



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia  
Chambres extraordinaires au sein des tribunaux cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

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

**អង្គបុរេជំនុំជម្រះ**

Pre-Trial Chamber  
Chambre Preliminaire

**D308/3/1/20**

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*

Case File No. 004/1/07-09-2009-ECCC/OCIJ (PTC50)

**THE PRE-TRIAL CHAMBER**

**Before:** Judge PRAK Kimsan, President  
Judge Olivier BEAUVALLET  
Judge NEY Thol  
Judge Kang Jin BAIK  
Judge HUOT Vuthy

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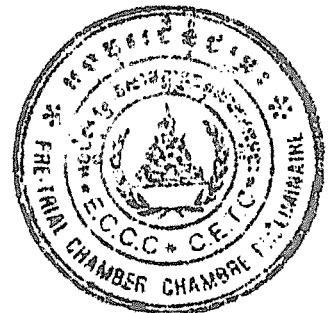
**CONSIDERATIONS ON THE INTERNATIONAL CO-PROSECUTOR'S  
APPEAL OF CLOSING ORDER (REASONS)**

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**TABLE OF CONTENTS**

<b>I.</b>	<b>PROCEDURAL HISTORY .....</b>	<b>1</b>
<b>II.</b>	<b>STANDARD OF REVIEW .....</b>	<b>6</b>
<b>III.</b>	<b>ADMISSIBILITY.....</b>	<b>8</b>
<b>IV.</b>	<b>PRELIMINARY ISSUES.....</b>	<b>9</b>
<b>A.</b>	<b>Reasonable Delay in Issuing the Closing Order (Reasons) .....</b>	<b>9</b>
<b>B.</b>	<b>Nature of the Closing Order (Reasons).....</b>	<b>11</b>
	1. Issuance of a Two-Fold Closing Order .....	11
	2. Severance and Nature of the Closing Order .....	12
<b>C.</b>	<b>Evidentiary Considerations.....</b>	<b>14</b>
	1. Principle of Freedom of Evidence.....	14
	a. <i>Admissibility of Torture-Tainted Evidence</i> .....	15
	b. <i>Probative Value of the 1997 and 1998 DC-Cam Reports</i> .....	16
	c. <i>Probative Value of Statements Other Than Written Records of Interview</i> .....	16
	d. <i>Probative Value of IM Chaem's Public Statements</i> .....	18
	2. Standard of Evidence.....	19
<b>D.</b>	<b>Position of the ECCC Within the Cambodian Legal System .....</b>	<b>20</b>
	1. Submissions.....	20
	2. Discussion .....	23
	a. <i>Cases of which the ECCC is Seised</i> .....	23
	b. <i>Cases of which the ECCC is not Seised</i> .....	24
	i. Inherent Jurisdiction.....	24
	ii. ECCC's Applicable Law.....	24
	3. Conclusion.....	26
<b>V.</b>	<b>MERITS.....</b>	<b>26</b>
<b>VI.</b>	<b>DISPOSITION .....</b>	<b>27</b>
<b>VII.</b>	<b>OPINION OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY .....</b>	<b>28</b>
<b>VIII.</b>	<b>OPINION OF JUDGES BAIK AND BEAUVALLET.....</b>	<b>31</b>
<b>A.</b>	<b>Ground 1: Alleged Failure to Consider Allegations Not Formally Charged for Indictment.....</b>	<b>31</b>
	1. Submissions.....	31
	2. Discussion .....	35
	a. <i>Notification of Charges and Scope of the Indictment</i> .....	35
	b. <i>The Co-Prosecutors' Right to Intervene in the Proceedings</i> .....	38
	c. <i>The Co-Investigating Judges' Duty to Issue a Decision on All Facts</i> .....	39



<b>B. Ground 2: Alleged Failure to Address All Facts in the Closing Order (Reasons) .....</b>	<b>39</b>
1. Submissions.....	39
2. Discussion .....	43
<i>a. Ground 2(1): Purge of the Northwest Zone .....</i>	<i>45</i>
<i>b. Ground 2(2): Forced Marriage.....</i>	<i>51</i>
<i>c. Ground 2(3): Crimes Against the Vietnamese.....</i>	<i>52</i>
<i>d. Ground 2(4): Crimes Against the Khmer Krom.....</i>	<i>59</i>
<i>e. Ground 2(5): Persecution Against Various Groups and Other Crimes.....</i>	<i>62</i>
i. Persecution Against the Northwest Zone Cadres.....	62
ii. Persecution Against Former Khmer Republic Officials .....	63
iii. Persecution Against the Cham .....	66
iv. Persecution Against the Chinese, Laotians and Khmer Leu Minorities .....	67
v. Torture at Phnom Trayoung Security Centre.....	68
vi. Torture at Wat Chamkar Khnol Security Centre and Execution Site .....	71
vii. Inhumane Living Conditions at Phum Chakrey Security Centre.....	75
viii. Imprisonment and Enforced Disappearances at Wat Ang Srei Mealy.....	77
<i>f. Further Considerations .....</i>	<i>79</i>
i. Trapeang Thma Dam Worksite.....	80
ii. Wat Preah Net Preah and Related Sites .....	86
iii. Phum Chakrey Security Centre and Prey Taruth Execution Site.....	90
iv. Wat Chamkar Khnol Security Centre and Execution Site .....	95
<b>C. Ground 3: Alleged Errors in Relation to the Crime of Extermination .....</b>	<b>98</b>
1. Submissions.....	98
2. Discussion .....	100
<b>D. Ground 4: Alleged Errors in Relation to the Crime of Enforced Disappearances .....</b>	<b>104</b>
1. Submissions.....	104
2. Discussion .....	107
<b>E. Grounds 5 and 6: Alleged Errors in Relation to Functions in the Southwest Zone.....</b>	<b>112</b>
1. Submissions.....	112
2. Discussion .....	115
<i>a. Reliance on IM Chaem's Declarations Given Outside of the Judicial Process .....</i>	<i>115</i>
<i>b. Personal Background of IM Chaem before 1975.....</i>	<i>116</i>
<i>c. Functions as Head of the Sector 13 Women's Association .....</i>	<i>118</i>
<i>d. Functions as Koh Andet District Secretary.....</i>	<i>120</i>
<i>e. Functions as Sector 13 Committee Member.....</i>	<i>124</i>
3. Conclusion.....	128
<b>F. Conclusion on Personal Jurisdiction .....</b>	<b>128</b>
1. Summary of Findings .....	129
2. Assessment of the Gravity of Alleged or Charged Crimes .....	130
3. Assessment of IM Chaem's Role and Responsibility .....	132
4. Conclusion.....	135



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the “International Co-Prosecutor’s Appeal of Closing Order (Reasons)”, filed on 9 August 2017 (“Appeal”).<sup>1</sup>

## I. PROCEDURAL HISTORY

1. On 20 November 2008, the International Co-Prosecutor brought a disagreement before the Pre-Trial Chamber, pursuant to Internal Rule 71(2), reporting that the National Co-Prosecutor disagreed with prosecuting new crimes identified in additional submissions.<sup>2</sup> On 18 August 2009, the Pre-Trial Chamber issued considerations on this disagreement.<sup>3</sup>
2. On 7 September 2009, the Acting International Co-Prosecutor filed the Third Introductory Submission, requesting the Co-Investigating Judges to open a judicial investigation against IM Chaem, among others, in relation to a number of allegations of crimes against humanity and violations of the 1956 Penal Code (“Third Introductory Submission”).<sup>4</sup> Further allegations were submitted in five supplementary submissions filed on 15 June 2011,<sup>5</sup> 18 July 2011 (“Supplementary Submission on Sector 1”),<sup>6</sup> 5 August 2011,<sup>7</sup> 24 April 2014 (“Supplementary Submission on Forced Marriage and Sexual Violence”)<sup>8</sup> and 8 April 2016.<sup>9</sup>
3. On 24 February 2012, the Reserve International Co-Investigating Judge notified IM Chaem that she was a suspect in Case 004 and informed her of her right to legal

<sup>1</sup> Case 004/1/07-09-2009-ECCC/OCIJ (“Case 004/1”), International Co-Prosecutor’s Appeal of Closing Order (Reasons), dated 9 August 2017 and notified on 10 August 2017, D308/3/1/1 (“Appeal”).

<sup>2</sup> Disagreement 001/18-11-2008-ECCC/PTC, International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement Pursuant to Rule 71(2), 20 November 2008, D1.

<sup>3</sup> Disagreement 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3.

<sup>4</sup> Case 004/20-11-2008-ECCC/OCIJ, Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1 (“Third Introductory Submission (D1)”).

<sup>5</sup> Case 004/07-09-2009-ECCC/OCIJ (“Case 004”), Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 15 June 2011, D27. *See also* Case 004, Decision on Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 30 June 2011, D27/3.

<sup>6</sup> Case 004, Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65 (“Supplementary Submission on Sector 1 (D65)”).

<sup>7</sup> Case 004, Response to Forwarding Order and Supplementary Submission Regarding Wat Ta Meak, 5 August 2011, D254/1.

<sup>8</sup> Case 004, Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191 (“Supplementary Submission on Forced Marriage and Sexual Violence (D191)”).

<sup>9</sup> Case 004, Response to Forwarding Order dated 5 November 2015 and Supplementary Submission Regarding the Scope of the Investigation into Forced Marriages in Sectors 1 and 4, dated 20 November 2015 and filed on 8 April 2016, D272/1 (“Supplementary Submission on Scope of Investigation (D272/1)”).



representation of her choice and to access to the Case File.<sup>10</sup>

4. Confidential disagreements between the Co-Investigating Judges were registered on 22 February 2013, 5 April 2013 and 20 May 2014.

5. On 29 July 2014, the International Co-Investigating Judge issued a summons for an initial appearance at the ECCC scheduled for 8 August 2014,<sup>11</sup> which the Co-Lawyers for IM Chaem (“Co-Lawyers”) challenged before the Co-Investigating Judges<sup>12</sup> and the Pre-Trial Chamber.<sup>13</sup> On 8 August 2014, the Pre-Trial Chamber dismissed a request to stay the summons.<sup>14</sup> On 14 August 2014, following IM Chaem’s failure to comply with the summons,<sup>15</sup> the International Co-Investigating Judge issued an arrest warrant,<sup>16</sup> which remained unexecuted and was finally rescinded in February 2016.<sup>17</sup>

6. On 3 March 2015, the International Co-Investigating Judge decided to charge IM Chaem *in absentia* (“Decision to Charge *In Absentia*”)<sup>18</sup> and detailed the charges in an annex to the decision (“Notification of Charges”).<sup>19</sup> The Co-Lawyers appealed the Decision to Charge *In Absentia* on 2 April 2015<sup>20</sup> and, on 2 March 2016, the Pre-Trial Chamber issued its

<sup>10</sup> Case 004, Notification of Suspect’s Rights [Rule 21(1)(d)], dated 24 February 2012 and filed on 23 March 2012, D108.

<sup>11</sup> Case 004, Summons to Initial Appearance, dated 29 July 2014 and filed on 8 August 2014, A150.

<sup>12</sup> See Case 004, Letter from the Co-Lawyers for IM Chaem to the Co-Investigating Judges in Response to the Summons, 1 August 2014, A151/2; Case 004, Letter of the International Co-Investigating Judge Concerning Modalities of Service of IM Chaem’s Summons, dated 1 August 2014 and filed on 4 August 2014, A122/6. See also Case 004, IM Chaem’s Urgent Application to Seize the Pre-Trial Chamber with a Request for Annulment of Her and Her Co-Lawyers’ Summonses Dated 31 July 2014, 6 August 2014, D207; Case 004, Order on IM Chaem’s Urgent Application to Seize the Pre-Trial Chamber with a Request for Annulment of Her and Her Co-Lawyers’ Summonses, dated 18 August 2014 and filed on 25 August 2014, D207/1.

<sup>13</sup> See Case 004, IM Chaem’s Urgent Request to Stay the Execution of Her Summonses to an Initial Appearance, dated 7 August 2014 and filed on 8 August 2014, A122/6.1/1.

<sup>14</sup> Case 004 (PTC09), Decision on IM Chaem’s Urgent Request to Stay the Execution of Her Summonses to an Initial Appearance, 8 August 2014, A122/6.1/2 (disposition) and 15 August 2014, A122/6.1/3 (reasons).

<sup>15</sup> See Case 004, International Co-Investigating Judge’s Note Concerning IM Chaem’s Initial Appearance, 14 August 2014, A150/2; Case 004, Email from the International Co-Lawyer to the International Co-Investigating Judge, dated 8 August 2014 and filed on 20 August 2014, A150/2.1.

<sup>16</sup> Case 004, Arrest Warrant, dated 14 August 2014 and filed on 12 February 2015, C1.

<sup>17</sup> See Case 004, Rescission of the Arrest Warrant Against IM Chaem, dated 5 February 2016 and filed on 8 February 2016, C1/1. See also Case 004, Decision to Charge IM Chaem *In Absentia*, 3 March 2015, D239 (“Decision to Charge *In Absentia* (D239)”), paras 23-30.

<sup>18</sup> See Decision to Charge *In Absentia* (D239). See also Case 004, Letter from the International Co-Investigating Judge to the Chairman of the Security Commission for the ECCC, dated 30 January 2015 and filed on 25 February 2015, D238.

<sup>19</sup> Case 004, Confidential Annex: Notification of Charges Against IM Chaem, 3 March 2015, D239.1 (“Notification of Charges (D239.1)”).

<sup>20</sup> Case 004, IM Chaem’s Appeal Against the International Co-Investigating Judge’s Decision to Charge Her *In Absentia*, 2 April 2015, D239/1/2.



considerations.<sup>21</sup>

7. On 24 July 2015, the Co-Investigating Judges invited the parties to file submissions on whether IM Chaem should be considered a “senior leader” or among “those most responsible” in the exercise of their discretion concerning personal jurisdiction.<sup>22</sup> Submissions were filed by the Co-Lawyers,<sup>23</sup> the International Co-Prosecutor<sup>24</sup> and the National Co-Prosecutor<sup>25</sup> on 21 September 2015.

8. On 18 December 2015, the Co-Investigating Judges notified the parties that they considered the investigation against IM Chaem to be concluded (“Internal Rule 66(1) Notification”).<sup>26</sup> On the same day, the Co-Investigating Judges notified the parties that they were inclined to dismiss the charges against IM Chaem, due to a lack of personal jurisdiction, and to sever the proceedings against her.<sup>27</sup>

9. On 5 February 2016, the Co-Investigating Judges ordered the severance of the proceedings against IM Chaem from Case 004 and the creation of a new Case File 004/1.<sup>28</sup>

10. On 27 July 2016, the Co-Investigating Judges forwarded the Case File to the Co-Prosecutors, pursuant to Internal Rule 66(4), inviting them to file their final submission within three months (“Forwarding Order”).<sup>29</sup>

11. On 27 October 2016, separate Internal Rule 66 final submissions were filed by the

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<sup>21</sup> Case 004 (PTC19), Considerations on IM Chaem’s Appeal Against the International Co-Investigating Judge’s Decision to Charge Her *In Absentia*, dated 1 March 2016 and filed on 2 March 2016, D239/1/8 (“Considerations on Decision to Charge *In Absentia* (D239/1/8)”).

<sup>22</sup> Case 004, Request for Submissions on Whether IM Chaem Should be Considered a “Senior Leader” or Among “Those Who Were Most Responsible”, dated 24 July 2015 and filed on 27 July 2015, D251.

<sup>23</sup> Case 004, IM Chaem’s Observations on Whether She Should be Considered a “Senior Leader” or Among “Those Who Were Most Responsible”, 21 September 2015, D251/4.

<sup>24</sup> Case 004, Submission on Whether IM Chaem Should be Considered a “Senior Leader” or Among “Those Who Were Most Responsible” for the Crimes Committed in Democratic Kampuchea, 21 September 2015, D251/5.

<sup>25</sup> Case 004, National Co-Prosecutor’s Observations Relating to CIJs’ Exercise of Discretion Over the Case of IM Chaem Regarding D251, 21 September 2015, D251/6.

<sup>26</sup> Case 004, Notice of Conclusion of Judicial Investigation Against IM Chaem, 18 December 2015, D285 (“Internal Rule 66(1) Notification (D285)”).

<sup>27</sup> Case 004, Notice of Intent to Dismiss the Charges Against IM Chaem and to Sever the Proceedings Against Her, 18 December 2015, D286 (“Notice of Intent to Dismiss and Sever Proceedings (D286)”).

<sup>28</sup> Case 004, Order for Severance of IM Chaem From Case 004, 5 February 2016, D286/7 (“Severance Order (D286/7)”).

<sup>29</sup> Case 004/1, Forwarding Order Pursuant to Internal Rule 66(4), 27 July 2016, D304 (“Forwarding Order (D304)”).



National Co-Prosecutor<sup>30</sup> and the International Co-Prosecutor (“Final Submission”).<sup>31</sup> IM Chaem filed a response to the International Co-Prosecutor’s Final Submission.<sup>32</sup>

12. On 22 February 2017, the Co-Investigating Judges rendered the disposition of the Closing Order (“Closing Order (Disposition)”)<sup>33</sup> in which they found that the ECCC has no personal jurisdiction over IM Chaem, dismissed the charges against her and informed the parties that reasons would be provided at a later date. On the same day, they dismissed all Civil Party applications.<sup>34</sup>

13. On 2 March 2017, the International Co-Prosecutor filed a request for leave to file any notice of appeal against the Closing Order (Disposition) after the delivery of full reasons,<sup>35</sup> which was granted by the Pre-Trial Chamber on 6 March 2017.<sup>36</sup>

14. On 10 July 2017, the Co-Investigating Judges delivered the Closing Order (Reasons) (“Closing Order (Reasons)”)<sup>37</sup>, providing the full reasons for their decision.<sup>37</sup>

15. On 20 July 2017, the International Co-Prosecutor filed a notice of appeal against the Closing Order (Reasons),<sup>38</sup> and, on 9 August 2017, filed his submissions on appeal.<sup>39</sup>

16. On 18 August 2017, the National Co-Lawyer for the Former Civil Party Applicants requested leave to file a response to the International Co-Prosecutor’s Appeal.<sup>40</sup> On

<sup>30</sup> Case 004/1, Final Submission Concerning IM Chaem Pursuant to Internal Rule 66, 27 October 2016, D304/1 (“National Co-Prosecutor’s Final Submission (D304/1)”).

<sup>31</sup> Case 004/1, International Co-Prosecutor’s Rule 66 Final Submission Against IM Chaem, 27 October 2016, D304/2 (“International Co-Prosecutor’s Final Submission (D304/2)”).

<sup>32</sup> Case 004/1, IM Chaem’s Response to the International Co-Prosecutor’s Rule 66 Final Submission Against Her, dated 28 November 2016, filed in English on 29 November 2016 and in Khmer on 13 January 2017, D304/6. *See also* Case 004/1, Decision on IM Chaem’s Request to File Her Response to the International Co-Prosecutor’s Final Submissions in English First, 10 November 2016, D304/5/1.

<sup>33</sup> Case 004/1, Closing Order (Disposition), 22 February 2017, D308 (“Closing Order (Disposition)”).

<sup>34</sup> Case 004/1, Order on Admissibility of Civil Party Applications, 22 February 2017, D307.

<sup>35</sup> Case 004/1, International Co-Prosecutor’s Request to File Notice of Appeal Against Case 004/1 Closing Order After the Co-Investigating Judges’ Delivery of Full Reasons, 2 March 2017, D308/1.

<sup>36</sup> Case 004/1, Order on International Co-Prosecutor’s Request to File Notice of Appeal Against Case 004/1 Closing Order After the Co-Investigating Judges’ Delivery of Full Reasons, 6 March 2017, D308/2 (“Order on Request to File Appeal After Delivery of Full Reasons (D308/2)”).

<sup>37</sup> Case 004/1, Closing Order (Reasons), 10 July 2017, D308/3 (“Closing Order (Reasons)”).

<sup>38</sup> Case 004/1, International Co-Prosecutor’s Notice of Appeal Against Closing Order (Reasons), 20 July 2017, D308/3/1.

<sup>39</sup> *See supra* footnote 1.

<sup>40</sup> Case 004/1, National Civil Party Co-Lawyer’s Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor’s Appeal of Closing Order (Reasons) in English with Khmer to Follow, dated 15 August 2017 and filed on 18 August 2017, D308/3/1/4.



29 August 2017, after having heard the parties,<sup>41</sup> the Pre-Trial Chamber denied the request and invited the Co-Lawyer for the Former Civil Party Applicants to file submissions limited to the issue of the position of the ECCC within the Cambodian Legal System.<sup>42</sup>

17. On 8 September 2017, the Co-Lawyers for the Former Civil Party Applicants filed submissions on the position of the ECCC within the Cambodian Legal System (“Submission on the ECCC”),<sup>43</sup> to which the Co-Lawyers for IM Chaem responded on 10 November 2017.<sup>44</sup> Neither Co-Prosecutor filed a response.

18. On 22 September 2017, pursuant to the Pre-Trial Chamber’s instructions,<sup>45</sup> the Co-Lawyers filed their response to the Appeal<sup>46</sup> and, on 16 October 2017,<sup>47</sup> the International Co-Prosecutor replied.<sup>48</sup>

19. On 14 November 2017, after having heard the parties,<sup>49</sup> the Pre-Trial Chamber issued

<sup>41</sup> See Case 004/1, IM Chaem’s Response to National Civil Party Co-Lawyer’s Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor’s Appeal of Closing Order Reasons in English with Khmer to Follow (D308/3/1/4), 21 August 2017, D308/3/1/5; Case 004/1, National Civil Party Co-Lawyer’s Reply to IM Chaem’s Response (D308/3/1/5) to the Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor’s Appeal of Closing Order (Reasons) in English with Khmer to Follow, 23 August 2017, D308/3/1/6; Case 004/1, International Co-Prosecutor’s Reply to IM Chaem’s Response to Civil Party Co-Lawyer’s Request, 23 August 2017, D308/3/1/7.

<sup>42</sup> Case 004/1, Decision on the National Civil Party Co-Lawyer’s Request regarding the Filing of Response to the Appeal Against the Closing Order and Invitation to File Submissions, 29 August 2017, D308/3/1/8 (“Decision Inviting Submissions on the ECCC (D308/3/1/8)”).

<sup>43</sup> Case 004/1, Civil Party Co-Lawyers’ Submission on the Position of the ECCC Within the Cambodian Legal System, 8 September 2017, D308/3/1/9 (“Submission on the ECCC (D308/3/1/9)”).

<sup>44</sup> Case 004/1, IM Chaem’s Response to the CPCLs’ Submission on the Position of the ECCC Within the Cambodian Legal System (D308/3/1/9), 10 November 2017, D308/3/1/18 (“Response to Submission on the ECCC (D308/3/1/18)”).

<sup>45</sup> Case 004/1, Decision on IM Chaem’s Urgent Request for an Extension of Time and Pages to Respond to the Appeal of the Closing Order, 17 August 2017, D308/3/1/3; see also Case 004/1, IM Chaem’s Urgent Request for an Extension of Time and Pages to Respond to the International Co-Prosecutor’s Appeal of the Closing Order (Reasons) (D308/3/1/1), 14 August 2017, D308/3/1/2.

<sup>46</sup> Case 004/1, IM Chaem’s Response to the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 22 September 2017, D308/3/1/11 (“Response”).

<sup>47</sup> See Case 004/1, Decision on International Co-Prosecutor’s Request for Additional Time to File His Reply, 29 September 2017, D308/3/1/12; see also Case 004/1, International Co-Prosecutor’s Request for Additional Time to Reply to IM Chaem’s Appeal Response, 13 September 2017, D308/3/1/10.

<sup>48</sup> Case 004/1, International Co-Prosecutor’s Reply Regarding Appeal of Closing Order (Reasons), 16 October 2017, D308/3/1/13 (“Reply”).

<sup>49</sup> Case 004/1, Pre-Trial Chamber’s Notice to the Parties in Case File N° 004/1/07-09-2009-ECCC/OCIJ (PTC50), 27 October 2017; Case 004/1, Co-Lawyers’ Proposed Details of Oral Hearings in Case 004/1, 31 October 2017, D308/3/1/14; Case 004/1, International Co-Prosecutor’s Submission on the Pre-Trial Chamber Hearing Regarding the Appeal of Closing Order (Reasons), 31 October 2017, D308/3/1/15; Case 004/1, Co-Lawyers’ Response to the International Co-Prosecutor’s Submission on the Pre-Trial Chamber Hearing Regarding the Appeal of Closing Order (Reasons) (D308/3/1/15), 6 November 2017, D308/3/1/16; Case 004/1, Communication from Case 004/1 Civil Party Lawyers, dated 6 November 2017 and filed on 10 November 2017, D308/3/1/17.





a scheduling order setting a date for the hearing on the Appeal.<sup>50</sup> Oral arguments on the Appeal were heard *in camera* on 11 and 12 December 2017.<sup>51</sup>

## II. STANDARD OF REVIEW

20. The determination of whether IM Chaem was among “those most responsible”, and therefore falls within the personal jurisdiction of the ECCC, is a discretionary decision.<sup>52</sup> However, the discretion of the Co-Investigating Judges in making this determination is a judicial one and does not permit arbitrary action, but should rather be exercised in accordance with well-settled legal principles.<sup>53</sup> In this regard, the terms “senior leaders” and “those who were most responsible” represent the limits of the ECCC’s personal jurisdiction.<sup>54</sup> While the flexibility of these terms inherently requires some margin of appreciation on the part of the Co-Investigating Judges, this discretion is not unlimited and does not exclude control by the appellate court. Accordingly, the Pre-Trial Chamber will review the Co-Investigating Judges’ determination that IM Chaem does not fall into the “most responsible” category, and thus does not fall under the Court’s personal jurisdiction, pursuant to the standard of review applicable to discretionary decisions.

21. A discretionary decision may be reversed where it was: (1) based on an incorrect interpretation of the governing law (*i.e.* an error of law) invalidating the decision; (2) based on

<sup>50</sup> Case 004/1, Scheduling Order for the Pre-Trial Chamber’s Hearing on Appeal Against Closing Order, 14 November 2017, D308/3/1/19.

<sup>51</sup> Case 004/1, Written Record of Hearing on Appeal Against the Closing Order in Case 004/1, 11 December 2017, D308/3/1/19/1; Case 004/1, Transcript of Hearing on Appeal Against the Closing Order in Case 004/1, dated 11 December 2017 and filed on 14 December 2017, D308/3/1/19/1.1; Case 004/1, Transcript of Hearing on Appeal Against the Closing Order in Case 004/1, 11 December 2017, D308/3/1/19/1.2 (“Transcript of 11 December 2017 (D308/3/1/19/1.2)”); Case 004/1, Written Record of Hearing on Appeal Against the Closing Order in Case 004/1, 12 December 2017, D308/3/1/19/2; Case 004/1, Transcript of Hearing on Appeal Against the Closing Order in Case 004/1, 12 December 2017, D308/3/1/19/2.1 (“Transcript of 12 December 2017 (D308/3/1/19/2.1)”).

<sup>52</sup> Case 001/18-07-2007-ECCC/SC (“Case 001”), Appeal Judgement, 3 February 2012, F28 (“Case 001 Appeal Judgement (F28)”), paras 62-74, 79. *See also* Closing Order (Reasons), para. 9; Response, paras 10-12; Reply, para. 4.

<sup>53</sup> *See* Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, Vol. I, p. 256.

<sup>54</sup> Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea, signed 6 June 2003 and entered into force on 29 April 2005 (“ECCC Agreement”), Art. 2(1); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006 (“ECCC Law”), Art. 2 *new*.



a patently incorrect conclusion of fact (*i.e.* an error of fact) occasioning a miscarriage of justice; and/or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion and to force the conclusion that they failed to exercise their discretion judiciously. In other words, it must be established that there was an error or abuse which was fundamentally determinative of the Co-Investigating Judges' exercise of discretion.<sup>55</sup>

22. In the context of discretionary decisions, the Pre-Trial Chamber will normally remit the decision back to the Co-Investigating Judges for reconsideration,<sup>56</sup> and will substitute its decision only in exceptional circumstances.<sup>57</sup> In the specific case of appeals against closing orders, "Internal Rule 79(1) suggests that the Pre-Trial Chamber has the power to issue a new or revised Closing Order that will serve as a basis for the trial".<sup>58</sup> Moreover, "[t]he Pre-Trial Chamber has previously decided that it fulfils the role of the Cambodian Investigation Chamber in the ECCC", and "[w]hen seized of a dismissal order as a consequence of an appeal lodged by the Prosecution or a civil party, the Investigation Chamber shall 'investigate the case by itself'."<sup>59</sup>

<sup>55</sup> See, e.g., Case 004 (PTC52), Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action Regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 February 2018, D365/3/1/5 ("Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5)"), para. 15; Case 004/2/07-09-2009-ECCC/OCIJ ("Case 004/2") (PTC36), Decision on Appeal Against the Decision on AO An's Tenth Request for Investigative Action, 26 April 2017, D343/4, para. 12; Case 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC67), Decision on Reconsideration of Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes, 27 September 2010, D365/2/17 ("Case 002 Decision on Placement of Additional Evidentiary Material on the Case File (D365/2/17)"), para. 36; Case 002 (PTC46), Decision on NUON Chea's Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 28 July 2010, D300/1/7 ("Case 002 Decision on Reconsideration of Requests (D300/1/7)"), para. 14; Case 002 (PTC52), Decision on Appeal of Co-Lawyers For Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3 ("Case 002 Decision on Request to Interview (D310/1/3)"), paras 15-16.

<sup>56</sup> See, e.g., Case 002 Decision on Request to Interview (D310/1/3), para. 16; Case 002 Decision on Reconsideration of Requests (D300/1/7), paras 19, 26.

<sup>57</sup> Case 002 Decision on Placement of Additional Evidentiary Material on the Case File (D365/2/17), para. 67.

<sup>58</sup> Case 001 (PTC02), Decision on Appeal Against Closing Order Indicting KAING Guek Eav *alias* "Duch", 5 December 2008, D99/3/42 ("Case 001 Decision on Closing Order Appeal (D99/3/42)"), para. 40 ("The Trial Chamber shall be seized by an indictment from the Co-Investigating Judges or the Pre-Trial Chamber". In the Glossary of the Internal Rules, the word 'Indictment' is defined as 'a Closing Order by the Co-Investigating Judges, or the Pre-Trial Chamber, committing a Charged Person for trial'.")

<sup>59</sup> Case 001 Decision on Closing Order Appeal (D99/3/42), paras 41-42 (footnotes omitted).



### III. ADMISSIBILITY

23. The International Co-Prosecutor filed the Appeal pursuant to Internal Rules 67(5) and 74(2).<sup>60</sup>

24. The Co-Lawyers do not challenge the admissibility of the Appeal, with the exception of Grounds 3 and 4.<sup>61</sup> They argue that the finding that the ECCC lacks personal jurisdiction precludes both the Co-Investigating Judges and the Pre-Trial Chamber from making or reviewing any findings regarding the crimes or likelihood of IM Chaem's criminal responsibility.<sup>62</sup> They further submit that Grounds 3 and 4 challenge the specific contours of crimes and are thus not within the scope of the Pre-Trial Chamber's power of review.<sup>63</sup>

25. The Pre-Trial Chamber recalls that, pursuant to Internal Rule 67(5), "[t]he [closing] order is subject to appeal as provided in Rule 74." Furthermore, in accordance with Internal Rule 74(2), "[t]he Co-Prosecutors may appeal against all orders by the Co-Investigating Judges." The Pre-Trial Chamber notes that the notice of appeal and submissions on appeal were filed in accordance with the time limits set forth in Internal Rule 75(3) and pursuant to its instructions.<sup>64</sup>

26. With regard to the admissibility of Grounds 3 and 4 of the Appeal, the Pre-Trial Chamber rejects the arguments of the Co-Lawyers. The determination that there is no personal jurisdiction is not unreviewable,<sup>65</sup> and the Pre-Trial Chamber, as an appellate chamber, must be able to review the findings that led to it, including those regarding the existence of crimes or the likelihood of IM Chaem's criminal responsibility. The jurisprudence upon which the Co-Lawyers rely regarding the scope of the Pre-Trial Chamber's power of review<sup>66</sup> further deals with appeals made by a charged person under Internal Rule 74(3)(a), whereas the current appeal was made by the International Co-Prosecutor pursuant to Internal Rule 74(2). The Co-

<sup>60</sup> Appeal, para. 1.

<sup>61</sup> Response, paras 16-23, 75, 92.

<sup>62</sup> Response, paras 17-19, 75, 92. *See also* Reply, paras 45, 49.

<sup>63</sup> Response, paras 20-23, 75, 92 *referring to* Case 002 (PTC145 & 146), Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, D427/2/15 & D427/3/15 ("Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15)"), para. 62. *See also* Reply, paras 44, 50 *referring to* Case 001 Decision on Closing Order Appeal (D99/3/42), paras 59-81; Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 71.

<sup>64</sup> Order on Request to File Appeal After Delivery of Full Reasons (D308/2).

<sup>65</sup> *See supra* para. 20.

<sup>66</sup> Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15), paras 59-62.



Lawyers' arguments are therefore inapposite.

27. Accordingly, the Pre-Trial Chamber finds the Appeal admissible.

#### IV. PRELIMINARY ISSUES

##### A. Reasonable Delay in Issuing the Closing Order (Reasons)

28. The Pre-Trial Chamber recalls that, pursuant to Internal Rule 21(4), proceedings before the ECCC shall be brought to a conclusion "within a reasonable time." This principle is reflected in Article 35 *new* of the ECCC Law and is paramount in Article 14(3)(c) of the 1966 International Covenant on Civil and Political Rights. While there is no explicit deadline in the Internal Rules, it is incumbent upon the Co-Investigating Judges to issue closing orders within a reasonable time. The Pre-Trial Chamber, as the control body at the judicial investigation stage, deems it necessary to address this issue.

29. In the present case, the Co-Investigating Judges delivered the reasons for the Closing Order on 10 July 2017, thereby terminating the investigation against IM Chaem eighteen months after notifying the conclusion of the judicial investigation on 18 December 2015.<sup>67</sup> The Pre-Trial Chamber observes, at the outset, that the Case File was forwarded to the Co-Prosecutors, for the purpose of issuing their final submission, on 27 July 2016,<sup>68</sup> *i.e.* more than six months after the disposal of the last investigation request on 11 January 2016, and not "immediately", as required by Internal Rule 66(4).<sup>69</sup> That provision reflects Article 246 of the Cambodian Code of Criminal Procedure, which provides that the investigating judge shall send the case file to the Prosecutor of the Kingdom "[t]wo days" after the notification that the judicial investigation is terminated. While the Pre-Trial Chamber is cognisant that the severance ordered on 5 February 2016,<sup>70</sup> as well as the replacement of the International Co-Lawyer,<sup>71</sup> may have caused some delays, it does not consider that these circumstances

<sup>67</sup> See Internal Rule 66(1) Notification (D285).

<sup>68</sup> See Forwarding Order (D304).

<sup>69</sup> See Case 004, Decision on IM Chaem's Request for Disclosure of Unredacted Case 002 Transcripts and Related Documents Relevant to Her and the International Co-Prosecutor's Request in Response to the Notice of Conclusion of Judicial Investigation Against IM Chaem, 11 January 2016, D289.

<sup>70</sup> See Severance Order (D286/7).

<sup>71</sup> See Case 004/1, Letter from the Defence team for Ms. IM Chaem to the Co-Investigating Judges concerning the Passing of John R.W.D. Jones QC, dated 28 April 2016 and filed on 5 May 2016, D302; Case 004/1, Letter



justify the six-month delay in issuing the Forwarding Order, in violation of Internal Rule 66(4).

30. The Pre-Trial Chamber is overall not convinced that an eighteen-month drafting process for the Closing Order (Reasons) is reasonable. The Pre-Trial Chamber takes into consideration the limited complexity of the case, as reflected by the number of charges,<sup>72</sup> the fact that the investigation was concluded within nine and a half months from the Notification of Charges and that the intent to dismiss the case had been expressed since 18 December 2015,<sup>73</sup> as well as the age and state of health of the Charged Person, witnesses and victims. By contrast, the Pre-Trial Chamber underlines that, pursuant to Internal Rule 66(5), the Co-Prosecutors had three months, since the Charged Person was not detained, to file their reasoned final submission, and that the Defence was provided with one month to respond.<sup>74</sup> It further finds relevant to note – although comparisons are of limited assistance when assessing the reasonableness of delays on a case-by-case basis – that the Closing Orders in Cases 001 and 002 were issued within three and eight months, respectively, after the conclusion of the investigations.<sup>75</sup>

31. In light of the foregoing, the Pre-Trial Chamber finds disproportionate the eighteen-month delay in issuing the Closing Order (Reasons) after the conclusion of the investigation against IM Chaem, and considers that it constituted undue delay.

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from the Defence Support Section to the Co-Investigating Judges concerning the Assignment of Foreign Co-Lawyer to Represent Ms. IM Chaem, 4 July 2016, D303.

<sup>72</sup> See Notification of Charges (D239.1). IM Chaem was charged with crimes against humanity (murder, extermination, enslavement, imprisonment, persecution on political grounds and other inhumane acts) and violations of Articles 501 and 506 (homicide) of the 1956 Penal Code at two crime sites: Phnom Trayoung Security Centre and Spean Sreng Canal Worksite.

<sup>73</sup> See Notice of Intent to Dismiss and Sever Proceedings (D286).

<sup>74</sup> See Case 004/1, Notice to Defence on Deadline to Respond to the Co-Prosecutors' Rule 66(5) Submissions, 1 November 2016, D304/4.

<sup>75</sup> See Case 001, Notice of Conclusion of Judicial Investigation, dated 15 May 2008 and filed on 16 May 2008, D108/48; Case 001, Closing Order Indicting KAINING Guek Eav *alias* Duch, 8 August 2008, D99 ("Case 001 Closing Order (D99)"); Case 002, Notice of Conclusion of Judicial Investigation, 14 January 2010, D317; Case 002, Closing Order, dated 15 September 2010 and filed on 16 September 2010, D427 ("Case 002 Closing Order (D427)").



## B. Nature of the Closing Order (Reasons)

### 1. Issuance of a Two-Fold Closing Order

32. Internal Rule 67(4) expressly requires that “[t]he Closing Order shall state the reasons for the decision”,<sup>76</sup> and it is “a fundamental right that parties know the reasons for a decision”.<sup>77</sup> In the present case, the Co-Investigating Judges issued the Closing Order (Disposition) on 22 February 2017 and, four and a half months later, on 10 July 2017, the Closing Order (Reasons), which contained the full reasons for their decision to dismiss the charges against IM Chaem. The Pre-Trial Chamber considers that it is its duty as an appellate court to determine whether the issuance of a two-fold Closing Order is compliant with Internal Rule 67(4).

