⁵ or Kampong Prieng and Reang Kesei Communes.⁵⁹⁶

Conclusion on Sector 4

201. The ICIJ erred in fact and law in finding that Mr YIM Tith was ‘appointed Sector 4 Secretary’ in mid-1978. There is no reliable evidence on the Case File that Mr YIM Tith was ever appointed as the Secretary of Sector 4.

202. The ICIJ failed to accurately assess the evidence of the only witness that he relied on, to take into consideration contradictory and exculpatory evidence, and to provide reasoning as

⁵⁸⁵ D219/627, LOCH Eng, WRI, A13, EN 01187741.

⁵⁸⁶ D119/65, TUM Soeun, WRI, A224 EN 00966813.

⁵⁸⁷ D219/884, LOCH Eng, WRI, A7, A18, EN 01476049-50.

⁵⁸⁸ D219/884, LOCH Eng, WRI, A13, EN 01476049.

⁵⁸⁹ D118/96, LOCH Eng, WRI, A30, EN 00974060.

⁵⁹⁰ D219/627, LOCH Eng, WRI, A13, EN 01187741.

⁵⁹¹ D219/627, LOCH Eng, WRI, A20, EN 01187742.

⁵⁹² D219/627, LOCH Eng, WRI, A31, EN 01187743.

⁵⁹³ D219/627, LOCH Eng, WRI, A22, EN 01187742.

⁵⁹⁴ ICIJ’s Closing Order, para. 869.

⁵⁹⁵ *Ibid.*, para. 893.

⁵⁹⁶ *Ibid.*, para. 920.

to why he found the evidence which he relied on so persuasive that no reasonable trier of fact could have reached any other conclusion, thereby failing to apply the standard of ‘probability.’⁵⁹⁷ By relying on Mr YIM Tith’s family relationship with Ta Mok and not taking into consideration relevant contradictory evidence in making this finding, the ICIJ failed to apply the principle *in dubio pro reo*.⁵⁹⁸ Thus, the ICIJ erred in law and fact by drawing patently incorrect conclusions that Mr YIM Tith ‘was appointed as Sector 4 Secretary’ in mid-1978, thereby effecting a miscarriage of justice that requires the PTC to reverse these findings.

vi. The ICIJ erred in finding that Mr YIM Tith was a member of the Northwest Zone Committee

203. The ICIJ erred in finding that Mr YIM Tith was appointed as a member of the Northwest Zone Committee and that he was ‘the second most powerful man in the Northwest Zone after Ta Mok.’⁵⁹⁹ As argued above, the ICIJ’s preoccupation with Mr YIM Tith’s family relationship with Ta Mok had a direct impact on his assessment of evidence.⁶⁰⁰

204. First, there is no evidence in the Case File that Mr YIM Tith was appointed as a member of the Northwest Zone Committee.

205. In making this finding the ICIJ relied only on one answer from Ta Paet’s bodyguard and messenger, CHHEAN Hea,⁶⁰¹ who stated that he accompanied Ta Paet to a meeting (on an unknown date) which he did not attend and, after this meeting, Ta Paet told him that ‘Yim Tith had announced that the Northwest Zone leaders were traitors, and that Yim Tith had showed him (Ta Paet) a document from the Centre which appointed Yim Tith to be responsible for the Northwest Zone.’⁶⁰² Ta Paet did not show this document to CHHEAN Hea. There is no evidence in the Case File to support either the allegation that this meeting ever took place or that this document, which CHHEAN Hea never saw, existed.

206. The ICIJ failed to take into consideration other relevant and contradictory evidence from this witness. CHHEAN Hea stated that he never attended any meetings with ‘Ta Tith,’⁶⁰³ he saw ‘Ta Tith’ only once in October or November 1978,⁶⁰⁴ and Ta Paet was the ‘second

⁵⁹⁷ *Supra*, paras 17 to 19.

⁵⁹⁸ *Supra*, paras 17 to 19 and 124 to 143.

⁵⁹⁹ ICIJ’s Closing Order, paras 380 to 382, 994.

⁶⁰⁰ *Supra*, paras 124 to 143.

⁶⁰¹ ICIJ’s Closing Order, para. 384, fn. 1015.

⁶⁰² *Ibid.*, para. 384.

⁶⁰³ D118/136, CHHEAN Hea, WRI, A9, EN 00969639.

⁶⁰⁴ D118/271, CHHEAN Hea, WRI, A25-A26, EN 01029420-1; D118/136, CHHEAN Hea, WRI, A20, EN 00969641.

chairman' of the Northwest Zone after Ta Keu was removed from this position.⁶⁰⁵ CHHEAN Hea also admitted that, despite working for Ta Paet since 1975,⁶⁰⁶ at the relevant time he was too young to understand what positions Ta Nhim and Ta Keu held.⁶⁰⁷

207. The ICIJ's conclusion that LIM Tim made a similar claim to CHHEAN Hea⁶⁰⁸ was erroneous. LIM Tim provided evidence about a meeting in a sugar factory in mid-1978 where 'Ta Tith' was allegedly present and introduced as being on the Committee of the Northwest Zone.⁶⁰⁹ However, LIM Tim later changed his statement and said that 'Ta Tith' 'never visited the factory.'⁶¹⁰ The ICIJ himself concluded that there is no reliable evidence that Mr YIM Tith visited the Kampong Kol Sugar Factory⁶¹¹ and found LIM Tim's evidence unreliable.⁶¹²

208. The ICIJ also found that 'the fact of Yim Tith holding a position on the Northwest Zone Committee and being *de facto* second-in-command as well as deputy to Ta Mok, receives support from other witnesses.'⁶¹³ The ICIJ misrepresented the evidence. For the following reasons, none of the cited witnesses support this finding:

- HAN Thy saw 'Ta Tith' for the first time three days before the Vietnamese arrived.⁶¹⁴
- The ICIJ himself found that LIM Tim's evidence is unreliable.⁶¹⁵
- HEM Moeun was never present at the meeting with 'Ta Tith'⁶¹⁶ but claimed to have heard, one week after he arrived in Battambang during the rainy season in 1978,⁶¹⁷ about an announcement that 'Ta Tith was the person who would replace' Ta Mok in the Northwest Zone whenever he was absent,⁶¹⁸ only to later change this statement during the Case 002/02 trial when he said that he did not attend this meeting and added that he did not know the contents of the meeting.⁶¹⁹
- PEOU Koeun did not know any leaders who controlled Zones and Sectors,⁶²⁰ never met 'Ta Tith,'⁶²¹ and did not know the leaders of the Northwest Zone when the Southwest

⁶⁰⁵ D118/136, CHHEAN Hea, WRI, A6, EN 00969638; D219/233, CHHEAN Hea, WRI, A56, EN 01090012.

⁶⁰⁶ D118/136, CHHEAN Hea, WRI, A2, EN 00969636-7.

⁶⁰⁷ D118/271, CHHEAN Hea, WRI, A44-A45, EN 01029424.

⁶⁰⁸ ICIJ's Closing Order, para. 384.

⁶⁰⁹ D118/108, LIM Tim, WRI, A18, EN 00976924; D219/649, LIM Tim, WRI, A37, EN 01207436.

⁶¹⁰ D118/108, LIM Tim, WRI, A16, EN 00976924.

⁶¹¹ ICIJ's Closing Order, para. 746.

⁶¹² *Ibid.*, para. 741.

⁶¹³ *Ibid.*, para. 383.

⁶¹⁴ D20, HAN Thy, WRI, EN 00710286;

⁶¹⁵ ICIJ's Closing Order, para. 741.

⁶¹⁶ D118/150, HEM Moeun, WRI, A62, EN 00975015.

⁶¹⁷ D118/222, HEM Moeun, WRI, A17, EN 00988135.

⁶¹⁸ D118/222, HEM Moeun, WRI, A14, EN 00988134;

⁶¹⁹ D339.1.1, HEM Moeun, Transcript, 2 August 2016, p. 64. Ll. 6-18, EN 01351805.

⁶²⁰ D219/682, PEOU Koeun, WRI, A17-A19, EN 01216218-9.

⁶²¹ D219/64, PEOU Koeun, WRI, A31, EN 01053949.

Zone cadres arrived.⁶²²

209. As argued above,⁶²³ the ICIJ attempted to support his findings with the opinions of fact witnesses regarding the family relationship between Ta Mok and Mr YIM Tith and the administrative organisation of the Northwest Zone, invoked by the ICIJ as support for his findings,⁶²⁴ cannot attest to Mr YIM Tith's *de jure* or *de facto* position as a Northwest Zone Deputy Secretary. This is especially true when it comes to the partially-cited statement from the witness PECH Chim whose evidence concerns the Southwest Zone,⁶²⁵ not the Northwest Zone. At the same time, the ICIJ failed to take into consideration important exculpatory evidence regarding the position of the deputy secretary of the Northwest Zone at the relevant time, which he erroneously considered to be 'of little consequence for the purpose of this Closing Order' without any further explanation.⁶²⁶

210. KAING Guek Eav, alias Duch, who was effectively the 'star witness' in all trials before the ECCC to date⁶²⁷ and who did not mention Mr YIM Tith in any of the 71 documents available on Case File 004, stated that in January 1979 Sarun was 'Deputy-secretary of the North Western Zone (the Secretary of which was Ta Mok) with whom I escaped to Samlaut.'⁶²⁸

211. Additionally, Timothy Carney's article titled 'The Organization of Power,' published as part of Karl Jackson's book 'Cambodia 1975-1978: Rendezvous with Death,'⁶²⁹ describes

⁶²² D219/682, PEOU Koeun, WRI, A17, EN 01216218-9.

⁶²³ *Supra*, paras 124 to 141.

⁶²⁴ ICIJ's Closing Order, para. 381 and 383.

⁶²⁵ D118/259, PECH Chim, WRI, A140, EN 01000683.

⁶²⁶ ICIJ's Closing Order, para. 385.

⁶²⁷ According to the data accessible to the Defence, Duch gave three statements to UNHCHR in 1999 (D1.3.29.7a, D1.3.29.7b and D1.3.29.7c, KAING Guek Eav alias Duch, UNHCHR Suspect statement), one statement to the Investigative Judge of the Military Court in the Kingdom of Cambodia in 1999 (D6.1.882, KAING Guek Eav alias Duch, WRI), 19 interviews to the OCIJ in Cases 001 and 002 (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), his testimony as an accused in Case 001 for 24 days (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), four additional interviews to the OCIJ in Case 002, (D6.1.637, D6.1.736, D6.1.796 and D219/702.1.150, KAING Guek Eav alias Duch, case 002, WRIs), his testimony a witness in Case 002/01 for five days in 2012 (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, transcript), his testimony as a witness in Case 002/02 for 12 days in 2016 (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.) and three interviews in Cases 003 and 004 (D219/672, D219/673 and D219/674, KAING Guek Eav alias Duch, cases 003 and 004, WRIs). The selected evidence of Duch that has been placed onto Case File 004 amounts to a total of 71 documents.

⁶²⁸ D6.1.1052, KAING Guek Eav alias Duch, WRI, EN 00160720.

⁶²⁹ 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.'

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 members of those bodies from 1975 to 1978.⁶³⁰ Mr YIM Tith's name is not mentioned in these tables.

212. Instead, in 'The Organization of Power,' Timothy Carney asserts that in August 1978⁶³¹ Heng Teav, alias Ta Pet, was a Member of the Standing Committee, Member of the Central Committee and Member of regional Party Committee.⁶³² The author also provides a table with the name, position, and dates of arrests and deaths of cadres during the purge of the Northwest Zone.⁶³³ There is no mention that Ta Pet was purged at any point.⁶³⁴

213. The ICIJ failed to take into consideration the fact that no evidence exists in the Case File that Mr YIM Tith exercised his alleged power as a member of the Northwest Zone Committee or *de facto* second-in-command to Ta Mok.

Conclusion on alleged membership of the Northwest Zone Committee

214. The ICIJ erred in fact and law in finding that Mr YIM Tith was member of the Northwest Zone Committee and second-in-command to Ta Mok at any point of time during DK regime. There is no evidence in the Case File that Mr YIM Tith was appointed as the member of the Northwest Zone Committee or that he was second-in-command to Ta Mok. Mr YIM Tith's mere alleged presence at a few meetings in the final few months of the Khmer Rouge regime in Sector 1 and his family relationship with Ta Mok do not amount to Mr YIM Tith having *de jure* or *de facto* authority in the Northwest Zone.⁶³⁵

215. The ICIJ failed to accurately assess witness statements, to take into consideration contradictory and exculpatory evidence, and to provide reasoning as to why he found that the evidence he is relying on so persuasive that no reasonable trier of fact could have reached any other conclusion, thus erring in law by failing to apply the standard of 'probability.'⁶³⁶ By relying on Mr YIM Tith's family relationship with Ta Mok and not taking into consideration relevant contradictory evidence in making this finding, the ICIJ failed to apply the principle *in*

⁶³⁰ 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.

⁶³¹ 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.

⁶³² 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.

⁶³³ 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.

⁶³⁴ 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.

⁶³⁵ *Supra*, paras 83 and 124 to 143.

⁶³⁶ *Supra*, paras 17 to 19.

*dubio pro reo.*⁶³⁷ Thus, the ICIJ erred in law and fact by drawing patently incorrect conclusions that Mr YIM Tith was a member of the Northwest Zone Committee and was second-in-command to Ta Mok, effecting a miscarriage of justice that requires the PTC to reverse these findings.

Conclusion

216. For the reasons set out above, the ICIJ erred in fact and law by finding that Mr YIM Tith had official positions in the Southwest Zone and Northwest Zone during the DK regime. There is no reliable evidence in the Case File that Mr YIM Tith was ever ‘the leader of Kirivong District,’ held ‘major factual authority’ throughout Sector 13, was appointed as Sector Secretary in Sectors 1, 3 and 4, or was appointed to the Northwest Zone Committee.

217. The ICIJ erred in law and fact through his extensive reliance on supposed ‘*de facto* authority’ in the Southwest and Northwest Zone. This was a smokescreen to obscure the lack of any reliable evidence of specific times, positions and responsibilities allegedly held by Mr YIM Tith. The ICIJ failed to take into consideration, in addition to these evidentiary *lacunae*, the large number of witnesses, selected for interview by the OCIJ in Case 004, who had never heard of Mr YIM Tith.⁶³⁸ The ICIJ failed to take into consideration the fact that Mr YIM Tith was never on the Standing Committee or Central Committee, despite his finding that ‘the Central Committee and Standing Committee were responsible for formulating policies and instructions.’⁶³⁹ The ICIJ ignored or misapplied his own findings from Case 004/1 that ‘decisions were made at the top and then implemented by the lower levels on pain of personal consequences at any level,’ and that even in view of the ‘increasing difficulty of maintaining organisational structures towards the end of the DK,’ the ‘ultimate definition of the content of policies and the means of their implementation rested with the top echelons, which could interfere at will.’⁶⁴⁰

218. Throughout the ICIJ’s analysis of the evidence to assess the Southwest and Northwest Zone allegations, he systematically failed to take into account contradictory evidence from the same witnesses that he relied upon, as well as contradictory and exculpatory evidence from other witnesses. The ICIJ systematically failed to provide reasoning for his findings, including no indication as to why he systematically preferred inculpatory conclusions rather than assessing even-handedly other reasonable conclusions.

⁶³⁷ *Ibid.*

⁶³⁸ See Annex A: Witnesses Who Had Never Heard of YIM Tith.

⁶³⁹ ICIJ’s Closing Order, para. 152.

⁶⁴⁰ Case 004/1, *Closing Order (Reasons)*, 10 July 2017, D308/3, para. 41.

219. Due to these multiple manifest errors of law and fact in the ICIJ's findings on the Southwest and Northwest Zone, the ICIJ did not establish the 'membership' element of the alleged JCEs in the Southwest and Northwest Zone.

220. On the basis of the Case File evidence of the Southwest and Northwest Zone allegations against Mr YIM Tith, no reasonable trier of fact could have reached the conclusions that the ICIJ did, such that his findings were so unreasonable as to constitute an abuse of the ICIJ's discretion. The ICIJ applied an incorrect legal standard in the assessment of evidence and failed to provide reasoned findings, impacting the overall credibility of the ICIJ's assessment of the Case File and invalidating the Closing Order in a miscarriage of justice that requires the PTC to reverse the ICIJ's findings.

C. SUB-GROUND 5.3: THE ICIJ ERRED IN LAW AND FACT BY FINDING THAT MR YIM TITH CONTRIBUTED TO THE JCES

221. In assessing the gravity of Mr YIM Tith's conduct, the ICIJ concluded in his Legal Findings on Personal Jurisdiction that Mr YIM Tith participated in and orchestrated genocide of the Khmer Krom in his areas of responsibilities⁶⁴¹ and 'other civilians and former CPK cadres were victimised under and by Yim Tith [...] through serial and well-organized mass killings as well as cruel and inhuman treatment through imprisonment and hard labour [...] in security centres and worksites,'⁶⁴² as well as through a policy of forced marriages.⁶⁴³ As argued above,⁶⁴⁴ the language employed by the ICIJ in his legal findings on personal jurisdiction,⁶⁴⁵ together with the structure of the ICIJ's Closing Order as a whole, suggests that the ICIJ assessed the gravity of Mr YIM Tith's conduct through his alleged contributions to the JCEs. The ICIJ's assessment of Mr YIM Tith's contributions to the JCEs was erroneous.

i. The ICIJ erred in finding that Mr YIM Tith contributed to JCE A

222. The ICIJ, analysing the evidence regarding Mr YIM Tith's alleged authority in the Northwest Zone from mid-1976 to mid-1978, did not find that Mr YIM Tith had *de jure* or *de facto* authority in Northwest Zone prior to his alleged formal appointments in June 1978.⁶⁴⁶ Nonetheless, the ICIJ found that Mr YIM Tith's alleged contribution to JCE in the Northwest

⁶⁴¹ ICIJ's Closing Order, para. 996.

⁶⁴² *Ibid.*, para. 997.

⁶⁴³ *Ibid.*, para. 998.

⁶⁴⁴ *Supra*, paras 104 to 120.

⁶⁴⁵ ICIJ's Closing Order, paras 992 to 999,

⁶⁴⁶ *Ibid.*, paras 353 to 356.

Zone establishment and operation of cooperatives and worksites started as early as 1976.⁶⁴⁷ This finding was erroneous. The ICIJ was not seised of Mr YIM Tith's alleged criminal conduct in the Northwest Zone before mid-1977, and he erred in law by exceeding the temporal scope of the investigation.⁶⁴⁸ Furthermore, an analysis of the evidence reveals that the ICIJ erred in fact and law in finding that Mr YIM Tith's conduct in the Northwest Zone leads to the conclusion that he was a 'most responsible' person.

223. The ICIJ erred in finding that Mr YIM Tith contributed to the establishment and operation of cooperatives and worksites by 'inspecting' worksites and cooperatives in the Northwest Zone from the middle of 1976.⁶⁴⁹ The ICIJ relied on uncorroborated evidence of three witnesses and failed to take into consideration contradictory and exculpatory evidence:

- SORM Vanna, a Civil Party Applicant stated that she worked at Kanghat Dam,⁶⁵⁰ had never seen 'Ta Tith' and only heard his name,⁶⁵¹ did not know his position,⁶⁵² never saw him participate in meetings at Kanghat Dam,⁶⁵³ and he never came to her worksite.⁶⁵⁴
- CHHOEUNG Bean stated that 'Ta Tith' started to come to Kanghat Dam Worksite in May, June, and July 1978⁶⁵⁵ but he then changed his evidence and said that he first saw 'Ta Tith' in September 1978.⁶⁵⁶
- SAO Chobb claimed that he knew two persons with the name 'Ta Tith' but he was not able to clarify in his evidence who they were.⁶⁵⁷ Throughout his seven statements he stayed consisted in that, first, 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

⁶⁴⁷ *Ibid.*, paras 398 to 411.

⁶⁴⁸ *Supra*, paras 95 to 103.

⁶⁴⁹ ICIJ's Closing Order, paras 400 to 401.

⁶⁵⁰ D219/46, SORM Vanna, WRI, A24-A25, EN 01050671.

⁶⁵¹ D219/46, SORM Vanna, WRI, A38-A40, EN 01050674.

⁶⁵² D219/46, SORM Vanna, WRI, A41, EN 01050674.

⁶⁵³ D219/46, SORM Vanna, WRI, A31-A37 EN 01050673; A47, EN 01050675.

⁶⁵⁴ D219/46, SORM Vanna, WRI, A42, EN 01050674.

⁶⁵⁵ D219/430, CHHOEUNG Bean, WRI, A121, EN 01128723,

⁶⁵⁶ D219/430, CHHOEUNG Bean, WRI, A99, EN 01128720; A128, EN 01128724.