33. While delivering reasons at a later date may in certain circumstances fulfil the obligation to issue reasoned decisions, the Pre-Trial Chamber finds that this approach cannot apply to closing orders, in view of the explicit requirement set out in Internal Rule 67(4) and the specificities of this procedural act, which officially concludes the judicial investigation. The Pre-Trial Chamber recalls that the Co-Investigating Judges are immediately *functus officio* after having signed the disposition of a closing order.

34. Furthermore, the Pre-Trial Chamber does not find that, in the present case, the interests of the Charged Person and victims under Internal Rules 21(1) and (4) were better protected by the issuance of two separate orders, despite the Co-Investigating Judges deeming this necessary to comply with the principle of speedy proceedings and to respect the Charged Person’s right to have the outcome of the proceedings determined as soon as possible.<sup>78</sup> The issuance of a two-fold Closing Order rather created undesirable confusion and uncertainty in the procedure, in particular with regard to the triggering of delays for appellate proceedings, which were ultimately postponed until the issuance of the Closing Order (Reasons).<sup>79</sup> The Charged Person

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<sup>76</sup> See Case 001 Decision on Closing Order Appeal (D99/3/42), para. 38 (“The Co-Investigating Judges’ decision to either dismiss acts or indict the Charged Person shall be reasoned as specifically provided by Internal Rule 67(4). The Pre-Trial Chamber also recalls that it is an international standard that all decisions of judicial bodies are required to be reasoned.”).

<sup>77</sup> Case 002 (PTC67), Decision on Co-Prosecutors’ Appeal Against the Co-Investigating Judges’ Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons’ Knowledge of the Crimes, 15 June 2010, D365/2/10, para. 24.

<sup>78</sup> Closing Order (Disposition), paras 12-13.

<sup>79</sup> See Order on Request to File Appeal After Delivery of Full Reasons (D308/2).



and the victims were further already put on notice since 18 December 2015 that the Co-Investigating Judges were inclined to dismiss the charges due to a lack of personal jurisdiction.<sup>80</sup> The Pre-Trial Chamber also recalls its previous finding that the judicial investigation was not brought to a conclusion within a reasonable time and, for the same reasons, holds that the four-and-a-half-month delay between the issuance of the disposition and reasons, eighteen months after the notice of conclusion of the investigation, was undue in the sense of Internal Rule 21(4).

35. Accordingly, the Pre-Trial Chamber considers, upon review, that the proceedings and the determination of their final outcome have not been expedited by the issuance of an unreasoned Closing Order (Disposition) followed by later reasons.

## 2. Severance and Nature of the Closing Order

36. Since the Co-Investigating Judges are seised of facts (*in rem*) and not of persons (*in personam*), the Pre-Trial Chamber considers it necessary to clarify the impact of “the severance of [IM] Chaem from Case 004”, pronounced on 5 February 2016,<sup>81</sup> in order to characterise the nature of the Closing Order in Case 004/1 and to address the issues raised in the Appeal.

37. According to Internal Rule 53(1), the Co-Prosecutors shall open a judicial investigation “by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons.” Pursuant to Internal Rule 55(2), “[t]he Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.”<sup>82</sup> The Co-Investigating Judges are therefore bound by the matter before them for determination, but also have a duty to investigate all the facts of which they are seised,<sup>83</sup> which means that they have to rule on all these facts at the time of the closing order and not only on those that were formally charged.

<sup>80</sup> See Notice of Intent to Dismiss and Sever Proceedings (D286).

<sup>81</sup> Severance Order (D286/7), paras 4, 7.

<sup>82</sup> See also Cambodian Code of Criminal Procedure, Art. 125.

<sup>83</sup> Case 003 (PTC20), Decision on MEAS Muth’s Appeal Against Co-Investigating Judge HARMON’s Decision on MEAS Muth’s Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (“Case 003 Decision on Two Applications for Annulment (D134/1/10)”, Opinion of Judges BEAUVALLET and BWANA, para. 13.



38. Under Internal Rule 55(4), the Co-Investigating Judges may further charge “any other persons [who] may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission.” In other words, in the same case, the same criminal allegation can be charged against a named suspect, as identified in the prosecutorial submissions, and against an unknown person whose identity may be revealed by the investigations conducted by the Co-Investigating Judges. If a severance occurs, the same factual allegation may be duplicated in the newly established case, inasmuch as it concerns the “severed” person, while also remaining in the original case if it involves other named suspect(s) or unknown person(s) who may be identified in the course of the investigation.

39. In sum, only facts can be severed. The Pre-Trial Chamber indeed observes that, in the case of severance concerning Duch, the Co-Investigating Judges properly made an order “to separate the case file of Duch *for those facts committed inside the framework of S-21*” while “*other facts specified in the Introductory Submission [...] related to Duch or other persons mentioned in the above Introductory Submission*”<sup>84</sup> were investigated under a different case file number.

40. The Pre-Trial Chamber therefore considers that, by ordering “the severance of [IM] Chaem from Case 004”,<sup>85</sup> the Co-Investigating Judges implicitly severed all criminal allegations brought against IM Chaem, but did not sever the person, in order to establish Case 004/1. The Pre-Trial Chamber draws three consequences from this. Firstly, all criminal allegations against IM Chaem have been duplicated and collected in Case 004/1, with no allegations against her remaining in Case 004. Secondly, the impugned order does constitute a closing order in the context of the ECCC, within the meaning of Internal Rule 67(3)(a), and not just an order on lack of jurisdiction. Thirdly, all criminal allegations in the Introductory and Supplementary Submissions, including those duplicated in Case 004/1 against IM Chaem, also remain in Case 004, against other known or unknown persons, and will require a final decision by the Co-Investigating Judges at the time of the closing order in the latter case.

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<sup>84</sup> Case 001, Separation Order, 19 September 2007, D18, p. 2 (emphasis added).

<sup>85</sup> Severance Order (D286/7), para. 7.





### C. Evidentiary Considerations

41. The Co-Investigating Judges devoted a chapter of the Closing Order (Reasons) to “Evidentiary Considerations” dealing with the reliability and probative value of categories of evidence;<sup>86</sup> by contrast, the Closing Orders in Cases 001 and 002 did not address such issues.<sup>87</sup> The Co-Investigating Judges thus made an attempt to explain their methodology by exposing the principles underpinning their reasoning, aiming at supporting their subsequent factual findings.

42. Such considerations are, however, not envisaged by the ECCC Law, the Internal Rules or the Cambodian Code of Criminal Procedure and may be, in the Pre-Trial Chamber’s view, unnecessary and superfluous. The sole duty of the Co-Investigating Judges, pursuant to Internal Rule 67, is to issue a dismissal order if, *inter alia*, there is not “sufficient evidence [...] of the charges.”

43. The Pre-Trial Chamber deems it necessary to examine (1) whether the Co-Investigating Judges erred in assessing the reliability and probative value of the evidence and (2) whether they applied the correct standard of evidence.

#### 1. Principle of Freedom of Evidence

44. The gathering of evidence before the ECCC is ruled by the principle of freedom of evidence, which is peculiar to the civil law system. In other words, all evidence is admissible<sup>88</sup> as provided under Internal Rule 87. Furthermore, all evidence generally has the same probative value.<sup>89</sup> Article 23 *new* of the ECCC Law reflects this principle by establishing that “[t]he Co-Investigating Judges shall conduct investigations on the basis of information *obtained from any institution*”.<sup>90</sup> Article 321 of the Cambodian Code of Criminal Procedure moreover states that, unless provided otherwise by law, all evidence is admissible in criminal cases and the court has to consider the value of the evidence submitted for its examination, according to the

<sup>86</sup> Closing Order (Reasons), paras 103-139.

<sup>87</sup> See Case 001 Closing Order (D99); Case 002 Closing Order (D427); Case 002, Dismissal Order, 14 September 2010, D420.

<sup>88</sup> Jean PRADEL, *Procédure pénale*, Cujas, 14<sup>th</sup> ed., 2008-2009, p. 364.

<sup>89</sup> Frédéric DEBOVE, François FALLETTI and Emmanuel DUPIC, *Précis de droit pénal et de procédure pénale*, Presses Universitaires de France, 5<sup>th</sup> ed., 2013, p. 697.

<sup>90</sup> ECCC Law, Art. 23 *new* (emphasis added).



judge's personal conviction. Article 427 of the French Code of Criminal Procedure equally provides that offences may be proved by any mode of evidence and that the judge decides according to his or her personal conviction.

45. In their evidentiary considerations, the Co-Investigating Judges successively addressed the admissibility and probative value of: statements other than written records of interview generated by the Office of the Co-Investigating Judges,<sup>91</sup> torture-tainted evidence,<sup>92</sup> the 1997 and 1998 Documentation Center of Cambodia ("DC-Cam") reports<sup>93</sup> and IM Chaem's public statements.<sup>94</sup>

a. Admissibility of Torture-Tainted Evidence

46. The Pre-Trial Chamber notes that the Co-Investigating Judges, after recalling the applicable law on torture-tainted evidence,<sup>95</sup> explicitly "disregarded" witnesses' evidence based on or linked to an organisational chart of the Sector 5 administration, which was created by their Office using names taken from S-21 confessions. They likewise "disregarded" sections of the written record of interview D219/477 referring to an S-21 confession.<sup>96</sup>

47. The Pre-Trial Chamber recalls that, if a piece of evidence is deemed procedurally defective and infringes the parties' rights, the Co-Investigating Judges cannot simply disregard it without referring it to the Pre-Trial Chamber for annulment under Internal Rule 76(1).<sup>97</sup> In the interests of the proper administration of justice, the Co-Investigating Judges should therefore have seised the Pre-Trial Chamber, before the issuance of the Closing Order (Reasons), of a reasoned application for annulment of torture-tainted evidence on the Case File that they considered null and void and intended to disregard.

<sup>91</sup> Closing Order (Reasons), paras 103-108.

<sup>92</sup> Closing Order (Reasons), paras 109-112.

<sup>93</sup> Closing Order (Reasons), paras 113-135.

<sup>94</sup> Closing Order (Reasons), paras 136-139.

<sup>95</sup> Closing Order (Reasons), paras 109-111.

<sup>96</sup> Closing Order (Reasons), para. 112.

<sup>97</sup> The Pre-Trial Chamber has indeed been seised in Case 004 of a request for annulment of the impugned sections of the written record of interview D219/477, disregarded in the Closing Order (Reasons). *See* Case 004 (PTC53), Annex B to YIM Tith's Application to Annul Evidence Made as a Result of Torture, 22 January 2018, D372/1/3.3, p. 5.



b. Probative Value of the 1997 and 1998 DC-Cam Reports

48. The Pre-Trial Chamber observes that the Co-Investigating Judges examined the substance of the 1997 and 1998 DC-Cam reports, discussed their methodology and inconsistencies, and compared the information provided in these reports to other available sources. They made specific findings on the information contained in these reports with regard to the number of victims, and ultimately concluded that they were unreliable and had little probative value.<sup>98</sup> The Pre-Trial Chamber stresses that these reports remain on the Case File, despite the Co-Investigating Judges' findings on their limited probative value, and could be taken into consideration when assessing the number of victims and other issues.

c. Probative Value of Statements Other Than Written Records of Interview

49. The Co-Investigating Judges found that the written records of interview generated by their Office during the investigation "are prepared under judicial supervision and subject to specific legal and procedural safeguards and are thus entitled to a presumption of relevance and reliability."<sup>99</sup> By contrast, they held that "[s]tatements or other evidence collected without judicial supervision by entities external to the ECCC enjoy no such presumption."<sup>100</sup> They refused to apply the presumption of relevance and reliability of evidence to "[i]nterviews conducted by the Co-Prosecutors during their preliminary investigations",<sup>101</sup> as well as to civil party applications, which in their view "enjoy no presumption of reliability and have been afforded little, if any, probative value if the circumstances in which they were recorded are not known."<sup>102</sup>

50. The Pre-Trial Chamber recalls that the entire Case File is under the judicial supervision of the Co-Investigating Judges, not only the evidence produced by their Office.<sup>103</sup>

51. The Pre-Trial Chamber further recalls that the Co-Investigating Judges freely evaluate the probative value of the evidence collected during the investigation,<sup>104</sup> and that the applicable

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<sup>98</sup> Closing Order (Reasons), paras 131-135.

<sup>99</sup> Closing Order (Reasons), para. 103.

<sup>100</sup> Closing Order (Reasons), para. 104.

<sup>101</sup> Closing Order (Reasons), para. 105.

<sup>102</sup> Closing Order (Reasons), para. 107.

<sup>103</sup> See, e.g., Internal Rule 55(5); Cambodian Code of Criminal Procedure, Art. 127.

<sup>104</sup> See *supra* para. 44.



law before the ECCC does not prescribe rules with regard to the assessment of the sufficiency of the evidence for the charges. There are in fact no grounds for distinguishing statements based on their provenance. All evidence is admissible and generally enjoys the same legal presumption of reliability, provided it has been legally collected.

52. The Pre-Trial Chamber therefore finds that it is an error of law, in an inquisitorial system based on written proof, to make general assertions as to the value of certain categories of evidence, thus creating a hierarchy of evidence based on its nature rather than on its substance, and to consequently give less weight to evidence collected by other entities for strictly formal reasons. The only relevant criterion should be the impact that the substance of the evidence may have on the personal conviction of the Co-Investigating Judges regarding whether there is sufficient evidence for the charges.

53. The Pre-Trial Chamber also considers that, while the probative value of particular items in isolation may be minimal, the very fact that they have some relevance means that they must be available for consideration.<sup>105</sup>

54. The Pre-Trial Chamber finds it particularly problematic to generally preclude civil party applications from any presumption of reliability and to afford them “little, if any, probative value” on the basis of the circumstances surrounding their recording.<sup>106</sup> The ECCC is the first court trying mass international crimes that provides an opportunity for victims to participate directly in the criminal proceedings as civil parties.<sup>107</sup> Pursuant to Internal Rule 23 *bis*, for a civil party action to be admissible, the applicant shall “demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.” Civil party applications, which are filed with the aim of contributing to the judicial investigations, thus necessarily warrant thoughtful consideration by the Co-Investigating Judges.

55. Therefore, if they were to deny *prima facie* the presumption of reliability for civil party

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<sup>105</sup> See, e.g., Special Court for Sierra Leone (“SCSL”), *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR65, Fofana – Appeal against Decision Refusing Bail, Appeals Chamber, 11 March 2005, para. 23. See also SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, Trial Chamber, 23 May 2005, para. 9.

<sup>106</sup> Closing Order (Reasons), para. 107.

<sup>107</sup> See, e.g., Internal Rule 23.



applications and afford them less weight than other evidence collected by their Office, the Co-Investigating Judges – either themselves or through rogatory letters – would be bound to hear every applicant as a witness, considering that they possess information conducive to ascertaining the truth. In fact, victims and civil party applicants have first-hand information about the relevant facts, and the credibility of their evidence should be evaluated on a case-by-case basis. The fact that they have a personal interest in the outcome of the case should not automatically lead to the assumption that their evidence is less credible.<sup>108</sup>

56. In other words, the legally incorrect hierarchisation of evidence imposed by the Co-Investigating Judges, denying the presumption of reliability and generally giving less weight to civil party applications, may be such as to reveal serious flaws in the conduct of the judicial investigation pursuant to Internal Rule 55(9). Furthermore, this hierarchisation would have the consequence of limiting the effectiveness of the victims' right of access to the courts, in the sense of Article 33 *new* of the ECCC Law, Internal Rule 21 and the United Nations General Assembly's Resolutions on Basic Principles of Justice for Victims,<sup>109</sup> despite the ECCC being among the first internationalised tribunals to have granted victims a role in proceedings.

d. Probative Value of IM Chaem's Public Statements

57. The Pre-Trial Chamber notes that the Co-Investigating Judges took into consideration the statements given by IM Chaem to DC-Cam, Youth for Peace and Smiling Toad Productions,<sup>110</sup> but gave them "less weight than interviews conducted by the [Office of the Co-Investigating Judges]", in accordance "with the approach taken in Case 002 and with the

<sup>108</sup> See Göran SLUITER et al., *International Criminal Procedure – Rules and Principles*, Oxford University Press, 2013, pp. 1353-1354.

<sup>109</sup> See United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985, *in particular* Annex, paras 4-5. See also United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 16 December 2005, *in particular* Annex, paras 12-14.

<sup>110</sup> The Pre-Trial Chamber notes that, in their chapter on evidentiary considerations, the Co-Investigating Judges stated that only two of the three statements given by IM Chaem to DC-Cam were considered in the Closing Order (Reasons). See Closing Order (Reasons), para. 139 and footnote 251 referring to Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c. The third statement given by IM Chaem to DC-Cam was however referred to elsewhere in the Closing Order (Reasons) and was thus also taken into consideration. See Closing Order (Reasons), footnotes 300, 306 referring to Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b.



general rules of evaluation of evidence”.<sup>111</sup>

58. The Pre-Trial Chamber, for the same reasons as above, reiterates that it is incorrect to assess the probative value of evidence based on its provenance, rather than on its intrinsic value, and to generally hierarchise categories of evidence.

59. The Pre-Trial Chamber further considers that, if the Co-Investigating Judges found the statements given by the Suspect to other institutions to be insufficient for ascertaining the truth because of their provenance, they should necessarily have invited her for an interview by their Office, after her Co-Lawyers were granted access to the Case File. The Pre-Trial Chamber has not found any indication that this was the case.

## 2. Standard of Evidence

60. The Pre-Trial Chamber observes that, although the Co-Investigating Judges did initially recall the probability standard of proof,<sup>112</sup> in their chapter on evidentiary considerations they in fact relied on the jurisprudence of the Trial Chamber and the Supreme Court Chamber to establish principles for the evaluation of the evidence.<sup>113</sup>

61. The Pre-Trial Chamber deems it necessary, at this point, to recall that the standard applying at the trial stage is higher than the standard that should be applied at the judicial investigation stage. Pursuant to Internal Rule 67, the test for issuing closing orders is the existence of “sufficient evidence [...] of the charges”. In the Case 002 Closing Order, the Co-Investigating Judges determined what they considered to be sufficient charges:

While it is obviously not required at this stage to ascertain the guilt of the Charged Person (given that only the Trial Chamber has such jurisdiction), it is clear that “probability” of guilt is necessary (i.e. more than a mere possibility). Accordingly, the assessment of the charges at this stage must not be confused with the “*beyond a reasonable doubt*” standard at the trial stage, yet the evidentiary material in the Case File must be sufficiently serious and corroborative to provide a certain level of probative force.<sup>114</sup>

62. While the notion of “sufficient charges” that the Co-Investigating Judges must consider

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<sup>111</sup> See Closing Order (Reasons), para. 139.

<sup>112</sup> See Closing Order (Reasons), para. 2.

<sup>113</sup> See, e.g., Closing Order (Reasons), footnotes 179-189, 249-250.

<sup>114</sup> Case 002 Closing Order (D427), para. 1323 (footnotes omitted).



to indict or dismiss a case is difficult to objectify, it is clear that the legal requirements for judicial proceedings progress incrementally from a “mere possibility” to a “probability” or “plausibility” of guilt during the investigation, to evidence of such guilt beyond reasonable doubt at the trial stage.<sup>115</sup> The Pre-Trial Chamber further considers that “sufficient charges” corresponds *a minima* to Internal Rule 55(4)’s “clear and consistent evidence” indicating that a person may be criminally responsible for the commission of a crime, and thus indicted by the Co-Investigating Judges.

63. The Judges of the Pre-Trial Chamber will examine under each ground of appeal, whenever relevant and on a case-by-case basis, whether the Co-Investigating Judges applied the appropriate standard of evidence.

#### **D. Position of the ECCC Within the Cambodian Legal System**

64. The Co-Investigating Judges held in the Closing Order (Reasons) that the ECCC Law on personal jurisdiction has the effect of excluding “any personal or subject-matter jurisdiction by the ordinary Cambodian courts over the events *under the ECCC’s temporal jurisdiction*”,<sup>116</sup> *i.e.* during the Democratic Kampuchea regime. The Pre-Trial Chamber invited submissions on this disputed finding,<sup>117</sup> which it will address in this section.

##### **1. Submissions**

65. The Co-Lawyers for the Former Civil Party Applicants submit that, by concluding that the ECCC Law excludes personal or subject-matter jurisdiction by the ordinary Cambodian courts over the events under the ECCC’s temporal jurisdiction, the Closing Order (Reasons) purported to strip these courts of their jurisdiction to adjudicate *any* Khmer Rouge-era crimes, including those falling outside the ECCC’s limited jurisdiction.<sup>118</sup> They aver that this “could have a profound adverse impact” on the interests of the Civil Parties and other victims of the Khmer Rouge, and that this “severely tarnishes the ECCC’s legacy by recasting the tribunal as the mechanism through which a near total amnesty for Khmer Rouge-era atrocity crimes was

<sup>115</sup> See Christian GUÉRY, “Les paliers de la vraisemblance pendant l’instruction préparatoire”, *La Semaine Juridique*, G. Ed. No. 24, 10 June 1998.

<sup>116</sup> Closing Order (Reasons), para. 23 (emphasis added).

<sup>117</sup> Decision Inviting Submissions on the ECCC (D308/3/1/8), paras 12-13.

<sup>118</sup> Submission on the ECCC (D308/3/1/9), paras 3, 6.



implemented in Cambodia.”<sup>119</sup>

66. They further contend that the ECCC Agreement, of which the ECCC Law is an integral part, must be interpreted according to the principles codified in the Vienna Convention on the Law of Treaties (“VCLT”).<sup>120</sup> Since there is neither a provision in the ECCC Agreement governing crimes committed by lower-level Khmer Rouge officials or by individuals outside of the ECCC’s personal jurisdiction, nor any provision constituting a jurisdictional waiver,<sup>121</sup> the ordinary Cambodian courts maintain their inherent jurisdiction over crimes that do not fall within the ECCC’s jurisdiction.<sup>122</sup> In their view, the Co-Investigating Judges’ “expansive interpretation of the ECCC’s exclusive jurisdiction”<sup>123</sup> is an example of judicial overreach and leads to absurd results under Article 31 of the VCLT, particularly displacing Cambodia’s sovereignty and creating blanket amnesties<sup>124</sup> violating *jus cogens* norms.<sup>125</sup>

67. The Co-Lawyers for the Former Civil Party Applicants add that the Co-Investigating Judges’ interpretation of the ECCC’s exclusive jurisdiction “is contradicted by the negotiating history of the ECCC and subsequent practice, as well as generally accepted principles of international law.”<sup>126</sup> They contend that the fact “[t]hat the drafters did not envision that the ECCC would try *every* individual who violated international law during the relevant time period *does not* [...] lead to the conclusion that those are the *only* persons who could be ever tried.”<sup>127</sup>

68. The Co-Lawyers for the Former Civil Party Applicants “submit that the Pre-Trial Chamber should not condone the Co-Investigating Judges’ attempts to usurp the sovereignty of Cambodia, in violation of international and Cambodian law, on such a significant matter.”<sup>128</sup> Therefore, they request that the Pre-Trial Chamber “redress the Closing Order’s erroneous

<sup>119</sup> Submission on the ECCC (D308/3/1/9), para. 6.

<sup>120</sup> Submission on the ECCC (D308/3/1/9), para. 9.

<sup>121</sup> Submission on the ECCC (D308/3/1/9), para. 10.

<sup>122</sup> Submission on the ECCC (D308/3/1/9), paras 8, 10. *See also* Case 004/1, Statement of Professor David SCHEFFER, 6 September 2017, D308/3/1/9.2 (“Statement of Professor SCHEFFER (D308/3/1/9.2)”), para. 8.

<sup>123</sup> Submission on the ECCC (D308/3/1/9), para. 13.

<sup>124</sup> Submission on the ECCC (D308/3/1/9), paras 11-15. *See also* Statement of Professor SCHEFFER (D308/3/1/9.2), para. 6.

<sup>125</sup> Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 15-16.

<sup>126</sup> Submission on the ECCC (D308/3/1/9), para. 16.

<sup>127</sup> Submission on the ECCC (D308/3/1/9), para. 17; *see also* paras 18-25; Statement of Professor SCHEFFER (D308/3/1/9.2), paras 7, 9.

<sup>128</sup> Submission on the ECCC (D308/3/1/9), para. 31.





findings on the scope of the ECCC's exclusive jurisdiction and declare that the extent to which ordinary Cambodian courts have the legal and institutional capacity to adjudicate Khmer Rouge-era crimes is an issue entrusted to those courts' own determination."<sup>129</sup>

69. The Co-Lawyers for IM Chaem respond that the Submission on the ECCC should be found inadmissible.<sup>130</sup> If only ordinary Cambodian courts can determine the extent of their jurisdiction over Khmer Rouge-era crimes, the Pre-Trial Chamber is not the appropriate forum to provide the requested redress.<sup>131</sup> The Co-Investigating Judges merely concluded that the lack of ordinary Cambodian courts' jurisdiction must have no policy impact on their exercise of discretion regarding personal jurisdiction,<sup>132</sup> which was a prerequisite finding to circumscribe "the nature of their own discretion and did not touch upon that of the ordinary Cambodian courts."<sup>133</sup> Thus, the Co-Lawyers contend that the only question that arises for the Pre-Trial Chamber's consideration is whether the Co-Investigating Judges erred in concluding that the exercise of their discretion was unaffected by any prevailing policy concerning ordinary Cambodian courts' jurisdiction over the relevant crimes.<sup>134</sup>

70. In the alternative, the Co-Lawyers argue that the Pre-Trial Chamber should affirm the finding that ordinary Cambodian courts lack jurisdiction over all Khmer Rouge-era crimes.<sup>135</sup> They contend that Cambodia is exercising its sovereign rights by electing to refrain from pursuing further prosecutions of Khmer Rouge-era offences<sup>136</sup> and that the government has consistently indicated its disagreement with any prosecution aside from senior leaders and those most responsible, which they deem antithetical to the aims of national reconciliation and political stability.<sup>137</sup> In their view, the Government's legislative and prosecutorial inactivity with regard to further prosecutions suggests that Cambodia has decided to limit its ordinary courts and deprive them of domestic jurisdiction over all Khmer Rouge-era crimes,<sup>138</sup> as supported by the ECCC's negotiating history.<sup>139</sup>

<sup>129</sup> Submission on the ECCC (D308/3/1/9), paras 31-32.

<sup>130</sup> Response to Submission on the ECCC (D308/3/1/18), paras 4-11.

<sup>131</sup> Response to Submission on the ECCC (D308/3/1/18), para. 6.

<sup>132</sup> Response to Submission on the ECCC (D308/3/1/18), para. 7 referring to Closing Order (Reasons), para. 25.

<sup>133</sup> Response to Submission on the ECCC (D308/3/1/18), para. 8.

<sup>134</sup> Response to Submission on the ECCC (D308/3/1/18), para. 10.

<sup>135</sup> Response to Submission on the ECCC (D308/3/1/18), paras 12-35.

<sup>136</sup> Response to Submission on the ECCC (D308/3/1/18), paras 14-15.

<sup>137</sup> Response to Submission on the ECCC (D308/3/1/18), paras 25-26.

<sup>138</sup> Response to Submission on the ECCC (D308/3/1/18), para. 29.

<sup>139</sup> Response to Submission on the ECCC (D308/3/1/18), paras 16-21.



71. Neither the National Co-Prosecutor nor the International Co-Prosecutor made written or oral submissions on this issue.

## 2. Discussion

72. The Pre-Trial Chamber recalls, at the outset, that the ECCC is an independent entity *within* the Cambodian court structure and has no jurisdiction to judge the activities of other bodies.<sup>140</sup> The Co-Investigating Judges and the Pre-Trial Chamber thus have no jurisdiction to rule upon decisions or actions of other courts within the Cambodian court system,<sup>141</sup> and in holding that ordinary Cambodian courts have no jurisdiction to hear cases involving Khmer Rouge-era crimes, the Co-Investigating Judges overstepped their mandate.

73. This being said, the Pre-Trial Chamber, as an appellate chamber, deems it necessary to consider the issue raised as one of general significance<sup>142</sup> for the ECCC's jurisprudence and legacy.

### a. Cases of which the ECCC is Seised

74. The Pre-Trial Chamber recalls that there is no referral procedure foreseen in the ECCC Law concerning cases of which the ECCC is already seised. Those cases cannot be transferred to domestic courts.<sup>143</sup> Since it has been clear since 2009 that there would be no further prosecutions after the conclusion of the four cases of which the ECCC is seised,<sup>144</sup> the issue raised by the Co-Investigating Judges can mainly pertain to other Khmer Rouge-era cases.

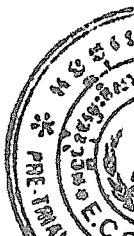
<sup>140</sup> Case 001 (PTC01), Decision on Appeal Against Provisional Detention Order of KAING Guek Eav *alias* "Duch", 3 December 2007, C5/45 ("Case 001 Decision on Provisional Detention Order (C5/45)"), para. 19. *See also* Case 002 (PTC01), Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge NEY Thol Pending the Appeal Against the Provisional Detention Order in the Case of NUON Chea, 4 February 2008, C11/29 ("Case 002 Decision on Provisional Detention Order (C11/29)"), para. 30; Case 001, Brief of Professor David SCHEFFER, International Law Expert, as *Amicus Curiae* in Support of the Co-Investigating Judges, 3 October 2007, C5/13 ("Brief of Professor SCHEFFER in Case 001 (C5/13)"), p. 5.

<sup>141</sup> *See* Case 001 Decision on Provisional Detention Order (C5/45), para. 17.

<sup>142</sup> *See, e.g.*, International Criminal Tribunal for the Former Yugoslavia ("ICTY"), *Prosecutor v. Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, paras 247, 281, 316; ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para. 221; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, paras 19, 23-24.

<sup>143</sup> Case 001 Decision on Provisional Detention Order (C5/45), para. 17; Case 001 Appeal Judgement (F28), para. 71.

<sup>144</sup> *See* ECCC, Press Release, Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions, 8 September 2009.



b. Cases of which the ECCC is not Seisedi. *Inherent Jurisdiction*

75. The Pre-Trial Chamber considers that Cambodia has inherent jurisdiction over all Khmer Rouge-era cases of which the ECCC is not seised. Prior to the establishment of the ECCC, the Royal Government of Cambodia was not only free, but even had an obligation under international law, to prosecute senior leaders of Democratic Kampuchea or those alleged to be mostly responsible for international crimes, as a basic exercise of its jurisdiction. In agreement with the United Nations, it only delegated jurisdiction to the ECCC over this one type of perpetrator, rather than using its pre-existing court structure.<sup>145</sup> At the time of the ECCC's inception, Cambodian courts were indeed in the process of trying certain individuals who would meet (or could have met) the threshold for personal jurisdiction at the ECCC.<sup>146</sup>

ii. *ECCC's Applicable Law*

76. More importantly, the Pre-Trial Chamber observes that the explicit text of the ECCC's founding instruments do not support the conclusion that the ECCC strips ordinary Cambodian courts of their inherent jurisdiction over all Khmer Rouge-era cases. Pursuant to Article 2 *new* of the ECCC Law and the Preamble of the ECCC Agreement, the ECCC is a specialised court established within the existing Cambodian court system.<sup>147</sup> Articles 1 and 2(1) of the ECCC Agreement, mirrored by Articles 1 and 2 *new* of the ECCC Law, expressly address the personal jurisdiction of the ECCC and limit it to senior leaders of Democratic Kampuchea and those most responsible for certain crimes committed during the Khmer Rouge era. Nothing in the applicable law suggests that the ECCC would have exclusive jurisdiction over other Khmer

<sup>145</sup> Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15), para. 103.

<sup>146</sup> *See, e.g.*, Case 004, First letter from Judge Mark HARMON to Judge NEY Thol regarding Ta Mok's Military Court File, 9 October 2013, D246.1.1; Case 004, First Letter of Response from Judge NEY Thol to Judge Mark HARMON regarding Ta Mok's Military Court File, 16 October 2013, D246.1.2; Case 004, Second Letter from Judge Mark HARMON to Judge NEY Thol regarding Ta Mok's Military Court File, 12 May 2015, D246.1.3; Case 004, Second Letter of Response from Judge NEY Thol to Judge Mark HARMON regarding Ta Mok's Military Court File, 25 May 2015, D246.1.4; Case 004, Letter from Judge Michael BOHLANDER to Judge NEY Thol regarding Additional Request for Assistance (relating to Ta Mok), 24 September 2015, D326.1; Case 004, Letter from Judge NEY Thol to Judge Michael BOHLANDER regarding Additional Request for Assistance (relating to Ta Mok), 16 October 2015, D326.2.

<sup>147</sup> ECCC Law, Art. 2 *new* (stating that the ECCC "shall be established in the existing court structure [of Cambodia]"); ECCC Agreement, Preamble, para. 4.



Rouge-era cases.

77. The available records of drafting history further support for the conclusion that the ECCC did not strip ordinary Cambodian courts of their jurisdiction. While the Co-Investigating Judges expressly based their finding upon a “close study of the negotiation history preceding the establishment of the ECCC”,<sup>148</sup> they did not refer to specific documents<sup>149</sup> and were actually denied by the United Nations the disclosure of the majority of the records of the negotiations.<sup>150</sup>

78. A close scrutiny of the available records of the negotiation history rather shows that the Royal Government of Cambodia considered that the appropriate forum for trials against a limited category of high-level perpetrators would be a special court assisted by the international community, with an international component and a limited mandate, for reasons pertaining to capacity, legitimacy and legacy.<sup>151</sup> Nothing supports the finding that the limitation of the ECCC’s personal jurisdiction could be interpreted as reflecting an intention on the part of the drafters of the ECCC Law and Agreement that other perpetrators would necessarily escape

<sup>148</sup> Closing Order (Reasons), para. 12.

<sup>149</sup> See Closing Order (Reasons), paras 12 *et seq.* referring to Case 001 Appeal Judgement (F28), paras 46-56 (negotiation history, as set out by the Supreme Court Chamber, in relation to a distinct issue).

<sup>150</sup> Closing Order (Reasons), para. 19 referring to Case 003, Notice of Placement on the Case File of Available Records Relating to the Establishment of the ECCC, 8 September 2016, D181/2.

<sup>151</sup> See, e.g., The First Session of the Third Term of the Cambodian National Assembly, *Debate and Approval of the Agreement Between the United Nations and the Royal Government of Cambodia and Debate and Approval of Amendments to the Law on Trying Khmer Rouge Leaders*, Document Center of Cambodia, 4-5 October 2004 (“Cambodian National Assembly Debate”), pp. 28-30 (“If we let [those who kill millions of people] get away with their crimes, this will set an example for the next leaders. [...] So we have to end such horrible practices, and to end such practices we have to establish a court, a special court [to try those Khmer Rouge leaders] with the participation of the United Nations and international community in order to ensure independence.”), 31-34 (“Now the time has come to bring to justice those who planned and ordered the atrocity. [...] It is reasonable to have Cambodian and international judges, prosecutors, and legal experts work together to try those most responsible. This will lead to the creation of a culture deterring the reemergence of such atrocities in other parts of the world.”), 45-46 (“[T]he Extraordinary Chambers will bring about justice. The victims of the regime can learn more of the principle of justice. The principle of justice is a source of Cambodian judicial reform and serves as a warning to all dictators in the world. The Cambodian people and people of the world will know the truth of why the leaders killed their own people.”), 48 (“[E]xperts in the arrangement of international courts acknowledge that the prosecution of dozens or thousands of suspects is not a task that produces good results.”). See also *Statement of Motivation for the Draft Law on The Establishment of Extraordinary Chambers within the Existing Cambodian Courts for Prosecution of Crimes Committed during Democratic Kampuchea* (Statement No. 01 SCN.KBC), 18 January 2000, p. 3; Constitutional Council Decision No. 040/002/2001, 12 February 2001, p. 3; *Statement of Motivation For Draft Law on the Approval of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea* (Statement No. 38.SCN.KBT), 16 June 2003, p. 1. See also Statement of Professor SCHEFFER (D308/3/1/9.2), paras 8-9; David SCHEFFER, “The Extraordinary Chambers in the Courts of Cambodia” in Cherif BASSIOUNI (ed.), *International Criminal Law*, Vol. III, Koninklijke Brill NV, 3<sup>rd</sup> ed., 2008, p. 240.



justice.<sup>152</sup>

### 3. Conclusion

79. As mentioned above, the ECCC has no jurisdiction to judge the activities of other bodies,<sup>153</sup> and the Co-Investigating Judges failed to refer to any specific law in deciding that ordinary Cambodian courts have no jurisdiction to hear cases involving Khmer Rouge-era crimes. While nothing in the ECCC's applicable law prevents the type of cases that would fall under its limited jurisdiction from reverting back to the jurisdiction of the ordinary Cambodian courts once it ceases to exist, determining whether domestic law prohibits or not further prosecutions is not the burden of the ECCC. The only relevant question before this Court is whether the ECCC's applicable law precludes national jurisdiction, which it does not.

80. In light of the foregoing, the Pre-Trial Chamber considers that the Co-Investigating Judges committed an error of law by interpreting the ECCC Law as stripping ordinary Cambodian courts of their jurisdiction over Khmer Rouge-era crimes. Ordinary Cambodian courts inherently have full jurisdiction over matters of criminal justice.

## V. MERITS

81. The Pre-Trial Chamber has not attained the required majority of four affirmative votes to reach a decision based on common reasoning. Pursuant to Internal Rule 77(14), the opinions of its various members are attached to these Considerations.

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<sup>152</sup> See, e.g., Ambassador Thomas HAMMARBERG, "How the Khmer Rouge Tribunal Was Agreed: Discussions Between the Cambodian Government and the UN", in Documentation Center of Cambodia, *Searching for the Truth*, Number 21, September 2001, p. 37 (there had been "a need to find a legal formulation [of the ECCC's personal jurisdiction] that would limit the number of prosecutions without giving an implicit amnesty to those outside that limited group."). The debates before the Cambodian National Assembly rather suggest that the negotiating parties intended for cases involving Khmer Rouge-era crimes committed by those who were not the most responsible to remain within the jurisdiction of ordinary Cambodian courts. See, e.g., Cambodian National Assembly Debate, p. 37 ("The prosecution of those holding ordinary positions is not a difficulty, for such people could also be held responsible before Cambodian courts.").

<sup>153</sup> Case 001 Decision on Provisional Detention Order (C5/45), para. 19. See also Case 002 Decision on Provisional Detention Order (C11/29), para. 30; Brief of Professor SCHEFFER in Case 001 (C5/13), p. 5.



81. The Pre-Trial Chamber has not attained the required majority of four affirmative votes to reach a decision based on common reasoning. Pursuant to Internal Rule 77(14), the opinions of its various members are attached to these Considerations.

## VI. DISPOSITION

**FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:**

- **FINDS** the Appeal admissible;
- **DECLARES** that the delay in issuing the Closing Order (Reasons) after the conclusion of the investigation against IM Chaem is unwarranted;
- **DECLARES** that the Co-Investigating Judges erred in assessing the reliability and probative value of the evidence;
- **DECLARES** that, subject to the jurisdiction of the ECCC, ordinary Cambodian courts have full jurisdiction over matters of criminal justice;
- **DECLARES** that it has not assembled an affirmative vote of at least four judges for a decision on the merits based on common reasoning;
- **DECLARES** that the Closing Order (Reasons) dismissing the charges against IM Chaem shall stand.