⁶⁵⁷ D219/763, SAO Chabb, WRI, A49-A52, EN 01337023-4; D219/763, SAO Chabb, WRI, A59-A64, EN 01337025-6; D219/763, SAO Chabb, WRI, A53-A54, EN 01337024; D219/763, SAO Chabb, WRI, A81, EN 01337028; D219/763, SAO Chabb, WRI, A55-A58, EN 01337024-5; D219/763, SAO Chabb, WRI, A65-A68, EN 01337026; D219/763, SAO Chabb, WRI, A69-A70, EN 01337026; D219/763, SAO Chabb, WRI, A71, EN 01337026; D219/763, SAO Chabb, WRI, A126-A131, EN 01337033-4;; D219/763, SAO Chabb, WRI, A134, EN 01337034; D219/763, SAO Chabb, WRI, A137, EN 01337035; D219/956, SAO Chabb, WRI, EN 01456263; D219/956, SAO Chabb, WRI, A2, EN 01456264; D219/956 SAO Chabb WRI, A22-A23, EN 01456266; D219/956, SAO Chabb, WRI, A9-A11, EN 01456265; D219/956, SAO Chabb, WRI, A17-18, EN 01456265; D219/956, SAO Chabb, WRI, A20-A21, EN 01456265-6; A27, EN 01456266; D219/956, SAO Chabb, WRI, A27, EN 01456266; D219/956, SAO Chabb, WRI, A15, EN 01456265; A36, EN 01456267; D219/956, SAO Chabb, WRI, A37, EN 01456267; D219/956, SAO Chabb, WRI, A39, EN 01456267; A59, EN 01456269; D219/956, SAO Chabb, WRI, A28, EN 01456266; D219/956, SAO Chabb, WRI, A11, EN 01456265; A64 EN01456270; D219/980, SAO Chabb, WRI, Q/A7, EN 01517543.

cadres arrived in the middle of 1977,⁶⁵⁸ and second, ‘Ta Tit’ was a company commander under the command of the Northwest Zone.⁶⁵⁹ SAO Chabb’s evidence concerns allegations that are outside the temporal scope of the investigation and must be disregarded.

224. In finding that Mr YIM Tith contributed to the ‘establishment and operation of cooperatives and worksites’ by ‘inspecting’ worksites and cooperatives in the Northwest Zone, the ICIJ also erred in finding that Mr YIM Tith ‘inspected’ the Kamping Puoy Worksite in 1977, (which was not charged as a crime site).⁶⁶⁰ The ICIJ was not seized of the crimes allegedly committed at the Kamping Puoy Worksite⁶⁶¹, nor did he charge Mr YIM Tith for his alleged involvement in events at this worksite.⁶⁶² Further, the ICIJ erred in concluding that Mr YIM Tith ‘inspected’ the Kamping Puoy Worksite in 1977 based only on the evidence of HUY Krim, whose witness statements concern events from the end of 1976⁶⁶³ when he allegedly watched a CPK film that documented Mr YIM Tith ‘inspecting’ Ream Kun Water Basin and the Sector 3 project at the Kamping Puoy Water Basin. This event is outside of the temporal scope of the investigation and the evidence of this witness must be disregarded.

225. Furthermore, the ICIJ failed to take into consideration evidence that directly contradicts HUY Krim’s evidence. Of note, the Civil Party Applicant THEAM Robieb, who worked at the Kamping Puoy worksite and featured in the film,⁶⁶⁴ stated that he never heard of or saw Mr YIM Tith inspecting the Kamping Puoy worksite,⁶⁶⁵ let alone that Mr YIM Tith featured in this film. Two other witnesses who were cited by the ICIJ in support of HUY Krim’s evidence⁶⁶⁶ stated that they never met or heard of Mr YIM Tith.⁶⁶⁷ Also, HUY Krim’s

⁶⁵⁸ D219/763, SAO Chabb, WRI, A44-45, EN 01337023 ; D219/956, SAO Chabb, WRI, A25, EN 01456266; A35, EN 01456267; A64, EN 01456270; D219/981, SAO Chabb, WRI, A22-A23, EN 01502686-7; D219/982, SAO Chabb, WRI, A33, EN 01517552; D219/983, SAO Chabb, WRI, A29-A31, EN 01519560-1, A59, EN 01519565; D219/984, SAO Chabb, WRI, A11-A12, EN 01517558; D219/763, SAO Chabb, WRI, A34, EN 01337021.

⁶⁵⁹ D219/763, SAO Chabb, WRI, A53-A54, EN 01337024; D219/956, SAO Chabb, WRI, A17, A27, EN 01456265-6; D219/981, SAO Chabb, WRI, A18-A23, EN 01502686-7. For detailed analysis of SAO Chabb’s statements, *see*, Combined Response to the Final Submissions, paras 1077 to 1122.

⁶⁶⁰ ICIJ’s Closing Order, para. 401.

⁶⁶¹ *ICP’s Third Introductory Submission*, 20 November 2008, D1; *Co-Prosecutors Supplementary Submission regarding Sector 1 crime sites and persecution of Khmer Krom*, 18 July 2011, D65; *Co-Prosecutors’ Supplementary Submission regarding forced marriage and sexual or gender based violence*, 24 April 2014, D191. *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.

⁶⁶² ICIJ’s Closing Order, paras 1088 to 1014.

⁶⁶³ *Ibid.*, para. 401, fn. 1060.

⁶⁶⁴ D219/914, THEAM Robieb, WRI of Civil Party Applicant, A25-A26, A39-A43, EN 01517537-9.

⁶⁶⁵ D219/914, THEAM Robieb, WRI of Civil Party Applicant, A38, EN 01517538.

⁶⁶⁶ ICIJ’s Closing Order, para. 401, fn. 1062.

⁶⁶⁷ D6.1.165, IM An, WRI (YIM Tith is not mentioned); D118/66, IM An, WRI, A15, EN 00954058; D219/784, MOM Krath, A48, EN 01485068.

statement that unknown militiamen showed him an article in the 1976 'Democratic Kampuchea Magazine' with a photograph of Mr YIM Tith during his visits to railroads and construction projects in the Northwest Zone⁶⁶⁸ is not supported in the Case File; not one of the 61 magazines available in the Case File mentions Mr YIM Tith's name or contains his picture.⁶⁶⁹

226. The ICIJ's disregard for exculpatory evidence and his use of evidence outside the

⁶⁶⁸ ICIJ's Closing Order, para. 401.

⁶⁶⁹ D322/8.1.11, CPK Magazine entitled: "Revolutionary Youth" Issue 8, August 1975; D6.1.737, CPK magazine entitled: "The Revolutionary Flag", Issue 8, August 1975; D6.1.1132, Revolutionary Youth, Special no, September 1975; D1.3.22.1, CPK Magazine entitled "Revolutionary Youth", Issue 10, October 1975; D322/8.1.12, CPK Magazine entitled: "Revolutionary Youth", Issue 11, November 1975; D6.1.746, CPK Magazine entitled: "The Revolutionary Flag", Special issue, October-November 1975; D322/8.1.13, Revolutionary Youth, No 12, December 1975; D6.1.747; CPK Magazine entitled: "Revolutionary Youth", Issue 2, February 1976; D322/8.1.16, CPK Magazine entitled: "Revolutionary Youth", Issue 3, March 1976; D6.1.749, CPK Magazine entitled: "The Revolutionary Flag", Issues 2 and 3, February - March 1976; D1.3.22.2, CPK Magazine entitled: "Revolutionary Youth," Special Issue, April 1976; D215/1.1.3, D61150 DK Magazine entitled Kampuchea, Issue No.3, March 1976; D215/1.1.6, D215/1.1.4, D61151 DK Magazine entitled Kampuchea, April 1976; D6.1.750, CPK Magazine entitled: "The Revolutionary Flag", Issue 4, April 1976; D6.1.1133, Revolutionary Youth, No. 5, May, 1976; D215/1.1.5, D61152 DK Magazine entitled Kampuchea, June 1976; D322/8.1.17, CPK Magazine entitled: "Revolutionary Youth," Issue 6, June 1976; D6.1.751, CPK Magazine entitled: " The Revolutionary Flag", Issue 6, June 1976; D1.3.22.3, CPK Magazine entitled: "Revolutionary Youth," Issue 7, July 1976; D6.1.100, "Revolutionary Flag ", Issue 7, July 1976; D61153 DK Magazine entitled Kampuchea, July 1976; D215/1.1.7, D61154 DK Magazine entitled Kampuchea, August 1976; D322/8.1.19, CPK Magazine entitled: "Revolutionary Youth," Issue 8, August 1976; D6.1.752, CPK Magazine entitled: "The Revolutionary Flag", Issue 8, August 1976; D219/370.1.1, CPK Magazine entitled: "Revolutionary Youth," Issue 9, September 1976; D6.1.748, CPK Magazine entitled: "Revolutionary Youth," Issue 10, October 1976; D6.1.753, CPK Magazine entitled: "The Revolutionary Flag", Special Issue, September - October 1976; D322/8.1.20, CPK Magazine entitled: "Revolutionary Youth," Issue 11, November 1976; D6.1.754, CPK Magazine entitled: "The Revolutionary Flag", Issue 11, November 1976; D322/8.1.21, CPK Magazine entitled: "Revolutionary Youth," Issue 12, December 1976; D6.1.755, CPK Magazine entitled: "The Revolutionary Flag", Special Issue, December 1976 -January 1977; D6.1.765, Revolutionary Youth Number 1-2 January-February 1977; D322/8.1.22, Revolutionary Youth Number 3, March 1977; D215/1.1.8, D61155 DK Magazine entitled Kampuchea, Special Edition, April 1977; D322/8.1.23, CPK Magazine entitled: " The Revolutionary Flag", Special Issue, April 1977; D322/8.1.24, Revolutionary Youth Number 4, April 1977; D215/1.1.9, D61156 DK Magazine entitled Kampuchea, Issue No. 14, May 1977; D322/8.1.25, Revolutionary Youth Number 5, May 1977; D1.3.6.1, CPK Magazine entitled: " The Revolutionary Flag", Issue 6, June 1977; D6.1.738, CPK Magazine entitled: "The Revolutionary Flag", Issue 7, July 1977; D322/8.1.27, Monthly Pictorial Magazine No. 18; August 1977; D6.1.766, Revolutionary Youth Number 7-8, July-August 1977; D6.1.739, CPK Magazine entitled: "The Revolutionary Flag", Special Issue, September 1977; D6.1.767, Revolutionary Youth Special Number, September 1977; D6.1.740; CPK Magazine entitled: "Revolutionary Flag, Special Issue, October - November 1977; D6.1.768, Revolutionary Youth Number 10-11, October-November 1977; D1.3.22.5, CPK Magazine entitled: " The Revolutionary Flag", Special Issue, December 1977 - January 1978; D215/1.1.10, D61157 DK Magazine entitled Kampuchea, Issue No. 24, January 1978; D6.1.1131, Revolutionary Youth, No. 1-2, January-February 1978; D6.1.741, CPK Magazine entitled: "The Revolutionary Flag", Issue 2, February 1978; D215/1.1.11, DK Magazine entitled Kampuchea, Issue No. 3, March 1978; D322/8.1.31, CPK Magazine entitled: " The Revolutionary Flag", Issue 3, March 1978; D6.1.742, CPK Magazine entitled: "The Revolutionary Flag", Issue 4, April 1978; D6.1.769, Revolutionary Youth Number 3-4, March-April 1978; D1.3.22.6, CPK Magazine entitled: " The Revolutionary Flag", Special Issue, May - June 1978; D6.1.743, CPK Magazine entitled: "The Revolutionary Flag", Issue 7, July 1978; D6.1.744, CPK Magazine entitled: "The Revolutionary Flag", Issue 8, August 1977; D6.1.745, CPK Magazine entitled: "The Revolutionary Flag", Issue 9, September 1978; D219/370.1.15, Revolutionary Youth Number 10, October 1978; D322/8.1.35, Revolutionary Youth Number 11, November 1978; D215/1.1.12, D61149 DK Magazine entitled Kampuchea, Issue No. 39, April 1979.

scope of the investigation to find that Mr YIM Tith contributed to the establishment and operation of cooperatives and worksites by ‘inspecting’ worksites and cooperatives in the Northwest Zone was so unfair and unreasonable as to constitute an abuse of the ICIJ’s discretion.

(a) Contribution to the establishment and operation of cooperatives and worksites – presence at the meetings

227. The ICIJ erred in finding that Mr YIM Tith ‘presided over meetings and study sessions at worksites, giving speeches and instructions and training lower level cadres on construction and agriculture’⁶⁷⁰ from the middle of 1976 and ‘exhorted CPK economic policy.’⁶⁷¹ The ICIJ failed to account for contradictory and exculpatory evidence of the witnesses who he cited in support of this conclusion:

- LEK Phiv never positively identified Mr YIM Tith, he was not sure of ‘Ta Tith’s’ role,⁶⁷² and he was present at the meetings with ‘Ta Tith’ after the rainy season of 1978.⁶⁷³
- DOS Doeun’s evidence concerned a person named ‘Ta Tith’ who was a Northwest Zone cadre in charge of Kanteu Muoy Commune in Banan District.⁶⁷⁴
- CHUCH Punlork stated that the ‘Ta Tith’ he knew ‘did farming like others,’ worked like ordinary people,⁶⁷⁵ and was ‘not a leader of any kind.’⁶⁷⁶
- TIEP Tith allegedly attended only one meeting where ‘Ta Tith’ was present before he was arrested⁶⁷⁷ in January or February 1978,⁶⁷⁸ and did not positively identify Mr YIM Tith.⁶⁷⁹ He also stated that he was unsure whether ‘Ta Tith’ was from the Southwest⁶⁸⁰ and that ‘Ta Tith’ rose to power after Ta Vanh was arrested.⁶⁸¹ Considering this evidence and the fact that Ta Paet replaced Ta Vanh after he was arrested,⁶⁸² this witness likely confused ‘Ta Tith’ with Ta Paet.

⁶⁷⁰ ICIJ’s Closing Order, paras 402 to 404.

⁶⁷¹ *Ibid.*, para. 405.

⁶⁷² D219/236, LEK Phiv, WRI, A18, EN 01092932.

⁶⁷³ D219/210 LEK Phiv WRI, A5-A6, EN 0108852-3. For detailed analysis of LEK Piv’s statements. *See* Combined Response to the Final Submissions, paras 1264 to 1273.

⁶⁷⁴ D219/797, DOS Doeun, WRI, A200-A214, EN01337079-80.

⁶⁷⁵ D22, CHUCH Punlork, WRI, EN 00707678.

⁶⁷⁶ D22, CHUCH Punlork, WRI, EN 00707678.

⁶⁷⁷ D219/464, TIEP Tith, WRI, A34, EN 01151249.

⁶⁷⁸ D219/464, TIEP Tith, WRI, A42-A43, EN 01151250.

⁶⁷⁹ He identified ‘Ta Tith’ as a tall and big with a dark skin D118/138, TIEP Tith, WRI, A35, EN 00970098; D219/464, TIEP Tith, WRI, A33, EN 01151249.

⁶⁸⁰ D219/464, TIEP Tith, WRI, A37, EN 01151249.

⁶⁸¹ D219/464, TIEP Tith, WRI, A39-A40, EN 01151250.

⁶⁸² ICIJ’s Closing Order, para. 353.

(b) Contribution to the establishment and operation of cooperatives and worksites – enforcement of strict discipline for workers, particularly at Kanghat Dam

228. The ICIJ erred in finding that Mr YIM Tith ‘contributed to enforcement of strict discipline for workers, particularly at Kanghat Dam.’⁶⁸³ In making this finding, the ICIJ relied only on Civil Party Applicant, SORM Vanna, and failed to account for contradictory and exculpatory evidence of this witness. SORM Vanna stated that she worked at Kanghat Dam,⁶⁸⁴ heard ‘Ta Tith’s’ name but never saw him,⁶⁸⁵ did not know his position,⁶⁸⁶ never saw ‘Ta Tith’ participate in meetings at Kanghat Dam,⁶⁸⁷ and ‘Ta Tith’ never came to her worksite.⁶⁸⁸ No other evidence exists on the Case File attesting to Mr YIM Tith’s involvement in enforcement of discipline for workers at the worksites in the Northwest Zone.

229. Contrary to his finding about Mr YIM Tith’s alleged contribution to the establishment and operation of cooperatives and worksites in the Northwest Zone, the ICIJ found that Mr YIM Tith was not present in Thipakdei Cooperative,⁶⁸⁹ Kampong Kol Sugar Factory,⁶⁹⁰ or Kampong Prieng and Reang Kesei Communes,⁶⁹¹ three cooperatives and worksites of the four investigated by the ICIJ. No evidence exists on the Case File attesting to Mr YIM Tith’s contribution to the establishment and operation of Thipakdei Cooperative, Kampong Kol Sugar Factory or Kampong Prieng and Reang Kesei Communes.

230. Furthermore, the ICIJ neither presented evidence of nor accounted for Mr YIM Tith’s *mens rea* to commit crimes against humanity of imprisonment, enslavement and other inhuman acts.⁶⁹²

231. Based on this evidence, no reasonable trier of fact could have reached the finding that Mr YIM Tith made a significant contribution to the establishment and operation of cooperatives and worksites in the Northwest Zone⁶⁹³ from ‘at least early 1977 until at least 6 January 1979.’⁶⁹⁴ The ICIJ’s finding was so unfair and unreasonable as to constitute an abuse of his discretion.

(c) The purge of the Northwest Zone and targeting of specific groups

⁶⁸³ *Ibid.*, para. 406.

⁶⁸⁴ D219/46, SORM Vanna, WRI, A25, EN 01050672.

⁶⁸⁵ D219/46, SORM Vanna, WRI, A38-A40, EN 01050674.

⁶⁸⁶ D219/46, SORM Vanna, WRI, A41, EN 01050674.

⁶⁸⁷ D219/46, SORM Vanna, WRI, A31-A37, 47 EN 01050673-75.

⁶⁸⁸ D219/46, SORM Vanna, WRI, A42, EN 01050674.

⁶⁸⁹ ICIJ’s Closing Order, paras 602 to 616.

⁶⁹⁰ *Ibid.*, para. 746.

⁶⁹¹ *Ibid.*, para. 920.

⁶⁹² *Ibid.*, para. 112.

⁶⁹³ *Ibid.*, paras 997, 1021.

⁶⁹⁴ *Ibid.*, para. 1016(i).

232. The ICIJ erred in finding that Southwest Zone cadres were selected and deployed on orders of ‘Ta Mok and Yim Tith’ between 1976 and 1978⁶⁹⁵ to take control of the Northwest Zone and purges were orchestrated by ‘Ta Mok and Yim Tith’ during the course of 1976 until the collapse of DK in January 1979.⁶⁹⁶ The ICIJ failed to explain which of his findings related to Ta Mok and which to Mr YIM Tith.

233. The documentary evidence cited by the ICIJ to support this finding does not mention Mr YIM Tith.⁶⁹⁷

234. Out of 41 witnesses cited by the ICIJ as the evidentiary basis for this finding,⁶⁹⁸ 16 witnesses stated that they had never heard of Mr YIM Tith or ‘Ta Tith’⁶⁹⁹ and 26 gave no evidence relevant to the Mr YIM Tith’s alleged involvement in purges.⁷⁰⁰

235. The ICIJ erred in finding that Mr YIM Tith ‘assigned a small number of Southwest

⁶⁹⁵ *Ibid.*, paras 295 to 299.

⁶⁹⁶ *Ibid.*, paras 413 to 426.

⁶⁹⁷ *Ibid.*, para. 295.

⁶⁹⁸ *Ibid.*, para. 295, fn. 743; para. 296, fn. 784 and para. 412, fn. 1086.

⁶⁹⁹ D118/84, TOCH Phoeun, WRI, A19, EN 00976937; D118/221, PHAN Yim, WRI, A129, EN 00987759; D219/140, YOUK Neam, WRI, A187, EN 01063686; D118/170, Sek Sam At alias YEAY Rim, WRI, A132, A133, A137, EN 00980013; D219/861, Sek Sam At alias YEAY Rim, WRI, A28, EN 01364076; A112, A115, A116, A124, EN 01364084-5; D219/869, Sek Sam At alias YEAY Rim, WRI, A44, A45, A47, A49, EN 01365562; D219/138, YOU Vann, WRI, A38, EN 01059281; ICIJ’s Closing Order, para. 295, fn. 744: D118/294, LAY Eng, WRI, A11-A12, EN 01037356; D219/50, UY Chinda, WRI, A166-A167, EN 01056865; D118/264, KHEM Sok, WRI, A53, EN 01033086; D219/57, KONG Run, WRI, A50-A51; ERN 01040562; D119/94, BOU Mao, WRI, A24, EN 00982758; D219/125, SREY Soeum, WRI of Civil Party Applicant, A78-A79, EN 01067738; D219/345, NOEM Lorn, WRI, A33, EN 01116102; D219/300, IM Bun Chhoeun, A16, EN 01111876; D219/310, VOAN Samut, WRI, A24, EN 01111941; D134/3, SAT Chhang, WRI, A40, EN 00974285; D119/109, SUON Lauv, WRI of Interview of Civil Party Applicant, A78, EN 00984914. *See Annex A: Witnesses Who Had Never Heard of YIM Tith.*