In accordance with Internal Rule 77(13), the present decision is not subject to appeal.

Phnom Penh, 28 June 2018

Pre-Trial Chamber



**PRAK Kimsan   Olivier BEAUVALLET   NEY Thol   Kang Jin BAIK   HUOT Vuthy**



## VII. OPINION OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

82. In their Closing Order (Disposition) dated 22 February 2017, the Co-Investigating Judges found that IM Chaem did not fall within the ECCC's personal jurisdiction and, accordingly, dismissed the charges against her on the ground that she was neither a senior leader nor one of those most responsible during the Khmer Rouge regime.<sup>154</sup>

83. The International Co-Prosecutor does not share the opinion of the Co-Investigating Judges. He submits that IM Chaem falls within the personal jurisdiction of the ECCC. He requests that the Pre-Trial Chamber send the case file back to the Co-Investigating Judges for them to re-evaluate whether IM Chaem falls within the personal jurisdiction of the ECCC or, in the alternative, for the Pre-Trial Chamber itself to re-evaluate the case.<sup>155</sup>

84. The National Co-Prosecutor maintains her view that the suspects in Case Files 003 and 004 were neither senior leaders nor those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979, and therefore that they did not fall within the ECCC's personal jurisdiction.<sup>156</sup>

85. In Case Files 001 and 002, by agreement, the National and International Co-Prosecutors filed an Introductory Submission with the Co-Investigating Judges, opening a judicial investigation against five suspects only on the basis that these suspects were senior leaders of the Democratic Kampuchea regime and those who were most responsible for crimes falling within the ECCC's jurisdiction.<sup>157</sup> They were NUON Chea, KHIEU Samphan, IENG Sary, IENG Thirith, and KAING Guek Eav *alias* Duch.<sup>158</sup>

86. In his Appeal before the Pre-Trial Chamber, the International Co-Prosecutor sets out

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<sup>154</sup> Closing Order (Disposition), para. 10.

<sup>155</sup> Appeal, para. 82.

<sup>156</sup> National Co-Prosecutor's Final Submission (D304/1), para. 27.

<sup>157</sup> *Ibid.*, para. 28.

<sup>158</sup> *Ibid.*, para. 31.



six grounds related to the errors committed by the Co-Investigating Judges and argues that IM Chaem should have been indicted.

87. The Pre-Trial Chamber has been previously seised of a disagreement between the National Co-Prosecutor and the International Co-Prosecutor pursuant to Internal Rule 71(2). The International Co-Prosecutor requested that two new Introductory Submissions create Case File 003/20-11-2008/ECCC/OCIJ and Case File 004/20-11-2008/ECCC/OCIJ to be forwarded to the Co-Investigating Judges so that judicial investigations should be opened. The National Co-Prosecutor disagreed.

88. In its Considerations dated 18 August 2009 regarding the disagreement between the Co-Prosecutors pursuant to Internal Rule 71, the Pre-Trial Chamber declared that it had not assembled an affirmative vote of at least four judges on a decision to settle the disagreement. The National Judges of the Pre-Trial Chamber found that the arguments raised by the National Co-Prosecutor were sufficient to block the forwarding of the Second and Third Introductory Submissions to the Co-Investigating Judges.

89. Pursuant to Internal Rule 71(4), the action of the International Co-Prosecutor shall be executed. Accordingly, the International Co-Prosecutor shall, pursuant to Internal Rule 53(1), open a judicial investigation by sending a new Introductory Submission to the Co-Investigating Judges.

90. The ECCC is a special court whose prosecutorial and judicial investigatory procedures are different from those of Cambodia's national courts. Prosecution and judicial investigation under the national courts merely concern facts, *i.e.* the investigating judge is only seised of factual allegations as set out in the prosecutor's Introductory Submission.<sup>159</sup> On the contrary, at the ECCC, prosecution can proceed only where the two conditions – first, facts “the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”, and second, individuals “senior leaders of Democratic Kampuchea and those most responsible for the crimes”<sup>160</sup> – are met.

91. In a press release dated 8 September 2009, the Acting International Co-Prosecutor

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<sup>159</sup> Cambodian Code of Criminal Procedure, Art. 44 and 125.

<sup>160</sup> ECCC Law, Art. 1; ECCC Agreement, Art. 1; Internal Rule 53.





suspects at the ECCC. The press release implies that the International Co-Prosecutor does not have a clear principle for selecting suspects for prosecution. If selecting suspects for prosecution at will without a clear principle were allowed, justice would not be served.

92. The National Judges of the Pre-Trial Chamber do not find that IM Chaem falls within the personal jurisdiction of the ECCC and uphold the Co-Investigating Judges' decision in the Closing Order that the ECCC has no jurisdiction over IM Chaem and dismissing the charges against her.

**Phnom Penh, 28 June 2018**



**President PRAK Kimsan**



**Judge NEY Thol**



**Judge HUOT Vuthy**



## VIII. OPINION OF JUDGES BAIK AND BEAUVALLET

93. The Undersigned Judges will set out below their considerations in relation to each of the six grounds of appeal raised by the International Co-Prosecutor, and then determine the impact of any errors on the conclusion regarding the personal jurisdiction of the ECCC over IM Chaem.

### A. Ground 1: Alleged Failure to Consider Allegations Not Formally Charged for Indictment

#### 1. Submissions

94. The International Co-Prosecutor submits that the Co-Investigating Judges failed to consider all of the factual allegations of which they were seised *in rem* by the Introductory and Supplementary Submissions, and failed to consider the arguments in the Final Submission as to how the evidence supports IM Chaem's responsibility for several crimes.<sup>161</sup> He challenges in particular the finding that it was impermissible to request the indictment of IM Chaem for a wider set of crimes than those with which she had been charged.<sup>162</sup> This ground of appeal is supported by four arguments.

95. First, IM Chaem was duly put on notice of all factual allegations through access to the Introductory and Supplementary Submissions, and understood that, even where not formally charged, they could be investigated and ultimately lead to an indictment.<sup>163</sup> The International Co-Prosecutor underlines that she made specific investigative requests regarding crime sites with which she had not been charged, for instance at Trapeang Thma Dam Worksite, showing that she did consider those facts to be within the permissible scope of a possible indictment.<sup>164</sup>

96. Second, the Co-Prosecutors' right to be heard on the evidence of IM Chaem's responsibility for crimes not formally charged has been denied.<sup>165</sup> The International Co-Prosecutor stresses that they were not provided, either by the Internal Rules or by invitation

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<sup>161</sup> Appeal, paras 11-12. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 40-41.

<sup>162</sup> Appeal, para. 12.

<sup>163</sup> Appeal, paras 13-14. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 46-48.

<sup>164</sup> Appeal, para. 14. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 47.

<sup>165</sup> Appeal, para. 15. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 44-45.



of the Co-Investigating Judges, with an opportunity to be heard on which crimes would be included in the notification of charges pursuant to Internal Rule 57.<sup>166</sup> The Co-Investigating Judges cannot simply drop the investigation into facts of which they were seised without hearing from the Co-Prosecutors and without a reasoned decision; otherwise, the provisions of Internal Rule 66 *bis*, which allow for the reduction of the scope of the investigation after hearing the parties, would be useless.<sup>167</sup>

97. Third, the International Co-Prosecutor claims that his right to appeal the Co-Investigating Judges' findings on the evidence of allegations not formally charged has also been denied, since there was no "decision" for the Co-Prosecutors to appeal at any time during the investigation.<sup>168</sup> If a closing order does not address those allegations not formally charged, but of which the Co-Investigating Judges were seised, the Co-Prosecutors are denied the right to appeal the reasonableness of any decision not to charge specific crimes or modes of liability.<sup>169</sup>

98. Fourth, the Co-Investigating Judges have an obligation to make a determinative finding in the closing order on every allegation of which they are seised, an obligation that would cease if they could only indict based on facts they have charged.<sup>170</sup> The International Co-Prosecutor challenges, in particular, the Co-Investigating Judges' reliance on a previous order in Case 002 ("Case 002 Clarification Order"), according to which they "may not indict a person for facts in relation to which he or she has not first been charged", and contends that this finding should not be isolated.<sup>171</sup> In his view, the Case 002 Clarification Order, read in its entirety, merely reaffirms the civil law practice that an individual cannot be indicted for factual allegations unless the investigating judge is validly seised of these facts by virtue of prosecutorial submissions.<sup>172</sup>

99. The Co-Lawyers respond that the International Co-Prosecutor's claims in relation to the prevailing law are factually and legally misconceived.<sup>173</sup> In particular, the obligation to

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<sup>166</sup> Appeal, para. 15.

<sup>167</sup> Appeal, para. 17.

<sup>168</sup> Appeal, para. 16. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 45-46.

<sup>169</sup> Appeal, para. 16.

<sup>170</sup> Appeal, para. 19.

<sup>171</sup> Appeal, paras 18-22 *referring to* Case 002, Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, D198/1 ("Case 002 Clarification Order (D198/1)"), para. 10.

<sup>172</sup> Appeal, para. 22.

<sup>173</sup> Response, paras 26-27.



address each factual allegation only arises once jurisdiction has been determined, as an indispensable requisite to making any decision on the merits of the case.<sup>174</sup> They underline that the Co-Investigating Judges properly considered all factual allegations of which they were seised in the Closing Order (Reasons),<sup>175</sup> and that IM Chaem would still fall outside the jurisdiction of the ECCC even if she had been charged with allegations that arose from the facts not charged.<sup>176</sup>

100. The Co-Lawyers further contend that it is not the purpose of the prosecutorial submissions, but rather that of the notification of charges, to inform in detail of the nature and cause of the charges, as explicitly held by the International Co-Investigating Judge when charging IM Chaem *in absentia*.<sup>177</sup> They stress that the notification of charges is a judicial decision made by the Co-Investigating Judges after clear and consistent evidence of criminal responsibility against a suspect has been found.<sup>178</sup> While IM Chaem could have been charged during the investigation for additional crimes – and in this context filed requests including that in relation to Trapeang Thma Dam Worksite – it is only the Notification of Charges which provided final information on the delineation of the scope of any potential indictment following the conclusion of the judicial investigation.<sup>179</sup> Any allegation of crimes outside the charges was no longer relevant or the subject of Defence preparation.<sup>180</sup>

101. The Co-Lawyers also aver that the arguments related to the right to be heard and the right to appeal are without merit.<sup>181</sup> The Co-Investigating Judges are empowered to identify which facts may form the basis of the charges, and neither the Co-Prosecutors nor the Defence have a right to be heard prior to this determination.<sup>182</sup> The International Co-Prosecutor's claim that he was not invited to hearings is thus devoid of merit, since Internal Rule 57 does not provide for his presence during initial appearance hearings and since IM Chaem was notified

<sup>174</sup> Response, paras 29-30.

<sup>175</sup> Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 35-37 *referring to* Closing Order (Reasons), paras 244-246.

<sup>176</sup> Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 35-36 *referring to* Closing Order (Reasons), paras 246-247.

<sup>177</sup> Response, paras 27-28 *referring to* Decision to Charge *In Absentia* (D239), para. 75.

<sup>178</sup> Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 39-40 *referring to* Case 002, Order Refusing Request for Further Charging, 16 February 2010, D298/2 (“Case 002 Order Refusing Request for Further Charging (D298/2)”), para. 13.

<sup>179</sup> Response, paras 31-33.

<sup>180</sup> Response, para. 33.

<sup>181</sup> Response, paras 34, 37.

<sup>182</sup> Response, para. 34.



of the charges through a judicial decision.<sup>183</sup> The proper course of action would rather have been to file a stand-alone submission for modification of the charges.<sup>184</sup> The Co-Lawyers further stress that the Co-Prosecutors had a right to appeal the Decision to Charge *In Absentia* and to raise challenges as to the reasonableness of the decision not to charge certain facts, and yet failed to do so.<sup>185</sup> Finally, the reference to Internal Rule 66 *bis* is inapposite, since the Co-Investigating Judges did not reduce the scope of the investigation, but merely decided not to charge certain facts because the threshold had not been met.<sup>186</sup>

102. The International Co-Prosecutor replies that the Co-Lawyers' claims are not supported and are at odds with ECCC jurisprudence.<sup>187</sup> He points, in particular, to the decision on the appeal against the Closing Order in Case 001, in which the Pre-Trial Chamber dealt with recharacterisation and found that crimes not formally charged could be added to the Closing Order if the underlying crimes were included in the prosecutorial submissions.<sup>188</sup> He stresses that the Pre-Trial Chamber unequivocally held that the Co-Investigating Judges shall decide in the Closing Order on all facts that were part of their investigation, without making any reference to the process of formal charging.<sup>189</sup> There is also no indication in the Internal Rule 66(1) Notification that the factual allegations on which the Closing Order would be based would be limited to those formally charged.<sup>190</sup>

103. The International Co-Prosecutor challenges the claim that the obligation to address each factual allegation only arises once jurisdiction has been determined, since a proper assessment of jurisdiction can only be made once all relevant facts have been examined.<sup>191</sup> The conclusion on lack of personal jurisdiction did not discharge the Co-Investigating Judges of their obligation to make factual findings on all allegations and did not preclude findings on the likelihood of IM Chaem's responsibility for crimes.<sup>192</sup> He adds that the Co-Lawyers made no attempt to justify the Co-Investigating Judges' failure to charge certain crimes, which makes it

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<sup>183</sup> Response, para. 35.

<sup>184</sup> Response, para. 36.

<sup>185</sup> Response, para. 38.

<sup>186</sup> Response, para. 39.

<sup>187</sup> Reply, paras 12-13.

<sup>188</sup> Reply, paras 13-14 *referring to* Case 001 Decision on Closing Order Appeal (D99/3/42), paras 104-105, 107. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 42-43.

<sup>189</sup> Reply, paras 15-17 *referring to* Case 001 Decision on Closing Order Appeal (D99/3/42), paras 29, 32-39. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 46.

<sup>190</sup> Reply, paras 18-19.

<sup>191</sup> Reply, para. 21.

<sup>192</sup> Reply, para. 22.



impossible to determine how the assessment of personal jurisdiction would have changed, had all allegations been considered.<sup>193</sup>

104. The International Co-Prosecutor further submits that the Co-Lawyers' submissions are contradictory regarding their understanding of whether facts not charged could lead to an indictment, and underlines that they did request the annulment of parts of the investigation, in relation to Trapeang Thma Dam Worksite and Wat Chamkar Khnol, after the notice of conclusion of the judicial investigation.<sup>194</sup> He finally contends that the Co-Lawyers misconstrued the Co-Prosecutors' right to be heard<sup>195</sup> and right to appeal.<sup>196</sup>

## 2. Discussion

105. The Undersigned Judges will consider, in turn: (a) whether the notification of charges limits the scope of any indictment; (b) whether the Co-Prosecutors' right to intervene in the proceedings has been violated; and (c) whether the Co-Investigating Judges have a duty to issue a decision on all facts of which they were validly seised.

### a. Notification of Charges and Scope of the Indictment

106. Internal Rule 67 reads in relevant part:

1. The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. The Co-Investigating Judges are not bound by the Co-Prosecutors' submissions.
2. The Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.
3. The Co-Investigating Judges shall issue a Dismissal Order in the following circumstances:
  - a) The acts in question do not amount to crimes within the jurisdiction of the ECCC;
  - b) The perpetrators of the acts have not been identified; or

<sup>193</sup> Reply, para. 24.

<sup>194</sup> Reply, paras 25-28. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 47.

<sup>195</sup> Reply, paras 29-30. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 44-45.

<sup>196</sup> Reply, paras 31-32. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 45.



- c) There is not sufficient evidence against the Charged Person or persons of the charges.

107. Internal Rule 57(1), which mirrors Article 143 of the Cambodian Code of Criminal Procedure, deals with the process of charging:

At the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silent. The Charged Person has the right to consult with a lawyer prior to being interviewed and to have a lawyer present while the statement is taken. If the Charged Person agrees, the Co-Investigating Judge shall take the statement immediately. A written record of the statement shall be placed in the case file.

108. Internal Rule 55(4) further clarifies the reasons for which the Co-Investigating Judges may decide to charge for the commission of a crime:

The Co-Investigating Judges have the power to charge any Suspects named in the Introductory Submission. They may also charge any other persons against whom there is clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission.

109. The notification of charges is consequently left to the discretion of the Co-Investigating Judges, who may charge any person named in the prosecutorial submissions or unnamed people. The only criterion for charging is whether, in their opinion, “there is *clear and consistent evidence* indicating that such person may be criminally responsible for the commission of a crime”.<sup>197</sup> The charging process, in the inquisitorial system, is thus a judicial decision through which the suspect is not only officially notified of the crimes for which he or she is under investigation, but also informed that there is a certain level of evidence gathered against him or her. It is further through the notification of charges that the suspect is put in a position to answer allegations and prepare a defence, such that he or she is able to play an active role in the proceedings and to exercise his or her rights.<sup>198</sup> From a prosecutorial standpoint, the charging process also brings clarity as to which charges, among the initial allegations, have been retained.

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<sup>197</sup> Internal Rule 55(4) (emphasis added).

<sup>198</sup> Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5), para. 36 referring to Case 001 Decision on Closing Order Appeal (D99/3/42), para. 138; Case 002 (PTC32), Decision on IENG Sary’s Appeal Against Order on Extension of Provisional Detention, 30 April 2010, C22/9/14, para. 26.



110. In light of the foregoing, the Pre-Trial Chamber recently confirmed that “[i]n a civil law system, only facts which have been charged beforehand can be considered for indictment”<sup>199</sup> and “the charging process [is] a requirement for subsequent indictment”.<sup>200</sup> In the Case 002 Clarification Order,<sup>201</sup> the Co-Investigating Judges also made extremely clear that they “may not indict a person for facts in relation to which he or she has not *first been charged*”,<sup>202</sup> and that they would make a decision in the Closing Order in respect of all the facts of which they had been validly seised, “either by indicting the charged persons, *after having charged them*, or by issuing a dismissal order”.<sup>203</sup>

111. These findings reflect the wording of Internal Rule 67(1), pursuant to which a closing order can indict “a Charged Person”, and mirror the law governing Cambodian and French criminal procedure. The Undersigned Judges underline in particular the provisions of Article 247 of the Cambodian Code of Criminal Procedure and Article 181 of the French Code of Criminal Procedure, according to which the investigating judge shall decide, if he or she considers that the “charges accepted against a person *under judicial examination*”<sup>204</sup> constitute a felony, “to indict the *charged person* before the trial court”.<sup>205</sup> Similarly, the investigating chamber shall only order indictment “if the *charges* brought against the person *under judicial examination* constitute an offence classed as a felony by law”.<sup>206</sup> It is further well settled in the jurisprudence of the French Court of Cassation that, when issuing a closing order, the investigating judges determine whether the charges accepted against a person under judicial examination constitute a felony,<sup>207</sup> which implies that only a person charged beforehand can be indicted and sent for trial.<sup>208</sup> A trial court, faced with a situation where the indicted person had not been charged beforehand, shall indeed return the file to the public prosecutor in order to enable him or her to seise once more the investigating judicial authority, with a view to

<sup>199</sup> Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5), para. 35.

<sup>200</sup> Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5), para. 36.

<sup>201</sup> See Appeal, paras 18-22.

<sup>202</sup> Case 002 Clarification Order (D198/1), para. 10 (emphasis added).

<sup>203</sup> Case 002 Clarification Order (D198/1), p. 6 (emphasis added).

<sup>204</sup> French Code of Criminal Procedure, Art. 181 (unofficial translation) (emphasis added).

<sup>205</sup> Cambodian Code of Criminal Procedure, Art. 247 (unofficial translation) (emphasis added).

<sup>206</sup> French Code of Criminal Procedure, Art. 214 (unofficial translation) (emphasis added). To the same effect, Article 282 of the Cambodian Code of Criminal Procedure provides that the provisions of Article 247, concerning closing orders issued by an investigating judge, shall apply to closing orders issued by the investigating chamber.

<sup>207</sup> See, e.g., French Cass. Crim., 17 October 2017, Case No. 17-84473; French Cass. Crim., 23 January 2013, Case No. 12-87137; French Cass. Crim., 13 February 2008, Cases No. 07-88314 & 07-88315.

<sup>208</sup> See, e.g., French Cass. Crim., 17 September 2014, Case No. 14-84187.





regularising the proceedings.<sup>209</sup>

112. Accordingly, the Undersigned Judges consider that a suspect has first to be charged before being indicted. The fact that the Co-Lawyers made legal arguments regarding allegations at crime sites other than those formally charged does not alleviate this procedural requirement, especially since IM Chaem could have been charged for additional crimes at any time during the investigation, up until the Closing Order. The Undersigned Judges further reject as irrelevant the submissions relating to Internal Rule 66 *bis*, which does not apply in the present case.

b. The Co-Prosecutors' Right to Intervene in the Proceedings

113. While the decision to charge a suspect is taken *ex parte*, the Co-Prosecutors have a right to participate in the investigation.<sup>210</sup> The Internal Rules provide them with various means to intervene in the course of the proceedings, including by requesting the Co-Investigating Judges to “make such orders or undertake such investigative action as they consider useful for the conduct of the investigation”, pursuant to Internal Rule 55(10).

114. It was therefore open to the Co-Prosecutors to request additional charges by way of requests for investigative action at any time during the judicial investigation and to raise any appeal against rejection orders – either explicit or implicit, on the basis of constructive denial – pursuant to Internal Rules 55(10) and 74(2).<sup>211</sup> The Undersigned Judges indeed note that the Co-Prosecutors resorted to this procedure when they requested further charging in Case 002,<sup>212</sup> expressly acknowledging at that time that the Co-Investigating Judges may not indict a person for facts in relation to which he or she has not first been charged.<sup>213</sup> There is therefore no doubt that the Co-Prosecutors were aware that they had to trigger a decision from the Co-Investigating Judges on further charges and eventually raise an appeal, should that decision not correspond

<sup>209</sup> See, e.g., French Cass. Crim., 15 September 2004, Case No. 04-83670. See also French Code of Criminal Procedure, Art. 385.

<sup>210</sup> Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5), para. 38 referring to Considerations on Decision to Charge *In Absentia* (D239/1/8), Opinion of Judges BEAUVALLET and BWANA, paras 19, 21.

<sup>211</sup> Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5), para. 38.

<sup>212</sup> Case 002, Co-Prosecutors' Request for Notification of Charges to KAING Guek Eav *alias* Duch, 21 January 2010, D334 (“Co-Prosecutors' Request for Further Charging (D334)”). See also Case 002 Order Refusing Request for Further Charging (D298/2).

<sup>213</sup> Co-Prosecutors' Request for Further Charging (D334), para. 1.



to their satisfaction.

115. In the present case, the Undersigned Judges conclude that the Co-Prosecutors failed to make use of their right to intervene in due course and that the International Co-Prosecutor cannot simply argue, at this stage, that the charges do not reflect his expectations. Accordingly, this part of the ground of appeal is dismissed.

c. The Co-Investigating Judges' Duty to Issue a Decision on All Facts

116. The Undersigned Judges recall that, pursuant to Internal Rule 55(2), the Co-Investigating Judges have the obligation to investigate *in rem* all the material facts set out in the prosecutorial submissions.<sup>214</sup> The Co-Investigating Judges further have the duty to make a decision, in the closing order, with respect to each of the facts of which they have been validly seised.<sup>215</sup>

117. The International Co-Prosecutor's claim that the Co-Investigating Judges failed to issue a reasoned decision in the Closing Order (Reasons) with regard to allegations not formally charged, and thus failed to make a proper assessment of jurisdiction on the basis of all relevant facts, is closely linked to the arguments raised in Ground 2 and will be addressed below.

118. In light of the foregoing, the Undersigned Judges dismiss the first ground of appeal.

**B. Ground 2: Alleged Failure to Address All Facts in the Closing Order (Reasons)**

**1. Submissions**

119. The International Co-Prosecutor submits that, in their assessment of IM Chaem's responsibility of for the purposes of determining personal jurisdiction, the Co-Investigating Judges failed to address five categories of allegations of which they were seised in the Introductory and Supplementary Submissions, but which were not charged: (i) the purge of the Northwest Zone; (ii) forced marriages in Sectors 5 and 13; (iii) persecution of the Vietnamese

<sup>214</sup> Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5), para. 39 *referring to, inter alia*, Case 003 Decision on Two Applications for Annulment (D134/1/10), Opinion of Judges BEAUVALLET and BWANA, para. 13.

<sup>215</sup> French Cass. Crim., 24 March 1977, Case No. 76-91442. *See also* Case 002 Clarification Order (D198/1), para. 10.



in Sector 5; (iv) crimes against the Khmer Krom in Sector 13; and (v) persecution, torture, enforced disappearances and other inhumane acts at specified sites.<sup>216</sup>

120. First, the International Co-Prosecutor asserts that the Co-Investigating Judges, despite recognising the key role IM Chaem played in the purge of the Northwest Zone, failed to consider the killings and related crimes that resulted therefrom in establishing her responsibility.<sup>217</sup> The evidence regarding the number of people killed or the gravity of the crimes was not discussed in the assessment of whether IM Chaem was one of the “most responsible”.<sup>218</sup> Second, the Co-Investigating Judges failed to assess IM Chaem’s culpability for forced marriage as the crime against humanity of other inhumane acts, despite the evidence provided by the International Co-Prosecutor.<sup>219</sup>

121. Third, the Co-Investigating Judges failed to consider the majority of the allegations regarding IM Chaem’s responsibility for crimes against the Vietnamese,<sup>220</sup> despite evidence of her involvement in the commission of such crimes at several sites,<sup>221</sup> and of her personally ordering the killing of two Vietnamese women.<sup>222</sup> Fourth, they also failed to consider allegations and to review the evidence of IM Chaem’s responsibility for crimes against the Khmer Krom in Sector 13, including in Koh Andet District, where she reportedly served as District Secretary.<sup>223</sup>

122. Fifth, the Co-Investigating Judges failed to consider the evidence of IM Chaem’s responsibility for other crimes of which they were seised, including: the persecution of Northwest Zone cadres, former Khmer Republic officials and their relatives, and ethnic minorities, including the Cham, Chinese, Laotians and Khmer Leu; as well as crimes of torture committed at Phnom Trayoung Security Centre and Wat Chamkar Khnol Security Centre, imprisonment and enforced disappearances at Wat Ang Srei Mealy, and inhumane living conditions at Phum Chakrey Security Centre.<sup>224</sup> The Co-Investigating Judges only made a

<sup>216</sup> Appeal, para. 23.

<sup>217</sup> Appeal, paras 24-26. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 52.

<sup>218</sup> Appeal, para. 26.

<sup>219</sup> Appeal, paras 27-28. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 57.

<sup>220</sup> Appeal, paras 29-32.

<sup>221</sup> Appeal, para. 31 (including at Phnom Trayoung Security Centre and Worksite, Spean Sreng Canal Worksite, Chamkar Khnol Security Office, Prey Taruth Execution Site, Trapeang Thma Dam Worksite, Phum Chakrey Security Centre, and Wat Preah Net Preah).

<sup>222</sup> Appeal, para. 31.

<sup>223</sup> Appeal, paras 33-34.

<sup>224</sup> Appeal, paras 35-37.



cursory finding that persecution took place at crime sites not charged, without establishing who the victims were or assessing the gravity of the crimes.<sup>225</sup>

123. The Co-Lawyers respond that the International Co-Prosecutor fails to address the correct appellate standard applicable to determining personal jurisdiction, and fails to identify how the alleged legal and factual errors amounted to an abuse of discretion.<sup>226</sup> In particular, the Co-Investigating Judges properly assessed and considered all facts of which they were seised.<sup>227</sup> They were neither bound by the prosecutorial submissions, nor required to make an express determination concerning each piece of evidence or each allegation with which IM Chaem was not charged, but nevertheless did consider the uncharged facts and still concluded these would not materially impact the Closing Order.<sup>228</sup>

124. The Co-Lawyers further aver that the Co-Investigating Judges appropriately considered all relevant facts in determining personal jurisdiction, including allegations related to the Southwest Zone<sup>229</sup> and Northwest Zone,<sup>230</sup> and claim that the International Co-Prosecutor does not show how the alleged failure to address these facts led to an abuse of discretion.<sup>231</sup> Regarding allegations related to the Southwest Zone, the Co-Investigating Judges determined that IM Chaem was not involved in the decision-making affecting Sector 13 and Koh Andet District, so they were not required to assess in detail the evidence related to the alleged crimes in that location.<sup>232</sup> In any case, the evidence relating to forced marriages in Sector 13<sup>233</sup> and crimes against the Khmer Krom<sup>234</sup> was irrelevant or not probative.

125. Concerning allegations related to the Northwest Zone, the Co-Lawyers contend that the International Co-Prosecutor fails to show any error or abuse of discretion relating to the Co-Investigating Judges' treatment of the purge,<sup>235</sup> forced marriages<sup>236</sup> and persecution of the

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<sup>225</sup> Appeal, para. 36 referring to Closing Order (Reasons), paras 295, 305.

<sup>226</sup> Response, para. 41. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), p. 43.

<sup>227</sup> Response, paras 42-44.

<sup>228</sup> Response, paras 42-43. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), p. 43.

<sup>229</sup> Response, paras 46-53.

<sup>230</sup> Response, paras 54-72.

<sup>231</sup> Response, para. 73.

<sup>232</sup> Response, paras 47-48. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), p. 45.

<sup>233</sup> Response, paras 49-51.

<sup>234</sup> Response, paras 52-53.

<sup>235</sup> Response, paras 55-56. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 46-48.

<sup>236</sup> Response, paras 58-61. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 48-51.



Vietnamese<sup>237</sup> in Sector 5, and other crimes of which they were seized.<sup>238</sup> In particular, the Co-Investigating Judges examined the evidence related to IM Chaem's involvement in the purge at length and found, at most, that she led the transfer of the cadres, which is of marginal relevance in determining personal jurisdiction.<sup>239</sup> The Co-Lawyers further aver that IM Chaem's involvement and authority over Trapeang Thma Dam Worksite, Wat Chamkar Khnol Security Centre and Wat Preah Net Preah were not established, and thus these sites were not relevant to the question of personal jurisdiction.<sup>240</sup> There was also no clear evidence of IM Chaem's involvement at crime sites relevant to the alleged persecutions.<sup>241</sup> Finally, while acknowledging that no express reasoning was provided regarding persecution of the Vietnamese at Prey Taruth Execution Site and Phum Chakrey Security Centre, or in relation to the killing of two Vietnamese women,<sup>242</sup> the Co-Lawyers submit that the evidence was unreliable or insufficient.<sup>243</sup>

126. The International Co-Prosecutor replies that the Co-Investigating Judges impermissibly omitted not just particular pieces of evidence, but entire allegations and their accompanying supporting evidence.<sup>244</sup> The Co-Lawyers' arguments sidestep how the assessment of personal jurisdiction was actually made, and amount to there being no requirement for any reasoning or mention of alleged crimes.<sup>245</sup> The Co-Lawyers further misrepresent the findings and evidence related to crimes for which IM Chaem was not charged, in particular in relation to the purge of the Northwest Zone.<sup>246</sup> The failure to consider the killing of a minimum of 1,200 people was not of marginal relevance to assessing IM Chaem's responsibility.<sup>247</sup> The Co-Lawyers also mischaracterised incriminating evidence regarding forced marriages,<sup>248</sup> the treatment of the Vietnamese<sup>249</sup> and other allegations.<sup>250</sup> The International Co-Prosecutor stresses that the evidence of eyewitnesses and victims, even if uncorroborated, is capable of meeting the

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<sup>237</sup> Response, paras 62-69.

<sup>238</sup> Response, paras 70-72.

<sup>239</sup> Response, paras 55-56.

<sup>240</sup> Response, paras 59, 63-64.

<sup>241</sup> Response, para. 71.

<sup>242</sup> Response, para. 65.

<sup>243</sup> Response, paras 66-68.

<sup>244</sup> Reply, para. 33.

<sup>245</sup> Reply, para. 34.

<sup>246</sup> Reply, paras 41-42. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 56-57.

<sup>247</sup> Reply, para. 42.

<sup>248</sup> Reply, paras 35-38. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 57-62.

<sup>249</sup> Reply, paras 39-40.

<sup>250</sup> Reply, para. 43.



standard of probability applicable at this stage of the proceedings.<sup>251</sup> Overall, assessing IM Chaem's contribution to those crimes was a necessary step in determining whether or not she was among those most responsible.<sup>252</sup>

## 2. Discussion

127. Ground 2 of the Appeal alleges that the Co-Investigating Judges erred in law by failing to address facts of which they were seised, and consequently failing to take them into consideration in their assessment of personal jurisdiction.<sup>253</sup>

128. At the outset, the Undersigned Judges recall that, pursuant to Internal Rule 55(2), the Co-Investigating Judges shall investigate all, but only, the facts of which they were seised, *i.e.* the facts which are alleged in an introductory and any supplementary submissions.<sup>254</sup> Whether particular allegations fall within the scope of the matter laid before the Co-Investigating Judges can only be determined by consideration of these introductory and supplementary submissions and their annexes,<sup>255</sup> with the guidance of the legal characterisations proposed by the Co-Prosecutors.<sup>256</sup> In other words, the Co-Investigating Judges may not charge a suspect with crimes falling outside the scope of the judicial investigation, and they cannot be requested to expand the charges at the time of a closing order through a Co-Prosecutor's final submission. Likewise, the Pre-Trial Chamber cannot expand the scope of the charges on the basis of allegations tardily raised in an appeal against a closing order.

129. The duty of Co-Investigating Judges to investigate all allegations of which they are

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<sup>251</sup> Reply, para. 38.

<sup>252</sup> Reply, paras 42-43.

<sup>253</sup> Appeal, paras 23-37.

<sup>254</sup> *See, e.g.*, Case 001 Decision on Closing Order Appeal (D99/3/42), paras 35-37; Case 003 Decision on Two Applications for Annulment (D134/1/10), Opinion of Judges BEAUVALLET and BWANA, para. 13; Case 003 (PTC28), Decision Related to (1) MEAS Muth's Appeal Against Decision on Nine Applications to Seise the Pre-Trial Chamber with Requests for Annulment and (2) the Two Annulment Requests Referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26, para. 175; Case 004 (PTC39), Considerations on YIM Tith's Application to Annul Investigative Action and Orders Relating to Kang Hort Dam, 11 August 2017, D345/1/6 ("Case 004 Considerations on Investigation Relating to Kang Hort Dam (D345/1/6)"), paras 24-26; Case 004 Decision on Investigation of Sexual Violence (D365/3/1/5), para. 39. *See also* Cambodian Code of Criminal Procedure, Art. 125.

<sup>255</sup> *See, e.g.*, Case 003 Decision on Two Applications for Annulment (D134/1/10), Opinion of Judges BEAUVALLET and BWANA, para. 4; Case 004 Considerations on Investigation Relating to Kang Hort Dam (D345/1/6), para. 26.

<sup>256</sup> *See, e.g.*, Case 001 Decision on Closing Order Appeal (D99/3/42), para 35.



seised also creates a duty, in conjunction with Internal Rule 67(1), to give a proper legal determination on every such allegation at the time of the closing order, and the Co-Investigating Judges remain seised of any facts for which they fail to exercise this duty.<sup>257</sup> The decision to indict a charged person or dismiss a case does not involve the exercise of any discretionary power.<sup>258</sup> Moreover, the Undersigned Judges recall that Internal Rule 67(4) requires that a closing order be reasoned.<sup>259</sup>

130. The Undersigned Judges note that IM Chaem was charged with allegations of crimes committed at Phnom Trayoung Security Centre and Spean Sreng Canal Worksite.<sup>260</sup> Other criminal allegations raised in the Introductory and Supplementary Submissions were not charged against her. In this regard, the Co-Investigating Judges provided a “summary review” of the evidence regarding uncharged crime sites,<sup>261</sup> generally noting that the extent and contours of IM Chaem’s authority over these sites,<sup>262</sup> as well as the number of victims,<sup>263</sup> were not clearly established by the investigation. Nonetheless, they made a cursory finding that “the crimes against humanity of imprisonment, murder, enslavement, other inhumane acts, persecution, as well as the national crime of homicide” were committed at uncharged crime sites,<sup>264</sup> but considered that, even if taken into account, IM Chaem “would still fall outside of the jurisdiction of the ECCC, under all alleged modes of liability.”<sup>265</sup>

131. The Undersigned Judges will, first, review the International Co-Prosecutor’s arguments in Ground 2 of the Appeal and, second, examine *ex officio* whether other criminal allegations raised in the Introductory and Supplementary Submissions, of which the Co-Investigating Judges were duly seised, were properly addressed in the Closing Order (Reasons). Such a review is required for the Undersigned Judges to be in a position to clarify the ECCC’s personal

<sup>257</sup> See, e.g., Case 001 Decision on Closing Order Appeal (D99/3/42), para 37. See also French Cass. Crim., 24 March 1977, Case No. 76-91442; French Cass. Crim., 4 March 2004, Case No. 03-85983.

<sup>258</sup> Case 001 Decision on Closing Order Appeal (D99/3/42), para. 37.

<sup>259</sup> Case 001 Decision on Closing Order Appeal (D99/3/42), para. 38. See also Cambodian Code of Criminal Procedure, Art. 247.

<sup>260</sup> See Notification of Charges (D239.1).

<sup>261</sup> Closing Order (Reasons), paras 248-251 (Wat Ang Srei Mealy Security Centre and Prey Sokhon Execution Site), 252-259 (Wat Preah Net Preah and Related Sites), 260-263 (Phum Chakrey Security Centre), 264-267 (Prey Taruth Execution Site), 268-270 (Wat Chamkar Khnol), 271-278 (Trapeang Thma Dam Worksite), 279-280 (rape and murder of two Vietnamese women in Preah Net Preah).

<sup>262</sup> Closing Order (Reasons), para. 247; see also paras 251, 259.

<sup>263</sup> Closing Order (Reasons), paras 250, 259, 263, 267, 270, 277-278, 321.

<sup>264</sup> Closing Order (Reasons), para. 305.

<sup>265</sup> Closing Order (Reasons), para. 313.



jurisdiction over IM Chaem.

a. Ground 2(1): Purge of the Northwest Zone

132. Ground 2(1) alleges that, despite recognising the key role IM Chaem played in the purge of the Northwest Zone, the Co-Investigating Judges failed to consider the gravity of the crimes that resulted therefrom – including the number of killings, the use of torture and the vulnerability of the victims – in their assessment of whether IM Chaem falls within the ECCC’s personal jurisdiction.<sup>266</sup>

133. The Co-Investigating Judges were duly seised, through paragraphs 54 to 59 of the Third Introductory Submission, of the allegations related to the purge of the Northwest Zone, which was led by IM Chaem and other Southwest Zone cadres, and which consisted of the arrest and killing of “[a]ll levels of existing Northwest Zone cadre” and further resulted in the “significant increase in the number of arrests, killings and disappearances amongst the general population”:

54. Starting in June 1977, the cadre of the Northwest Zone were purged from the village to zone level by a group of CPK cadre from the Southwest Zone that were led by [Ta] Mok, [Ta] Tith and IM Chaem.