⁷⁰⁰ D119/124, Nhem En, A29-A31, EN 01055654; D219/66, Kung Chhom, WRI, A43-A48 A51-A59, EN 01053984-01053986; D118/86, NHOEK Ly, A10-A11, EN 00976960; D6.1.132, Hun Sa, EN 00250274; D118/249, Son Em, WRI of Civil Party Applicant, A73, EN 01034094; D219/37, SUON Mot, WRI, A76, EN 01053624; D6.1.730, D127/2.1.10, D127/2.1.11, D117/70, D117/71, D117/72, D219/234.1.2, D117/73, D219/120, D219/702.1.94, D219/702.1.95, D347/2.1.27, D219/792.1.2, D347/2.1.28, D219/792.1.3, D219/971, WRIs and Transcripts, Prak Yut; D219/847.1, Transcript of AO An; D219/62, PREAP Kap, WRI, A32-A33. EN 01053907-8; D118/259, PECH Chim, WRI, A47-A50, A54-A57, EN 01000672-3, A142, A148-A150, EN 01000684-5, A280-A282 EN 01000700; D119/124, Nhem En, WRI, A26-A27, EN 01055653-4; D118/85, Chea Choeun, A27 EN 00976946; D118/150, HEM Moeun, WRI, A10, EN 00975008, A23-A25, ERN 00975010, A72-A74, ERN 00975016; D219/900, MOUL En, WRI, A57-A59, EN 01517478; D219/19, Sann Lorn, A755, A759, EN 01050426, A774, EN 01050428; D118/96, LOCH Eng, WRI, A4, A6-A9, A11-A13, A17-A20, EN 00974055-00974058; D219/117, TOP Seung, WRI, A15, A24, A27, A32-A34, A36, A39-A43, A54-A57, EN 01067700-06, A131-A132, A134, EN 01067716-01067717; D6.1.1063, KAING Guek Eav alias Duch, WRI, EN 00204354; D1.3.29.2, KAING Guek Eav alias Duch, WRI, EN 00149917; D6.1.873, Transcript of Hearing on the Substance in Case 001, KAING Guek Eav alias Duch, 25 November 2009, EN 00406699, lines 21-24; D219/85.1.3, Transcript of Hearing on the Substance in Case 002/02, KAING Guek Eav alias Duch, 9 June 2016, EN 01319813-01319814; D6.1.866, Transcript of Hearing on the Substance in Case 001, KAING Guek Eav alias Duch, 17 June 2009, EN 00342878, lines 1-11. ICIJ’s Closing Order, para. 295, fn. 744: D219/64, PEOU Koeun, WI, A34-A35, ERN 01053950, A64, EN 01053954; D118/75, HUY Krim, WRI, A41, EN 00976620; D118/5, TUM Pheuy, WRI, A32-A33, EN 00935596; D219/175, HANG Horn, A19, A28, EN 01077003-04; D219/689, SOK Cheat, WRI, A105-A106, EN 01216256; D219/586, KHUN Mon, WRI, A75-A76, EN 01178707-8; D219/538, SOEUN Mat, A25, EN 01173576-01173577; D219/589, CHOEM Bunret, WRI, A120-A121, EN 01178790-91.

Zone cadre to work alongside Northwest Zone cadre' in 1976.⁷⁰¹ None of the 17 witnesses cited by the ICIJ support this finding.⁷⁰² Six witnesses had never heard of Mr YIM Tith or 'Ta Tith,'⁷⁰³ one witness never mentioned his name in his evidence,⁷⁰⁴ four witnesses never mentioned Mr YIM Tith in the context of events in 1976,⁷⁰⁵ and six witnesses' evidence relates to the second half of 1978.⁷⁰⁶

236. The ICIJ erred in finding that in mid-1977, Mr YIM Tith welcomed the Southwest Zone cadres upon their arrival in Battambang and assigned them to replace cadres at various locations in the Northwest Zone.⁷⁰⁷ None of the witnesses cited by the ICIJ support this finding.⁷⁰⁸

- YOUEM Kuonh arrived in Battambang in late 1978.⁷⁰⁹
- PREAP Kap, who was blind at the time,⁷¹⁰ never saw or heard about 'Ta Tith,'⁷¹¹ prior to his wedding on 20 August 1978 when his wife told him that 'Ta Tith' attended their wedding ceremony.⁷¹²
- NOP Ngim came to the Northwest Zone in June 1978 and three months after that she married PREAP Kap on 20 August 1978.⁷¹³
- PEOU Koeun was a Northwest Zone soldier stationed at O Ta Krey (Ou Ta Krei) from 1975 to late 1977⁷¹⁴ when he escaped to work at a cotton plantation at Chi Pang Mountain

⁷⁰¹ ICIJ's Closing Order, para. 298.

⁷⁰² *Ibid.*, para. 298, fn. 752.

⁷⁰³ D118/250, MUTH Voeuk, WRI, Note at EN 01032481; D219/36, CHHUOM Savoeun, WRI, A32, EN 01053607; D118/107, SET Dun, WRI, A23, EN 00976912; D219/20, CHHUM Vanny, WRI of Civil Party Applicant, A67, EN 01050473-4; D219/5, Cheam Nhor, WRI, A27-A28, EN 01047125; D219/142, TEP Sarun, WRI, A53, EN 01063714.

⁷⁰⁴ D119/69, Kroch Toem, WRI, A28-A30, A33-A34, A36, EN 01035113-4;

⁷⁰⁵ D118/106, HUON Choeum, WRI, A12, EN 00978419-00978420, A36, A39, EN 00978423-4; D118/87, TEP Sien, WRI, A49, EN 00976977; D219/538, SOEUN Mat, WRI, A36, EN 01173579, A40, EN 01173580, A96, EN 01173590; D119/65, TUM Soeun, WRI, A30-A33, EN 00966782, A40-A41, EN 00966783, A47-A48, A53-A54, EN 00966784-5, A60, A62, EN 00966786, A65, EN 00966788, A78-A79, EN 00966790.

⁷⁰⁶ D118/85, CHEA Choeun, WRI, A27, A30 EN 00976946-7; D219/551, HENG Khly, WRI, A61-A62, EN 01178560, A156-A162, EN 01178576-7; D118/86, NHOEK Ly, A13, EN 00976961, A23-A24, EN 00976963; D219/430, CHHOEUNG Bean, WRI, A99, EN 01128720, A128, EN 01128724; D219/117, TOP Seung, WRI, A67-A72, EN 01067707-8; D219/953, CHHOENG Chhoeurt, WRI, A55-A56, EN 01451716;

⁷⁰⁷ ICIJ's Closing Order, para. 299.

⁷⁰⁸ *Ibid.*, para. 299, fn. 578.

⁷⁰⁹ D219/904, YOEM Kuonh, WRI, A47, EN 01517498.

⁷¹⁰ D219/62, PREAP Kap, WRI, A17, EN 01053904.

⁷¹¹ D219/62, PREAP Kap, WRI, A29-30, EN 01053907, A72, EN 01053915-6.

⁷¹² D219/62, PREAP Kap, WRI, A29, EN 01053907, A50-A51, EN 01053911-2.

⁷¹³ D123/2/2.17a, NOP Ngim, DC-Cam Statement, EN 01155597; D118/285, NOP Ngim, WRI, A68, EN 01044685-6

⁷¹⁴ D219/64, PEOU Koeun, WRI, A51-A53, EN 01053952-3; D219/682, PEOU Koeun, WRI, A11-A13, EN 01216218.

until the Vietnamese arrived.⁷¹⁵ He did not know any leaders who controlled zones and sectors,⁷¹⁶ never met ‘Ta Tith,’ and only heard his name,⁷¹⁷ and did not know who were the leaders of the Northwest Zone when the Southwest Zone cadres arrived.⁷¹⁸

237. None of the witnesses stated that Mr YIM Tith or ‘Ta Tith’ assigned them to replace Northwest Zone cadre.

238. The ICIJ erred in finding, based on the evidence of only one witness, that in the middle of 1977 Mr YIM Tith was involved in the arrest of two unnamed battalion chairmen in charge of Kampong Kol Sugar Factory.⁷¹⁹ The ICIJ failed to take into consideration evidence from HUON Choeum that was relevant to this finding and which contradicted the evidence relied on by the ICIJ; HUON Choeum never worked at Kampong Kol Sugar Factory, never saw ‘Ta Tit’ in person,⁷²⁰ and never heard about any other event involving ‘Ta Tit.’⁷²¹ The ICIJ also failed to take into consideration that this witness gave a 90-page statement to DC-Cam on 17 July 2006 where he did not mention ‘Ta Tit,’ but 8 years later, on 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, remembered that he had heard something about ‘Ta Tit.’ The ICIJ failed to take into consideration the lack of any reliable evidence that Mr YIM Tith ever visited the Sugar Factory, which the ICIJ recognised elsewhere in the Closing Order,⁷²² and that the evidence of this witness is anonymous unsupported hearsay.

239. The ICIJ neither presented evidence of nor accounted for Mr YIM Tith’s *mens rea* to commit crimes against humanity of imprisonment, murder, extermination and other inhuman acts.⁷²³

240. No reasonable trier of fact would have reached, based on this evidence, the finding that Mr YIM Tith supported and contributed to the CPK policy on the re-education of so-called ‘bad elements’ and the killing of enemies and ‘bad elements’ both inside and outside the CPK ranks⁷²⁴ from ‘at least early 1977 until at least 6 January 1979.’⁷²⁵ The ICIJ’s finding was so unfair and unreasonable as to constitute an abuse of his discretion.

⁷¹⁵ D219/682, PEOU Koeun, WRI, A19, EN 01216219, A44-A47, EN 01216222; D219/64, PEOU Koeun, WRI, A8-A13, EN 01053945-6.

⁷¹⁶ D219/682, PEOU Koeun, WRI, A17-A19, EN 01216218-9.

⁷¹⁷ D219/64, PEOU Koeun, WRI, A31, EN 01053949.

⁷¹⁸ D219/682, PEOU Koeun, WRI, A17, EN 01216218-9.

⁷¹⁹ ICIJ’s Closing Order, para. 418.

⁷²⁰ D118/106, HUON Choeum, WRI, A12, EN 00978419-20.

⁷²¹ D118/106, HUON Choeum, WRI, A19, EN 00978421.

⁷²² ICIJ’s Closing Order, para. 746.

⁷²³ *Ibid.*, para. 112.

⁷²⁴ *Ibid.*, paras 997, 1022.

⁷²⁵ *Ibid.*, para. 1016.i.

(d) Regulation of marriage

241. The ICIJ erred in finding, based on the evidence of two witnesses,⁷²⁶ that, as part of the Northwest Zone Committee, as Secretary of Sector 1 and Sector 4, and by his ‘presence’ at one wedding ceremony⁷²⁷ held in August 1978,⁷²⁸ Mr YIM Tith supported⁷²⁹ and contributed to the CPK policy on the regulation of marriage⁷³⁰ from ‘at least early 1977 until at least January 1979.’⁷³¹ The ICIJ neither presented evidence of nor accounted for Mr YIM Tith’s *mens rea* to commit the crime against humanity of the regulation of marriage,⁷³² and such evidence does not exist on the Case File.

242. Even assuming *arguendo* the Mr YIM Tith was part of the Northwest Zone Committee and Secretary of Sector 1 and Sector 4 in the second part of 1978,⁷³³ which he was not,⁷³⁴ the ICIJ failed to explain how Mr YIM Tith’s mere presence at one wedding ceremony in August 1978 amounted to a ‘significant contribution’ to the policy of the regulation of marriage, as required by the law on JCE.⁷³⁵

243. No reasonable trier of fact would have reached, based on this evidence, the finding that Mr YIM Tith supported and significantly contributed to the CPK policy on the regulation of marriage⁷³⁶ from ‘at least early 1977 until at least 6 January 1979.’⁷³⁷ The ICIJ’s finding is so unfair and unreasonable as to constitute an abuse of the his discretion.

ii. The ICIJ erred in finding that Mr YIM Tith contributed to JCE B

244. The ICIJ found that Mr YIM Tith made a significant contribution to the CPK policy on eliminating the Khmer Krom ‘no later than when he took office in various functions on the Sector 13 Committee by some point in 1976’ until the end of the regime.⁷³⁸ The ICIJ’s findings are erroneous.