55. The purge started in June 1977 with the arrest of Northwest Zone Committee Member and Sector 1 Secretary Ros Mao *alias* Say, and the arrival of Southwest Zone forces in Preah Net Preah District led by IM Chaem. Southwest Zone Secretary and CPK Standing Committee Member [Ta] Mok assigned IM Chaem to take over Preah Net Preah District and “resolve” people issues there, and communicated with Chaem and provided orders to her after she moved to the Northwest Zone.

56. Upon her arrival in Preah Net Preah District, IM Chaem met with her predecessor as district secretary, AN Maong, and obtained a list of 100,000 names including those of the existing district cadre. AN Maong was arrested shortly thereafter on June 28, 1977, and over the next two days other high ranking cadre from Sector 5 and Preah Net Preah District were also arrested. IM Chaem brought 500 Southwest Zone cadre with her to Preah Net Preah District and used those forces to disarm existing Northwest Zone cadre and send them to forced labour sites or security centres, such as S-21 and the Sector 5 prison at Phnom Trayoung, where they were detained and executed. All levels of existing Northwest Zone cadre were arrested and killed, including village chiefs, commune chiefs, district and sector officials, and their family members.

57. Over the remainder of 1977 and the first half of 1978, the purge was systematically extended to the entire Northwest Zone. For example, in August 1977, the Southwest Zone cadre (sometimes referred to as the *Niredey*) arrived in Moug Ruessei District and “all the old leaders were executed.” In Battambang District of

<sup>266</sup> Appeal, paras 24-26. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 52.





Sector 4, Southwest Zone cadre arrived in August 1977, were joined by West Zone cadre around February 1978, and “in April 1978, local cadre suddenly disappeared.” In Sisophon District of Sector 5, the local cadre “were all purged and taken elsewhere and replaced by *Niredey*” around November 1977. In February 1978, Northwest cadre in Pursat province “were made to board GMC trucks and taken in the direction of Mong Russey.” In the Wat Banteay Neang area of Mongkol Borei District, the local chiefs “were arrested by the incoming *Niredey* in March 1978.” Similar evidence exists in other parts of the Northwest Zone. The purge was enforced by the Southwest Zone military forces of [Ta] Mok, who “disarmed” the local Northwest cadre.

58. The purge culminated in June 1978 with the arrests of the senior zone and sector leaders, including Northwest Zone Secretary MUOL Sambath *alias* RUOS Nheum, Northwest Zone Deputy Secretary Keu, Sector 3 Secretary PHOK Sary *alias* Tom, Sector 1 Secretary and Northwest Zone Committee Member HENG Teav *alias* Paet *alias* Kantol, and Nheum’s son Diel. When the purge was complete, [Ta] Tith emerged as the Acting Secretary of the Northwest Zone, and the sector, district and commune level CPK organizations had been replaced with Southwest cadre who reported to him. The purged cadre from the Northwest Zone either “disappeared” and were never seen again, or were arrested and taken to S-21, where they were subsequently executed. The Northwest Zone accounted for the highest number of S-21 prisoners of any zone, having 5 times as many prisoners as the second highest zone.

59. In addition to the purge of the existing cadre, there was a significant increase in the number of arrests, killings and disappearances amongst the general population in Preah Net Preah District and the entire Northwest Zone after [Ta] Tith, IM Chaem, [Ta] Mok and the Southwest cadre assumed control. In the words of one survivor from the Northwest, “1978 was the real year for killings.” The victims of this period included new people, base people, persons of Vietnamese ethnicity and truckloads of people brought in from the East Zone. The security centres, execution sites and forced labour sites set forth in the following paragraphs were some of the crime sites at which these victims were detained and executed during the period that [Ta] Tith, IM Chaem and the Southwest cadre were in control of the Northwest Zone.<sup>267</sup>

134. The International Co-Prosecutor further alleged that IM Chaem participated as a co-perpetrator in a joint criminal enterprise to purge the Northwest Zone, and described the crimes committed against the general population following the arrival of the Southwest Zone cadres:

11. Following the arrival of the Southwest cadre in the Central and Northwest Zones, a brutal period ensued in which people were forced to work harder, less food was provided, and hundreds of thousands of people were arrested and killed, including new people, local cadre, Cham, Cambodians of Vietnamese descent, and people from the Eastern Zone who were brought to the Central and Northwest Zones in truckloads to be executed. There may have been as many as 400,000 deaths in the Central Zone and 560,000 deaths in the Northwest Zone during the DK period.

<sup>267</sup> Third Introductory Submission (D1), paras 54-59 (footnotes omitted).



17. Another common criminal plan, or joint criminal enterprise (JCE), existed from at least mid-1977 to the end of the DK regime, which included [Ta] Mok, [Ta] Tith, IM Chaem and their fellow committee members and direct subordinates who came from the Southwest Zone. The object of this [joint criminal enterprise] was to purge the Northwest Zone and execute all perceived enemies of the DK regime. The specific targets of this [joint criminal enterprise] were the local cadre, their families and “connections,” and people with connections to the “old society,” new or “1975 people,” the Cham ethnic and religious minority and persons of Vietnamese ethnicity. [Ta] Tith and IM Chaem participated in this [joint criminal enterprise] as co-perpetrators and intended the results thereof.<sup>268</sup>

135. The Co-Investigating Judges made no express legal determination, in their brief overview of the uncharged crimes, with regard to the purge of the Northwest Zone and IM Chaem’s responsibility therefor.<sup>269</sup> Nonetheless, they made several findings throughout the Closing Order (Reasons) as to IM Chaem’s role in the purge when discussing her overall role, authority and conduct in the Northwest Zone,<sup>270</sup> as well as in the factual and legal findings related to crimes against humanity committed at Phnom Trayoung Security Centre and Spean Sreng Canal Worksite.<sup>271</sup>

136. In particular, the Co-Investigating Judges noted evidence indicating that, after IM Chaem and the Southwest Zone cadres took control of Sector 5 in mid-1977, they carried out a systematic campaign of arrests and killings targeting Northwest Zone cadres.<sup>272</sup> The operation, engineered and overseen by Ta Mok,<sup>273</sup> aimed to replace Northwest Zone cadres from the cooperative to the zone level.<sup>274</sup> In March 1977, IM Chaem was appointed Secretary of Preah Net Preah District in Sector 5, replacing Ta Maong, who was arrested and sent to S-21.<sup>275</sup> She held this position until the arrival of the Vietnamese in January 1979.<sup>276</sup> Members of the Sector 5 Committee were also arrested upon IM Chaem’s and Ta Mok’s arrival in the Northwest Zone, starting with Ta Hoeng, possibly Ta Vuth and Ta Val, then Ta Cheal in early or mid-1978, and finally Ta Rin.<sup>277</sup> IM Chaem became Sector 5 Deputy Secretary after

<sup>268</sup> Third Introductory Submission (D1), paras 11, 17 (footnotes omitted).

<sup>269</sup> Closing Order (Reasons), paras 247-280.

<sup>270</sup> Closing Order (Reasons), paras 156-188.

<sup>271</sup> Closing Order (Reasons), paras 189-243, 285-302, 308-309.

<sup>272</sup> Closing Order (Reasons), para. 185; *see also* paras 153-154.

<sup>273</sup> Closing Order (Reasons), paras 155, 284.

<sup>274</sup> Closing Order (Reasons), para. 152.

<sup>275</sup> Closing Order (Reasons), para. 158; *see also* para. 154.

<sup>276</sup> Closing Order (Reasons), paras 160, 166.

<sup>277</sup> Closing Order (Reasons), paras 162-163.



*Ta Rin's removal.*<sup>278</sup>

137. In relation to the crime sites charged, the Co-Investigating Judges found that, upon IM Chaem's orders, Northwest Zone cadres were arrested and sent to Phnom Trayoung Security Centre<sup>279</sup> for being perceived as bad elements or enemies of the CPK,<sup>280</sup> and that they were victims of the crime against humanity of persecution on political grounds.<sup>281</sup> The Co-Investigating Judges also noted evidence that Northwest Zone cadres were forced to work at Spean Sreng Canal Worksite, and were killed if they made a mistake.<sup>282</sup> The Co-Investigating Judges generally acknowledged that, after the arrival of the Southwest Zone cadres, large numbers of people were arrested and killed, including people with ties to Vietnam and former Khmer Republic officials, upon IM Chaem's and others' orders.<sup>283</sup>

138. With regard to IM Chaem's responsibility, the Co-Investigating Judges noted evidence that she took part in the second wave of the purge in 1977 and early 1978 by leading a group of Southwest Zone cadres – amounting to 500 to 600 families and including 300 to 500 soldiers – by train from Takeo to the Northwest Zone, stopping on the way in Phnom Penh, where they met with POL Pot.<sup>284</sup> Upon her arrival in the Northwest Zone, IM Chaem became responsible for worksites and a sector-level security centre, and was informed of what was happening on the ground through multiple sources, such as reports, personal visits, meetings and messengers.<sup>285</sup> The Co-Investigating Judges also noted that IM Chaem had a close relationship with *Ta Mok*,<sup>286</sup> and that she may have been aware of the purge as early as 1976, when she attended a meeting in Koh Andet District at which the plan to relocate Southwesterners was discussed.<sup>287</sup> They further identified evidence that IM Chaem publicly spoke against Northwest Zone cadres and, at a meeting in Phnum Lieb, called for attendees to identify high-ranking people to be killed.<sup>288</sup> The Co-Investigating Judges were thus satisfied that IM Chaem was aware of the existence of the attack and that her actions formed a part thereof.<sup>289</sup> They were

<sup>278</sup> Closing Order (Reasons), paras 163-166.

<sup>279</sup> Closing Order (Reasons), paras 200, 202.

<sup>280</sup> Closing Order (Reasons), paras 281, 295.

<sup>281</sup> Closing Order (Reasons), para. 295.

<sup>282</sup> Closing Order (Reasons), para. 232.

<sup>283</sup> Closing Order (Reasons), para. 186.

<sup>284</sup> Closing Order (Reasons), paras 152, 155-156, 284.

<sup>285</sup> Closing Order (Reasons), para. 284.

<sup>286</sup> Closing Order (Reasons), para. 155.

<sup>287</sup> Closing Order (Reasons), para. 156.

<sup>288</sup> Closing Order (Reasons), paras 181-182.

<sup>289</sup> Closing Order (Reasons), para. 284.



further satisfied that she could be held responsible as a member of a joint criminal enterprise for crimes against humanity committed at Phnom Trayoung Security Centre and Spean Sreng Canal Worksite,<sup>290</sup> since she shared the plan to replace cadres<sup>291</sup> and contributed to it by ordering the enslavement, arrest and killing of Northwest Zone cadres.<sup>292</sup>

139. In light of the foregoing, the Undersigned Judges consider that the allegations related to the purge of the Northwest Zone, despite being at the core of the International Co-Prosecutor's contentions, were only partly addressed, and only in relation to charged crimes committed against Northwest Zone cadres at Phnom Trayoung Security Centre and Spean Sreng Canal Worksite. The Co-Investigating Judges failed to address the evidence regarding crimes against humanity committed against cadres and the general population in the context of the purge in the entire Northwest Zone, and more specifically in Preah Net Preah District and Sector 5, as well as IM Chaem's responsibility for her role therein.<sup>293</sup> IM Chaem's substantial role in the systematic campaign of arrests and killings of Northwest Zone cadres, and in the resulting attacks against the general civilian population in this Zone, was thus only partially taken into consideration in the determination of whether she was amongst those most responsible for crimes committed during the Khmer Rouge regime.

140. The Undersigned Judges note, in particular, that there is sufficient evidence that several other cadres were arrested and killed in Sector 5, such as Sam-At, accused by IM Chaem of being a traitor,<sup>294</sup> *Ta Krak*, who was arrested during a meeting organised by IM Chaem; other cadres of Preah Net Preah Commune;<sup>295</sup> and *Ta Theang*, the former Phnum Lieb commune secretary.<sup>296</sup> The evidence also shows that 1,211 people from the Northwest Zone were sent to S-21 and were killed, mostly between June 1977 and May 1978.<sup>297</sup> The Co-Investigating

<sup>290</sup> Closing Order (Reasons), para. 309.

<sup>291</sup> Closing Order (Reasons), para. 308.

<sup>292</sup> Closing Order (Reasons), para. 309.

<sup>293</sup> See Third Introductory Submission (D1), para. 17.

<sup>294</sup> Case 004/1, Written Record of Interview of CHRACH Kit, 21 January 2014, D119/74, at ERN (EN) 00981123 (A1).

<sup>295</sup> Case 004/1, Written Record of Interview of SOS Narin, 17 May 2013, D119/38, at ERN (EN) 00944475 (A12); Case 004/1, Written Record of Interview of PECH Ruos, 12 March 2014, D119/99, at ERN (EN) 00985203 (A26-A27); Case 004/1, Written Record of Interview of KOR Len, 29 April 2014, D119/121, at ERN (EN) 01067925 (A35), 01067926 (A42), 01067927 (A43-A44). See also Closing Order (Reasons), para. 254.

<sup>296</sup> Case 004/1, Written Record of Interview of SVA Nung, 23 May 2013, D119/43, at ERN (EN) 00944492 (A18); Case 004/1, Written Record of Interview of DUONG Vandy, 14 June 2013, D119/48, at ERN (EN) 00966722 (A5); Case 004/1, Written Record of Interview of KOR Len, 29 April 2014, D119/121, at ERN (EN) 01067925 (A35), 01067926 (A42), 01067927 (A43-A44).

<sup>297</sup> See Case 004/1, OCP List of S-21 Prisoners Coming from the Northwest Zone, 19 May 2009, D6.1.890.



Judges further did not address, although duly seised,<sup>298</sup> the extent of the increase in the number of arrests, killings and disappearances amongst the general population resulting from the purge. While they generally found that “Southwest Zone cadres did not only target Northwest Zone cadres”, and that, after the arrival of the Southwest Zone cadres, IM Chaem “decided on the arrests of large numbers of people”,<sup>299</sup> they only briefly noted evidence of crimes committed under the rule of the Southwesterners at Wat Preah Net Preah and related sites,<sup>300</sup> Phum Chakrey Security Centre<sup>301</sup> and Prey Taruth Execution Site,<sup>302</sup> as well as evidence of crimes committed under both the Northwest and Southwest Zone leadership at Wat Chamkar KhnoI<sup>303</sup> and Trapeang Thma Dam Worksite.<sup>304</sup> They mostly declined to enter any findings regarding the scope and gravity of those crimes that had not been charged, especially in relation to the assessment of the number of victims and IM Chaem’s responsibility. The Undersigned Judges, noting that these issues will be addressed in detail below, consider that several thousand people from the Northwest Zone may have been purged at various security centres and execution sites in the Northwest Zone, in addition to those identified and counted in the records of S-21.

141. The Undersigned Judges recall that crimes allegedly resulting from the purge of the Northwest Zone which are relevant to IM Chaem’s responsibility, including killings, unlawful arrests and detentions, persecutions, enforced disappearances and other inhumane acts, should have been clearly addressed and reasoned in the Closing Order (Reasons). There is indeed sufficient evidence, as acknowledged by the Co-Investigating Judges, that IM Chaem was aware of the attack against the civilian population in the Northwest Zone and that her actions, including leading the purge, formed a part thereof;<sup>305</sup> there is also sufficient evidence that she shared the plan to replace Northwest Zone cadres and contributed to it by ordering their enslavement, arrest and execution.<sup>306</sup> In light of these findings, and considering IM Chaem’s conduct and authority within Sector 5 and Preah Net Preah District,<sup>307</sup> there is sufficient evidence to establish that she could be held responsible as a member of a joint criminal enterprise for crimes against humanity committed not only at Phnom Trayoung Security Centre

<sup>298</sup> See Third Introductory Submission (D1), paras 11, 59.

<sup>299</sup> Closing Order (Reasons), para. 186.

<sup>300</sup> Closing Order (Reasons), paras 252, 257.

<sup>301</sup> Closing Order (Reasons), paras 260, 263.

<sup>302</sup> Closing Order (Reasons), paras 264, 266-267.

<sup>303</sup> Closing Order (Reasons), paras 269-270.

<sup>304</sup> Closing Order (Reasons), paras 274, 276-278.

<sup>305</sup> Closing Order (Reasons), para. 284.

<sup>306</sup> Closing Order (Reasons), paras 308-309.

<sup>307</sup> Closing Order (Reasons), paras 180-188.



and Spean Sreng Canal Worksite, but also at least in all of Sector 5 of the Northwest Zone.

142. The Undersigned Judges conclude that, overall, the Co-Investigating Judges failed to make a proper legal determination regarding the purge of the Northwest Zone, consider the gravity of the crimes and to assess IM Chaem's responsibility therefor. Accordingly, the Undersigned Judges uphold Ground 2(1) of the Appeal and will address later in their conclusion whether this failure was fundamentally determinative of the determination on the ECCC's personal jurisdiction.

b. Ground 2(2): Forced Marriage

143. The International Co-Prosecutor submits, in Ground 2(2) of the Appeal, that the Co-Investigating Judges failed to assess the issue of forced marriage as other inhumane acts in Sectors 5 and 13, which he raised in his Final Submission.<sup>308</sup>

144. The Undersigned Judges concur that the offence of forced marriage was not addressed in the Closing Order (Reasons). However, a review of the scope of the investigation reveals that the Co-Investigating Judges were not seised of such allegations and thus did not err in not making a legal determination on forced marriage as a crime against humanity.

145. The Undersigned Judges note, first, that the Third Introductory Submission did not include any factual allegations of forced marriage as other inhumane acts. While the specific Supplementary Submission on Forced Marriage and Sexual Violence did seise the Co-Investigating Judges of allegations related to forced marriage in Sectors 1 and 41,<sup>309</sup> it expressly limited the scope of their investigation to those two sectors, in relation to which none of the evidence available in the Case File establishes a link with IM Chaem. Finally, the International Co-Prosecutor filed, in response to a forwarding order, a supplementary submission requesting the investigation of allegations of forced marriages in Samlaut District in Sector 1,<sup>310</sup> which were irrelevant to Sector 5 and Sector 13.

146. Therefore, while a cursory review of the evidence collected in Case 004/1 could have provided the International Co-Prosecutor with reason to believe, in the sense of Internal

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<sup>308</sup> Appeal, paras 27-28.

<sup>309</sup> Supplementary Submission on Forced Marriage and Sexual Violence (D191), paras 2-6.

<sup>310</sup> Supplementary Submission on Scope of Investigation (D272/1), paras 10-11.



Rule 53(1), that crimes of forced marriage were committed in Sectors 5<sup>311</sup> and 13,<sup>312</sup> the Co-Investigating Judges could not consider themselves seised absent a supplementary submission expanding the scope of the investigation to those sectors. Accordingly, the Co-Investigating Judges did not err in failing to address in the Closing Order (Reasons) the issue of forced marriage as the crime against humanity of other inhumane acts. Sub-ground 5(2) of the Appeal is therefore denied.

c. Ground 2(3): Crimes Against the Vietnamese

147. Ground 2(3) of the Appeal alleges that the Co-Investigating Judges failed to consider the majority of the allegations regarding IM Chaem's responsibility for the crime against humanity of persecution and various grave breaches of the Geneva Conventions in relation to the treatment of the Vietnamese in Sector 5.<sup>313</sup> The International Co-Prosecutor points to evidence of IM Chaem's involvement in the killing of two Vietnamese women and in the commission of crimes at Phnom Trayoung Security Centre, Spean Sreng Canal Worksite, Wat Chamkar Khnol Security Centre, Prey Taruth Execution Site, Trapeang Thma Dam Worksite, Phum Chakrey Security Centre and Wat Preah Net Preah and related sites.<sup>314</sup>

148. The Undersigned Judges observe that the proposed charges against IM Chaem in the Third Introductory Submission and the Supplementary Submission on Forced Marriage and Sexual Violence included the crime against humanity of persecution on political, racial and religious grounds against, *inter alia*, persons of Vietnamese ethnicity, but not grave breaches of the Geneva Conventions.<sup>315</sup> The Undersigned Judges recall that the crime of persecution can be defined as the deliberate perpetration of an act or omission, which discriminates in fact and denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*), with the intent to discriminate on political, racial or religious grounds

<sup>311</sup> See, e.g., Case 004/1, Civil Party Application of ROEUNG Saruon, 13 March 2013, D5/865, at ERN (EN) 00982872; Case 004/1, Civil Party Application of SUN Suy, 13 March 2013, D5/895, at ERN (EN) 01109237; Case 004/1, Written Record of Interview of THANG Thoeuy, 16 June 2014, D119/131, at ERN (EN) 01025297 (A65); Case 004/1, Written Record of Interview of SEN Sophon, 15 September 2015, D219/506, at ERN (EN) 01167929 (A51).

<sup>312</sup> See, e.g., Case 004/1, Written Record of Interview of YIN Teng, 29 December 2014, D219/135, at ERN (EN) 01067085-01067097 (A421-A528).

<sup>313</sup> Appeal, paras 29, 32.

<sup>314</sup> Appeal, paras 29-32.

<sup>315</sup> Third Introductory Submission (D1), para. 119; Supplementary Submission on Forced Marriage and Sexual Violence (D191), para. 13.



(*mens rea*).<sup>316</sup>

149. The Co-Investigating Judges were further explicitly seized of factual allegations related to the purge of the Northwest Zone, in which IM Chaem allegedly participated as a co-perpetrator. This purge allegedly targeted, amongst others, “persons of Vietnamese ethnicity”, and resulted in a “significant increase in the number of arrests [and] killings”.<sup>317</sup> According to paragraph 59 of the Third Introductory Submission, the victims of the purge in the general population included persons of Vietnamese ethnicity who were detained and executed at, *inter alia*, the security centres, execution sites and forced labour sites set forth in the that Submission. The factual allegations relating to Wat Chamkar Khnol specifically indicate that “[m]any of the victims were Vietnamese settlers”.<sup>318</sup> The Supplementary Submission on Forced Marriage and Sexual Violence further expressly seized the Co-Investigating Judges of the rape and killing of two women of Vietnamese descent in Preah Net Preah District.<sup>319</sup>

150. The Undersigned Judges therefore consider that the Co-Investigating Judges were duly seized of the persecution of persons of Vietnamese ethnicity at the listed crime sites, and generally throughout Sector 5, in the context of the purge of the Northwest Zone. However, they did not charge IM Chaem with this crime at Phnom Trayoung Security Centre, Spean Sreng Canal Worksite, or at any other crime site.<sup>320</sup>

151. The Undersigned Judges will now examine whether the Co-Investigating Judges failed to consider “most of” the allegations of persecution against persons of Vietnamese ethnicity. As they were properly seized of these allegations, they had a duty, pursuant to Internal Rules 55(2) and 67(1), to investigate and rule upon them at the time of the Closing Order (Reasons).

152. At the outset, the Undersigned Judges note that the Co-Investigating Judges made no express legal determination with regard to the alleged persecution of persons of Vietnamese ethnicity in Sector 5, except in relation to offences committed at Phnom Trayoung Security

<sup>316</sup> Case 001 Appeal Judgement (F28), paras 226, 241.

<sup>317</sup> Third Introductory Submission (D1), paras 11, 17, 59.

<sup>318</sup> Third Introductory Submission (D1), para. 71.

<sup>319</sup> Supplementary Submission on Forced Marriage and Sexual Violence (D191), para. 9.

<sup>320</sup> See Notification of Charges (D239.1).





Centre,<sup>321</sup> as well as a cursory finding that “the crime[] against humanity of [...] persecution [was] committed at Wat Ang Srei Mealy and Prey Sokhon execution site, Wat Preah Net Preah and related sites, Phum Chakrey security centre, Prey Taruth execution site, Wat Chamkar Khnol, and Trapeang Thma worksite.”<sup>322</sup>

153. This being said, the Co-Investigating Judges made several other relevant findings throughout the Closing Order (Reasons), noting in particular that “Southwest Zone cadres carried out an attack against the civilian population [...] in Sector 5”, which included “the ‘re-education’ or elimination of all real or perceived ‘bad elements’ or ‘enemies’ of the CPK, [including] people thought to have ties with the Vietnamese”.<sup>323</sup> “People identified as belonging to these groups were arrested and detained at security and execution sites in Sector 5, such as the Phnom Trayoung security centre, where they were executed in the hundreds.”<sup>324</sup> The Co-Investigating Judges also took into consideration evidence that “under IM Chaem’s tenure as Preah Net Preah District Secretary, [...] people with ties to Vietnam [...] were arrested and killed”, and that “it was IM Chaem who decided on the arrests of large numbers of people”.<sup>325</sup> In relation to the assessment of her individual criminal responsibility, they found that she and other Southwest Zone cadres “shared the plan to replace the Northwest Zone cadres [...] and to successfully implement the CPK’s policies”, including by “detain[ing] and kill[ing] workers who were perceived as enemies and people who were considered to have connection [*sic*] with Vietnam or with the Khmer Republic.”<sup>326</sup>

154. With regard to specific crime sites in Sector 5, the Co-Investigating Judges further relied on evidence that “[p]risoners at [Phnom Trayoung] security centre included [...] Vietnamese [...] citizens”,<sup>327</sup> and that “[r]easons for arrests [at Spean Sreng Canal Worksite] included family ties, for instance with persons of Vietnamese origin”.<sup>328</sup> They were satisfied that the crimes committed at Phnom Trayoung Security Centre amounted to persecution on political grounds, as “[m]any of the people detained, enslaved, and killed [there] were [...] persons thought to have links with Vietnam or persons perceived as ‘traitors’ of the CPK or

<sup>321</sup> Closing Order (Reasons), para. 295.

<sup>322</sup> Closing Order (Reasons), para. 305.

<sup>323</sup> Closing Order (Reasons), para. 281.

<sup>324</sup> Closing Order (Reasons), para. 281.

<sup>325</sup> Closing Order (Reasons), para. 186.

<sup>326</sup> Closing Order (Reasons), para. 308.

<sup>327</sup> Closing Order (Reasons), para. 202.

<sup>328</sup> Closing Order (Reasons), para. 238.



‘bad elements’, [who were targeted] because they belonged to these categories.’<sup>329</sup> By contrast, in their brief overview of the evidence regarding uncharged crimes, the Co-Investigating Judges discarded an uncorroborated witness statement that 1,000 Vietnamese families disappeared from Trapeang Thma Dam Worksite within a 24-hour period in 1978,<sup>330</sup> as well as evidence regarding the rape and murder of two Vietnamese women in Preah Net Preah, which they found to be insufficient.<sup>331</sup>

155. The Undersigned Judges consider that these findings only partly address the allegations that persons of Vietnamese ethnicity were persecuted in the Northwest Zone, including at crime sites other than Phnom Trayoung Security Centre. For the same reasons as above,<sup>332</sup> the Undersigned Judges find that the Co-Investigating Judges failed to address the evidence regarding crimes committed against the Vietnamese in the context of the purge of the Northwest Zone – more specifically in Preah Net Preah District and Sector 5 – and failed to make a proper legal determination on the extent and gravity of these crimes.

156. In fact, having reviewed the evidence on the Case File, the Undersigned Judges find that, on the whole, there is sufficient evidence to establish, to the requisite standard at this stage, that persons of Vietnamese ethnicity and those otherwise associated with Vietnam were targeted, arrested and killed under the rule of the Southwest Zone cadres in the Northwest Zone. Regarding Trapeang Thma Dam Worksite, although the Co-Investigating Judges rejected the evidence that 1,000 Vietnamese families disappeared within one day in 1978,<sup>333</sup> there is nevertheless sufficient evidence that persons of Vietnamese ethnicity and those otherwise associated with Vietnam were generally targeted.<sup>334</sup> In particular, CHHAO Chat stated that, when IM Chaem was in charge as District Committee, many people were killed at Trapeang

<sup>329</sup> Closing Order (Reasons), para. 295.

<sup>330</sup> Closing Order (Reasons), para. 276.

<sup>331</sup> Closing Order (Reasons), paras 279-280.

<sup>332</sup> See *supra* paras 132-142.

<sup>333</sup> Closing Order (Reasons), para. 276. See also Case 004/1, Written Record of Interview of BUTH Svoeuy, 19 March 2013, D119/23, at ERN (EN) 00935608 (A20).

<sup>334</sup> Case 004/1, DC-Cam Interview of BOU Mao, 16 June 2011, D123/1/2.53, at ERN (EN) 00969902-00969905, 00969909; Case 004/1, Written Record of Interview of BOU Mao, 21 February 2014, D119/94, at ERN (EN) 00982761 (A37); Case 004/1, DC-Cam Interview of KHOR Mot, 17 June 2011, D123/1/2.57, at ERN (EN) 00987554; Case 004/1, Written Record of Interview of SAK Sam, 23 April 2014, D119/120, at ERN (EN) 01057753 (A144); Case 004/1, Written Record of Interview of SORM Seila, 14 October 2014, D219/35, at ERN (EN) 01053592 (A44); Case 004/1, Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, at ERN (EN) 01059955 (A151-A153), 01059963 (A207); Case 004/1, DC-Cam Interview of PICH Ham, 5 March 2007, D123/1/1.6a, at ERN (EN) 00982770.



Thma Dam, and the Vietnamese were searched out, arrested and killed.<sup>335</sup> CHIEP Chhean reported that, in 1977, people in his unit were arrested and accused of being connected to the “*Yuon*”.<sup>336</sup> PICH Ham further stated that people had their backgrounds traced, as confirmed by CHAN Diel,<sup>337</sup> and that those found to be Vietnamese were not safe.<sup>338</sup>

157. Vietnamese and those associated with Vietnam were likewise targeted in other places in Sector 5. In Preah Net Preah District, CHAN Die confirmed that those who were entangled with the “*Yuon*” were killed, along with their families, at *Ta Krak*’s quarters,<sup>339</sup> while CHHEAN Huong recalled that two Vietnamese families of 12 members were taken to be killed in 1977.<sup>340</sup> MAK Vonny reported that those killed at Prey Taruth were accused of being Vietnamese.<sup>341</sup> KHOR Mot described how, at Veal Dang Kieb Kdam, she and others were arrested and sent to be killed when they were accused of being “*Yuon*”.<sup>342</sup> PECH Ruos also stated that people accused of having connections with the “*Yuon*” were killed at Phnom Trayoung or Phnum Lieb.<sup>343</sup> PHUONG Pai and PRAK Kav, who lived in Phnom Srok District and were themselves accused of being Vietnamese, reported that the Southwest Zone cadres screened the remaining Vietnamese families and selected them to be killed.<sup>344</sup> In Sisophon District, SIEN Nhien stated that most of the estimated 4,000-4,500 victims at Chamkar Khnol were recognised as long-time Vietnamese settlers.<sup>345</sup> TIL Hev was also told that Vietnamese were arrested and sent to Chamkar Khnol under the control of the Southwest cadres,<sup>346</sup> and OEUR Loeur was herself imprisoned there from 1976 to 1978 on the accusation of being

<sup>335</sup> Case 004/1, Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, at ERN (EN) 01059955 (A151-A153), 01059963 (A207).

<sup>336</sup> Case 004/1, Written Record of Interview of CHIEP Chhean, 20 December 2008, D6.1.431, at ERN (EN) 00277817.

<sup>337</sup> Case 004/1, DC-Cam Interview of CHAN Diel, 16 June 2011, D123/1/2.48, at ERN (EN) 01063444.

<sup>338</sup> Case 004/1, DC-Cam Interview of PICH Ham, 5 March 2007, D123/1/1.6a, at ERN (EN) 00982770.

<sup>339</sup> Case 004/1, Written Record of Interview of CHAN Die, 18 May 2013, D119/39, at ERN (EN) 00944479 (A7).

<sup>340</sup> Case 004/1, Report on Civil Party Application of CHHEAN Huong, 27 September 2013, D5/929/1, at ERN (EN) 00979900.

<sup>341</sup> See, e.g., Case 004/1, Written Record of Interview of MAK Vonny, 9 May 2014, D119/125, at ERN (EN) 01035088 (A14, A18).

<sup>342</sup> Case 004/1, DC-Cam Interview of KHOR Mot, 17 June 2011, D123/1/2.57, at ERN (EN) 00987556-00987557, at ERN (FR) 01169540-01169541.

<sup>343</sup> Case 004/1, Civil Party Application of PECH Ruos, 28 March 2013, D5/1100, at ERN (EN) 01186136.

<sup>344</sup> Case 004/1, Civil Party Application of PHUONG Phai, 10 March 2013, D5/998, at ERN (EN) 01190850; Case 004/1, Civil Party Application of PRAK Kav, 13 March 2013, D5/1000, at ERN (EN) 01135194.

<sup>345</sup> Case 004/1, DC-Cam Report, Mapping the Killing Fields of Cambodia – Banteay Mancheay, 1998, D1.3.27.10, at ERN (EN) 00078068. See also Case 004/1, Site identification Report, 25 March 2013, D118/38, at ERN (EN) 00900781; Case 004/1, Written Record of Interview of SIN Khin, 5 March 2015, D219/206, at ERN (EN) 01087434 (A21).

<sup>346</sup> Case 004/1, Written Record of Interview of TIL Hev, 3 April 2014, D119/115, at ERN (EN) 00987794 (A25-A26).



Vietnamese.<sup>347</sup> There is further similar evidence that people were killed for having connections to the Vietnamese in all sectors of the Northwest Zone.<sup>348</sup>

158. The Undersigned Judges also consider that there is sufficient specific evidence that two women of Vietnamese descent, *Neary San* and *Neary Nuon*, were killed in Preah Net Preah District under IM Chaem's control.<sup>349</sup> One of the alleged perpetrators, mobile unit chairman KOR Len, denied the incident occurred,<sup>350</sup> but later admitted that he knew *Neary San* and that she was probably taken to be killed in 1977 in Preah Net Preah District, when the district was under the administration of the Southwest group and governed by IM Chaem.<sup>351</sup> Moreover, while the Co-Investigating Judges noted the contradictory evidence of one witness, at least three other people corroborated the event. PECH Ruos detailed that KOR Len's subordinates raped, sliced open the stomachs of, and killed the two Vietnamese women at Veal Dang Kieb Kdam worksite; this event happened under the orders of the Southwest group, and IM Chaem must have known about it.<sup>352</sup> BOU Mao, who was KOR Len's deputy chairman<sup>353</sup> and whose statements were relied upon elsewhere in the Closing Order (Reasons),<sup>354</sup> confirmed that women with Vietnamese relations were arrested and taken away near Au Lieb Dam worksite, although the issue was not investigated further.<sup>355</sup> SAUR Chansareth also reported that he was talking with *Neary San* when a young mobile unit chairman from the Southwest Zone came

<sup>347</sup> Case 004/1, Civil Party Application of OEUR Loeur, 30 June 2013, D5/1252, at ERN (EN) 01144155-01144156.

<sup>348</sup> See, e.g., Case 004/1, Written Record of Interview of UONG Sav, 11 March 2014, D118/199, at ERN (EN) 00985108-00985109 (A30-A35); Case 004/1, Written Record of Interview of YON Han, 19 September 2015, D219/516, at ERN (EN) 01166153-01166154 (A8-A9), 01166158-01166159 (A30, A33-A34); Case 004/1, Written Record of Interview of KHIEV Phan, 28 January 2016, D219/664, at ERN (EN) 01207571 (A116); Case 004/1, Written Record of Interview of KHEM Sok, 25 June 2014, D118/264, at ERN (EN) 01033087-01033088 (A61-A62); Case 004/1, Written Record of Interview of LIM Tim, 24 September 2013, D118/108, at ERN (EN) 00976928 (A47); Case 004/1, Civil Party Application of KIM Saur, 28 October 2008, D5/147, at ERN (EN) 00384366.

<sup>349</sup> Closing Order (Reasons), paras 279-280.

<sup>350</sup> Closing Order (Reasons), para. 279. See also Case 004/1, Written Record of Interview of KOR Len, 29 April 2014, D119/121, at ERN (EN) 01067919 (A1-A2).

<sup>351</sup> Case 004/1, Written Record of Interview of KOR Len, 29 April 2014, D119/121, at ERN (EN) 01067919-01067923 (A3-A21), 01067929 (A50).

<sup>352</sup> Case 004/1, Written Record of Interview of PECH Ruos, 12 March 2014, D119/99, at ERN (EN) 00985204-00985205 (A31-A33); Case 004/1, DC-Cam Interview of PECH Ruos, 17 June 2011, D123/1/2.52, at ERN (EN) 00969843-00969846; Case 004/1, Civil Party Application of PECH Ruos, 28 March 2013, D5/1100, at ERN (EN) 01186137.

<sup>353</sup> Case 004/1, Written Record of Interview of KOR Len, 29 April 2014, D119/121, at ERN (EN) 01067923 (A23, A25).

<sup>354</sup> See, e.g., Closing Order (Reasons), para. 186, footnote 397.

<sup>355</sup> Case 004/1, Written Record of Interview of BOU Mao, 21 February 2014, D119/94, at ERN (EN) 00982761 (A37).



with subordinates to arrest her on charges of being affiliated with the Vietnamese.<sup>356</sup> KHOR Mot likewise recalled that San had been arrested and killed, and that her sibling and another “*Yuon*” woman were also later arrested at Veal Dang Kieb Kdam.<sup>357</sup>

159. Overall, the Undersigned Judges consider that there is sufficient evidence of the existence of a CPK policy against persons of Vietnamese ethnicity and those associated with Vietnam, which was implemented in the Northwest Zone under the Southwest cadres’ control as part of the joint criminal enterprise in which, on a balance of probabilities, IM Chaem participated as a co-perpetrator.<sup>358</sup> IM Chaem herself admitted that there were letters sent from the Zone Office to have her arrest different categories of people, and that those accused of having relationships with Vietnamese agents were indeed searched for and captured.<sup>359</sup> This evidence is corroborated by, *inter alia*, KOR Len, who confirmed that there was in fact a policy that “designated a goal of killing the Vietnamese during the Khmer Rouge regime,”<sup>360</sup> and BOU Mao, who stated that the people from the Southwest Zone tried to “eliminate” the “*Yuon*”.<sup>361</sup> SAUR Chansareth further affirmed that, after the Southwest cadres arrived and killed the Northwest cadres, they searched for everyone connected with the Vietnamese and took them to be killed.<sup>362</sup>

160. In light of the foregoing, the Undersigned Judges find that there is sufficient evidence to establish that the crime against humanity of persecution against the Vietnamese was committed not only at Phnom Trayoung Security Centre, but also in at least all of Sector 5 of the Northwest Zone, and that IM Chaem could be held responsible for it. Accordingly, the Co-Investigating Judges failed to make a proper legal determination regarding the persecution of the Vietnamese in at least all of Sector 5 of the Northwest Zone, and to consider the gravity of the crime in the assessment of IM Chaem’s responsibility. The Undersigned Judges therefore

<sup>356</sup> Case 004/1, Written Record of Interview of SAUR Chansareth, 13 August 2015, D219/455, at ERN (EN) 01151189-01151192 (A56-A64).

<sup>357</sup> Case 004/1, DC-Cam Interview of KHOR Mot, 17 June 2011, D123/1/2.57, at ERN (EN) 00987562-00987563, at ERN (FR) 01169544.

<sup>358</sup> *See supra* paras 132-142.

<sup>359</sup> Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089782. *See also*, in relation to the Southwest Zone, Case 004/1, Written Record of Interview of BUN Thien, 17 August 2009, D6.1.688, at ERN (EN) 00384406 (“At that time, *Yeay* [Chaem] was talking with her colleagues about arresting those secretaries. She said that they were connected to *Yuon* [...]”).

<sup>360</sup> Case 004/1, Written Record of Interview of KOR Len, 29 April 2014, D119/121, at ERN (EN) 01067930 (A55).

<sup>361</sup> Case 004/1, DC-Cam Interview of BOU Mao, 16 June 2011, D123/1/2.53, at ERN (EN) 00969902.

<sup>362</sup> Case 004/1, Written Record of Interview of SAUR Chansareth, 13 August 2015, D219/455, at ERN (EN) 01151187 (A49).



uphold Ground 2(3) of the Appeal and will address whether this failure was fundamentally determinative of the determination on the ECCC's personal jurisdiction in their conclusion.

d. Ground 2(4): Crimes Against the Khmer Krom

161. Ground 2(4) of the Appeal alleges that the Co-Investigating Judges failed to consider evidence of IM Chaem's responsibility for the crime against humanity of persecution and various grave breaches of the Geneva Conventions in relation to the treatment of the Khmer Krom in Sector 13.<sup>363</sup>

162. The Undersigned Judges observe that paragraph 15 of the Supplementary Submission on Sector 1 raised allegations against IM Chaem of detention and mass executions of the Khmer Krom at Wat Ang Srei Mealy and Prey Sokhon, which were located in Koh Andet District, Sector 13<sup>364</sup> of the Southwest Zone:

In Koh Andet District, mass executions of Khmer Krom were conducted at the Prey Sokhon execution site (also known as Prey Lopeak), located in Sy Sla village, Thlea Prachum commune. The Khmer Krom victims were temporarily detained at Wat Ang Srei Muny [*sic*], and then taken for execution by armed CPK cadres in groups of 10 to 20 families at a time. As set forth in paragraph 101 of the [Third Introductory Submission], Suspect IM Chaem was the CPK Secretary of Koh Andet District from 1976 to June 1977.<sup>365</sup>

163. The proposed legal qualifications for these allegations included, *inter alia*, the crime against humanity of persecution on political and racial grounds, as well as grave breaches of the Geneva Conventions of 1949.<sup>366</sup> The Undersigned Judges further note that these allegations were explicitly limited to Koh Andet District – including, in particular, crimes committed at Wat Ang Srei Mealy and Prey Sokhon Execution Site – and that they do not extend to all of Sector 13.

164. The Co-Investigating Judges' factual findings in the Closing Order (Reasons) were limited to noting evidence that, from April 1975 until at least November 1978, "the prisoners detained at Wat Ang Srei Mealy were Khmer Krom and '17 April people', a number of whom

<sup>363</sup> Appeal, paras 33-34.

<sup>364</sup> Case 004/1, Site Identification Report, 4 December 2012, D119/9, at ERN (EN) 00887253; Case 004/1, Site Identification Report, 6 December 2012, D119/10, at ERN (EN) 00887250.

<sup>365</sup> Supplementary Submission on Sector 1 (D65), para. 15 (footnotes omitted).

<sup>366</sup> Supplementary Submission on Sector 1 (D65), para. 22.



would be taken to be killed in Prey Sokhon.<sup>367</sup> They found that the evidence did not establish IM Chaem's authority in relation to the operations at Wat Ang Srei Mealy and Prey Sokhon,<sup>368</sup> or that she was Koh Andet District Secretary or a Sector 13 Committee member,<sup>369</sup> which the Undersigned Judges address in detail in relation to Grounds 5 and 6 of the Appeal.<sup>370</sup>

165. First, the Undersigned Judges find that the investigation did not sufficiently demonstrate the requisite discriminatory element to establish that the treatment of the Khmer Krom in Koh Andet District, during IM Chaem's tenure as District Secretary, amounted to the crime against humanity of persecution, as defined above.<sup>371</sup>

166. The Undersigned Judges generally note evidence that Khmer Krom were targeted in Sector 13 of the Southwest Zone<sup>372</sup> and that some of them were detained and killed at Wat Ang Srei Mealy and Prey Sokhon. However, among the few witnesses who provided specific evidence in relation to Koh Andet District,<sup>373</sup> both NEANG Ouch<sup>374</sup> and MOM Pholla<sup>375</sup> indicated that Khmer Krom and "ordinary" Khmer were treated the same in the district mobile unit. MOM Pholla recalled witnessing – either four months or over one and a half years before the collapse of the Khmer Rouge regime – the killing of about thirty people at Prey Sokhon who may have been Khmer Krom, although she did not know for certain who the victims were.<sup>376</sup> VORNG Nop reported that Khmer Krom families from Phnom Penh and Takeo, who were initially mixed with "ordinary" Khmer and all considered as "enemies", were separated and killed at Prey Sokhon upon orders from the upper level, about a month and a half after the

<sup>367</sup> Closing Order (Reasons), para. 249 (footnote omitted).

<sup>368</sup> Closing Order (Reasons), para. 251.

<sup>369</sup> Closing Order (Reasons), para. 144.

<sup>370</sup> See *infra* Ground 5 and 6 of the Appeal.

<sup>371</sup> See *supra* para. 148 referring to Case 001 Appeal Judgement (F28), paras 226, 241.

<sup>372</sup> See, e.g., Case 004/1, Written Record of Interview of HEM Chhuon, 23 April 2013, D118/45, at ERN (EN) 00923041-00923042 (A29-A32); Case 004/1, Written Record of Interview of RY Peou, 30 October 2013, D118/130, at ERN (EN) 00970032-00970033 (A52-A58); Case 004/1, Written Record of Interview of LACH Sambath, 5 December 2013, D118/165, at ERN (EN) 00980254-00980255 (A9), 00980259 (A30-A31); Case 004/1, Written Record of Interview of YORK Pet, 18 September 2015, D219/525, at ERN (EN) 01166211-01144212 (A61-A68).

<sup>373</sup> See Case 004/1, Site Identification Report, 4 December 2012, D119/9, at ERN (EN) 00887254-00887255; Case 004/1, Site Identification Report, 6 December 2012, D119/10, at ERN (EN) 00887251-00887252.

<sup>374</sup> Case 004/1, Written Record of Interview of NEANG Ouch, 28 January 2014, D119/82, at ERN (EN) 00981152 (A86-A87).

<sup>375</sup> Case 004/1, Written Record of Interview of MOM Pholla, 30 October 2015, D219/568, at ERN (EN) 001182725 (A32-A33).

<sup>376</sup> Case 004/1, Written Record of Interview of MOM Pholla, 30 October 2015, D219/568, at ERN (EN) 001182728-001182733 (A61-A99).



fall of Phnom Penh in 1975.<sup>377</sup> Witnesses interviewed by DC-Cam confirmed that many people were killed at Prey Sokhon in 1975 and that the first victims were “people evacuated from cities, and especially lower Kampuchean people (Kampuchea Kraom)”.<sup>378</sup> Finally, SAM Kun heard, after the collapse of the regime, that following the evacuation of Phnom Penh in 1975, Khmer Krom people were mixed with other people, detained at Wat Ang Srei Mealy and killed in Prey Sokhon.<sup>379</sup> While he also referred to a timeframe of 1976-1977,<sup>380</sup> the Undersigned Judges find the evidence of this witness insufficient to establish, to the requisite standard, that victims of crimes allegedly committed during IM Chaem’s tenure in Koh Andet were targeted for being Khmer Krom, or that the perpetrators acted with the requisite discriminatory intent.

167. Second, the Undersigned Judges dismiss the arguments regarding the alleged commission of various grave breaches of the Geneva Conventions in relation to the Khmer Krom in Koh Andet District. While there is evidence of an armed conflict between Cambodia and the Socialist Republic of Vietnam from May 1975 to January 1979,<sup>381</sup> there is not sufficient evidence that crimes allegedly committed against Khmer Krom during IM Chaem’s tenure as Koh Andet District Secretary were “closely related” to the hostilities, such as to establish the requisite nexus.<sup>382</sup> The Undersigned Judges consider the totality of the evidence concerning the treatment of the Khmer Krom in Koh Andet District, within the relevant temporal scope,<sup>383</sup> insufficient to demonstrate that the existence of the armed conflict played a substantial part in the perpetrators’ ability to commit the alleged crimes, their decision to commit them, the

<sup>377</sup> Case 004/1, Written Record of Interview of VORNG Nop, 12 November 2015, D219/592, at ERN (EN) 01185739-01185742 (A12-A35), 01185744-01185747 (A47-A67).

<sup>378</sup> Case 004/1, DC-Cam Report, Mapping the Killing Fields of Cambodia – Takeo Province, 1998, D1.3.10.14, at ERN (EN) 00207679.

<sup>379</sup> Case 004/1, Written Record of Interview of SAM Kun, 7 December 2012, D119/4, at ERN (EN) 00876982 (A36); Case 004/1, Written Record of Interview of SAM Kun, 12 November 2015, D219/591, at ERN (EN) 01178841-01178846 (A11-A45).

<sup>380</sup> Case 004/1, Written Record of Interview of SAM Kun, 12 November 2015, D219/591, at ERN (EN) 01178843 (A25, A28).

<sup>381</sup> See, e.g., Case 004/1, Philip SHORT, *Pol Pot: The History of a Nightmare*, 2014, D117/36.1.23, at ERN (EN) 00396580 *et seq.*; Case 004/1, Democratic Kampuchea Telegram 45 from Chhon to Brother POL Pot on Situation on the Border Situation in Region 23, 11 November 1975, D132.1.160; Case 004/1, Report Number 327 on the Border Situation in Region 20, 17-25 June 1977, D132.1.74.

<sup>382</sup> See, e.g., Case 001, Judgement, 26 July 2010, E188 (“Case 001 Trial Judgement (E188)”), para. 416; ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70; ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, Appeals Chamber, 22 March 2006, para. 342.

<sup>383</sup> See *supra* para. 166.





purpose for which they were committed or the manner in which they were committed.<sup>384</sup>

168. In light of the foregoing, the Undersigned Judges find the evidence gathered during the investigation to be clearly insufficient to establish IM Chaem's responsibility for persecution and various grave breaches of the Geneva Conventions committed against the Khmer Krom in Koh Andet District. The Co-Investigating Judges thus did not err in failing to review it in detail. The Undersigned Judges accordingly deny Ground 2(4) of the Appeal in its entirety.

e. Ground 2(5): Persecution Against Various Groups and Other Crimes

169. Ground 2(5) of the Appeal alleges that the Co-Investigating Judges failed to properly review allegations, raised in the Final Submission, of persecution against various political and ethnic groups,<sup>385</sup> as well as factual allegations regarding torture committed at Phnom Trayoung Security Centre and Wat Chamkar Khnol Security Centre, imprisonment and enforced disappearances at Wat Ang Srei Mealy, and inhumane living conditions at Phum Chakrey Security Centre.<sup>386</sup>

170. At the outset, the Undersigned Judges recall that whether particular allegations and related investigations fall within the scope of the matter laid before the Co-Investigating Judges can only be determined by consideration of the introductory and supplementary submissions and their annexes.<sup>387</sup> The Undersigned Judges therefore summarily dismiss the claims that the Co-Investigating Judges failed to entertain allegations belatedly raised in the Final Submission. They will review the scope of the investigation for each contention raised under Ground 2(5) of the Appeal.

i. *Persecution Against the Northwest Zone Cadres*

171. The proposed charges against IM Chaem in paragraph 119 of the Third Introductory Submission included the crime against humanity of "[p]ersecutions on political [...] grounds", but do not expressly mention Northwest Zone cadres amongst the targeted groups.

<sup>384</sup> See, e.g., ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 58; International Criminal Tribunal for Rwanda ("ICTR"), *Prosecutor v. Setako*, ICTR-04-81-A, Judgement, Appeals Chamber, 28 September 2011, para. 249.

<sup>385</sup> Appeal, paras 35-36.

<sup>386</sup> Appeal, para. 37.

<sup>387</sup> See *supra* para. 128.



Paragraph 17, however, specifically alleged that “local cadre” were targets of the joint criminal enterprise to purge the Northwest Zone, in which IM Chaem participated as co-perpetrator. Paragraphs 54 to 58 of the Third Introductory Submission further detailed the purge of the local cadres upon the arrival of the Southwest Zone cadres, alleging that “[a]ll levels of existing Northwest Zone cadre were arrested and killed” and that “the purge was systematically extended to the entire Northwest Zone.”

172. The Undersigned Judges thus consider that the Co-Investigating Judges were duly seized of allegations of persecution against Northwest Zone cadres and, as determined above,<sup>388</sup> that they failed overall to make a proper legal determination regarding the allegations relating to the purge, to consider the gravity of the crimes and to assess IM Chaem’s responsibility therefor. The Undersigned Judges also consider that there is sufficient evidence to establish the requisite discriminatory element of the crime against humanity of persecution, as defined above,<sup>389</sup> and to conclude that this crime was committed against Northwest Zone cadres not only at Phnom Trayoung Security Centre,<sup>390</sup> but also in at least all of Sector 5. Finally, there is sufficient evidence of IM Chaem’s responsibility.<sup>391</sup> The Undersigned Judges therefore uphold this part of Ground 2(5) of the Appeal. They will later address whether this failure was fundamentally determinative of the determination on the ECCC’s personal jurisdiction.

*ii. Persecution Against Former Khmer Republic Officials*

173. The proposed charges against IM Chaem in paragraph 119 of the Third Introductory Submission included the crime against humanity of “[p]ersecutions on political [...] grounds of former officials of the Khmer Republic”, and paragraph 17 specifically alleged that “people with connections to the ‘old society’” were targets of the joint criminal enterprise to purge the Northwest Zone, in which IM Chaem participated as co-perpetrator. There is also evidence cited in support of the allegations relating to the purge of the Northwest Zone, which further provides that, following the arrival of the Southwest Zone cadres, disappearances and killings extended to “people who had any link with relatives who served as a former government

<sup>388</sup> See *supra* paras 132-142.

<sup>389</sup> See *supra* para. 148 referring to Case 001 Appeal Judgement (F28), paras 226, 241.

<sup>390</sup> See Closing Order (Reasons), para. 295.

<sup>391</sup> See *supra* paras 132-142.



official”.<sup>392</sup>

174. Accordingly, the Undersigned Judges consider that the Co-Investigating Judges were seised of allegations of persecution against former Khmer Republic officials and their relatives, in the context of the purge of the Northwest Zone, and thus had a duty to investigate and rule upon them at the time of the Closing Order (Reasons).

175. The Co-Investigating Judges indeed made several factual findings that Khmer Republic officials and their relatives were amongst those arrested and detained at Phnom Trayoung Security Centre,<sup>393</sup> *Ta Krak*’s house near Wat Preah Net Preah,<sup>394</sup> and Phum Chakrey Security Centre.<sup>395</sup> The Co-Investigating Judges further found that the Southwest Zone cadres carried out an attack in the Northwest Zone, of which IM Chaem was aware and in which she participated,<sup>396</sup> against the civilian population, targeting in particular “all real or perceived ‘bad elements’ or ‘enemies’ of the CPK,” including “former civil servants and military personnel of the Khmer Republic and their families”.<sup>397</sup> They concluded that the crime of persecution on political grounds against former Khmer Republic officials was committed at Phnom Trayoung Security Centre,<sup>398</sup> but only made a cursory finding regarding persecution at other uncharged crime sites.<sup>399</sup>

176. The Undersigned Judges consider that these findings only partly address the allegations that Khmer Republic officials and their relatives were persecuted in the context of the purge of the Northwest Zone, in particular in Preah Net Preah District and Sector 5, and that the Co-Investigating Judges failed to make a proper legal determination on the extent and gravity of these crimes.

177. The Undersigned Judges consider that there is sufficient evidence of the widespread and systematic arrest, detention and execution of former Khmer Republic civil servants, military officials and their relatives, in the context of the purge of the Northwest Zone, in at

<sup>392</sup> Third Introductory Submission (D1), footnotes 222, 456, 458 referring to Case 004/1, Office of the Co-Prosecutors’ Interview of the Wat Preah Net Preah Group, 6 August 2008, D1.3.11.40, at ERN (EN) 00210566.

<sup>393</sup> Closing Order (Reasons), para. 202.

<sup>394</sup> Closing Order (Reasons), para. 255.

<sup>395</sup> Closing Order (Reasons), para. 261.

<sup>396</sup> Closing Order (Reasons), para. 284.

<sup>397</sup> Closing Order (Reasons), paras 281, 283.

<sup>398</sup> Closing Order (Reasons), para. 295.

<sup>399</sup> Closing Order (Reasons), para. 305.



least all of Sector 5. Several witnesses stated that former Khmer Republic soldiers and officials were arrested and killed in Preah Net Preah District upon the arrival of the Southwest cadres,<sup>400</sup> including in the vicinity of Wat Preah Net Preah,<sup>401</sup> at Phnom Trayoung Security Centre<sup>402</sup> and at Phum Chakrey Security Centre,<sup>403</sup> as well as in neighbouring districts, notably at Trapeang Thma Dam Worksite<sup>404</sup> and at Wat Chamkar Khnol Security Centre.<sup>405</sup> A fear of being arrested spread amongst former LON Nol soldiers and civil servants after the Southwest cadres arrived in the Northwest Zone.<sup>406</sup>

178. The Undersigned Judges further find that there is sufficient evidence of a CPK policy targeting former Khmer Republic officials, which was implemented in the Northwest Zone under the Southwest cadres' control as part of the joint criminal enterprise and in which, on a balance of probabilities, IM Chaem participated as a co-perpetrator.<sup>407</sup> The Undersigned Judges, recalling findings in the Closing Order (Reasons) related to IM Chaem's role and authority in the Northwest Zone,<sup>408</sup> note that IM Chaem herself admitted receiving letters ordering the arrest of "bad elements", including former Khmer Republic officials and civil

<sup>400</sup> Case 004/1, Written Record of Interview of PHON Mon, 12 March 2013, D119/19, at ERN (EN) 00901008 (A10); Case 004/1, Written Record of Interview of LAY Khann, 28 March 2012, D106/4, at ERN (EN) 00842021 (A8); Case 004/1, Written Record of Interview of PAO Bandet, 16 February 2015, D219/181, at ERN (EN) 01077037 (A16), 01077038 (A19); Case 004/1, Written Record of Interview of NOU Choung, 20 January 2014, D119/73, at ERN (EN) 00980543 (A17-A18); Case 004/1, Written Record of Interview of PHOK Roeub, 1 April 2015, D219/255, at ERN (EN) 01095818 (A16).

<sup>401</sup> Case 004/1, Written Record of Interview of SONG Pharath, 17 May 2013, D119/37, at ERN (EN) 00944468 (A4); Case 004/1, Written Record of Interview of CHAN Die, 18 May 2013, D119/39, at ERN (EN) 00944479 (A6-A7); Case 004/1, Written Record of Interview of PAO Bandet, 16 February 2015, D219/181, at ERN (EN) 01077038 (A18).

<sup>402</sup> Case 004/1, Written Record of Interview of IM Soeun, 23 January 2015, D219/153, at ERN (EN) 01066826 (A14); Case 004/1, Written Record of Interview of ORM Huon, 27 May 2014, D119/130, at ERN (EN) 01075206 (A22-A24).

<sup>403</sup> Case 004/1, Written Record of Interview of YOU Mut, 8 September 2014, D219/1, at ERN (EN) 01044857-01044858 (A37-A38); Case 004/1, Civil Party Application of YOU Mut, 10 May 2013, D5/965, at ERN (EN) 01123489; Case 004/1, Written Record of Interview of KHOP Sok, 5 March 2015, D219/212, at ERN (EN) 01088534 (A26).

<sup>404</sup> Case 004/1, Civil Party Application of KHORN Prek, 13 March 2013, D5/1134, at ERN (EN) 01145196, 01145199; Case 004/1, Civil Party Application of NIT Luon, 15 March 2013, D5/1019, at ERN (EN) 01145094; Case 004/1, Written Record of Interview of SAK Sam, 23 April 2014, D119/120, at ERN (EN) 01057753 (A144).

<sup>405</sup> Case 004/1, Report of Victim Support Section on MOK Thou, 29 November 2013, D5/983/1, at ERN (EN) 00990127; Case 004/1, Written Record of Interview of YONG Sin, 27 July 2015, D219/433, at ERN (EN) 01142962-01142963 (A10); Case 004/1, Civil Party Application of OEUR Loeur, 30 June 2013, D5/1252, at ERN (EN) 01144155; Case 004/1, Written Record of Interview of SIN Khin, 5 March 2015, D219/206, at ERN (EN) 01087434 (A20-A21); Case 004/1, Written Record of Investigation Action, 3 April 2014, D119/118, at ERN (EN) 00982278.

<sup>406</sup> Case 004/1, Written Record of Interview of HEM Soeun, 30 October 2015, D219/567, at ERN (EN) 01182700 (A44-A45); Case 004/1, Written Record of Interview of ITH Hal, 19 August 2015, D219/475, at ERN (EN) 01173549 (A9).

<sup>407</sup> See *supra* paras 132-142.

<sup>408</sup> Closing Order (Reasons), paras 156-179.



servants in the LON Nol regime.<sup>409</sup> SUON Mot confirmed that the Sector 5 security apparatus would distribute lists of “those who had LON Nol regime tendencies” to village and commune chiefs, in order to arrest them and send them to re-education.<sup>410</sup>

179. In light of the foregoing, the Undersigned Judges find that there is sufficient evidence to establish that the crime against humanity of persecution against former Khmer Republic officials and their relatives was committed not only at Phnom Trayoung Security Centre, but also at least in all of Sector 5 of the Northwest Zone, as well as sufficient evidence of IM Chaem’s responsibility therefor. Accordingly, the Co-Investigating Judges failed to make a proper legal determination and to consider the gravity of the crime in their assessment of IM Chaem’s overall responsibility. The Undersigned Judges thus uphold this part of Ground 2(5) of the Appeal. Whether this failure was fundamentally determinative of the determination on the ECCC’s personal jurisdiction will be addressed later.

*iii. Persecution Against the Cham*

180. Paragraph 17 of the Third Introductory Submission alleged that the “Cham ethnic and religious minority” was a target of the joint criminal enterprise to purge the Northwest Zone, in which IM Chaem participated as a co-perpetrator, and the proposed charges in paragraph 119 included the “[p]ersecutions on political, racial and religious grounds of [...] Cham”. Accordingly, the Undersigned Judges consider that the Co-Investigating Judges were seised of allegations of persecution against the Cham in the context of the purge of the Northwest Zone, and had a duty to investigate and rule upon them.

181. The Undersigned Judges observe that crimes committed against the Cham were not specifically addressed in the Closing Order (Reasons). However, they also consider that the evidence gathered during the investigation does not sufficiently demonstrate that the treatment of the Cham, during IM Chaem’s tenure in the Northwest Zone, amounted to the crime against humanity of persecution, as defined above.<sup>411</sup> In particular, they note that the International Co-Prosecutor points to evidence that the Cham were targeted at Wat Chamkar Khnol in Preah

<sup>409</sup> Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089782.

<sup>410</sup> Case 004/1, Written Record of Interview of SUON Mot, 16 October 2014, D219/37, at ERN (EN) 01053621-01053622 (A58-A63).

<sup>411</sup> See *supra* para. 148 referring to Case 001 Appeal Judgement (F28), paras 226, 241.



Net Preah District based on the statements of KHUON Say and SIEN Nhien.<sup>412</sup> SIEN Nhien, who oversaw the exhumation and transfer of remains at Chamkar Khnol after the fall of the Democratic Kampuchea regime, reported that there was a mixture of victims, including “a few Cham and Laotians”,<sup>413</sup> while KHUON Say merely mentioned “[s]ome Chinese-Cambodian”.<sup>414</sup>

182. The Undersigned Judges find the totality of the evidence insufficient, under the probability standard, to establish the necessary discriminatory element and to conclude that the treatment of the Cham amounted to the crime against humanity of persecution when IM Chaem was in charge in Preah Net Preah District.

183. In light of the foregoing, the Undersigned Judges dismiss this part of Ground 2(5) of the Appeal.

*iv. Persecution Against the Chinese, Laotians and Khmer Leu Minorities*

184. The Undersigned Judges note that the proposed charges of persecution as a crime against humanity were limited, in the Third Introductory Submission, to certain groups, and that they did not expressly mention the Chinese, Laotians or Khmer Leu minorities.<sup>415</sup> While the factual allegations against IM Chaem include references in the footnotes to people of Chinese ethnicity in relation to the purge,<sup>416</sup> and to “[s]ome” victims of Chinese and Laotian ethnicity in relation to Wat Chamkar Khnol Security Centre,<sup>417</sup> the cited evidence instead supports allegations of persecution against the Vietnamese and does not evince the requisite discriminatory element against other ethnic minorities.

185. The Undersigned Judges therefore consider that the Co-Investigating Judges were not

<sup>412</sup> Appeal, para. 35 referring to International Co-Prosecutor’s Final Submission (D304/2), para. 240.

<sup>413</sup> Case 004/1, DC-Cam Interview of SIEN Nhien, 1997, D219/204.2.1, at ERN (EN) 01122437. See also Case 004/1, DC-Cam Report, Mapping the Killing Fields of Cambodia – Banteay Manthey, 1998, D1.3.27.10, at ERN (EN) 00078068; Case 004/1, Site identification Report, 25 March 2013, D118/38, at ERN (EN) 00900781.

<sup>414</sup> Case 004/1, DC-Cam Interview of KHUON Say, 1997, D219/204.2.1, at ERN (EN) 01122452.

<sup>415</sup> Third Introductory Submission (D1), para. 119.

<sup>416</sup> Third Introductory Submission (D1), para. 59, footnote 227 referring to Case 004/1, Office of the Co-Prosecutors’ Interview of LIM Kimsunn, 3 August 2008, D1.3.11.28, at ERN (EN) 00210520 (stating that, amongst 24 members of a Sino-Vietnamese family who were arrested, only two escaped and survived, including the brother of the witness who spoke Chinese); Case 004/1, SOAS/HRW Interview of CHHUON Bon, 20 October 2005, D1.3.11.10, at ERN (EN) 00210397 (stating that people of Chinese ethnicity who did not speak Khmer were accused of being Vietnamese and killed).

<sup>417</sup> Third Introductory Submission (D1), para. 71, footnote 287 referring to Case 004/1, DC-Cam Report, Mapping the Killing Fields of Cambodia – Banteay Manthey, 1998, D1.3.27.10, at ERN (EN) 00078068.



seised in the Introductory or Supplementary Submissions of allegations against IM Chaem of persecution against the Chinese, Laotians and Khmer Leu minorities, and thus did not have a duty, pursuant to Internal Rules 55(2) and 67(1), to investigate and rule upon them at the time of the Closing Order (Reasons).

186. Accordingly, the Undersigned Judges dismiss this part of Ground 2(5) of the Appeal.

*v. Torture at Phnom Trayoung Security Centre*

187. The proposed charges against IM Chaem in the Third Introductory Submission included the crime against humanity of torture.<sup>418</sup> The Undersigned Judges note, in this regard, that paragraph 8 of that Submission alleged that “[t]he CPK enforced its illegal policies through a nationwide network of security centres that unlawfully detained, mistreated, tortured and executed vast numbers of the [Democratic Kampuchea] population.” Regarding Phnom Trayoung Security Centre in particular, the Third Introductory Submission alleged that:

Phnom Trayoung Security Centre functioned as a tempering place for allegedly traitorous elements, a forced labour site, and an execution site for perceived enemies of the [Democratic Kampuchea] regime. Detainees classified as heavy offenders were forced to work in the quarry breaking rocks, and were fed only one spoonful of rice porridge per mealtime. Those who did not work hard enough were killed, and some died from starvation or overwork. Sub-district *chhlop* and Southwest Zone cadre under the control of IM Chaem were responsible for arresting people and taking them to Phnom Trayoung to be killed. Executions, as many as 15 per night[,] were conducted on the north side of Phnom Trayoung mountain.<sup>419</sup>

188. The Undersigned Judges further observe that security centres have been described in the jurisprudence of the ECCC as places “tasked with interrogating and executing perceived opponents of the CPK”.<sup>420</sup> They accordingly consider that the Co-Investigating Judges were duly seised of allegations of torture committed at Phnom Trayoung Security Centre and thus had a duty, pursuant to Internal Rules 55(2) and 67(1), to investigate and rule upon them at the time of the Closing Order (Reasons).

189. The Co-Investigating Judges acknowledged evidence that “between mid-1977 and the

<sup>418</sup> Third Introductory Submission (D1), para. 119.

<sup>419</sup> Third Introductory Submission (D1), para. 75 (footnotes omitted).

<sup>420</sup> See Case 003 Decision on Two Applications for Annulment (D134/1/10), Opinion of Judges BEAUVALLET and BWANA, para. 52; Case 001 Trial Judgement (E188), paras 111, 115; Case 001 Appeal Judgement (F28), para. 2.



end of 1978, at least hundreds, but possibly a few thousand people” were detained at Phnom Trayoung Security Centre.<sup>421</sup> They further considered that the imposition of inhumane living conditions, such as the deprivation of adequate food and water, the dire sanitary conditions and the shackling of “serious offenders”, constituted an attack on human dignity of sufficient gravity to amount to the crime against humanity of other inhumane acts.<sup>422</sup> Nonetheless, the Co-Investigating Judges failed to assess specific evidence of torture at Phnom Trayoung Security Centre and to make a legal determination on these allegations.

190. The Undersigned Judges recall that the crime against humanity of torture has been defined as any act causing severe pain or suffering, whether physical or mental (*actus reus*), that is intentionally inflicted upon a person (*mens rea*), by or at the instigation of a public official, for such purposes as obtaining information or a confession, punishment, or intimidation.<sup>423</sup>

191. The Undersigned Judges consider that there is indeed sufficient evidence, on a balance of probabilities, that prisoners at Phnom Trayoung Security Centre suffered acts causing severe physical or mental pain, which were inflicted on them in order to obtain information. In particular, TOR Pinthang, who was detained at Phnom Trayoung Security Centre in 1978, stated that soldiers “used keys to hit [his] head” each time they interrogated him, to force him to confess that he was a LON Nol soldier.<sup>424</sup> RIN Kheng similarly reported that he was imprisoned for two months in 1978 at Phnom Trayoung Security Centre, where he was interrogated and severely whipped at night.<sup>425</sup> TUOK Bou, who was arrested in 1977 and detained for three months,<sup>426</sup> was interrogated by soldiers five or six times and feared he would be beaten to death if he did not provide the “correct answer”.<sup>427</sup>

192. There is also sufficient evidence that prisoners at Phnom Trayoung Security Centre were subjected to physical and mental suffering as a form of punishment and intimidation. Prisoners generally feared that they would be beaten or killed if they tried to escape or

<sup>421</sup> Closing Order (Reasons), paras 194, 199.

<sup>422</sup> Closing Order (Reasons), paras 203, 206, 293.

<sup>423</sup> Case 001 Appeal Judgement (F28), paras 195, 205.

<sup>424</sup> Case 004/1, Civil Party Application of TOR Pinthang, 20 May 2013, D5/1075, at ERN (EN) 01144959.

<sup>425</sup> Case 004/1, Civil Party Application of RIN Kheng, 30 March 2013, D5/988, at ERN (EN) 01190838-01190839.

<sup>426</sup> Case 004/1, Written Record of Interview of TUOK Bou, 9 July 2015, D219/400, at ERN (EN) 01147823 (A43), 01147825 (A58).

<sup>427</sup> Case 004/1, Written Record of Interview of TUOK Bou, 9 July 2015, D219/400, at ERN (EN) 01147833 (A123-A128).





committed mistakes. According to TUOK Bou and HEM Soeun, IM Chaem herself held a meeting at the security centre “to prevent prisoners from running away”, stating that those who had committed mistakes, or who could not rehabilitate or improve themselves, “would die”.<sup>428</sup> Soldiers would in fact kill those prisoners and leave those remaining to sleep with the dead bodies.<sup>429</sup> TUOK Bou specifically recalled that prisoners, including himself, were beaten for trying to escape the security centre or for entering the hall late, and that a prisoner who could not complete his tasks was forced to eat sand until he died.<sup>430</sup> HEM Soeun, who was arrested upon the arrival of the Southwest Zone cadres,<sup>431</sup> stated that prisoners who had escaped were beaten with wooden clubs.<sup>432</sup> ITH Hal, also imprisoned under the rule of the Southwest Zone cadres, reported receiving death threats from the Khmer Rouge stationed at the prison, who would regularly put a wooden stick near the prisoners’ heads and say that “sooner or later, [they] would become part of the earth core.”<sup>433</sup> CHUM Chim, who was also brought to the security centre in 1978,<sup>434</sup> recalled that prisoners who could no longer walk were kicked and beaten.<sup>435</sup> BIN Nan and RIN Kheng further confirmed that, under the rule of the Southwest Zone cadres,<sup>436</sup> people at Phnom Trayoung were beaten or killed when they stole things.<sup>437</sup>

193. The evidence as a whole moreover sufficiently establishes, to the requisite standard, that these acts of torture were perpetrated by prison guards or soldiers under the supervision of the chief of the security centre, TUM Soeun, who in turn reported directly to IM Chaem.<sup>438</sup>

<sup>428</sup> Case 004/1, Written Record of Interview of TUOK Bou, 9 July 2015, D219/400, at ERN (EN) 01147825 (A64), 01147826 (A68). *See also* Case 004/1, Written Record of Interview of HEM Soeun, 30 October 2015, D219/567, at ERN (EN) 01182711 (A139).

<sup>429</sup> Case 004/1, Written Record of Interview of TUOK Bou, 9 July 2015, D219/400, at ERN (EN) 01147826 (A69).

<sup>430</sup> Case 004/1, Written Record of Interview of TUOK Bou, 9 July 2015, D219/400, at ERN (EN) 01147830 (A98), 01147834 (A130-A132).

<sup>431</sup> Case 004/1, Written Record of Interview of HEM Soeun, 30 October 2015, D219/567, at ERN (EN) 01182700 (A42), 01182701 (A48).

<sup>432</sup> Case 004/1, Written Record of Interview of HEM Soeun, 30 October 2015, D219/567, at ERN (EN) 01182715 (A167).

<sup>433</sup> Case 004/1, Written Record of Interview of ITH Hal, 19 August 2015, D219/475, at ERN (EN) 01173551 (A19).

<sup>434</sup> Case 004/1, Written Record of Interview of CHUM Chim, 20 January 2015, D219/149, at ERN (EN) 01064150 (A18).

<sup>435</sup> Case 004/1, Written Record of Interview of CHUM Chim, 20 January 2015, D219/149, at ERN (EN) 01064153 (A32).

<sup>436</sup> Case 004/1, DC-Cam Interview of BIN Nan and RIN Kheng, 11 September 2011, D123/1/2.65, at ERN (EN) 00985032-00985034.

<sup>437</sup> Case 004/1, DC-Cam Interview of BIN Nan and RIN Kheng, 11 September 2011, D123/1/2.65, at ERN (EN) 00985035, 00985041.

<sup>438</sup> *See, e.g.*, Closing order (Reasons), paras 175, 189, 192-195. *See also* Case 004/1, Written Record of Interview of TUM Soeun, 16 October 2013, D119/65, at ERN (EN) 00966802 (A158), 00966805 (A175), 00966809 (A198-A199); Case 004/1, Written Record of Interview of TUM Soeun, 2 December 2014, D219/102, at



194. In light of the foregoing, the Undersigned Judges conclude that there is sufficient evidence that the crime against humanity of torture was committed at Phnom Trayoung Security Centre, and that IM Chaem could be held responsible for its commission. The Undersigned Judges further consider the number of prisoners detained at Phnom Trayoung Security Centre under IM Chaem's rule – at least several thousand<sup>439</sup> – relevant to assessing the possible number of victims of torture and the gravity of the crime. The Undersigned Judges therefore uphold this part of Ground 2(5) of the Appeal. They will address later whether the failure to consider the gravity of these crimes, and assess IM Chaem's responsibility therefor, was fundamentally determinative of the determination on the ECCC's personal jurisdiction.

*vi. Torture at Wat Chamkar Khnol Security Centre and Execution Site*

195. The proposed charges against IM Chaem in the Third Introductory Submission included the crime against humanity of torture.<sup>440</sup> The Undersigned Judges note, as above, that paragraph 8 of that Submission alleged that “[t]he CPK enforced its illegal policies through a nationwide network of security centres that unlawfully detained, mistreated, tortured and executed vast numbers of the [Democratic Kampuchea] population.” The factual allegations regarding Wat Chamkar Khnol relied on material evidence that the site included both a security office and an execution site<sup>441</sup> and provided that:

The Wat Chamkar Khnol Execution Site was located in O Ombel commune, Sisophon District of Banteay Meanchey Province. The pagoda next to the killing site was used as an office by the local cadre. More than 9,000 skulls were discovered at this site and put in a memorial at Wat Sopheak Mongkol. Many of the victims were Vietnamese settlers. Executions were particularly intense at the end of 1978, when “5 or 6 trucks full of people” would sometimes arrive. One survivor witnessed “thousands” of people “tied, shackled and carried away in 20 big trucks” one night.

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ERN (EN) 01061140 (A13); Case 004/1, Written Record of Interview of MI Tal, 2 April 2015, D219/256, at ERN (EN) 01095825 (A25, A28); Case 004/1, Written Record of Interview of THIP Samphat, 2 April 2012, D106/8, at ERN (EN) 00842060 (A35); Case 004/1, Written Record of Interview of THIP Samphat, 15 June 2013, D119/49, at ERN (EN) 00966736 (A75); Case 004/1, Written Record of Interview of CHUM Kan, 26 March 2014, D119/110, at ERN (EN) 00985686 (A89); Case 004/1, Written Record of Interview of CHUM Chim, 20 January 2015, D219/149, at ERN (EN) 01064154 (A36).

<sup>439</sup> Closing Order (Reasons), paras 194, 199.

<sup>440</sup> Third Introductory Submission (D1), para. 119.