245. As argued above, the ICIJ failed to set out a description of the material facts and their legal characterisation as the basis for finding that Mr YIM Tith was responsible for

⁷²⁶ NOP Ngim and PREAP Kap.

⁷²⁷ ICIJ’s Closing Order, para. 314.

⁷²⁸ D118/285, NOP Ngim, WRI, A68, EN 01044685-6, A73, EN 01044686; D219/835, NOP Ngim, WRI, A149, EN 01432970.

⁷²⁹ ICIJ’s Closing Order, para. 314.

⁷³⁰ *Ibid.*, para. 427.

⁷³¹ *Ibid.*, para. 1016.i.

⁷³² *Ibid.*, para. 112.

⁷³³ *Ibid.*, paras 380 to 382, 994; 360 to 371, 993; 377.

⁷³⁴ *Supra*, paras 164 to 188, 198 to 215.

⁷³⁵ ICIJ’s Closing Order, para. 110.

⁷³⁶ *Ibid.*, paras 998, 1024.

⁷³⁷ *Ibid.*, para. 1016.i.

⁷³⁸ *Ibid.*, paras 1016(ii), 1017(ii), 1018, 1022.

genocide.⁷³⁹

246. The ICIJ failed to explain how the following allegations,⁷⁴⁰ even if proven to have occurred (which they were not) would constitute a ‘significant contribution’ to the alleged genocide of the Khmer Krom:

- Mr YIM Tith’s alleged ‘pejorative statements,’⁷⁴¹
- his alleged ‘strong hatred towards the Vietnamese,’⁷⁴²
- his alleged *warning* (not threat) to anyone who ‘ran off to join the Yuon,’⁷⁴³
- his alleged *presence* at meetings where Vietnamese affiliates were described as enemies,⁷⁴⁴
- the allegation that he made unclear statements about ‘Yuon Khmer [...] internal security issues,’⁷⁴⁵
- the allegation that Mr YIM Tith was ‘always talking about the Vietnamese,’⁷⁴⁶
- the statements attributed to Mr YIM Tith about the need to fight ‘the Yuon’ who posed a threat and the need to work with the CPK rather than joining ‘the Yuon.’⁷⁴⁷

247. These ‘statements’ lack content, context, and precise dates. The ICIJ failed to explain how the alleged speeches, warnings, and informal comments containing anti-Vietnamese rhetoric constitute a ‘significant contribution’ to the genocidal elimination of the Khmer Krom, particularly in the context where Mr YIM Tith was allegedly serving under a regime at war with Vietnam.

248. The ICIJ failed to explain which of his findings concern Mr YIM Tith’s contribution and which relate to the CPK’s policies. The ICIJ referred collectively to ‘the CPK, Yim Tith, and those he collaborated with,’⁷⁴⁸ as well as to ‘Yim Tith and those he cooperated with on all levels of the CPK hierarchy.’⁷⁴⁹ The ICIJ found that ‘the CPK’s policy towards the Khmer Krom was largely rooted in animosity towards the Vietnamese over previous “acts of aggression and annexation” and a continual fear that Vietnam held territorial ambitions over DK,’ yet he failed to distinguish Mr YIM Tith’s contribution from CPK policy.⁷⁵⁰ These

⁷³⁹ *Supra*, paras 63 to 79.

⁷⁴⁰ ICIJ’s Closing Order, paras 387 to 386.

⁷⁴¹ *Ibid.*, para. 388.

⁷⁴² *Ibid.*, para. 387.

⁷⁴³ *Ibid.*, para. 388.

⁷⁴⁴ *Ibid.*, para. 389.

⁷⁴⁵ *Ibid.*, para. 390.

⁷⁴⁶ *Ibid.*, para. 393.

⁷⁴⁷ *Ibid.*, paras 394 to 397.

⁷⁴⁸ *Ibid.* para. 1011.

⁷⁴⁹ *Ibid.*, para. 1040.

⁷⁵⁰ *Ibid.*, para. 197.

findings are not about Mr YIM Tith's individual contribution and 'JCE is not an open-ended concept that permits convictions based on guilt by association.'⁷⁵¹

249. The ICIJ erroneously reasoned that Mr YIM Tith made a significant contribution since 'these statements [...] coincided temporally and geographically with the mass killing of at least hundreds of Khmer Krom.'⁷⁵² The ICIJ failed to explain how the 'coinciding' of his alleged words with these killings proves that Mr YIM Tith significantly contributed to genocide. Moreover, the ICIJ did not explain which statements attributed to Mr YIM Tith were temporally and geographically proximate or how they prompted the mass killing.⁷⁵³ The ICIJ's finding must be treated with caution in view of the ICIJ's systematic failure to make specific findings about the times of Mr YIM Tith's alleged *de jure* positions and factual authority,⁷⁵⁴ his failure to constrain the indictment to the temporal bounds of the investigation,⁷⁵⁵ and his lack of specificity about Mr YIM Tith responsibilities at different stages during the periods for which he was indicted in the Southwest Zone from approximately September 1975⁷⁵⁶ until 6 January 1979⁷⁵⁷ and in the Northwest Zone from 'at least early 1977' until 6 January 1979.⁷⁵⁸

250. No reasonable trier of fact would have reached, based on this evidence, the finding that Mr YIM Tith significantly contributed to the CPK policy on eliminating the Khmer Krom no later than when he took office in various functions on the Sector 13 Committee by some point in 1976 until the end of the regime.⁷⁵⁹ The ICIJ's finding was so unfair and unreasonable as to constitute an abuse of his discretion.

iii. The ICIJ erred in finding that Mr YIM Tith contributed to JCE C

251. The ICIJ found that Mr YIM Tith made a significant contribution to the common objective of JCE C of furthering a system of ill treatment at Wat Pratheat Security Centre from October 1975 until the end of the regime as an element of JCE1 or JCE2 liability.⁷⁶⁰ The ICIJ found that Mr YIM Tith 'regularly visited' Wat Pratheat Security Centre, ordered crimes at Wat Pratheat, and directly participated in crimes at Wat Pratheat,⁷⁶¹ specifically that

⁷⁵¹ Brdanin Appeals Chamber, para. 428.

⁷⁵² ICIJ's Closing Order, para. 391.

⁷⁵³ *Ibid.*, paras 386 to 391.

⁷⁵⁴ *Supra*, paras 124 to 215, 217.

⁷⁵⁵ *Supra*, paras 95 to 103.

⁷⁵⁶ ICIJ's Closing Order, paras 1016(iii) and 1017(iii).

⁷⁵⁷ *Ibid.*, paras 1016(ii) and (iii) and 1018.

⁷⁵⁸ *Ibid.*, paras 1016(i), 1017(i), 1020.

⁷⁵⁹ *Ibid.*, paras 1016(ii), 1017(ii), 1018, 1022.

⁷⁶⁰ *Ibid.*, paras 1016(iii), 1017(iii), 1018.

⁷⁶¹ *Ibid.*, paras 433 to 469.

‘[d]uring those visits, he questioned prisoners, identified prisoners as enemies, and ordered, passed on the order to, or at the least acquiesced to the interrogation and killing of prisoners.’⁷⁶² These findings are erroneous.

(a) The ICIJ erred in finding that Mr YIM Tith regularly visited Wat Pratheath

252. The ICIJ found that Mr YIM Tith ‘regularly’ visited Wat Pratheath Security Centre.⁷⁶³ The ICIJ’s faulty logic was that since ‘[t]he Kirivong District Committee directly oversaw the Wat Pratheath Security Centre’ it followed that Mr YIM Tith regularly visited the site.⁷⁶⁴ The ICIJ thus wrongly deduced Mr YIM Tith’s contribution to JCE C from his alleged membership of the District Committee.⁷⁶⁵

253. The ICIJ failed to take into consideration the totality of the evidence of the witnesses DOK Chann, YOU Phnom, TUN Soun, ORK Chan and HOR Yan.⁷⁶⁶

- DOK Chann was at Wat Pratheath from 1973 to approximately June 1975⁷⁶⁷ and did not return to Wat Pratheath, stating that although his name was still listed as a staff member from around June 1975 to mid-1977 he was no longer in Kirivong District during this time.⁷⁶⁸ After leaving Kirivong District in June 1975 he was in Takeo Town until around mid-1977.⁷⁶⁹ He returned to Kirivong District in mid-1977 to work in a production unit, at which time he did not see any district leaders coming to check Wat Pratheath.⁷⁷⁰ The ICIJ relied on DOK Chann’s temporally irrelevant evidence in finding that Mr YIM Tith visited Wat Pratheath and failed to take into consideration his contradictory testimony.⁷⁷¹
- HOR Yan gave contradictory evidence about the number of times he saw ‘Teut’ at Wat Pratheath.⁷⁷² The reliability of his apparent sighting(s) of ‘Teut’ is lowered further by his inability to identify Mr YIM Tith accurately when shown a photograph, mistaking Mr

⁷⁶² *Ibid.*, para. 463.

⁷⁶³ *Ibid.*, para. 439. The ICIJ found that Mr YIM Tith visited three times in a period of more than a year. ICIJ’s Closing Order, para. 463.

⁷⁶⁴ *Ibid.*, paras 439, 459, 463 to 469.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ ICIJ’s Closing Order, paras 439, 459, 463 to 469.

⁷⁶⁷ D219/86, DOK Chann, WRI, A3, EN 01056873. (‘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.’) See also: DOK Chann’s statement that ‘all that probably began in 1974.’ D219/86 DOK Chann, A7, EN 01056874.

⁷⁶⁸ D219/86, DOK Chann, WRI, A2, EN 01056872-3.

⁷⁶⁹ D219/86, DOK Chann, A2, WRI, EN 01056872.

⁷⁷⁰ D219/86, DOK Chann, WRI, A11-12, EN 01056875.

⁷⁷¹ ICIJ’s Closing Order, paras 463, 465.

⁷⁷² D1.3.11.18, HOR Yan, WRI, EN 00217607. D105/6, HOR Yan, WRI, A22, EN 00841978. D219/55, HOR Yan, WRI, A10, EN 01053831-32. D219/55, HOR Yan, WRI, A20, EN 01053833-4.

- YIM Tith for Ta Nam.⁷⁷³ The photograph was not identified by reference number, nor formally verified as identifying Mr YIM Tith.⁷⁷⁴ The ICIJ failed to provide a reason for relying on HOR Yan's statement when it was unclear how, as a prisoner, he could have known who Mr YIM Tith was or what his role was in the operation of Wat Pratheath.
- YOU Phnom did not dare go near the Security Office,⁷⁷⁵ stating that Wat Pratheath was relocated in 1975 before being combined with another 'underground prison' in 1976 and completely ceased operation in 1977, which calls into question when YOU Phnom actually visited in 1976 and 1977, if at all.⁷⁷⁶ ORK Chan said that the Khmer Rouge stopped using Voat Preah Theat Pagoda as the detention office in 1977.⁷⁷⁷
 - TUN Soun was at Wat Pratheath for only a short period of four days 'in late 1975 or early 1976.'⁷⁷⁸ He was not able to comment on Mr YIM Tith's alleged visits to Wat Pratheath on repeated occasions during the Khmer Rouge era. The ICIJ erroneously extrapolated assertions about Mr YIM Tith's 'regular visits' to Wat Pratheath based on a four-day period.⁷⁷⁹
 - ORK Chan's account lacks clear dates and refers in general terms to the period '1975-1979.'⁷⁸⁰ ORK Chan was confused about the occasions he thought he saw 'Ta Tith' at Wat Pratheath. He thought he saw 'Ta Tith' on a single occasion when detained at Wat Pratheath in April 1977.⁷⁸¹ He said that he never saw 'Ta Tith' after 1976,⁷⁸² while also saying that 'Ta Tith' came to the prison every week,⁷⁸³ or alternatively, that he saw 'Ta Tith' twice during three months of detention.⁷⁸⁴
 - ORK Chan was shackled inside Wat Pratheath in a room with no windows and it was unclear how he could have known that 'Ta Tith' visited the prison.⁷⁸⁵ ORK Chan said he

⁷⁷³ 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 [...].')

⁷⁷⁴ *Ibid.*

⁷⁷⁵ D219/109, YOU Phnom, WRI, A9, EN 01081739. ICIJ's Closing Order, paras 463, 465.

⁷⁷⁶ D219/369, ORK Chan, WRI, A52, EN 01128258.

⁷⁷⁷ D118/156, ORK Chan, WRI, A20, EN 00980468.

⁷⁷⁸ D219/346, TUN Soun, WRI, A48-49, A60, EN 01116113-4.

⁷⁷⁹ ICIJ's Closing Order, paras 463, 465.

⁷⁸⁰ D219/369, ORK Chan, WRI, A3, EN 01128255.

⁷⁸¹ D219/369, ORK Chan, WRI, A80, EN 01128260.

⁷⁸² 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.')

⁷⁸³ D1.3.11.2, ORK Chan, ICP Interview, EN 00219254.

⁷⁸⁴ D118/156, ORK Chan, A75, WRI, EN 00980474.

⁷⁸⁵ 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.')

'did not know if Ta Tith often came here or not because I was still in a prison cell.'⁷⁸⁶ 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.⁷⁸⁷ He did not know when the prison was relocated from Wat Slaeng to Wat Pratheat Pagoda as the prisons were in different communes⁷⁸⁸ and did not know 'if they built an underground prison in Wat Slaeng.'⁷⁸⁹

- ORK Chan was unable to identify Mr YIM Tith when shown a photograph of someone he thought was KHIEU Samphan. This photograph was not, in any case, formally proven in evidence to be an accurate depiction of Mr YIM Tith.⁷⁹⁰ The ICIJ made the extraordinary finding that 'the significant time period between DK and the date of the photograph, and the fact that the witness knew Yim Tith during DK, the witness's failure to identify Yim Tith in the photograph does not materially affect the reliability of his evidence.'⁷⁹¹ Such evidentiary issues should have given the ICIJ reason to doubt the reliability of ORK Chan's recollection, not to seek to justify it.
- HOR Yan recalled that Mr YIM Tith visited Wat Pratheat 'likely no later than late 1977 or early 1978'⁷⁹² yet HOR Yan was at Wat Pratheat in 1973.⁷⁹³ He was asked to clarify the timing of his detention and replied: 'I was jailed in 1973 not in 1978; there might be confusion between 1973 and 1978.'⁷⁹⁴ HOR Yan subsequently clarified once more that the correct date of his eight-month imprisonment was in 1973.⁷⁹⁵
- HOR Yan referred generically to 'a district committee member' and the ICIJ failed to take into consideration the insufficiency of evidence that he was referring to Mr YIM Tith. The ICIJ again stated that 'the passage of time between the events in question and the date of the photograph explain the witness' failure to identify Yim Tith; his evidence therefore

⁷⁸⁶ D105/5, ORK Chan, WRI, A98, EN 00803451.

⁷⁸⁷ 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.')

⁷⁸⁸ 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.')

⁷⁸⁹ 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.'). ORK Chan also stated that, personally, he 'did not know much' about the Kirivong District Office. D118/156, ORK Chan, WRI, A57, EN 00980472.

⁷⁹⁰ D105/5, ORK Chan, WRI, A104, WRI, EN 00803451.

⁷⁹¹ ICIJ's Closing Order, para. 469.

⁷⁹² *Ibid.*, para. 469.

⁷⁹³ D118/155, HOR Yan, WRI, A10, EN 00978587.

⁷⁹⁴ *Ibid.* This is a reasonable mistake to make, especially given that in the Khmer language, the words for three ('bei') and eight ('bpram bei') can be easily misheard.

⁷⁹⁵ 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.')

retains sufficient reliability,⁷⁹⁶ yet this should have been reason to doubt HOR Yan's recollection, not to justify it.

254. No reasonable trier of fact would have reached, based on this evidence, the finding that Mr YIM Tith regularly visited Wat Pratheath Security Centre.⁷⁹⁷ The ICIJ's finding was so unfair and unreasonable as to constitute an abuse of his discretion.

(b) The ICIJ erred in finding that Mr YIM Tith directly participated in interrogations at Wat Pratheath

255. The ICIJ erred in finding that Mr YIM Tith directly participated in interrogations at Wat Pratheath on two occasions on unspecified dates based on a single statement of TUN Soun dated 14 December 2014.⁷⁹⁸

- The ICIJ failed to take into consideration TUN Soun's contradictory evidence and that TUN Soun did not mention Mr YIM Tith interrogating prisoners at Wat Pratheath in his previous interviews or communications with the ICP, the OCIJ, and at least two different NGO organisations.
- TUN Soun's interview with the ICP on 15 August 2008 does not mention Mr YIM Tith in connection with Wat Pratheath.⁷⁹⁹ He spent four months in Prison 204,⁸⁰⁰ but had no direct knowledge of Wat Pratheath,⁸⁰¹ saying it was a 'restricted area' and 'they were not allowed to approach the place'⁸⁰² and that entering Wat Pratheath was prohibited and to do so could lead to arrest.⁸⁰³
- TUN Soun's Civil Party application dated 29 July 2009 does not mention Mr YIM Tith. He stated that his knowledge of Wat Pratheath was derived from anonymous hearsay: 'The prisoners told me as I was eager to know, how they were kept in the prison.'⁸⁰⁴
- TUN Soun's interview with former ICIJ Blunk on 29 September 2010 does not mention Mr YIM Tith in connection with Wat Pratheath. He did not say that he was imprisoned there, even when providing further evidence about,⁸⁰⁵ and confirming his previous

⁷⁹⁶ ICIJ's Closing Order, para. 469.

⁷⁹⁷ *Ibid.*, para. 439. The ICIJ found that Mr YIM Tith visited three times in a period of more than a year. ICIJ's Closing Order, para. 463.

⁷⁹⁸ *Ibid.*, paras 463, 467, fns 1264-1266, citing D219/110, TUN Soun, WRI, A3, 4, 6, EN 01076896- 01076898.

⁷⁹⁹ D1.3.11.56, TUN Soun, ICP Interview.

⁸⁰⁰ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

⁸⁰¹ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

⁸⁰² D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

⁸⁰³ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

⁸⁰⁴ D5/122, TUN Soun, Civil Party Application, EN 00426758.

⁸⁰⁵ D3/8, TUN Soun, WRI, A3, EN 00622285. TUN Soun referred to the size of the restricted area at Wat Pratheath being about 100 metres by 100 metres.

- evidence regarding, Wat Pratheath.⁸⁰⁶
- In TUN Soun's interview with former ICIJ Blunk on 6 May 2011,⁸⁰⁷ in the face of pressing questioning, he insisted that he 'didn't know anything about [Wat Pratheath].'⁸⁰⁸ He then changed his evidence to say that he had been to Wat Pratheath 'to attend training' on unspecified dates. When asked about Mr YIM Tith, he gave no evidence about him questioning prisoners at Wat Pratheath: 'Q: Do you know anything else about Ta Tith? A: No, I don't.'⁸⁰⁹
 - In TUN Soun's OCIJ interview on 20 February 2013, he said he was re-educated at Wat Pratheath for two to three days.⁸¹⁰ He was not allowed to enter the detention site for prisoners⁸¹¹ and 'only Ta Tit, or Ta Tom or Yeay Bau, came to inspect the prisoners.'⁸¹² The questioning did not establish if TUN Soun knew this from his direct experience during the Democratic Kampuchea period or arrived at this view subsequent to 1979, following his interactions with investigators, public discussions, and NGO organisations, or whether, since his last interview on 6 May 2011, he had been influenced by the ICP's Third Introductory Submission that was publicly disclosed - illegally - and became widely accessible by 26 May 2011.⁸¹³
 - TUN Soun was informally questioned by OCIJ investigators on 3 December 2014 and 'was de-briefed and [found to have] useful information to offer.'⁸¹⁴

256. TUN Soun's OCIJ statement on 14 December 2014 stated for the first time that 'Ta Tith' interrogated prisoners at Wat Pratheath on two occasions in late 1976.⁸¹⁵ TUN Soun subsequently gave an account of 'Ta Tith' and the other 'Chiefs' of Kirivong District, Ta Tom

⁸⁰⁶ D3/8, TUN Soun, WRI, A2, EN 00622284.

⁸⁰⁷ D13, TUN Soun, WRI.

⁸⁰⁸ D13, TUN Soun, WRI, EN 00698809. (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.)

⁸⁰⁹ D13, TUN Soun, WRI, EN 00698809.

⁸¹⁰ D118/22, TUN Soun, WRI, A12, EN 00976606.

⁸¹¹ 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.)

⁸¹² D118/22, TUN Soun, WRI, A16-18, EN 00976607.

⁸¹³ 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. See D72/1.1.11, Written Record of Investigative Action ('WRIA'), 2 September 2011.

⁸¹⁴ D219/122, WRIA, EN 01047275.