<sup>441</sup> Third Introductory Submission (D1), footnotes 284, 287 referring to Case 004/1, DC-Cam Report, Mapping the Killing Fields of Cambodia – Banteay Meanchey, 1997, D1.3.10.10, at ERN (EN) 00218605; Case 004/1, DC-Cam Report, Mapping the Killing Fields of Cambodia – Banteay Mancheay, 1998, D1.3.27.10, at ERN (EN) 0078068-0078069.



The trucks returned later that evening “carrying only the people’s clothes.”<sup>442</sup>

196. Recalling that security centres have been described as places “tasked with interrogating and executing perceived opponents of the CPK”,<sup>443</sup> the Undersigned Judges consider that the Co-Investigating Judges were duly seised of allegations of torture committed at Wat Chamkar Khnol Security Centre, and thus had a duty to investigate and rule upon them at the time of the Closing Order (Reasons).

197. The Co-Investigating Judges found that, “under both the Northwest Zone and the Southwest Zone leadership, people were detained and killed” at Wat Chamkar Khnol.<sup>444</sup> They also noted the evidence of TOEM Ratanak who, in November 1978, saw at the site blood-stained rooms, as well as hand-cuffed and shackled, recently-deceased bodies with bruises and knife wounds, leading him to conclude they had been tortured before being killed.<sup>445</sup> The Co-Investigating Judges, however, failed to make express findings and a legal determination on the commission of torture, as defined above.<sup>446</sup>

198. The Undersigned Judges consider that there is sufficient evidence that prisoners at Wat Chamkar Khnol were caused physical and mental suffering in order to obtain information or as a form of punishment and intimidation. LEM Phenh, who was imprisoned after the arrival of the Southwest Zone cadres,<sup>447</sup> stated that female cadres from the Northwest Zone electrocuted her using wires connected to her feet, hands, neck and body during her interrogation in 1978.<sup>448</sup> BUN Kim Eng, imprisoned in late 1978, stated that she was frightened to see militiamen taking people to be killed every day, and witnessed the Khmer Rouge beating a woman and stomping on her stomach as a punishment for committing “moral misconduct”.<sup>449</sup> DIEB Poeng Lang reported that she was frightened, “insulted and cursed [...] with harsh words” at the prison

<sup>442</sup> Third Introductory Submission (D1), para. 71 (footnotes omitted).

<sup>443</sup> See Case 003 Decision on Two Applications for Annulment (D134/1/10), Opinion of Judges BEAUVALLET and BWANA, para. 52; Case 001 Trial Judgement (E188), paras 111, 115; Case 001 Appeal Judgement (F28), para. 2.

<sup>444</sup> Closing Order (Reasons), para. 269.

<sup>445</sup> Closing Order (Reasons), para. 269 referring to Case 004/1, Written Record of Interview of TOEM Ratanak, 2 April 2014, D119/113, at ERN (EN) 00986765-00986766 (A18-A21).

<sup>446</sup> See *supra* para. 190.

<sup>447</sup> Case 004/1, Written Record of Interview of LEM Phenh, 10 February 2015, D219/174, at ERN (EN) 01076985 (A13), 01076987 (A20), 01076989 (A37).

<sup>448</sup> Case 004/1, Written Record of Interview of LEM Phenh, 10 February 2015, D219/174, at ERN (EN) 01076991 (A45-A47).

<sup>449</sup> Case 004/1, Civil Party Application of BUN Kim Eng, 20 March 2013, D5/923, at ERN (EN) 01251838.



in 1978.<sup>450</sup> PAO Ngoeut, who worked at Wat Chamkar Khnol until 1978, generally confirmed that former LON Nol soldiers were beaten by militiamen during interrogation, before being killed.<sup>451</sup> KHUON Say likewise confirmed that he had been interrogated and tortured at Wat Chamkar Khnol,<sup>452</sup> and described prisoners being whipped, walked on and suffocated with plastic bags by Khmer Rouge soldiers,<sup>453</sup> although he was detained there only until January or mid-1977.<sup>454</sup> He further confirmed that people were arrested and killed there until 1979, and that bloodstains were apparent on the pagoda walls, splattered from people who were beaten to death.<sup>455</sup> DC-Cam investigator SIN Khin seemingly learned from witnesses that prisoners were interrogated and tortured at Wat Chamkar Khnol through such techniques as being beaten up, bitten by centipedes and having their nails pulled.<sup>456</sup> Finally, an investigator in the Office of the Co-Investigating Judges further concluded, based on collected evidence, that Wat Chamkar Khnol was a detention centre used throughout the Northwest Zone and Southwest Zone cadres' rule, "where prisoners were detained and tortured prior of [*sic*] being executed."<sup>457</sup>

199. In light of the above evidence, it is sufficiently established, to the requisite standard, that these acts of torture at Wat Chamkar Khnol Security Centre were perpetrated by militiamen, cadres or soldiers, under both the Northwest Zone and Southwest Zone cadres' rule.

200. Turning to IM Chaem's authority in relation to this site, the Undersigned Judges note that Wat Chamkar Khnol was under the control of the Sisophon District Committee as well as the Sector 5 Committee,<sup>458</sup> the latter of which IM Chaem became a member in the beginning

<sup>450</sup> Case 004/1, Civil Party Application of DIEB Poeng Lang, 2 October 2009, D5/1459, at ERN (EN) 01210265.

<sup>451</sup> Case 004/1, Civil Party Application of PAO Ngoeut, 15 September 2013, D5/995, at ERN (EN) 01191931.

<sup>452</sup> Case 004/1, Written Record of Interview of TANN Say *alias* KHUON Say, 12 February 2013, D118/25, at ERN (EN) 00903211 (A11-A13).

<sup>453</sup> Case 004/1, Written Record of Investigative Action, 4 April 2014, D119/119, at ERN (EN) 00982280.

<sup>454</sup> Case 004/1, Written Record of Interview of TANN Say *alias* KHUON Say, 12 February 2013, D118/25, at ERN (EN) 00903210 (A9), 00903211 (A15); Case 004/1, DC-Cam Interview of KHUON Say, 1997, D219/204.2.1, at ERN (EN) 01122452-01122454; Case 004/1, Written Record of Investigative Action, 4 April 2014, D119/119, at ERN (EN) 00982280.

<sup>455</sup> Case 004/1, DC-Cam Interview of KHUON Say, 1997, D219/204.2.1, at ERN (EN) 01122452. *See also* Case 004/1, DC-Cam Interview of SET Thla, 1997, D219/204.2.1, at ERN (EN) 01122455.

<sup>456</sup> 004/1, Written Record of Interview of SIN Khin, 5 March 2015, D219/206, at ERN (EN) 01087433-01087434 (A14-A17).

<sup>457</sup> Case 004/1, Written Record of Investigative Action, 3 April 2014, D119/118, at ERN (EN) 00982277-00982278.

<sup>458</sup> Case 004/1, Written Record of Interview of PAN Chhuong, 22 July 2014, D119/136, at ERN (EN) 01044767 (A28); Case 004/1, Written Record of Interview of TANN Say *alias* KHUON Say, 12 February 2013, D118/25, at ERN (EN) 00903211-00903212 (A10, A16); Case 004/1, Written Record of Interview of VAN Samut, 21 August 2015, D219/477, at ERN (EN) 01141201-01141202 (A27).



or middle of 1978.<sup>459</sup> The evidence further sufficiently shows that, under both the Northwest Zone and Southwest Zone cadres' rule, Wat Chamkar Khnol was used as a security centre for prisoners arrested in Preah Net Preah District,<sup>460</sup> where IM Chaem was in charge as District Secretary from March 1977,<sup>461</sup> and where she thus had the authority to order arrests.<sup>462</sup> There is, on the whole, evidence that Wat Chamkar Khnol detainees were transferred to or from various locations in Sector 5, including Phnom Trayoung Security Centre.<sup>463</sup> Additionally, the evidence establishes that IM Chaem's authority extended beyond the boundaries of Preah Net Preah District,<sup>464</sup> and in particular into Sisophon District, where her husband, *Ta Nhen*, was appointed to the District Committee,<sup>465</sup> and where her parents and siblings lived.<sup>466</sup> In this regard, the Co-Investigating Judges acknowledged evidence that IM Chaem worked and had an office in Sisophon, that she travelled and visited worksites throughout Sector 5, and that she attended and called meetings at the sector level.<sup>467</sup> IM Chaem herself mentioned attending a meeting in Svay Sisophon "to receive the work plan",<sup>468</sup> while SUON Mot, a village chief in Phniet Commune in Sisophon District, confirmed that he saw her "come back and forth to hold

<sup>459</sup> Closing Order (Reasons), para. 166.

<sup>460</sup> See, e.g., Case 004/1, Written Record of Interview of LEM Phenh, 10 February 2015, D219/174, at ERN (EN) 01076985 (A13), 01076987 (A20), 01076989 (A35, A37) (transferred under the rule of the Southwest Zone cadres from the Preah Net Preah District Office to Wat Chamkar Khnol); Case 004/1, Written Record of Interview of TANN Say *alias* KHUON Say, 12 February 2013, D118/25, at ERN (EN) 00903210 (A9) (transferred in 1976 from Preah Net Preah to Wat Chamkar Khnol Security Centre); Case 004/1, Written Record of Investigative Action, 4 April 2014, D119/119, at ERN (EN) 00982279-00982280.

<sup>461</sup> Closing Order (Reasons), paras 158, 166.

<sup>462</sup> Closing Order (Reasons), paras 186, 187.

<sup>463</sup> See, e.g., Case 004/1, Civil Party Application of OEUR Loeur, 30 June 2013, D5/1252, at ERN (EN) 01144155-01144156 (transferred from Wat Chamkar Khnol "by the prison chief, Comrade Nau", "who was from the Southwest Zone", to Phnom Trayoung Security Centre in 1978, where killings were reportedly ordered by IM Chaem). See also generally Case 004/1, Written Record of Interview of TANN Say *alias* KHUON Say, 12 February 2013, D118/25, at ERN (EN) 00903211 (A10); Case 004/1, SOAS/HRW Interview of TEUL Hev, 20 October 2005, D6.1.634, at ERN (EN) 00352099.

<sup>464</sup> Closing Order (Reasons), para. 165.

<sup>465</sup> Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089782; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951863; Case 004/1, Written Record of Interview of SUON Mot, 16 October 2014, D219/37, at ERN (EN) 01053619 (A45); Case 004/1, Written Record of Interview of BOU Mao, 21 February 2014, D119/94, at ERN (EN) 00982764 (A52); Case 004/1, Written Record of Interview of CHHOENG Choeun, 4 September 2014, D119/156, at ERN (EN) 01044846-01044847 (A27).

<sup>466</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951862-00951863.

<sup>467</sup> Closing Order (Reasons), para. 165. See also, e.g., Case 004/1, Written Record of Interview of LIEM Sarem, 22 January 2014, D119/76, at ERN (EN) 00980711-00980712 (A19-A23); Case 004/1, Written Record of Interview of BIN Heuy, 27 November 2013, D119/66, at ERN (EN) 00975039 (A13); Case 004/1, Written Record of Interview of SUON Mot, 16 October 2014, D219/37, at ERN (EN) 01053618-01053619 (A42-A44), 01053620 (A52-A55); Case 004/1, Written Record of Interview of CHUM Kan, 26 March 2014, D119/110, at ERN (EN) 00985685 (A85-A86); Case 004/1, Written Record of Interview of VAN Samut, 21 August 2015, D219/477, at ERN (EN) 01141204 (A35).

<sup>468</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951800.



meetings at the Svay Sisophon District Office [which] was the Sector 5 office.”<sup>469</sup>

201. In light of the foregoing, the Undersigned Judges find that there is sufficient evidence that the crime against humanity of torture was committed at Wat Chamkar Khnol Security Centre, and that IM Chaem could be held responsible for its commission. The Undersigned Judges thus uphold this part of Ground 2(5) of the Appeal. The impact of this conclusion on the determination on the ECCC’s personal jurisdiction will be addressed later.

*vii. Inhumane Living Conditions at Phum Chakrey Security Centre*

202. The Third Introductory Submission alleged, in relation to Phum Chakrey Security Centre:

The Phum Chakrey Security Centre and the nearby Phum [*sic*] Taruth execution site were located in Chakrey village, Choup commune of Preah Net Preah District, Banteay Meanchey Province. Reports estimate that as many as 6,000 individuals were detained and killed at this location. During one week in late June 1978, “female Southwest Zone officials” took 20 to 30 individuals every night to the prison and executed them. In addition, almost the entire population of Chakrey village, some 400 individuals, was killed during a purge that occurred throughout Preah Net Preah district lasting until late August 1978. Both the security centre and the execution site were located close to the Preah Net Preah District Office, and it appears that Phum Chakrey Security Centre was the district-level prison for Preah Net Preah District.<sup>470</sup>

203. The proposed charges against IM Chaem in the Third Introductory Submission included the crime against humanity of other inhumane acts,<sup>471</sup> which the jurisprudence of the ECCC has defined as a residual offence intended to criminalise conduct “similar in gravity” to other enumerated crimes against humanity, including “detention in brutal and deplorable living conditions”.<sup>472</sup> The Undersigned Judges consider the scrutiny of living conditions in detention to be an inherent aspect of the investigation into allegations of crimes committed at a security centre. Accordingly, they find that the Co-Investigating Judges were duly seized of allegations of inhumane living conditions as other inhumane acts committed at Phum Chakrey Security Centre, and thus had a duty to investigate and rule upon them at the time of the Closing Order

<sup>469</sup> Case 004/1, Written Record of Interview of SUON Mot, 16 October 2014, D219/37, at ERN (EN) 01053619 (A41-A42).

<sup>470</sup> Third Introductory Submission (D1), para. 76 (footnotes omitted).

<sup>471</sup> Third Introductory Submission (D1), para. 119.

<sup>472</sup> Case 001 Trial Judgement (E188), paras 367-371. *See also* ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, Trial Chamber, 15 March 2002 (“*Krnojelac* Trial Judgment”), paras 133-144.



(Reasons).

204. The Undersigned Judges observe that the allegations of crimes committed at Phum Chakrey Security Centre and adjoining sites were not included in the charges.<sup>473</sup> The Co-Investigating Judges moreover did not specifically address in the Closing Order (Reasons) the allegations of inhumane living conditions at Phum Chakrey Security Centre,<sup>474</sup> or make any specific legal determination thereon, except for the cursory finding that crimes against humanity generally took place at crime sites not charged.<sup>475</sup> The Co-Investigating Judges did, however, note evidence that arrestees were “briefly detained” before being executed at Phum Chakrey Security Centre over the course of about a year until late 1978 or early 1979,<sup>476</sup> while IM Chaem was in power in Preah Net Preah District.<sup>477</sup> They also expressly found that the Southwest Zone cadres in charge of running and sending arrestees to Phum Chakrey Security Centre reported to IM Chaem,<sup>478</sup> who, as Secretary of Preah Net Preah District, had authority over security centres, executions and arrests carried out by militia in the district.<sup>479</sup>

205. This being said, the Undersigned Judges observe that the evidence gathered during the investigation is limited and indicates that arrestees were detained at Phum Chakrey Security Centre for a very short time before being killed — from one night<sup>480</sup> up to two or three days.<sup>481</sup> The evidence further suggests that around fifteen to twenty arrestees were brought there at a time,<sup>482</sup> and that the prison could only detain around twenty to thirty prisoners at one time.<sup>483</sup> The Undersigned Judges consider that the scarce available evidence and relatively short period of detention render difficult a finding of inhumane living conditions. The evidence of YOU Mut and CHRACH Kit indeed does not provide consistent information on the conditions

<sup>473</sup> See Notification of Charges (D239.1).

<sup>474</sup> Closing Order (Reasons), paras 260-263.

<sup>475</sup> Appeal, para. 36 *referring to* Closing Order (Reasons), para. 305.

<sup>476</sup> Closing Order (Reasons), paras 260-261.

<sup>477</sup> Closing Order (Reasons), para. 166.

<sup>478</sup> Closing Order (Reasons), paras 261-262.

<sup>479</sup> Closing Order (Reasons), paras 173-175.

<sup>480</sup> Case 004/1, Written Record of Interview of CHRACH Kit, 15 February 2012, D106/2, at ERN (EN) 00784870 (A20).

<sup>481</sup> Case 004/1, Written Record of Interview of YOU Mut, 8 September 2014, D219/1, at ERN (EN) 01044858-01044860 (A43-A44).

<sup>482</sup> Case 004/1, Written Record of Interview of CHRACH Kit, 15 February 2012, D106/2, at ERN (EN) 00784870 (A21).

<sup>483</sup> Case 004/1, Written Record of Interview of YOU Mut, 8 September 2014, D219/1, at ERN (EN) 01044858 (A38); Case 004/1, Written Record of Interview of BEN Sokh, 2 July 2015, D219/397, at ERN (EN) 01128311 (A25).



of detention, in particular on whether or not the detainees had their hands tied,<sup>484</sup> and rather supports that they were not shackled or beaten, and that they were fed with rice.<sup>485</sup>

206. In sum, the Undersigned Judges find that there is insufficient evidence to establish that the crime of other inhumane acts in the form of imposing inhumane living conditions was committed against those detained at Phum Chakrey Security Centre. The Co-Investigating Judges thus did not err in not taking these allegations into consideration in their conclusion on personal jurisdiction. This part of Ground 2(5) is accordingly denied.

*viii. Imprisonment and Enforced Disappearances at Wat Ang Srei Mealy*

207. Paragraph 15 of the Supplementary Submission on Sector 1 alleged that “[i]n Koh Andet District, mass executions of Khmer Krom were conducted at the Prey Sokhon execution site” and that “[t]he Khmer Krom victims were temporarily detained at Wat Ang Srei Muny [*sic*], and then taken for execution by armed CPK cadres”.<sup>486</sup> In the Undersigned Judges’ view, this amounts to allegations of, *inter alia*, the crimes against humanity of imprisonment and other inhumane acts by enforced disappearances<sup>487</sup> committed against Khmer Krom at Wat Ang Srei Mealy. The Co-Investigating Judges were accordingly duly seised of and had a duty to investigate and rule upon these allegations at the time of the Closing Order (Reasons).

208. The Co-Investigating Judges found that Wat Ang Srei Mealy was in operation from April 1975 until at least November 1978, and acknowledged evidence that a number of crimes were committed at this site.<sup>488</sup> In particular, they noted evidence that Khmer Krom and “17 April people” were detained at Wat Ang Srei Mealy and taken to be executed at Prey Sokhon Execution Site on a regular basis during the Khmer Rouge era,<sup>489</sup> although they considered that the evidence could not establish the number of victims or IM Chaem’s authority in relation to these sites.<sup>490</sup> They ultimately failed to make an express legal determination on

<sup>484</sup> Case 004/1, Written Record of Interview of YOU Mut, 8 September 2014, D219/1, at ERN (EN) 01044858 (A38), 01044862 (A60); Case 004/1, Civil Party Application of YOU Mut, 10 May 2013, D5/965, at ERN (EN) 01123489; Case 004/1, Written Record of Interview of CHRACH Kit, 15 February 2012, D106/2, at ERN (EN) 00784870 (A20).

<sup>485</sup> Case 004/1, Written Record of Interview of YOU Mut, 8 September 2014, D219/1, at ERN (EN) 01044862 (A61).

<sup>486</sup> Supplementary Submission on Sector 1 (D65), para. 15.

<sup>487</sup> See *infra* Ground 4 of the Appeal.

<sup>488</sup> Closing Order (Reasons), para. 249.

<sup>489</sup> Closing Order (Reasons), para. 249.

<sup>490</sup> Closing Order (Reasons), paras 250-251.





these allegations, except for the cursory finding at paragraph 305 of the Closing Order (Reasons) that crimes against humanity generally took place at crime sites not charged.

209. The Undersigned Judges consider that the evidence examined above<sup>491</sup> sufficiently shows that Khmer Krom, amongst other people, were detained and eventually disappeared at Wat Ang Srei Mealy, including while IM Chaem was in charge as Koh Andet District Secretary and on the Sector 13 Committee.<sup>492</sup> The evidence further sufficiently shows that Wat Ang Srei Mealy was used as a district office or by the district military,<sup>493</sup> and that members of the militia, police and soldiers took people to be killed at Prey Sokhon.<sup>494</sup> IM Chaem reportedly controlled the Koh Andet District military and militia in Sector 13,<sup>495</sup> and gave orders to arrest people to *Ta Soeun*,<sup>496</sup> who was a district or sector security chairman based at Wat Ang Srei Mealy.<sup>497</sup> There is also evidence that Maong, a district-level police chairman working at Wat Ang Srei Mealy and involved in killings at Prey Sokhon during the first half of the Khmer Rouge regime, received orders from and reported to the upper level.<sup>498</sup>

210. The Undersigned Judges further consider that a cursory review of the evidence collected in Case 004/1 could have provided the International Co-Prosecutor with reason to believe, in the sense of Internal Rule 53(1), that people other than Khmer Krom were detained in large numbers and forcibly disappeared at Wat Ang Srei Mealy, and eventually killed at Prey

<sup>491</sup> See *supra* para. 166.

<sup>492</sup> See *infra* Ground 5 and 6 of the Appeal.

<sup>493</sup> See Case 004/1, Written Record of Interview of VORNG Nop, 5 December 2012, D119/2, at ERN (EN) 00945871 (A11); Case 004/1, Written Record of Interview of SAM Kun, 12 November 2015, D219/591, at ERN (EN) 01178841 (A13), 01178845 (A40), 01178846 (A47); Case 004/1, Written Record of Interview of SAM Kun, 7 December 2012, D119/4, at ERN (EN) 00876980 (A18-A19); Case 004/1, Written Record of Interview of KAO Chheng, 28 February 2013, D119/16, at ERN (EN) 00919151 (A20); Case 004/1, Written Record of Investigation Action, 1 March 2013, D119/18, at ERN (EN) 00893287.

<sup>494</sup> Case 004/1, Written Record of Interview of VORNG Nop, 5 December 2012, D119/2, at ERN (EN) 00945872 (A18), 00945873 (A25-A26); Case 004/1, Written Record of Interview of VORNG Nop, 12 November 2015, D219/592, at ERN (EN) 01185745-01185746 (A53-A59), 01185748 (A72-A73); Case 004/1, Written Record of Interview of SAM Kun, 7 December 2012, D119/4, at ERN (EN) 00876980 (A18); Case 004/1, Written Record of Interview of MOM Pholla, 30 October 2015, D219/568, at ERN (EN) 01182731 (A78-A81).

<sup>495</sup> Case 004/1, Written Record of Interview of KAO Chheng, 28 February 2013, D119/16, at ERN (EN) 00919151 (A19-A21, A24), 00919152 (A31); Case 004/1, Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111845 (A186-A187).

<sup>496</sup> Case 004/1, Written Record of Interview of UL Hoeun, 13 October 2014, D219/34, at ERN (EN) 01053575 (A33).

<sup>497</sup> Case 004/1, Written Record of Interview of SAM Kun, 7 December 2012, D119/4, at ERN (EN) 00876980 (A20); Case 004/1, Written Record of Interview of UL Hoeun, 19 March 2014, D118/209, at ERN (EN) 00983570 (A21-A22); Case 004/1, Written Record of Interview of UL Hoeun, 13 October 2014, D219/34, at ERN (EN) 01053575 (A33).

<sup>498</sup> Case 004/1, Written Record of Interview of VORNG Nop, 12 November 2015, D219/592, at ERN (EN) 01185742-01185743 (A35-A44), 01185747 (A67); Case 004/1, Written Record of Interview of VORNG Nop, 5 December 2012, D119/2, at ERN (EN) 00945873 (A26, A28).



Sokhon Execution Site.<sup>499</sup> However, the Co-Investigating Judges could not consider themselves seised absent a supplementary submission expanding the scope of the investigation at these sites to victims other than Khmer Krom.

211. In light of the above, the Undersigned Judges conclude that there is sufficient evidence that the crimes of imprisonment and other inhumane acts by enforced disappearances were committed against Khmer Krom at Wat Ang Srei Mealy, for which IM Chaem could be held responsible. The Undersigned Judges thus uphold this part of Ground 2(5) of the Appeal. The impact of this conclusion on the determination on the ECCC's personal jurisdiction will be addressed later.

f. Further Considerations

212. The Undersigned Judges observe that the Co-Investigating Judges were seised of additional allegations at various crime sites that were neither charged against IM Chaem nor raised by the International Co-Prosecutor in his Appeal, including at Trapeang Thma Dam Worksite, Wat Preah Net Preah and related sites, Phum Chakrey Security Centre and Prey Taruth Execution Site, and Wat Chamkar Khnol Security Centre and Execution Site.<sup>500</sup>

213. Although the Co-Investigating Judges briefly reviewed the evidence<sup>501</sup> and made a cursory observation that crimes were committed at these crime sites,<sup>502</sup> they did not charge them against IM Chaem and did not make any reasoned and specific legal determinations thereon. The Co-Investigating Judges have a duty to investigate and rule upon all allegations of which they were duly seised, pursuant to Internal Rules 55(2) and 67(1);<sup>503</sup> this failure thus constituted an error of law.

214. In addition, the Undersigned Judges note that the Co-Investigating Judges sought,

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<sup>499</sup> See, e.g., Case 004/1, Written Record of Interview of VORNG Nop, 5 December 2012, D119/2, at ERN (EN) 00945871-00945874 (A9-A36); Case 004/1, Written Record of Interview of VORNG Nop, 12 November 2015, D219/592, at ERN (EN) 01185739-01185748 (A16-A72); Case 004/1, Written Record of Interview of SAM Kun, 12 November 2015, D219/591, at ERN (EN) 01178843-01178845 (A29-A37); Case 004/1, Written Record of Interview of SAM Touch, 18 November 2015, D219/604, at ERN (EN) 01184874 (A69-A74); Case 004/1, Written Record of Investigation Action, 1 March 2013, D119/18, at ERN (EN) 00893287-00893288.

<sup>500</sup> Third Introductory Submission (D1), paras 71, 76-78. See also Notification of Charges (D239.1).

<sup>501</sup> Closing Order (Reasons), paras 248-278.

<sup>502</sup> Closing Order (Reasons), para. 305.

<sup>503</sup> Case 003 Decision on Two Applications for Annulment (D134/1/10), Opinion of Judges BEAUVALLET and BWANA, para. 13.



throughout their review of the evidence, to establish an accurate and precise number of victims for each uncharged crime site.<sup>504</sup> The Undersigned Judges consider this requirement unjustified, particularly in view of the evidential standard applicable at the pre-trial stage of proceedings.<sup>505</sup> They recall that it may be impractical to insist on a high degree of specificity in cases of mass crimes, and that it is not necessary that the precise number of victims be known.<sup>506</sup> The uncertainty regarding the exact number of victims indeed does not preclude the conclusion that crimes were committed at a concrete place and at a concrete point in time.<sup>507</sup>

215. In light of these errors, the Undersigned Judges deem it necessary to examine *ex officio* whether the allegations of crimes committed at Trapeang Thma Dam Worksite, Wat Preah Net Preah and related sites, Phum Chakrey Security Centre, Prey Taruth Execution Site and Wat Chamkar Khnol Security Centre were properly addressed, to the requisite standard for the assessment of evidence, in the Closing Order (Reasons).

*i. Trapeang Thma Dam Worksite*

216. The Co-Investigating Judges were seised of allegations regarding Trapeang Thma Dam Worksite in paragraph 78 of the Third Introductory Submission:

The Trapeang Thma Dam is located at Trapeang Thma Khang Cheung Village, Por Char Commune, Phnom Srok District, Banteay Meanchey Province. Certain facts relating to the Trapeang Thma dam forced labour site were set forth in paragraph 46 of the previous Introductory Submission filed on 18 July 2007. In her role as District Secretary, IM Chaem acknowledges that she supervised hundreds of individuals from Preah Net Preah District who were forced to work in rice fields near the Trapeang Thma dam. The workday was extremely long and the forced labourers had little time to rest. The food ration was one bowl of rice porridge per day.<sup>508</sup>

217. In the Undersigned Judges' view, these allegations may amount to crimes against humanity in the form of, *inter alia*, enslavement, murder, extermination and other inhumane

<sup>504</sup> Closing Order (Reasons), paras 250, 259, 263, 267, 270, 277-278, 321.

<sup>505</sup> See *supra* paras 61-62.

<sup>506</sup> International Criminal Court ("ICC"), *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 134; ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, Pre-Trial Chamber I, 16 December 2011, para. 112; ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Judgement, Trial Chamber, 31 July 2003 ("*Stakić* Trial Judgement"), para. 201; ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005, para. 30. See also Case 002 Closing Order (D427), para. 1382.

<sup>507</sup> *Stakić* Trial Judgement, para. 201.

<sup>508</sup> Third Introductory Submission (D1), para. 78 (footnotes omitted).



acts.<sup>509</sup> The Co-Investigating Judges indeed made factual findings acknowledging that thousands of people were forced to work in constructing the dam and died of illness, starvation, exhaustion and killings.<sup>510</sup> However, they considered it impossible to accurately establish the number of people who worked and died there during the relevant temporal scope,<sup>511</sup> found IM Chaem's "precise role [was] not clear",<sup>512</sup> and ultimately failed to make a legal determination on the allegations relating to Trapeang Thma Dam Worksite.

218. As held above,<sup>513</sup> the Undersigned Judges consider that the Co-Investigating Judges erred in requiring that the number of victims be precisely determined. There is sufficient evidence to establish a reasonable estimate of the number of people who were forced to work and ultimately died at the worksite under the rule of IM Chaem and the Southwest Zone cadres, *i.e.* between March 1977 and January 1979.

219. First, the Undersigned Judges note that the Trapeang Thma Dam was built entirely by manual labour,<sup>514</sup> with construction starting in 1976 or 1977 and continuing after the arrival of the Southwest Zone cadres<sup>515</sup> in March 1977.<sup>516</sup> Although there is evidence that an important part of the dam may have been completed in 1977,<sup>517</sup> major works, including the construction of bridges,<sup>518</sup> canals and water gates,<sup>519</sup> and the completion of the reservoir,<sup>520</sup> continued until the arrival of the Vietnamese. Today, the reservoir is approximately nine by thirteen kilometres

<sup>509</sup> Third Introductory Submission (D1), para. 119.

<sup>510</sup> Closing Order (Reasons), paras 274, 277.

<sup>511</sup> Closing Order (Reasons), paras 277-278.

<sup>512</sup> Closing Order (Reasons), paras 272-273.

<sup>513</sup> *See supra* para. 214.

<sup>514</sup> *See, e.g.*, Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089772. *See also* Closing Order (Reasons), para. 274; Case 004/1, Site Identification Report, 6 January 2010, D6.1.710, at ERN (EN) 00428005.

<sup>515</sup> Closing Order (Reasons), para. 271; *see also* paras 152, 154.

<sup>516</sup> Closing Order (Reasons), para. 156.

<sup>517</sup> Closing Order (Reasons), para. 271. *See also* Case 004/1, Written Record of Interview of KAN Thol, 20 December 2008, D6.1.430, at ERN (EN) 00277820; Case 004/1, Written Record of Interview of SAOM Phan, 30 January 2009, D6.1.450, at ERN (EN) 00290358; Case 004/1, Written Record of Interview of KOR Len, 11 March 2014, D119/98, at ERN (EN) 00985187 (A19).

<sup>518</sup> Case 004/1, Written Record of Interview of THIB Nam, 3 March 2015, D219/209, at ERN (EN) 01088517 (A38); Case 004/1, Civil Party Application of DIB Phalla, 3 June 2013, D5/1065, at ERN (EN) 01210527; Case 004/1, Written Record of Interview of KOR Len, 11 March 2014, D119/98, at ERN (EN) 00985187 (A19).

<sup>519</sup> Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089775; Case 004/1, Written Record of Interview of PHY Phuon, 28 November 2013, D119/68, at ERN (EN) 00975046 (A6).

<sup>520</sup> Case 004/1, Written Record of Interview of CHUM Kan, 27 February 2013, D119/14, at ERN (EN) 00899961 (A27); Case 004/1, Written Record of Interview of PHI Phuon, 28 November 2013, D119/68, at ERN (EN) 00975046 (A6).



in size.<sup>521</sup>

220. The Undersigned Judges further note that the number of workers is relevant to assessing the number of victims of the various crimes at Trapeang Thma Dam Worksite. The CPK cadre *Ta Nhim* reportedly boasted, in February and December 1977, that a total manpower of 15,000 to 20,000 workers was “used” in building the project.<sup>522</sup> Other evidence indeed confirms that thousands<sup>523</sup> or tens of thousands<sup>524</sup> of people worked at the Trapeang Thma Dam Worksite after IM Chaem and the Southwest Zone cadres arrived. PAN Chhuong stated that approximately 7,800 to 9,000 people from the Sector 5 mobile unit alone worked at the dam from early 1977 and throughout the rule of the Southwest Zone cadres, along with thousands more from other district mobile units.<sup>525</sup> IM Chaem and several witnesses reported that the workers came from different districts in Sector 5, including Preah Net Preah District.<sup>526</sup>

221. The Undersigned Judges moreover note evidence that the forced labour, as well as

<sup>521</sup> Case 004/1, Site Identification Report, 6 January 2010, D6.1.710, at ERN (EN) 00428005, 00428008.

<sup>522</sup> Case 004/1, Written Record of Interview of KAN Thol, 20 December 2008, D6.1.430, at ERN (EN) 00277820-00277821; Case 004/1, New China News Agency Report of Vice-Premier Chen Yung Kuei’s Visit to Cambodia, 22 December 1977, D6.1.992, at ERN (EN) 00498181.

<sup>523</sup> Case 004/1, Written Record of Interview of YENG Chhan, 25 June 2014, D119/132, at ERN (EN) 01035103 (A78, A80); Case 004/1, Written Record of Interview of LEUY Taes, 10 June 2015, D219/361, at ERN (EN) 01113712 (A50); Case 004/1, Written Record of Interview of SAUR Chansareth, 13 August 2015, D219/455, at ERN (EN) 01151185 (A42); Case 004/1, Written Record of Interview of LACH Kea, 18 August 2011, D59, at ERN (EN) 00737709; Case 004/1, Written Record of Interview of LIV Saleang, 18 December 2008, D6.1.426, at ERN (EN) 00277832; Case 004/1, Civil Party Application of TAING Hiv, 25 June 2013, D5/1250, at ERN (EN) 01145440.

<sup>524</sup> Case 004/1, Written Record of Interview of DAN Sa, 29 January 2009, D6.1.449, at ERN (EN) 00289932; Case 004/1, Written Record of Interview of SAOM Phan, 30 January 2009, D6.1.450, at ERN (EN) 00290358; Case 004/1, Written Record of Interview of LAT Suoy, 18 August 2014, D119/144, at ERN (EN) 01031891 (A33); Case 004/1, Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, at ERN (EN) 01059949 (A107), 01059956 (A156); Case 004/1, Written Record of Interview of YI Laisauv, 2 February 2009, D6.1.343, at ERN (EN) 00288640; Case 004/1, DC-Cam Interview of PICH Ham, 5 March 2007, D123/1/1.6a, at ERN (EN) 00982776; Case 004/1, Written Record of Interview of LIV Peou, 19 December 2008, D6.1.427, at ERN (EN) 00277827.

<sup>525</sup> Case 004/1, Written Record of Interview of PAN Chhuong, 14 March 2013, D119/29, at ERN (EN) 00937033 (A2), 00937035 (A9). *See also* Case 004/1, DC-Cam Report, Field Trip’s Report in Preah Netr Preah District, 14 June 2011, D119/148.1, at ERN (EN) 00729878; Case 004/1, Written Record of Interview of LIM Hong, 13 June 2013, D119/47, at ERN (EN) 00966716 (A9); Case 004/1, Written Record of Interview of SAK Sam, 23 April 2014, D119/120, at ERN (EN) 01057743 (A59), 01057751 (A125); Case 004/1, Written Record of Interview of PAN Chhuong, 19 August 2011, D61, at ERN (EN) 00738311-00738312; Case 004/1, DC-Cam Interview of PAN Chhuong, 18 June 2011, D67.6, at ERN (EN) 00728669-00728670.

<sup>526</sup> Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089772; Case 004/1, Written Record of Interview of SAK Sam, 23 April 2014, D119/120, at ERN (EN) 01057751 (A122); Case 004/1, Written Record of Interview of PAN Chhuong, 14 March 2013, D119/29, at ERN (EN) 00937033 (A2), 00937035 (A8); Case 004/1, DC-Cam Report, Field Trip’s Report in Preah Netr Preah District, 14 June 2011, D119/148.1, at ERN (EN) 00729878; Case 004/1, Written Record of Interview of TANN Than, 18 December 2008, D6.1.425, at ERN (EN) 00277841; Case 004/1, Written Record of Interview of NOU Chong, 20 January 2014, D119/73, at ERN (EN) 00980541 (A5).



inhumane living and working conditions, worsened after the arrival of IM Chaem and the Southwest Zone cadres.<sup>527</sup> THANG Thoeuy, who saw IM Chaem inspecting the worksite with armed guards once a week,<sup>528</sup> estimated that nearly one hundred people died of starvation.<sup>529</sup> Other witnesses generally confirmed that “many” died of such causes as starvation, illness and exhaustion.<sup>530</sup>

222. Additionally, there is evidence that arrests, disappearances and killings were common at Trapeang Thma Dam Worksite,<sup>531</sup> and increased after the Southwest Zone cadres arrived.<sup>532</sup> LIV Saleang, CHHAO Chat and TAK Buy described how two to fifteen people disappeared every night or every few nights,<sup>533</sup> seemingly under the Southwest Zone cadres’ rule. LIV Peou specifically reported that fifteen people disappeared from his unit in one night during the

<sup>527</sup> Case 004/1, Written Record of Interview of LEUY Taes, 10 June 2015, D219/361, at ERN (EN) 01113712 (A44), 01113715 (A90); Case 004/1, Written Record of Interview of SORM Seila, 14 October 2014, D219/35, at ERN (EN) 01053592 (A43); Case 004/1, Written Record of Interview of HANG Horn, 11 February 2015, D219/175, at ERN (EN) 01077004 (A27); Case 004/1, Civil Party Application of EAM Vuy, 13 March 2013, D5/962, at ERN (EN) 01040610-01040611. *See also* Case 004/1, Civil Party Application of THOY Thiem, 29 December 2015, D5/1089, at ERN (EN) 01185544.

<sup>528</sup> Case 004/1, Written Record of Interview of THANG Thoeuy, 16 June 2014, D119/131, at ERN (EN) 01025301 (A95-A96), 01025302 (A100).

<sup>529</sup> Case 004/1, Written Record of Interview of THANG Thoeuy, 16 June 2014, D119/131, at ERN (EN) 01025304 (A114-A115). *See also* Case 004/1, Civil Party Application of RIK Thuong, 27 March 2013, D5/1033, at ERN (EN) 01040594.

<sup>530</sup> *See* Case 004/1, Written Record of Interview of SAK Sam, 23 April 2014, D119/120, at ERN (EN) 01057753-01057754 (A145-A146); Case 004/1, Written Record of Interview of SIM Leang, 2 February 2009, D6.1.344, at ERN (EN) 00284313-00284314; Case 004/1, Written Record of Interview of LIV Saleang, 18 December 2008, D6.1.426, at ERN (EN) 00277832; Case 004/1, Written Record of Interview of LIV Peou, 19 December 2008, D6.1.427, at ERN (EN) 00277828; Case 004/1, Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, at ERN (EN) 01059951-01059952 (A124-A125).

<sup>531</sup> Case 004/1, Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, at ERN (EN) 01059954 (A141, A143), 01059955 (A154); Case 004/1, Civil Party Application of PAO Vong, 16 March 2013, D5/897, at ERN (EN) 01123481; Case 004/1, Written Record of Interview of SAING Nham, 30 January 2009, D6.1.451, at ERN (EN) 00290385-00290386; Case 004/1, Written Record of Interview of PAI Koeut, 31 January 2009, D6.1.452, at ERN (EN) 00290352; Case 004/1, Written Record of Interview of TANN Than, 18 December 2008, D6.1.425, at ERN (EN) 00277841-00277842; Case 004/1, Written Record of Interview of SAOM Phan, 30 January 2009, D6.1.450, at ERN (EN) 00290357-00290358; Case 004/1, Written Record of Interview of CHUON Pheap, 18 February 2014, D119/90, at ERN (EN) 00982316 (A11); Case 004/1, Written Record of Interview of LEUY Taes, 10 June 2015, D219/361, at ERN (EN) 01113712 (A51), 01113713 (A53); Case 004/1, Civil Party Application of KOAM Bopha, 20 May 2013, D5/1045, at ERN (EN) 01195941; Case 004/1, Written Record of Interview of NOU Chong, 20 January 2014, D119/73, at ERN (EN) 00980542 (A12-A13), 00980543 (A18).

<sup>532</sup> Closing Order (Reasons), para. 276. *See also* Case 004/1, Written Record of Interview of LEUY Taes, 10 June 2015, D219/361, at ERN (EN) 01113713 (A63), 01113715 (A85); Case 004/1, Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, at ERN (EN) 01059955 (A153); Case 004/1, DC-Cam Interview of PICH Ham, 5 March 2007, D123/1/1.6a, at ERN (EN) 00982770; Case 004/1, Written Record of Interview of HANG Horn, 11 February 2015, D219/175, at ERN (EN) 01077004 (A28).

<sup>533</sup> Case 004/1, Written Record of Interview of LIV Saleang, 18 December 2008, D6.1.426, at ERN (EN) 00277833; Case 004/1, Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, at ERN (EN) 01059956 (A155); Case 004/1, Written Record of Interview of TAK Buy, 3 April 2012, D106/9, at ERN (EN) 00842066 (A26).



relevant period.<sup>534</sup> YI Laisauv also saw fifteen to twenty people being taken away on three occasions,<sup>535</sup> while SIM Leang and KAN Thol witnessed people being taken away with their hands tied behind their backs.<sup>536</sup> Further, KOAM Bopha described a meeting, in late 1977 or early 1978, during which IM Chaem sent six trucks of people from the worksite to be killed at Phnom Trayoung Mountain,<sup>537</sup> while BIN Huey recalled a meeting led by IM Chaem and Ta Mok in 1978, during which eighty to ninety individuals were transported to be killed and buried in the foundation of the dam.<sup>538</sup> There is also evidence that at least five pregnant women were killed and buried at a bridge of the dam in 1977, upon IM Chaem's orders.<sup>539</sup> YENG Chhan recalled two bodies being buried in front of the dam water gate,<sup>540</sup> while PAO Vong saw people being killed at the first bridge on multiple occasions in 1978, including up to ten victims on the first occasion alone.<sup>541</sup> Finally, THANG Thoeuy recalled that people who collapsed from exhaustion were beaten and taken to be killed, on IM Chaem's orders, north of the dam.<sup>542</sup>

223. In light of the above, the Undersigned Judges find it is sufficiently established, to the requisite standard, that at least thousands and up to tens of thousands of people were victims of forced labour and other inhumane acts, including inhumane living and working conditions, at Trapeang Thma Dam Worksite from approximately March 1977 until early 1979, *i.e.* during IM Chaem's tenure as Preah Net Preah District Secretary and Sector 5 Committee Member.<sup>543</sup> The evidence also sufficiently demonstrates, on a balance of probabilities, that people were

<sup>534</sup> Case 004/1, Written Record of Interview of LIV Peou, 19 December 2008, D6.1.427, at ERN (EN) 00277826, 00277828.

<sup>535</sup> Case 004/1, Written Record of Interview of YI Laisauv, 2 February 2009, D6.1.343, at ERN (EN) 00288641.

<sup>536</sup> Case 004/1, Written Record of Interview of SIM Leang, 2 February 2009, D6.1.344, at ERN (EN) 00284313; Case 004/1, Written Record of Interview of KAN Thol, 20 December 2008, D6.1.430, at ERN (EN) 00277821.

<sup>537</sup> Case 004/1, Civil Party Application of KOAM Bopha, 13 March 2013, D5/1045, at ERN (EN) 01195941-01195942.

<sup>538</sup> Case 004/1, Written Record of Interview of BIN Huey, 27 November 2013, D119/66, at ERN (EN) 00975040 (A15).

<sup>539</sup> Case 004/1, Written Record of Interview of THANG Thoeuy, 16 June 2014, D119/131, at ERN (EN) 01025300-01025301 (A83-A90). *See also* Case 004/1, Written Record of Interview of YI Laisauv, 2 February 2009, D6.1.343, at ERN (EN) 00288641; Case 004/1, Transcript of Hearing on the Substance in Case 002/2, 20 August 2015, D219/494.1.11, pp. 53, 55, 75; Case 004/1, Civil Party Application of NUN Dul, 13 March 2013, D5/1032, at ERN (EN) 01145112; Case 004/1, Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, at ERN (EN) 01059957 (A161); Case 004/1, Written Record of Interview of LIV Saleang, 18 December 2008, D6.1.426, at ERN (EN) 00277833.

<sup>540</sup> Case 004/1, Written Record of Interview of YENG Chhan, 25 June 2014, D119/132, at ERN (EN) 01035100 (A56).

<sup>541</sup> Case 004/1, Civil Party Application of PAO Vong, 16 March 2013, D5/897, at ERN (EN) 01123481.

<sup>542</sup> Case 004/1, Written Record of Interview of THANG Thoeuy, 16 June 2014, D119/131, at ERN (EN) 01025304-01025306 (A120-A124).

<sup>543</sup> Closing Order (Reasons), para. 166.



arrested, forcibly disappeared and killed at Trapeang Thma Dam Worksite during the relevant period, with victims numbering in the hundreds or thousands.

224. Turning to IM Chaem's role, the Undersigned Judges recall that she became Preah Net Preah District Secretary in March 1977 and a Sector 5 Committee member in the beginning or middle of 1978.<sup>544</sup> IM Chaem herself recognised that she sent workers to Trapeang Thma Dam Worksite and continued to supervise them there,<sup>545</sup> as confirmed by several witnesses<sup>546</sup> who reported that she inspected the site once a week.<sup>547</sup> IM Chaem also organised and chaired meetings at the worksite,<sup>548</sup> imposed quotas<sup>549</sup> and was present when POL Pot and KHIEU Samphan visited the dam.<sup>550</sup> Moreover, as noted above, IM Chaem gave orders to the Sector 5 militia who patrolled the site<sup>551</sup> to beat, arrest or kill people who collapsed from exhaustion or tried to flee the worksite.<sup>552</sup> The totality of the evidence sufficiently establishes, on a balance of probabilities, that IM Chaem had authority over military personnel stationed at the dam<sup>553</sup> and that she was at least one of the cadres in charge of Trapeang Thma Dam

<sup>544</sup> Closing Order (Reasons), paras 158, 166.

<sup>545</sup> Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089773-00089774, 00089778-00089779; Case 004/1, Smiling Toad Productions Interview of IM Chaem, 26 April 2007, D1.3.12.1, at ERN (EN) 00217523.

<sup>546</sup> Case 004/1, Civil Party Application of RIK Thuong, 27 March 2013, D5/1033, at ERN (EN) 01040594; Case 004/1, Written Record of Interview of BOU Mao, 21 February 2014, D119/94, at ERN (EN) 00982759-00982760 (A29-A31); Case 004/1, Written Record of Interview of NHEM En, 7 May 2014, D119/124, at ERN (EN) 01055651-01055652 (A16-A19).

<sup>547</sup> Case 004/1, Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, at ERN (EN) 01059950 (A109); Case 004/1, Written Record of Interview of CHUON Pheap, 18 February 2014, D119/90, at ERN (EN) 00982317 (A12-A13); Case 004/1, Written Record of Interview of LEUY Taes, 10 June 2015, D219/361, at ERN (EN) 01113714 (A73-A74); Case 004/1, Written Record of Interview of THANG Thoey, 16 June 2014, D119/131, at ERN (EN) 01025301 (A95-A96).

<sup>548</sup> Case 004/1, Written Record of Interview of LEUY Taes, 10 June 2015, D219/361, at ERN (EN) 01113714 (A75-A78); Case 004/1, Written Record of Interview of LACH Kea, 18 August 2011, D59, at ERN (EN) 00737709.

<sup>549</sup> Case 004/1, Written Record of Interview of LEUY Taes, 10 June 2015, D219/361, at ERN (EN) 01113714 (A76), 01113715 (A87-A89). *See also* Closing Order (Reasons), para. 273.

<sup>550</sup> Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089778.

<sup>551</sup> Case 004/1, Written Record of Interview of THANG Thoey, 25 June 2014, D119/131, at ERN (EN) 01025304 (A116-A118), 01025305 (A121).

<sup>552</sup> Closing Order (Reasons), para. 276. *See also* Case 004/1, Written Record of Interview of THANG Thoey, 25 June 2014, D119/131, at ERN (EN) 01025304-01025306 (A118-A124); Case 004/1, Written Record of Interview of LEUY Taes, 10 June 2015, D219/361, at ERN (EN) 01113715 (A91-A92); Case 004/1, Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, at ERN (EN) 01059952 (A128-A131), 01059955 (A152-A153); Case 004/1, Written Record of Interview of BOU Mao, 21 February 2014, D119/94, at ERN (EN) 00982759-00982760 (A29).

<sup>553</sup> Case 004/1, Written Record of Interview of ORM Huon, 27 May 2014, D119/130, at ERN (EN) 01075214 (A87).





Worksite.<sup>554</sup>

225. Accordingly, the Undersigned Judges find that there is sufficient evidence that the crimes against humanity of murder, extermination, enslavement and other inhumane acts were committed at Trapeang Thma Dam Worksite during the relevant period, with victims numbering in the hundreds or thousands, as well as sufficient evidence showing IM Chaem could be held responsible for these crimes. The Undersigned Judges consider that these allegations should have been included in the charges and properly considered in the assessment of the ECCC's personal jurisdiction over IM Chaem. Whether these errors were fundamentally determinative of that assessment will be addressed in the conclusion below.

*ii. Wat Preah Net Preah and Related Sites*

226. The Co-Investigating Judges were seised, in paragraph 77 of the Third Introductory Submission, of allegations regarding Wat Preah Net Preah, including the hospital and the adjoining Chamkar Ta Ling execution site:

Wat Preah Net Preah, with a hospital and adjoining execution site at Chamkar Ta Ling, includes six excavated grave sites. Initial estimates from the grave sites suggest approximately 700 people were killed here, though some bodies may have been burned at both sites. One witness has stated that "Pol Pot's commune committee" used a house near Wat Preah Net Preah and that prisoners were detained in the house before being killed at Chamkar Ta Ling. A report identifies most of the remains as those of male adults under the age of 45, most likely Phnom Penh evacuees.<sup>555</sup>

227. The Undersigned Judges consider that these allegations may amount to crimes against humanity in the form of, *inter alia*, murder, extermination, imprisonment and other inhumane acts.<sup>556</sup> The Undersigned Judges further observe that the house of former Preah Net Preah Commune Secretary *Ta Krak* and the nearby Chamkar Daung and Chamkar *Yeay Ning*

<sup>554</sup> Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089772-00089773; Case 004/1, Written Record of Interview of LEUY Taes, 10 June 2015, D219/361, at ERN (EN) 01113717 (A104); Case 004/1, Written Record of Interview of LONG Vun, 26 November 2013, D118/153, at ERN (EN) 00978776 (A54); Case 004/1, Written Record of Interview of LACH Kea, 18 August 2011, D59, at ERN (EN) 00737709; Case 004/1, Written Record of Interview of HUON Chanrin, 18 August 2015, D219/474, at ERN (EN) 01152319 (A14); Case 004/1, Written Record of Interview of NHEM En, 7 May 2014, D119/124, at ERN (EN) 01055651 (A18); Case 004/1, Written Record of Interview of MOM Chhouk, 17 June 2013, D119/52, at ERN (EN) 00966759 (A12).

<sup>555</sup> Third Introductory Submission (D1), para. 77 (footnotes omitted).

<sup>556</sup> Third Introductory Submission (D1), para. 119.



execution sites are to be considered as locations where connected criminal events took place.<sup>557</sup> The Co-Investigating Judges acknowledged, in their brief review of the evidence, that people were detained and killed or died from starvation or disease at Wat Preah Net Preah and its related sites under the rule of the Southwest Zone cadres, with killings occurring almost every night during the last month of the Democratic Kampuchea regime.<sup>558</sup> They nevertheless failed to make a proper legal determination on these allegations, noting that “there is no clear evidence of precisely how many people died”, and “no direct evidence of IM Chaem’s involvement with deaths and arrests at this location.”<sup>559</sup>

228. The Undersigned Judges reiterate that the Co-Investigating Judges erred in requiring that a precise number of deaths be established.<sup>560</sup> They note sufficient evidence was gathered during the investigation to show that people were killed at the Wat Preah Net Preah complex. While the 1997 DC-Cam Report contains conflicting figures for the death toll at this site, the Undersigned Judges consider that the 660-720 estimate, based on the statements of TOM Seun, is sufficient to establish on a balance of probabilities that at least several hundred victims were buried at Chamkar Ta Ling.<sup>561</sup> SOS Narin, Deputy Chief of Paoy Kdoeung Village, reported witnessing four murders at Preah Net Preah Pagoda.<sup>562</sup> The public execution of Soeun and Peou for “immoral offences” in front of the pagoda, in 1977 or 1978, further remains in the memory of many witnesses.<sup>563</sup>

<sup>557</sup> See Case 004/1, Site Identification Report, 9 May 2013, D119/46, at ERN (EN) 00920230-00920231; Case 004/1, Site Identification Report, 14 February 2012, D106/12, at ERN (EN) 00783173. See also Closing Order (Reasons), paras 255-258.

<sup>558</sup> Closing Order (Reasons), paras 252-259.

<sup>559</sup> Closing Order (Reasons), para. 259.

<sup>560</sup> See *supra* para. 213.

<sup>561</sup> Case 004/1, DC-Cam Report, Mapping the Killing Fields of Cambodia – Banteay Meanchey, 1997, D1.3.10.10, at ERN (EN) 00218603, 00218609. See also Case 004/1, Written Record of Interview of SIN Khin, 4 March 2015, D219/205, at ERN (EN) 01087428 (A28-A29); Case 004/1, Written Record of Investigation Action, 14 February 2012, D106/11, at ERN (EN) 00780978; Case 004/1, Preah Net Preah District Propaganda Office, *Report on the Lists of Ancient Temples, Shrines and Artists*, 28 June 1984, D119/50.2, at ERN (EN) 00938421.

<sup>562</sup> Case 004/1, Written Record of Interview of SOS Narin, 17 May 2013, D119/38, at ERN (EN) 00944474 (A4).

<sup>563</sup> Case 004/1, Written Record of Interview of KRET Ret, 20 May 2013, D119/42, at ERN (EN) 00950742 (A9); Case 004/1, Written Record of Interview of MOM Chhouk, 17 June 2013, D119/52, at ERN (EN) 00966762 (A21); Case 004/1, Written Record of Interview of PECH Ruos, 12 March 2014, D119/99, at ERN (EN) 00985202 (A20-A21); Case 004/1, Written Record of Interview of CHHIM Phan, 2 June 2015, D219/347, at ERN (EN) 01116121 (A4); Case 004/1, Written Record of Interview of VAN Teav, 1 September 2014, D119/152, at ERN (EN) 01045541 (A15); Case 004/1, Civil Party Application of THANG Thoeuy, 13 March 2013, D5/853, at ERN (EN) 00982862; Case 004/1, Civil Party Application of THIM Sovanny, 29 March 2013, D5/969, at ERN (EN) 01123497; Case 004/1, Civil Party Application of PAK Siloeurt, 3 March 2013, D5/984, at ERN (EN) 01192082-01192083; Case 004/1, Civil Party Application of LAIM Bunsuoy, 30 March 2013, D5/986, at ERN (EN) 01190817; Case 004/1, Civil Party Application of LAIM Bopha, 20 May 2013, D5/989, at ERN (EN) 01143859; Case 004/1, Civil Party Application of KETOK Savan, 26 June 2013, D5/1254, at ERN (EN) 01143859.



229. There is also evidence of crimes committed at *Ta Krak*'s house, which was used as a detention centre.<sup>564</sup> Detainees would be executed in the backyard or at the nearby execution sites.<sup>565</sup> KRET Ret recalled seeing female Southwest Zone cadres walking arrestees in lines to be killed,<sup>566</sup> and NAV Ek witnessed them killing a lot of people there one day towards the end of the regime.<sup>567</sup> PAO Bandet remembered that they brought people to be killed every night in late 1977,<sup>568</sup> while SONG Pharath similarly stated that more and more people were killed behind *Ta Krak*'s house right before the arrival of the Vietnamese army, perhaps from around August 1978.<sup>569</sup> VAN Teav witnessed around twelve people taken to be killed in the vicinity of *Ta Krak*'s house, and heard people screaming almost every night in the final month of the regime.<sup>570</sup> NAV Ream saw many pits and a human leg sticking out of the ground behind *Ta Krak*'s house during the Southwest Zone rule.<sup>571</sup> According to CHAN Die, after the collapse of the Khmer Rouge regime the area around *Ta Krak*'s house was filled with human skulls and bones, and she estimated that hundreds of people were buried there.<sup>572</sup> SOS Narin assessed that approximately 200 people were killed at Chamkar Daung and Chamkar *Yeay Ning*.<sup>573</sup>

230. There is further evidence that there were hundreds of sick people at the hospital in the pagoda compound,<sup>574</sup> which was guarded by eight to ten soldiers,<sup>575</sup> and that many – reportedly

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ERN (EN) 01144165-01144166; Case 004/1, Written Record of Interview of SOS Narin, 17 May 2013, D119/38, at ERN (EN) 00944474 (A3); Case 004/1, DC-Cam Interview of CHHIM Phan, 11 October 2011, D123/1/2.68, at ERN (EN) 00987690-00987691.

<sup>564</sup> Case 004/1, Written Record of Interview of KRET Ret, 20 May 2013, D119/42, at ERN (EN) 00950742 (A10); Case 004/1, Written Record of Interview of PAO Bandet, 16 February 2015, D219/181, at ERN (EN) 01077039 (A21); Case 004/1, Written Record of Interview of CHHIM Phan, 13 April 2013, D119/32, at ERN (EN) 00920588 (A25); Case 004/1, Written Record of Interview of PECH, Ruos, 12 March 2014, D119/99, at ERN (EN) 00985200 (A9); Case 004/1, DC-Cam Report, Mapping the Killing Fields of Cambodia – Banteay Meanchey, 1997, D1.3.10.10, at ERN (EN) 00218609.

<sup>565</sup> Case 004/1, Written Record of Interview of KRET Ret, 20 May 2013, D119/42, at ERN (EN) 00950741-00950742 (A6-A8); Case 004/1, Written Record of Investigation Action, 14 February 2012, D106/11, at ERN (EN) 00780979.

<sup>566</sup> Case 004/1, Written Record of Interview of KRET Ret, 20 May 2013, D119/42, at ERN (EN) 00950742 (A7).

<sup>567</sup> Case 004/1, Written Record of Investigation Action, 13 February 2015, D219/177, at ERN (EN) 01066009.

<sup>568</sup> Case 004/1, Written Record of Interview of PAO Bandet, 16 February 2015, D219/181, at ERN (EN) 01077038-01077039 (A18-A23).

<sup>569</sup> Case 004/1, Written Record of Interview of SONG Pharath, 17 May 2013, D119/37, at ERN (EN) 00944468 (A3-A4).

<sup>570</sup> Case 004/1, Written Record of Interview of VAN Teav, 1 September 2014, D119/152, at ERN (EN) 01045542-01045543 (A19-A25).

<sup>571</sup> Case 004/1, Written Record of Investigation Action, 13 February 2015, D219/177, at ERN (EN) 01066009.

<sup>572</sup> Case 004/1, Written Record of Interview of CHAN Die, 18 May 2013, D119/39, at ERN (EN) 00944479 (A5, A8).

<sup>573</sup> Case 004/1, Written Record of Investigation Action, 14 February 2012, D106/11, at ERN (EN) 00780979.

<sup>574</sup> Case 004/1, Office of the Co-Prosecutors' Interview of POR Bandet, 6 August 2008, D1.3.11.40, at ERN (EN) 00210566.

<sup>575</sup> Case 004/1, Written Record of Interview of MOM Chhouk, 17 June 2013, D119/52, at ERN (EN) 00966763 (A27).



up to a thousand – died of disease while hospitalised due to the lack of treatment and medicine.<sup>576</sup> Their bodies were buried in the pagoda complex or at Chamkar Daung and Chamkar Yeay Ning,<sup>577</sup> along with the bodies of people who had died of starvation, which THIM Sovanny witnessed in 1978.<sup>578</sup>

231. Turning to IM Chaem's responsibility, the Undersigned Judges note that the Closing Order (Reasons) established that IM Chaem, as Preah Net Preah District Secretary, had authority over the district, and this encompassed the power to order the arrest and killing of any person.<sup>579</sup> In particular, the militia who carried out arrests in the communes were under the District Committee's control, and IM Chaem decided on the arrests of large numbers of people.<sup>580</sup> In addition, as the Co-Investigating Judges noted, she held several meetings, some attended by thousands of people, in Preah Net Preah Commune and specifically at the pagoda complex.<sup>581</sup> At least one witness reported that IM Chaem was present during the public execution of Soeun and Peou,<sup>582</sup> while another saw her ordering that execution.<sup>583</sup> Several witnesses also saw her visiting villages in Preah Net Preah Commune,<sup>584</sup> sometimes in a car reserved for the military.<sup>585</sup> After IM Chaem ordered the execution of Commune Secretary

<sup>576</sup> Case 004/1, Written Record of Interview of MOM Chhouk, 17 June 2013, D119/52, at ERN (EN) 00966763 (A26); Case 004/1, Written Record of Investigation Action, 13 March 2013, D119/24, at ERN (EN) 00894523; Case 004/1, Written Record of Interview of SONG Pharath, 17 May 2013, D119/37, at ERN (EN) 00944470 (A21-A22).

<sup>577</sup> Case 004/1, Written Record of Investigation Action, 13 March 2013, D119/24 at ERN (EN) 00894523; Case 004/1, Written Record of Interview of SOS Narin, 17 May 2013, D119/38, at ERN (EN) 00944475 (A8); Case 004/1, Written Record of Interview of SONG Pharath, 17 May 2013, D119/37, at ERN (EN) 00944469 (A12).

<sup>578</sup> Case 004/1, Civil Party Application of THIM Sovanny, 29 March 2013, D5/969, at ERN (EN) 01123496-01123497; Case 004/1, Written Record of Interview of THIM Sovanny, 11 November 2014, D219/60, at ERN (EN) 01053881-01053882 (A43, A47-A52). *See also* Case 004/1, Written Record of Interview of PAO Bandet, 16 February 2015, D219/181, at ERN (EN) 01077040-01077041 (A28).

<sup>579</sup> Closing Order (Reasons), paras 173-188.

<sup>580</sup> Closing Order (Reasons), para. 186.

<sup>581</sup> Closing Order (Reasons), para. 253. *See also* Case 004/1, Written Record of Interview of SONG Pharath, 17 May 2013, D119/37, at ERN (EN) 00944470 (A19-A20); Case 004/1, Written Record of Investigation Action, 13 February 2015, D219/177, at ERN (EN) 01066009; Case 004/1, Written Record of Interview POR Bandet, 2 September 2011, D101/1.1, at ERN (EN) 00746366.

<sup>582</sup> Case 004/1, Civil Party Application of PAK Siloeurt, 30 March 2013, D5/984, at ERN (EN) 01192082-01192083.

<sup>583</sup> Case 004/1, Civil Party Application of THANG Thoeuy, 13 March 2013, D5/853, at ERN (EN) 00982862.

<sup>584</sup> Case 004/1, Written Record of Interview of SONG Pharath, 17 May 2013, D119/37, at ERN (EN) 00944470 (A18); Case 004/1, Written Record of Investigation Action, 13 February 2015, D219/177, at ERN (EN) 01066009; Case 004/1, Office of the Co-Prosecutors' Interview of POR Bandet, 6 August 2008, D13.11.40, at ERN (EN) 00210567.

<sup>585</sup> Case 004/1, Written Record of Investigation Action, 13 February 2015, D219/177, at ERN (EN) 01066009.



*Ta Krak*,<sup>586</sup> the cadre who replaced him reported directly to her.<sup>587</sup> The Undersigned Judges are therefore satisfied, to the requisite standard, that IM Chaem had authority over Wat Preah Net Preah and related sites, and was involved in the crimes committed there.

232. Accordingly, the Undersigned Judges find that there is sufficient evidence that the crimes against humanity of imprisonment, murder, extermination and other inhumane acts were committed at the Wat Preah Net Preah complex and related sites during the relevant period, against at least several hundred people, and that IM Chaem could be held responsible for these crimes. The Undersigned Judges consider that these allegations should have been included in the charges and properly considered in the assessment of the ECCC's personal jurisdiction over IM Chaem. Whether these errors were fundamentally determinative of that assessment will be addressed in the conclusion below.

*iii. Phum Chakrey Security Centre and Prey Taruth Execution Site*

233. Paragraph 76 of the Third Introductory Submission alleges that people were detained and killed at Phum Chakrey Security Centre – which was “the district-level prison for Preah Net Preah District” – and killed at the nearby Prey Taruth Execution Site, and that “almost the entire population of Chakrey village, some 400 individuals, was killed during a purge that occurred throughout Preah Net Preah district lasting until late August 1978”.

234. The Undersigned Judges consider that these allegations may amount to crimes against humanity in the form of, *inter alia*, murder, extermination, imprisonment, torture<sup>588</sup> and, as noted above, inhumane living conditions as other inhumane acts.<sup>589</sup> The Co-Investigating Judges were thus seised of these allegations and had a duty to investigate and rule upon them at the time of the Closing Order (Reasons).

235. The Co-Investigating Judges indeed acknowledged, in their brief review of the evidence, that people were detained and killed at Phum Chakrey Security Centre over the course of about a year until late 1978 or early 1979,<sup>590</sup> and that Prey Taruth was used as an

<sup>586</sup> Case 004/1, Written Record of Interview of PECH Ruos, 12 March 2014, D119/99, at ERN (EN) 00985202 (A22).

<sup>587</sup> Closing Order (Reasons), para. 254.

<sup>588</sup> Third Introductory Submission (D1), para. 119.

<sup>589</sup> See *supra* paras 202-206.

<sup>590</sup> Closing Order (Reasons), paras 260-261.



execution site by the Southwest Zone cadres from late 1977 or early 1978 until the end of the Democratic Kampuchea regime.<sup>591</sup> They further noted estimates ranging from 200 to 7,300 people killed at Phum Chakrey Security Centre,<sup>592</sup> and of at least one hundred victims killed at Prey Taruth, but found the latter “unspecific” and the overall picture “blurred”.<sup>593</sup> They ultimately failed to include these allegations in the charges and to make a proper legal determination at the time of the Closing Order (Reasons), except for a cursory finding at paragraph 305.

236. The Undersigned Judges note the evidence that Phum Chakrey Security Centre (also known as Chob or Chob Veari Prison) was used as a prison<sup>594</sup> and execution site<sup>595</sup> while IM Chaem was in control of the district.<sup>596</sup> Grave sites were uncovered after the fall of the

<sup>591</sup> Closing Order (Reasons), paras 264-266.

<sup>592</sup> Closing Order (Reasons), paras 263, 321.

<sup>593</sup> Closing Order (Reasons), paras 267, 321.

<sup>594</sup> Case 004/1, Site Identification Report, 15 February 2012, D106/15, at ERN (EN) 00787078. *See also* Case 004/1, Civil Party Application of YOU Mut, 10 May 2013, D5/965, at ERN (EN) 01123489; Case 004/1, Written Record of Interview of YOU Mut, 8 September 2014, D219/1, at ERN (EN) 01044857-01044859 (A38-A43); Case 004/1, Written Record of Interview of KHOP Sop, 5 March 2015, D219/212, at ERN (EN) 01088533 (A24); Case 004/1, Written Record of Interview of DIK Kuy, 26 June 2015, D219/384, at ERN (EN) 01132649 (A18); Case 004/1, Written Record of Interview of BEN Sokh, 2 July 2015, D219/397, at ERN (EN) 01128310-01128311 (A22-A25); Case 004/1, Written Record of Investigation Action, 26 June 2015, D219/387, at ERN (EN) 01113246-01113247; Case 004/1, Written Record of Interview of SOR Kin, 31 July 2015, D219/437, at ERN (EN) 01143031 (A25); Case 004/1, Written Record of Interview of NITH Sorth, 3 July 2014, D119/133, at ERN (EN) 01037375 (A102); Case 004/1, Written Record of Interview of THIP Kimlun, 21 August 2014, D119/145, at ERN (EN) 01079709 (A63).

<sup>595</sup> Case 004/1, Written Record of Interview of MAK Vonny, 9 May 2014, D119/125, at ERN (EN) 01035086 (A9), 01035087 (A12), 01035088 (A14); Case 004/1, Written Record of Interview of CHRACH Kit, 15 February 2012, D106/2, at ERN (EN) 00784870 (A20-A22), 00784871 (A26); Case 004/1, Written Record of Interview of SOS Narin, 17 May 2013, D119/38, at ERN (EN) 00944474 (A6); Case 004/1, Written Record of Interview of PAN Chhuong, 14 March 2013, D119/29, at ERN (EN) 00937036 (A11); Case 004/1, Written Record of Interview of NITH Sorth, 3 July 2014, D119/133, at ERN (EN) 01037376 (A104); Case 004/1, Written Record of Interview of IV Mara, 2 September 2014, D119/154, at ERN (EN) 01044834 (A35); Case 004/1, Written Record of Interview of DIK Kuy, 26 June 2015, D219/384, at ERN (EN) 01132649 (A18); Case 004/1, Written Record of Investigation Action, 26 June 2015, D219/387, at ERN (EN) 01113246-01113247.

<sup>596</sup> Case 004/1, Written Record of Interview of MAK Vonny, 9 May 2014, D119/125, at ERN (EN) 01035088 (A14); Case 004/1, Written Record of Interview of CHRACH Kit, 15 February 2012, D106/2, at ERN (EN) 00784870 (A19).



Khmer Rouge,<sup>597</sup> with people executed and buried around the detention centre,<sup>598</sup> in a pond,<sup>599</sup> and in the nearby rice fields.<sup>600</sup> The Undersigned Judges also observe that Prey Taruth was first used as an execution site in late 1977 or early 1978, after the arrival of the Southwest Zone cadres, and that killings were regularly carried out from June or July 1978 up until the end of the Democratic Kampuchea regime.<sup>601</sup> Well-placed witnesses, such as SUM Tao, who lived 300 metres away from Prey Taruth,<sup>602</sup> and MAK Vonny, whose house was located close to the path leading to the site,<sup>603</sup> heard trucks coming, as well as shouting and screaming, and saw bodies at Prey Taruth.<sup>604</sup>

237. Turning to victim numbers at Phum Chakrey Security Centre, the Undersigned Judges note that the Co-Investigating Judges' estimates are inaccurate and misrepresent the evidence on the Case File. In particular, the minimum estimate of 200 killings adopted in the Closing Order (Reasons)<sup>605</sup> was actually provided by SOS Narin in relation to other execution sites near

<sup>597</sup> Case 004/1, Written Record of Interview of NITH Sorth, 3 July 2014, D119/133, at ERN (EN) 01037376 (A104-A105); Case 004/1, Written Record of Interview of DIK Kuy, 26 June 2015, D219/384, at ERN (EN) 01132649 (A18); Case 004/1, Written Record of Investigation Action, 26 June 2015, D219/387, at ERN (EN) 01113247; Case 004/1, Annex 5 to the Site Identification Report, 15 February 2012, D106/15.5, at ERN (EN) 00787086-00787087.

<sup>598</sup> Case 004/1, Annex 5 to the Site Identification Report, 15 February 2012, D106/15.5, at ERN (EN) 00787083, 00787086-00787087; Case 004/1, Written Record of Interview of CHRACH Kit, 15 February 2012, D106/2, at ERN (EN) 00784870 (A22); Case 004/1, Written Record of Interview of SIN Khin, 4 March 2015, D219/205, at ERN (EN) 01087426 (A4); Case 004/1, Site Identification Report, 15 February 2012, D106/15, at ERN (EN) 00787078.

<sup>599</sup> Case 004/1, Written Record of Interview of IV Mara, 2 September 2014, D119/154, at ERN (EN) 01044834 (A35); Case 004/1, Written Record of Interview of SOS Narin, 17 May 2013, D119/38, at ERN (EN) 00944474 (A6); Case 004/1, Written Record of Interview of MAK Vonny, 9 May 2014, D119/125, at ERN (EN) 01035086 (A9), 01035087 (A12), 01035088 (A14).

<sup>600</sup> Case 004/1, Written Record of Interview of DIK Kuy, 26 June 2015, D219/384, at ERN (EN) 01132649 (A18).

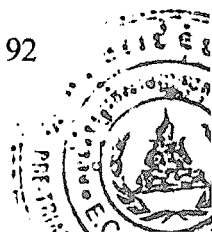
<sup>601</sup> Closing Order (Reasons), paras 264-266. *See also* Case 004/1, Written Record of Interview of HIEM Sakhan, 16 February 2012, D106/3, at ERN (EN) 00784864 (A23); Case 004/1, Written Record of Interview of SUM Tao, 20 February 2014, D119/92, at ERN (EN) 00982334 (A28); Case 004/1, Written Record of Interview of CHAN Phon, 20 February 2014, D119/93, at ERN (EN) 00982751 (A34).

<sup>602</sup> Case 004/1, Written Record of Interview of SUM Tao, 20 February 2014, D119/92, at ERN (EN) 00982334 (A28).

<sup>603</sup> Case 004/1, Written Record of Interview of MAK Vonny, 9 May 2014, D119/125, at ERN (EN) 01035088 (A16), 01035089 (A19).

<sup>604</sup> Closing Order (Reasons), para. 266. *See also, e.g.,* Case 004/1, Written Record of Interview of SUM Tao, 20 February 2014, D119/92, at ERN (EN) 00982334 (A26, A28); Case 004/1, Written Record of Interview of MAK Vonny, 9 May 2014, D119/125, at ERN (EN) 01035088 (A16, A18); Case 004/1, Written Record of Interview of CHAN Phon, 20 February 2014, D119/93, at ERN (EN) 00982751 (A34-A35); Case 004/1, Written Record of Interview of LIES Sdeung, 9 February 2015, D219/173, at ERN (EN) 01076977-01076978 (A42); Case 004/1, Written Record of Interview of NUON Hoeuk, 26 June 2015, D219/385, at ERN (EN) 01128304 (A20-A28); Case 004/1, Written Record of Interview of DIK Kuy, 26 June 2015, D219/384, at ERN (EN) 01132649-01132650 (A21-A24).

<sup>605</sup> Closing Order (Reasons), para. 263 *referring to* Case 004/1, Written Record of Interview of SOS Narin, 17 May 2013, D119/38, at ERN (EN) 00944474 (A6).



*Ta Krak's* house and Wat Preah Net Preah.<sup>606</sup> His evidence concerning Phum Chakrey is limited to the observation that five to ten people were sometimes brought from *Ta Krak's* house to be killed there.<sup>607</sup> Similarly, the calculation by the Co-Investigating Judges of a range of between 1,825 and 7,300 victims<sup>608</sup> relies on the misquoted evidence of CHRACH Kit, who in fact estimated that fifteen – rather than five – to twenty people were brought in and killed every day.<sup>609</sup> A reasonable calculation based on his evidence would yield a conservative estimate of between 5,475 (rather than 1,825) and 7,300 victims of arrests and killings. Other evidence on the Case File indeed supports this estimate, showing that the prison could hold between twenty and thirty prisoners at a time<sup>610</sup> and that people brought in disappeared by the following morning.<sup>611</sup>

238. With regard to the number of victims at Prey Taruth Execution Site, the evidence shows that five grave sites or pits were identified during the investigation.<sup>612</sup> Four were located near the entrance and measured nine metres squared and some 1.8 metres deep,<sup>613</sup> while the fifth was located 1,000 metres north and measured sixteen metres squared and two metres deep.<sup>614</sup> SUM Tao, who was chief of Krasang Thmei Village at the time of his interview,<sup>615</sup> reported seeing three graves, which he estimated held less than one hundred corpses, each measuring two-and-a-half metres wide, three metres long and less than one metre deep.<sup>616</sup> Similarly, HIEM Sakhan was told that many people were killed at Prey Taruth and that three or four

<sup>606</sup> Case 004/1, Written Record of Interview of SOS Narin, 17 May 2013, D119/38, at ERN (EN) 00944474 (A6); Case 004/1, Written Record of Investigative Action, 14 February 2012, D106/11, at ERN (EN) 00780979.

<sup>607</sup> Case 004/1, Written Record of Interview of SOS Narin, 17 May 2013, D119/38, at ERN (EN) 00944474 (A6).

<sup>608</sup> Closing Order (Reasons), para. 263 *referring to* Case 004/1, Written Record of Interview of CHRACH Kit, 15 February 2012, D106/2, at ERN (EN) 00784870 (A20-A21, A23).

<sup>609</sup> Case 004/1, Written Record of Interview of CHRACH Kit, 15 February 2012, D106/2, at ERN (EN) 00784870 (A21), 00784871 (A26).

<sup>610</sup> Case 004/1, Written Record of Interview of YOU Mut, 8 September 2014, D219/1, at ERN (EN) 01044858 (A38); Case 004/1, Written Record of Interview of BEN Sokh, 2 July 2015, D219/397, at ERN (EN) 01128311 (A25).

<sup>611</sup> Case 004/1, Written Record of Interview of CHRACH Kit, 15 February 2012, D106/2, at ERN (EN) 00784870 (A20).