⁸¹⁵ D219/110, TUN Soun, WRI, A1, 3-4, 8, EN 01076896-8.

and Yeay Bo, interrogating prisoners at Wat Pratheat.⁸¹⁶ TUN Soun was not permitted to enter the prisoner detention area of Wat Pratheat (he was detained in the monastery or a wood sawing warehouse and he could enter only the pagoda compound⁸¹⁷), yet he 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?.’⁸¹⁸ In addition, TUN Soun could not be sure whether he saw ‘Ta Tith’ speaking to prisoners or prison staff.⁸¹⁹

257. The dates of TUN Soun’s alleged imprisonment are unclear. He was arrested in late 1976 and sent to Prison 204.⁸²⁰ As set out above, he said in later interviews that he was sent for re-education at Wat Pratheat for two-to-three days⁸²¹ or for four days ‘between 1975 and 1979’⁸²² or possibly ‘in late 1975 or early 1976’⁸²³ during which time he claimed to have seen ‘Ta Tith’ twice, for about 10 minutes each time.⁸²⁴ He said that Aun was the Wat Pratheat chief at the time.⁸²⁵ The ICIJ failed to recognize that this ‘inconsistency regarding time’ means that TUN Soun’s evidence cannot be relied on.⁸²⁶

258. No reasonable trier of fact would have reached, based on this evidence, the finding that Mr YIM Tith was directly involved in questioning prisoners.⁸²⁷ The ICIJ’s finding was so unfair and unreasonable as to constitute an abuse of his discretion.

(c) The ICIJ erred in finding that Mr YIM Tith directly participated in killings at Wat Pratheat

259. The ICIJ found that Mr YIM Tith gave an order to ‘cut open’ prisoners at Wat Pratheat.⁸²⁸ This is erroneous.

260. The ICIJ based his finding solely on the evidence of HOR Yan, who even by the ICIJ’s own analysis, gave evidence full of inconsistencies that should have caused the ICIJ to reject his testimony entirely.⁸²⁹ The ICIJ failed to take into consideration that HOR Yan was

⁸¹⁶ D219/346, TUN Soun, WRI, A26, 47-9, 54-56, 62, EN 01116111, 13-4.

⁸¹⁷ D219/346, TUN Soun, WRI, A10, EN 01116110. *See also*: D118/22, TUN Soun, WRI, A15, EN 00976607. D219/346, TUN Soun, WRI, A53, EN 01116113.

⁸¹⁸ D219/346, TUN Soun, WRI, A56, EN 01116113.

⁸¹⁹ D219/346, TUN Soun, WRI, A46, 52, EN 01116113.

⁸²⁰ D5/122, TUN Soun, WRI, EN 00426757.

⁸²¹ D118/22, TUN Soun, WRI, A12, EN 00976606.

⁸²² D219/346, TUN Soun, WRI, A3-12, 48, EN 01116109-10, 13.

⁸²³ D219/346, TUN Soun, WRI, A60, EN 01116113-4.

⁸²⁴ D219/346, TUN Soun, WRI, A50, EN 01116113.

⁸²⁵ D1.3.11.56, TUN Soun, ICP Interview, EN 00219281.

⁸²⁶ ICIJ’s Closing Order, para. 467.

⁸²⁷ *Ibid.*, para. 463.

⁸²⁸ *Ibid.*, paras 456 to 457.

⁸²⁹ *Ibid.*

in prison in 1973⁸³⁰ and failed to give appropriate weight to his evidence that he ‘did not see what happened’⁸³¹ and to the contradictions in his evidence about this alleged incident.⁸³² He did not know the identity of Khmer Rouge cadre, the orders they gave, or the functioning of the security centre and said that he ‘did not know’ what role ‘Tit’ had in Kirivong District.⁸³³ The source of his evidence that ‘Teut, Tom, Bau (f), and Nam were above the Voat Pratheat’ is unclear and it does not correspond to the time he was in prison in 1973.⁸³⁴

261. The ICIJ’s finding about the order to ‘cut open’ prisoners was based on his analysis of DOK Chann’s evidence that Mr YIM Tith attended district level meetings with the Wat Pratheat chief Ta Pring.⁸³⁵ The ICIJ failed to take into consideration that DOK Chann did not give evidence about the role of Mr YIM Tith, the content of Ta Pring’s reports, their timing and frequency, whether the reports were in written format, or the matters on which Ta Pring was required to report to the Kirivong District Committee.⁸³⁶ There is no detailed evidence as to how DOK Chann could have known of the specific reporting structure of Wat Pratheat in the context of the secretive DK regime.

262. The ICIJ’s finding about the alleged order to ‘cut open’ prisoners was also based on his findings on the chain-of-command in Kirivong District above Wat Pratheat. The ICIJ found that the ‘prison chief reported the answers recorded during the interrogation to the District Committee, and the reports formed the basis for any decisions on release.’⁸³⁷ The basis of the finding was a few lines of HOK Chan’s testimony and the date of HOR Yan’s alleged imprisonment is unclear.⁸³⁸ The ICIJ, faced with a lack of evidence, reasoned that ‘at a time when Yim Tith visited the security centre, it is likely that HOR Yan was at Wat

⁸³⁰ *Supra*, para. 253. D118/155, HOR Yan, WRI, A10, EN 00978587.

⁸³¹ D219/55, HOR Yan, WRI, EN 01053830-01053831, A7-A11.

⁸³² 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 Theat 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 Theat Pagoda Prison?” You answered, “I saw him twice. Ta Tith came to Wat Preah Theat 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 gallbladders from that prison only once. I also saw him again in Kbal Damrey Village, which was located near Wat Preah Theat Pagoda.’)

⁸³³ 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 [...]’)

⁸³⁴ D1.3.11.18, HOR Yan, SOAS Interview, EN 00217606-7.

⁸³⁵ ICIJ’s Closing Order, paras 439, 459, 463 to 469.

⁸³⁶ D219/86, DOK Chann, WRI, A7, EN 01056873-4.

⁸³⁷ ICIJ’s Closing Order, para. 451.

⁸³⁸ D219/369, Written Record of Interview of Witness Hok Chan, 19 June 2015, ERN 01128260, A94-A97.

Pratheat in 1977 to 1978.⁸³⁹ The ICIJ failed to take into consideration that his finding about Mr YIM Tith's alleged visits was itself based on a misrepresentation of HOR Yan's evidence, rendering this a circular and self-defeating rationale for the erroneous finding that Mr YIM Tith made 'regular visits.'⁸⁴⁰

263. The ICIJ failed to take into consideration that ORK Chan never said that Mr YIM Tith gave orders to the prison chief and said the District level could not issue an order to kill prisoners.⁸⁴¹ To the contrary, he stated that 'Ta Tith' did not give orders.⁸⁴² He stated that it was not 'Ta Tith' who was in a more senior position, but Ta Tom.⁸⁴³ In addition, he said 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.⁸⁴⁴

264. No reasonable trier of fact would have reached, based on the evidence of HOR Yan, the finding that Mr YIM Tith gave orders to 'cut open' prisoners at Wat Pratheat⁸⁴⁵ and ordered, passed on the order to, or at the least acquiesced to the interrogation and killing of prisoners.⁸⁴⁶ The ICIJ's findings were so unfair and unreasonable as to constitute an abuse of his discretion.

D. CONCLUSION

265. The ICIJ's assessment of personal jurisdiction is, for the reasons set out above, unsafe due to manifold errors of law and fact: (i) the ICIJ erroneously considered that a family relationship to a superior Khmer Rouge cadre, Ta Mok, meant that Mr YIM Tith was 'most responsible'; (ii) the ICIJ erred repeatedly in his findings about Mr YIM Tith's alleged official positions or factual authority in the Southwest and Northwest Zones and his alleged membership of the JCEs; and (iii) the ICIJ erred in finding that Mr YIM Tith made significant contributions to the alleged JCEs A, B and C. On the basis of the available Case File evidence, no reasonable trier of fact could have reached the factual finding that Mr YIM Tith was 'most responsible' and thus within the ECCC's personal jurisdiction.

⁸³⁹ ICIJ's Closing Order, para. 455.

⁸⁴⁰ HOR Yan was imprisoned in 1973. *Supra*, para. 253. D118/155, HOR Yan, WRI, A10, EN 00978587.

⁸⁴¹ D118/156, ORK Chan, WRI, A59, EN 00980472.

⁸⁴² 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.')

⁸⁴³ 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.

⁸⁴⁴ 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.')

⁸⁴⁵ ICIJ's Closing Order, paras 456 to 457.

⁸⁴⁶ *Ibid.*, paras 463.

CONCLUSION

266. For the reasons set out above, the ICIJ grossly erred in law and fact by finding Mr YIM Tith ‘most responsible’ for the crimes of the DK era. The errors are individually fatal and cumulatively cast serious doubts on the entire conduct of the judicial investigation. First, the ICIJ should never have reached the procedural stage of issuing an indictment, since the circumstances of Case 004 had already precluded any possibility of a fair trial. Second, when the ICIJ nonetheless indicted Mr YIM Tith, he did so in a document that failed to meet even the most basic formal requirements for a valid Indictment under Rule 67(2), and the charges in that document, thirdly, did not respect the factual scope of the investigation. Fourth, the ICIJ erroneously based his finding of personal jurisdiction on JCE liability, inexplicably treating Mr YIM Tith differently to other ECCC Charged Persons. Lastly, the ICIJ’s Closing Order is, in any event, replete with factual and legal errors throughout the findings that underlie his conclusion that Mr YIM Tith was ‘most responsible,’ systematically failing to take into consideration exculpatory evidence and testimony that contradicts the witness statements he relied on, and systematically failing to apply the principle of *in dubio pro reo* where the evidence was unclear or raised doubts. The ICIJ did not provide any reason for ignoring large swathes of important Case File evidence, including the relevant witnesses who had never heard of Mr YIM Tith, nor did he attempt to justify his findings with reference to the applicable ‘probability’ standard.

267. On the basis of the available Case File evidence, no reasonable trier of fact could have reached the ICIJ’s conclusion that Mr YIM Tith was ‘most responsible’ for the crimes of the DK era. Indeed, this finding is so unreasonable and so unfair as to constitute an abuse of the ICIJ’s discretion that requires the PTC to dismiss the Indictment in order to avoid a miscarriage of justice.

268. In relation to the remedies requested in the *Appeal of the Issuance of Two Closing Orders*, should the PTC deny the request for dismissal of both Closing Orders, the present request for dismissal of the Indictment must, in the presence of the ICIJ’s Closing Order, result in the immediate dismissal of the case against Mr YIM Tith.


REMEDY

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 Pre-Trial Chamber:


- (1) **Find** that this Appeal is admissible, *and*

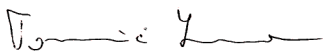
- (2) **Find** that the ICIJ erred in law and fact in Indicting Mr YIM Tith and dismiss the Indictment with full prejudice, *and*
- (3) **Dismiss** the case against Mr YIM Tith.

Respectfully submitted,



SO Mosseny





Suzana TOMANOVIĆ

Co-Lawyers for Mr YIM Tith

Signed in Phnom Penh, Kingdom of Cambodia on this 2nd day of December 2019.