<sup>612</sup> Closing Order (Reasons), para. 267; Case 004/1, Site Identification Report, 15 February 2012, D106/15, at ERN (EN) 00787078-00787079.

<sup>613</sup> Case 004/1, Site Identification Report, 15 February 2012, D106/15, at ERN (EN) 00787078-00787079; Case 004/1, Annex 5 to the Site Identification Report, 15 February 2012, D106/15.5, at ERN (EN) 00787091, 00787094.

<sup>614</sup> Case 004/1, Site Identification Report, 15 February 2012, D106/15, at ERN (EN) 00787079; Case 004/1, Annex 5 to the Site Identification Report, 15 February 2012, D106/15.5, at ERN (EN) 00787093, 00787095.

<sup>615</sup> Case 004/1, Written Record of Interview of SUM Tao, 20 February 2014, D119/92, at ERN (EN) 00982329.

<sup>616</sup> Case 004/1, Written Record of Interview of SUM Tao, 20 February 2014, D119/92, at ERN (EN) 00982335 (A30).





graves of a comparable size were found in the area.<sup>617</sup> CHAN Phon further saw two graves that could have accommodated hundreds of bodies, and which he estimated to be about four metres wide, five metres long and two metres deep.<sup>618</sup>

239. These statements are supported by the evidence of the frequency with which prisoners arrived at the site for execution. During a two-month period in early 1978, MAK Vonny saw about three trucks, filled with prisoners, heading to Prey Taruth for three or four consecutive days each week.<sup>619</sup> NUON Hoeuk recounted hearing trucks once a week, during the rule of the Southwest Zone cadres, and recalled once seeing two trucks.<sup>620</sup> SUM Tao stated that, from June or July 1978 until the end of the Khmer Rouge regime, trucks arrived every day or every two days.<sup>621</sup> CHAN Phon confirmed hearing one to two trucks a day, shortly before the collapse of the regime.<sup>622</sup> In sum, although the Undersigned Judges concur that the death toll provided in the 1997 DC-Cam report regarding this site is not probative,<sup>623</sup> they consider that it can reasonably be estimated, on a balance of probabilities, that at least several hundred people were killed and buried at Prey Taruth.

240. The Undersigned Judges finally recall that the two sites were close to the Preah Net Preah District Office<sup>624</sup> and that Phum Chakrey Security Centre was used as the district-level prison.<sup>625</sup> Both were in operation during the period the Co-Investigating Judges found

<sup>617</sup> Case 004/1, Written Record of Interview of HIEM Sakhan, 16 February 2012, D106/3, at ERN (EN) 00784864 (A20).

<sup>618</sup> Case 004/1, Written Record of Interview of CHAN Phon, 20 February 2014, D119/93, at ERN (EN) 00982751 (A34-A35).

<sup>619</sup> Case 004/1, Written Record of Interview of MAK Vonny, 9 May 2014, D119/125, at ERN (EN) 01035088 (A16-A17).

<sup>620</sup> Case 004/1, Written Record of Interview of NUON Hoeuk, 26 June 2015, D219/385, at ERN (EN) 01128304-01128305 (A20-A31).

<sup>621</sup> Case 004/1, Written Record of Interview of SUM Tao, 20 February 2014, D119/92, at ERN (EN) 00982334 (A28).

<sup>622</sup> Case 004/1, Written Record of Interview of CHAN Phon, 20 February 2014, D119/93, at ERN (EN) 00982751 (A34).

<sup>623</sup> Case 004/1, Written Record of Investigative Action, 11 March 2014, D119/102, at ERN (EN) 00978937; Case 004/1, Written Record of Interview of PHENG Pong Rasy, 15 January 2015, D219/144, at ERN (EN) 01063739-01093740 (A11-A13).

<sup>624</sup> Case 004/1, Site Identification Report, 15 February 2012, D106/15, at ERN (EN) 00787078; Case 004/1, Annex 2 to Site Identification Report, 15 February 2012, D106/15.2, at ERN (EN) 00804668.

<sup>625</sup> Case 004/1, Site Identification Report, 15 February 2012, D106/15, at ERN (EN) 00787078. *See also* Case 004/1, Civil Party Application of YOU Mut, 10 May 2013, D5/965, at ERN (EN) 01123489; Case 004/1, Written Record of Interview of YOU Mut, 8 September 2014, D219/1, at ERN (EN) 01044857-01044859 (A38-A43); Case 004/1, Written Record of Interview of KHOP Sop, 5 March 2015, D219/212, at ERN (EN) 01088533 (A24); Case 004/1, Written Record of Interview of DIK Kuy, 26 June 2015, D219/384, at ERN (EN) 01132649 (A18); Case 004/1, Written Record of Interview of BEN Sokh, 2 July 2015, D219/397, at ERN (EN) 01128310-01128311 (A22-A25); Case 004/1, Written Record of Investigation Action, 26 June 2015, D219/387, at ERN (EN) 01113246-01113247; Case 004/1, Written Record of Interview of SOR Kin, 31 July 2015, D219/437,



IM Chaem to have been in power as Secretary of Preah Net Preah District,<sup>626</sup> where she had authority over security centres, executions and arrests carried out by militia.<sup>627</sup>

241. Accordingly, the Undersigned Judges find that there is sufficient evidence that the crimes against humanity of imprisonment, murder and extermination<sup>628</sup> were committed at Phum Chakrey Security Centre and Prey Taruth Execution Site during the relevant period, and that IM Chaem could be held responsible for these crimes. Recalling that a precise number of victims need not be established,<sup>629</sup> the Undersigned Judges additionally find the evidence sufficient to establish that victims numbered at least in the thousands at Phum Chakrey and in the hundreds at Prey Taruth. The Undersigned Judges consider that these allegations should have been included in the charges and properly considered in the assessment of the ECCC's personal jurisdiction over IM Chaem. Whether these errors were fundamentally determinative of that assessment will be addressed below in the conclusion.

*iv. Wat Chamkar Khnol Security Centre and Execution Site*

242. Paragraph 71 of the Third Introductory Submission alleged that “[m]ore than 9,000 skulls were discovered” at Wat Chamkar Khnol – which was used as a security office and execution site according to the supporting evidence<sup>630</sup> – and that “[e]xecutions were particularly intense at the end of 1978,” with “thousands” of people “tied, shackled and carried away” in just one night. The Undersigned Judges consider that these allegations may amount to crimes against humanity in the form of, *inter alia*, murder, extermination, imprisonment, other inhumane acts<sup>631</sup> and, as previously assessed,<sup>632</sup> torture. The Co-Investigating Judges were thus duly seised of these allegations and had a duty to investigate and rule upon them at the time of the Closing Order (Reasons).

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at ERN (EN) 01143031 (A25); Case 004/1, Written Record of Interview of NITH Sorth, 3 July 2014, D119/133, at ERN (EN) 01037375 (A102); Case 004/1, Written Record of Interview of THIP Kimlun, 21 August 2014, D119/145, at ERN (EN) 01079709 (A63).

<sup>626</sup> Closing Order (Reasons), para. 166.

<sup>627</sup> Closing Order (Reasons), paras 173-175.

<sup>628</sup> By contrast, the Undersigned Judges consider that there is insufficient evidence, as previously assessed, to establish that the crimes against humanity of inhumane living conditions as other inhumane acts and, for the same reasons, of torture, were committed at Phum Chakrey Security Centre. *See supra* paras 202-206.

<sup>629</sup> *See supra* para. 214.

<sup>630</sup> Third Introductory Submission (D1), footnotes 284, 287.

<sup>631</sup> Third Introductory Submission (D1), para. 119.

<sup>632</sup> *See supra* paras 195-201.



243. The Co-Investigating Judges found evidence that people were detained and killed at Wat Chamkar Khnol “under both the Northwest Zone and the Southwest Zone leadership,” noting that “[a] number of graves have since been discovered at this site”<sup>633</sup> and that witnesses reported seeing varying numbers of bodies in each grave, totalling over 1,000 bodies.<sup>634</sup> However, they found that it was “unclear what proportion of victims was killed by Southwest Zone cadres”<sup>635</sup> and ultimately failed to make a proper legal determination at the time of the Closing Order (Reasons), except for a cursory finding at paragraph 305.

244. The Undersigned Judges, recalling that standard of evidence at this stage does not require the establishment of a specific number of victims,<sup>636</sup> consider that it was not necessary to determine an exact “proportion” of victims under the rule of the Southwest Zone cadres.

245. As noted above, Wat Chamkar Khnol Security Centre served as a security office and execution site under both the Northwest Zone and the Southwest Zone leadership.<sup>637</sup> TIL Sengly, who worked nearby from March 1977, recalled hearing screams coming from the site almost every evening until the Khmer Rouge regime fell; he knew there were at least four mass graves and many small graves, and estimated that approximately 1,000 people died there.<sup>638</sup> SAOM Lang<sup>639</sup> and HONG Srey<sup>640</sup> confirmed the existence of multiple mass graves and gave similar estimates of victim numbers. TOEM Ratanak further reported seeing hundreds of hand-cuffed and shackled bodies throughout the Wat Chamkar Khnol compound in November 1978, both around the pagoda wall and inside the compound, especially in a wooden room; the bodies were recently deceased and smelly and swollen.<sup>641</sup> BUN Kim Eng, who was detained at Wat Chamkar Khnol Security Centre in late 1978, saw militiamen taking people to

<sup>633</sup> Closing Order (Reasons), para. 269 (footnotes omitted).

<sup>634</sup> Closing Order (Reasons), para. 270.

<sup>635</sup> Closing Order (Reasons), para. 270.

<sup>636</sup> *See supra* para. 214.

<sup>637</sup> Closing Order (Reasons), paras 268-269.

<sup>638</sup> Case 004/1, Written Record of Interview of TIL Sengly, 1 April 2014, D119/112, at ERN (EN) 00987778 (A8), 00987780 (A22), 00987781 (A25, A28).

<sup>639</sup> Case 004/1, Written Record of Interview of SAOM Lang, 31 March 2014, D119/111, at ERN (EN) 0098770 (A5), 0098771 (A6-A8) (reported seeing two graves, including one of five metres wide, 200 metres long and one metre deep, which he estimated contained approximately 1,000 bodies). *See also* Case 004/1, DC-Cam Report, Mapping the Killing Fields of Cambodia – Banteay Mancheay, 1998, D1.3.27.10, at ERN (EN) 00078068.

<sup>640</sup> Case 004/1, Written Record of Interview of HONG Srey, 2 April 2014, D119/114, at ERN 00986771-0986772 (A1-A7) (reported the existence of five or six graves, including a big grave containing hundreds of bodies, and/or a long grave measuring sixty metres long and five metres wide and containing scattered bodies).

<sup>641</sup> Case 004/1, Written Record of Interview of TOEM Ratanak, 2 April 2014, D119/113, at ERN (EN) 00986762 (A1), 00986765-00986766 (A15, A18-A24).



be killed every day.<sup>642</sup> LEM Phenh, who was also detained there after the arrival of the Southwest Zone cadres,<sup>643</sup> recalled people being taken away and saw a pit used for burying bodies.<sup>644</sup> Several other witnesses reported disappearances and daily killings by militiamen or soldiers, occurring throughout 1977 and 1978, in or around Wat Chamkar Khnol – which occupied a site covering several hectares of land<sup>645</sup> – including near the Chamkar Khnol worksite,<sup>646</sup> the Chamkar Khnol “cave”,<sup>647</sup> and Chamkar Khnol Mountain.<sup>648</sup>

246. There is also evidence that prisoners were tortured, as previously noted,<sup>649</sup> and detained in inhumane conditions during the relevant temporal scope. BUN Kim Eng stated that she was deprived of food while detained at Wat Chamkar Khnol in late 1978.<sup>650</sup> OEUR Loeur, who was imprisoned there from 1976 to 1978, reported that prisoners would be starved if they did not fulfil their work quota, and were only allowed to go as far as ten metres from the prison to defecate; she also recalled being forced to work just two or three days after giving birth and losing her baby.<sup>651</sup> KHUON Say further described the premises of the detention centre and indicated that many thousands of prisoners could be interned there.<sup>652</sup>

247. Taken together, the evidence sufficiently establishes that arrests, detentions, disappearances and killings regularly took place in 1977 and 1978 at Wat Chamkar Khnol under the rule of the Southwest Zone cadres, with victims numbering at least in the hundreds, and that bodies were buried or scattered throughout the pagoda compound.

248. In light of the above, the Undersigned Judges are satisfied, to the requisite standard, that the crimes against humanity of murder, extermination, imprisonment and other inhumane

<sup>642</sup> Case 004/1, Civil Party Application of BUN Kim Eng, 20 March 2013, D5/923, at ERN (EN) 01251838.

<sup>643</sup> Case 004/1, Written Record of Interview of LEM Phenh, 10 February 2015, D219/174, at ERN (EN) 01076985 (A13), 01076987 (A20), 01076989 (A37).

<sup>644</sup> Case 004/1, Written Record of Interview of LEM Phenh, 10 February 2015, D219/174, at ERN (EN) 01076992 (A54-A55).

<sup>645</sup> Case 004/1, Written Record of Interview of TIL Sengly, 1 April 2014, D119/112, at ERN (EN) 00987783 (A38); Case 004/1, Written Record of Interview of TANN Say *alias* KHUON Say, 12 February 2013, D118/25, at ERN (EN) 00903212 (A17); Case 004/1, Written Record of Investigation Action, 3 April 2014, D119/118, at ERN (EN) 00982278.

<sup>646</sup> Case 004/1, Civil Party Application of ROEUNG Sareath, 23 June 2013, D5/1256, at ERN (EN) 01145499.

<sup>647</sup> Case 004/1, Civil Party Application of KINH Ay, 30 March 2013, D5/944, at ERN (EN) 01194704.

<sup>648</sup> Case 004/1, Civil Party Application of NHOEK Yun, 29 March 2013, D5/1128, at ERN (EN) 01143265-01143266; Case 004/1, Civil Party Application of MOK Thou, 9 March 2013, D5/983, at ERN (EN) 01143825.

<sup>649</sup> *See supra* paras 195-201.

<sup>650</sup> Case 004/1, Civil Party Application of BUN Kim Eng, 20 March 2013, D5/923, at ERN (EN) 01251838.

<sup>651</sup> Case 004/1, Civil Party Application of OEUR Loeur, 30 June 2013, D5/1252, at ERN (EN) 01144155.

<sup>652</sup> Case 004/1, Written Record of Interview of TANN Say *alias* KHUON Say, 12 February 2013, D118/25, at ERN (EN) 00903212 (A20-A21).



acts, in the form of enforced disappearances and inhumane living conditions, were committed at Wat Chamkar Khnol throughout the relevant period. The Undersigned Judges recall that they have already found sufficient evidence of IM Chaem's responsibility for this site.<sup>653</sup> The Undersigned Judges consider that these allegations should have been included in the charges and properly considered in the assessment of the ECCC's personal jurisdiction over IM Chaem. Whether these errors were fundamentally determinative of that assessment will be addressed in the conclusion below.

### C. Ground 3: Alleged Errors in Relation to the Crime of Extermination

#### 1. Submissions

249. The International Co-Prosecutor asserts that the Co-Investigating Judges erred in law when finding that the intent for the crime of extermination must be formed "*ex ante*", and erred in fact when finding that IM Chaem did not have the requisite *mens rea* for the crime of extermination allegedly committed at Phnom Trayoung Security Centre.<sup>654</sup>

250. According to the International Co-Prosecutor, there is no logical basis to include a requirement of *ex ante* intent for extermination, and such a requirement cannot be found in the jurisprudence of the ECCC or other international courts.<sup>655</sup> He contends that the introduction of such *ex ante* requirement raises the *mens rea* for extermination to something akin to premeditated or preconceived plans of killing on a large scale.<sup>656</sup> Such a requirement would foster impunity and would make no sense where, for instance, a commander in a continuous campaign orders the executions of small groups each time the opportunity arises.<sup>657</sup> Even the crime of genocide, which is analogous to the crime of extermination but has a stricter *mens rea*,<sup>658</sup> does not require *ex ante* intent.<sup>659</sup>

251. The International Co-Prosecutor further submits that, if not for their error in requiring proof of an *ex ante* intent to establish extermination, the Co-Investigating Judges' factual

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<sup>653</sup> See *supra* para. 200.

<sup>654</sup> Appeal, para. 38 referring to Closing Order (Reasons), para. 288.

<sup>655</sup> Appeal, para. 40. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 63.

<sup>656</sup> Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 63-64.

<sup>657</sup> Appeal, para. 41.

<sup>658</sup> Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 64.

<sup>659</sup> Appeal, paras 42-44.

findings clearly support IM Chaem's responsibility for extermination at Phnom Trayoung Security Centre.<sup>660</sup> Recalling that knowledge that numerous killings are taking place and continued participation in related killings demonstrate the intent to kill on a large scale,<sup>661</sup> he argues that IM Chaem's required *mens rea* is clearly established by findings regarding her responsibilities for the operation of Phnom Trayoung and her knowledge of large-scale killing taking place there.<sup>662</sup>

252. The Co-Lawyers respond that the Co-Investigating Judges did not err in law in defining the *mens rea* of extermination and correctly adopted the law as determined by the Supreme Court Chamber.<sup>663</sup> They assert that the Co-Investigating Judges did not intend to introduce an *ex ante* legal requirement, but rather imposed a "reasonable evidential requirement" in the circumstances of the relevant allegations, which is consistent with the burden and standard of proof and the principle of culpability,<sup>664</sup> as well as standard international approaches to the crime.<sup>665</sup> The Co-Investigating Judges could indeed not be satisfied that the *mens rea* for extermination had been established without evidence of an *ex ante* intent to kill on a massive scale, where there was a degree of uncertainty concerning the identity of the physical perpetrators and the nexus between different killing events at Phnom Trayoung Security Centre.<sup>666</sup>

253. The Co-Lawyers additionally allege that, even if an error of law is established, the International Co-Prosecutor fails to show that it led to an abuse of discretion.<sup>667</sup> They underline that the Co-Investigating Judges considered that multiple possible legal characterisations of the same facts do not significantly enhance the gravity of IM Chaem's actions.<sup>668</sup> As such, any error regarding the legal categorisation of killings at Phnom Trayoung Security Centre as extermination would not materially impact the assessment of personal jurisdiction, or be fundamentally determinative of the final assessment,<sup>669</sup> in that it would merely introduce new

<sup>660</sup> Appeal, para. 45; *see also* para. 39.

<sup>661</sup> Appeal, para. 45 *referring to* ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgment (Reasons), Appeals Chamber, 1 June 2001, para. 198.

<sup>662</sup> Appeal, paras 45-46.

<sup>663</sup> Response, paras 77-79 *referring to* Closing Order (Reasons), para. 68; Case 002, Appeal Judgement, 23 November 2016, F36 ("Case 002/1 Appeal Judgement (F36)"), paras 520, 522.

<sup>664</sup> Response, paras 79-84. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 54-62.

<sup>665</sup> Response, para. 82 and footnotes 168-169; Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 60-62.

<sup>666</sup> Response, paras 81-84. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 55-59.

<sup>667</sup> Response, paras 85, 90. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 62-64.

<sup>668</sup> Response, para. 86 *referring to* Closing Order (Reasons), para. 323.

<sup>669</sup> Transcript of 12 December 2017 (D308/3/1/19/2.1), p. 64.



legal elements but not new victims, and would not more than marginally aggravate the crimes.<sup>670</sup>

254. The International Co-Prosecutor replies that the Co-Lawyers' arguments are inherently contradictory,<sup>671</sup> and that the characterisation of the *ex ante* intent as merely a "reasonable evidential requirement" is factually and legally wrong.<sup>672</sup> First, he emphasises that the Co-Investigating Judges estimated that over 2,000 prisoners were executed by the guards and hundreds of people died of starvation at Phnom Trayoung between mid-1977 and January 1979, and that these were not random or unconnected incidents.<sup>673</sup> The facts found in the Closing Order (Reasons) clearly prove the involvement and intent of IM Chaem.<sup>674</sup> Second, contrary to the contention that the crime of extermination requires an additional *ex ante* intent element to be proven depending on the circumstances of the case, crimes under international criminal law do not have different definitions depending on the context.<sup>675</sup> The massiveness requirement of extermination can be met through a series of killings or a course of conduct.<sup>676</sup>

## 2. Discussion

255. The elements of extermination as a crime against humanity were set out by the Supreme Court Chamber in Case 002,<sup>677</sup> and were properly reflected in paragraph 68 of the Closing Order (Reasons):

(a) *Actus reus*: an act, omission, or a combination of both, resulting in the death of persons on a massive scale. There is no minimum number of victims required to establish extermination. The assessment of the "massive scale" requirement must be made on case-by-case basis, having regard to such factors as the time and place of the killings, the selection of the victims and the manner in which they were targeted, and whether the killings were aimed at the collective group rather than the victims in their individual capacity.

(b) *Mens rea*: the intent to kill persons on a massive scale, or to inflict serious bodily injury or create living conditions calculated to bring about the destruction of a numerically significant part of the population. The [Supreme Court Chamber] took

<sup>670</sup> Response, paras 87-89.

<sup>671</sup> Reply, para. 46.

<sup>672</sup> Reply, para. 47 referring to Response, para. 82.

<sup>673</sup> Reply, para. 47 referring to Closing Order (Reasons), paras 189, 208-209, 220. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 65-66.

<sup>674</sup> Reply, para. 47 referring to Closing Order (Reasons), paras 192, 195, 200-201, 212. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 66-67.

<sup>675</sup> Reply, para. 48; Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 65.

<sup>676</sup> Reply, para. 48 and footnote 151.

<sup>677</sup> Case 002/1 Appeal Judgement (F36), paras 517-522, 525, 527, 551.



the position that the aim of extermination is to eliminate individuals that are part of a group and that it is thus incompatible with the notion of *dolus eventualis*. It then clarified that, however, knowledge that the *actus reus* would cause certain death is not required, but rather, what is necessary is “a showing that the killing of members of a group is what was desired by the perpetrator, irrespective of whether he was certain that this would actually happen. Mere knowledge that deaths may occur would be insufficient.”<sup>678</sup>

256. However, the Co-Investigating Judges held in paragraph 288 of the Closing Order (Reasons):

As for the killings committed on a regular basis at Phnom Trayoung security centre, the aggregate number reaches the threshold of massiveness. They were also killed for similar reason [*sic*]; that is behaviour contrary to the ideology and policies of the CPK. *These killings, however, were carried out during a longer period of time and possibly by different physical perpetrators. These circumstances make it unclear whether the executions were carried out with the ex ante intent to kill on a massive scale. We are thus not satisfied that there are reasonable grounds to believe that these deaths, in addition to murder, also amounted to extermination.*<sup>679</sup>

257. The Undersigned Judges observe that the Co-Investigating Judges referred to the “*ex ante* intent” of the perpetrators only once, in the above-cited paragraph 288, and did not explain how it relates to the definition of the *mens rea* of extermination laid out in paragraph 68. Nevertheless, the Co-Investigating Judges explicitly came to the conclusion that the deaths did not amount to extermination because it was unclear whether the massive killings at Phnom Trayoung were carried out with the *ex ante* intent to kill on a large scale, considering that they were committed by different physical perpetrators over a long period of time. The Undersigned Judges therefore infer, from a plain reading of paragraph 288, that the Co-Investigating Judges treated the *ex ante* intent not as a mere “evidential requirement”, but as a legal element of the crime of extermination, which had to be proven.

258. The Undersigned Judges recall that the elements of extermination do not include a requirement that the *mens rea* be formed prior to the commission of the relevant acts.<sup>680</sup> As

<sup>678</sup> Closing Order (Reasons), para. 68 (footnotes omitted). *See also* ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Judgement, Trial Chamber, 2 August 2001 (“*Krstić* Trial Judgement”), paras 495-503; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-17-A, Judgement, Appeals Chamber, 13 December 2004, paras 516, 522; ICTR, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Appeals Chamber, 7 July 2006, para. 86; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Judgement, Trial Chamber, 10 June 2010 (“*Popović* Trial Judgement”), paras 799-806; ICTR, *Prosecutor v. Munyakazi*, ICTR-97-36A-A, Judgement, Appeals Chamber, 28 September 2011 (“*Munyakazi* Appeal Judgement”), paras 141-142; ICTY, *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, Judgement, Appeals Chamber, 4 December 2012 (“*Lukić* Appeal Judgement”), paras 536-538; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgement, Appeals Chamber, 8 April 2015, para. 146.

<sup>679</sup> Closing Order (Reasons), para. 288 (emphasis added); *see also* paras 189-223.

<sup>680</sup> *See supra* para. 255.





with the specific intent for the crime of genocide,<sup>681</sup> the question is not whether the necessary intent was formed prior to the commission of the acts, but whether the perpetrators possessed it at the moment of commission of the crime of extermination. At most, proof of premeditation can be evidence of the intent, but it cannot be required to establish intent. Therefore, in holding that there were no reasonable grounds to believe that killings at Phnom Trayoung Security Centre amounted to extermination because it was unclear whether they were carried out with *ex ante* intent to kill on a massive scale, the Co-Investigating Judges erroneously introduced an additional legal element into the *mens rea* of the crime.

259. The Undersigned Judges will now consider whether a reasonable trier of fact, applying the correct *mens rea* for extermination, could have concluded that there were no reasonable grounds to believe that IM Chaem possessed the requisite intent to commit the crime against humanity of extermination at Phnom Trayoung Security Centre.

260. The Undersigned Judges recall that the assessment of the massiveness requirement must be done on a case-by-case basis, taking into account the circumstances in which the killings occurred, with relevant factors including, *inter alia*, the time and place of killings, the selection of victims, the manner of targeting the victims and whether the killings were aimed at a collective group or individual victims.<sup>682</sup> Separate killing incidents may be aggregated for the purpose of meeting the massiveness requirement if they are considered to be part of the same operation.<sup>683</sup> This massiveness requirement is inherent in both the *actus reus* and *mens rea* of extermination<sup>684</sup> and, as such, those factors are also relevant for the establishment of the intent to kill on a massive scale.<sup>685</sup>

<sup>681</sup> See, e.g., ICTR, *Prosecutor v. Simba*, ICTR-01-76-A, Judgement, Appeals Chamber, 27 November 2007, para. 266; *Munyakazi* Appeal Judgement, para. 142; *Krstić* Trial Judgement, para. 572.

<sup>682</sup> Case 002/1 Appeal Judgement (F36), para. 551. See also, e.g., ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgement, Appeals Chamber, 30 June 2016 (“*Stanišić and Župljanin* Appeal Judgement”), paras 1022, 1027; *Lukić* Appeal Judgement, paras 538, 542; *Popović* Trial Judgement, paras 804-805; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, Appeals Chamber, 14 December 2015 (“*Nyiramasuhuko* Appeal Judgement”), paras 2123-2126.

<sup>683</sup> *Stanišić and Župljanin* Appeal Judgement, paras 1022, 1025; *Nyiramasuhuko* Appeal Judgement, para. 2125 referring to ICTR, *Prosecutor v. Bagosora and Nsengiyumva*, ICTR-98-41-A, Judgment, Appeals Chamber, 14 December 2011, para. 396.

<sup>684</sup> Case 002/1 Appeal Judgement (F36), para. 525 (“The Supreme Court Chamber recalls that extermination is generally defined as ‘killing on a large scale’. As such, the element of mass killing is inherently part of the notion of extermination. This element is present both in respect of the *actus reus* and the *mens rea* – killings must occur on a large scale and the perpetrator must be aware of [and indeed intend] the killing on a large scale.”).

<sup>685</sup> For example, in the *Popović* Trial Judgement, at paras 804-805, the Chamber found that the killing events were committed in multiple locations within the same geographic area and by different physical perpetrators, but considered that the separate killing events formed part of a single operation in light of the “temporal and



261. The Undersigned Judges observe that the Co-Investigating Judges considered that the chapeau elements of crimes against humanity were established for the crimes committed in Sector 5 and relevant to this Ground of Appeal.<sup>686</sup> They further expressly found that the killings that were committed on a regular basis at Phnom Trayoung Security Centre, although carried out during an extended period of time and possibly by different physical perpetrators, formed part of a single operation and “reache[d] the threshold of massiveness.”<sup>687</sup> They estimated that more than 2,000 prisoners were executed in 1977-1979 by the same category of perpetrator – armed prison guards<sup>688</sup> – at the security centre or in its vicinity;<sup>689</sup> found that executions were organised, coordinated and carried out under similar circumstances;<sup>690</sup> and noted that victims were targeted collectively and selected in a systematic manner<sup>691</sup> for similar reasons, namely their “behaviour contrary to the ideology and policies of the CPK.”<sup>692</sup>

262. The Undersigned Judges further note the Co-Investigating Judges’ findings on IM Chaem’s actions, statements and leadership role.<sup>693</sup> In particular, the Co-Investigating Judges found that there is reliable evidence that IM Chaem had overall authority over people detained at Phnom Trayoung, and had authority to order executions.<sup>694</sup> They took into account the evidence that she oversaw the operation of the security centre; issued its regulations; gave orders to the chief of the centre, who reported directly to her,<sup>695</sup> including orders to arrest,<sup>696</sup> and visited the centre or sent her messengers every two or three days.<sup>697</sup> Recalling that the

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geographical proximity of the killings, the similarities between them and the organized and coordinated manner in which the Bosnian Serb Forces conducted them”. The Chamber concluded it was “clear from the evidence that the Bosnian Serb Forces intended to kill Bosnian Muslim able-bodied males from Srebrenica on a massive scale.”

<sup>686</sup> Closing Order (Reasons), paras 281-284.

<sup>687</sup> Closing Order (Reasons), para. 288.

<sup>688</sup> Closing Order (Reasons), paras 189, 196, 205-207, 209 (“Guards boasted about executing prisoners and bragged among themselves as to who had killed more people.”).

<sup>689</sup> Closing Order (Reasons), paras 189, 218, 219-220. The Pre-Trial Chamber recalls that “there is no numerical minimum; extermination has been found to have been committed in relation to thousands of killings as well as for fewer than sixty individuals.” See Case 002/1 Appeal Judgement (F36), para. 551 referring to *Lukić* Appeal Judgement, para. 537; ICTR, *Prosecutor v. Ndahimana*, ICTR-01-68-A, Judgement, Appeals Chamber, 16 December 2013, para. 231.

<sup>690</sup> Closing Order (Reasons), paras 203, 208-209, 211.

<sup>691</sup> See, e.g., Closing Order (Reasons), paras 197, 200, 202.

<sup>692</sup> Closing Order (Reasons), para. 288.

<sup>693</sup> See Closing Order (Reasons), paras 175, 195, 200, 217, 222, 306-311. See also *Munyakazi* Appeal Judgement, para. 142 (inferring intent from personal participation and leadership role).

<sup>694</sup> Closing Order (Reasons), para. 175.

<sup>695</sup> Closing Order (Reasons), para. 195; see also para. 200.

<sup>696</sup> Closing Order (Reasons), para. 200.

<sup>697</sup> Closing Order (Reasons), para. 222.



*mens rea* can be inferred from circumstances,<sup>698</sup> the Undersigned Judges consider that there are reasonable grounds to believe that IM Chaem had the intent to kill on a massive scale, as evinced by her role and continuous participation in killing incidents which, even if committed over a long period of time and by different perpetrators, were part of the same operation and reached the threshold of massiveness.

263. In light of the foregoing, the Undersigned Judges find that, had the Co-Investigating Judges not imposed the incorrect legal element of *ex ante* intent, the only reasonable conclusion would have been that there are reasonable grounds to believe that IM Chaem possessed the requisite *mens rea* for extermination. The impact of this error on the finding that IM Chaem was not amongst those most responsible and did not meet the ECCC's personal jurisdiction will be assessed later.

#### **D. Ground 4: Alleged Errors in Relation to the Crime of Enforced Disappearances**

##### **1. Submissions**

264. The International Co-Prosecutor alleges that the Co-Investigating Judges erred by failing to find that the crime of enforced disappearance as an other inhumane act took place at Spean Sreng Canal Worksite.<sup>699</sup> He submits that the Co-Investigating Judges wrongly applied the definition of the modern crime of enforced disappearance, which was not in existence in 1975, instead of the elements of other inhumane acts as a crime against humanity,<sup>700</sup> and that they erroneously required proof that persons had sought information about individuals forcibly disappeared, thereby disregarding the realities of the CPK.<sup>701</sup>

265. The International Co-Prosecutor specifically argues that the Co-Investigating Judges should have applied the elements of other inhumane acts, which are defined by the Supreme Court Chamber as conduct which "violates a basic right of the victims and is of similar nature and gravity to other enumerated crimes against humanity".<sup>702</sup> It was therefore an error not to

<sup>698</sup> See, e.g., *Munyakazi Appeal Judgement*, para. 142 ("The Appeals Chamber has held that an accused's intent to participate in a crime may be inferred from circumstantial evidence, including his active participation in an attack.") (footnotes omitted).

<sup>699</sup> Appeal, para. 47 referring to Closing Order (Reasons), para. 302.

<sup>700</sup> Appeal, paras 47-51 referring to Case 002/1 Appeal Judgement (F36), para. 589. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 67-68.

<sup>701</sup> Appeal, paras 47, 52-57.

<sup>702</sup> Appeal, para. 49. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 67.



characterise enforced disappearances at Spean Sreng Canal Worksite as other inhumane acts, based on the sole reason that there was no evidence of inquiries made by the disappeared labourers' families to the authorities.<sup>703</sup> This factor is irrelevant and, had the Co-Investigating Judges applied the correct definition, IM Chaem would have been considered responsible for enforced disappearances.<sup>704</sup> The International Co-Prosecutor relies on the finding that arrests and disappearances of workers were common occurrences at Spean Sreng Canal Worksite, as well as on the Trial Chamber's holding in Case 002/1 that enforced disappearances amount to other inhumane acts given the great suffering caused to the victims.<sup>705</sup>

266. Moreover, regardless of the qualification of the crime, it was an error to require, as an element of the offence, that persons must have enquired as to the victims' whereabouts, which is unreasonable in a context of extremely coercive circumstances such as those prevailing at the time of Democratic Kampuchea.<sup>706</sup> Those circumstances have to be taken into consideration so as to ensure that the law can function, as supported by the case law of the Inter-American Court of Human Rights ("IACtHR").<sup>707</sup>

267. The Co-Lawyers respond that the Appeal misinterprets the Co-Investigating Judges' approach to the definition of enforced disappearances and that the International Co-Prosecutor fails to argue or establish any abuse of discretion.<sup>708</sup> They stress that the Co-Investigating Judges correctly adopted the Supreme Court Chamber's definition of other inhumane acts as crimes against humanity and recalled that enforced disappearances may qualify as such.<sup>709</sup> In this context, the Co-Investigating Judges did not err in taking into account evidence of persons' enquiries about the fate of the victims, not as an additional element of the offence, but because they considered it essential to distinguish enforced disappearances from other crimes against

<sup>703</sup> Appeal, para. 49; Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 68-69.

<sup>704</sup> Appeal, para. 51; Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 70.

<sup>705</sup> Appeal, para. 51 referring to Closing Order (Reasons), paras 238, 302; Case 002, Case 002/01 Judgement, 7 August 2014, E313 ("Case 002/1 Trial Judgement (E313)"), para. 643. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 70-71.

<sup>706</sup> Appeal, paras 47, 52-57.

<sup>707</sup> Appeal, paras 53-55 referring to Inter-American Court of Human Rights ("IACtHR"), *Velásquez-Rodríguez v. Honduras*, Judgment (Merits), 29 July 1988, para. 126; IACtHR, *Godínez-Cruz v. Honduras*, Judgment (Merits), 20 January 1989, para. 76; IACtHR, *Caballero-Delgado and Santana v. Colombia*, Judgment (Merits), 8 December 1995, para. 72(5).

<sup>708</sup> Response, para. 93.

<sup>709</sup> Response, para. 94 referring to Closing Order (Reasons), paras 74-75. See also Transcript of 12 December 2017 (D308/3/1/19/2.1), p. 65.



humanity on a case-by-case basis.<sup>710</sup>

268. The Co-Lawyers moreover challenge the International Co-Prosecutor's reliance on the IACtHR's case law, which applies a different burden of proof,<sup>711</sup> and claim that it was not open to the Co-Investigating Judges to merely assume that the occurrence of arrests and disappearances satisfied the *actus reus* and *mens rea* elements of the crime.<sup>712</sup> In particular, the mere assertion that the suffering caused to the victims of enforced disappearance at Spean Sreng Canal Worksite was no different than that found within the scope of Case 002 is insufficient; no reasonable trier of fact could have adopted this comparison.<sup>713</sup> Finally, they submit that the International Co-Prosecutor failed to argue a sufficient nexus between IM Chaem and the alleged crime and failed to show how the legal characterisation of enforced disappearances would have altered the assessment of personal jurisdiction, and thus invalidated the Closing Order (Reasons).<sup>714</sup> In fact, multiple legal characterisations of the same facts would not significantly enhance the gravity of her acts.<sup>715</sup>

269. The International Co-Prosecutor reiterates in reply that the Co-Investigating Judges erroneously adopted the Trial Chamber's approach to the crime of enforced disappearances in Case 002, which is "anachronistic and legally incorrect".<sup>716</sup> In particular, in light of the Supreme Court Chamber's holding regarding the threshold of other inhumane acts,<sup>717</sup> the findings in the Closing Order (Reasons) make clear the fiercely oppressive and fearful conditions at Spean Sreng Canal Worksite, and it is clear that unexplained disappearances caused severe mental suffering for the victims.<sup>718</sup> The International Co-Prosecutor therefore requests the intervention of the Pre-Trial Chamber, since the error in applying the definition of enforced disappearance as a stand-alone crime, rather than as an other inhumane act, resulted

<sup>710</sup> Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 65-67; *see also* p. 70.

<sup>711</sup> Response, para. 97.

<sup>712</sup> Response, para. 98 *referring to* Appeal, para. 51; Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 67-71.

<sup>713</sup> Response, para. 98 *referring to* Appeal, para. 51; Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 68-70 *referring to* Case 002/1 Appeal Judgement (F36), paras 655-656.

<sup>714</sup> Response, paras 96, 99. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 71-72.

<sup>715</sup> Transcript of 12 December 2017 (D308/3/1/19/2.1), p. 71 *referring to* Closing Order (Reasons), para. 323.

<sup>716</sup> Reply, para. 51 *referring to* Case 002/1 Appeal Judgement (F36), para. 589. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 69.

<sup>717</sup> Reply, para. 52 *referring to* Case 002/1 Appeal Judgement (F36), para. 656.

<sup>718</sup> Reply, para. 53 *referring to* Closing Order (Reasons), paras 231, 234, 238. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 70-71.



in a deficient evaluation of IM Chaem's personal responsibility.<sup>719</sup>

## 2. Discussion

270. In paragraph 74 of the Closing Order (Reasons), the Co-Investigating Judges correctly laid out the elements of other inhumane acts as a crime against humanity as follows:

(a) *Actus reus*: an act or omission of the perpetrator causing serious bodily or mental harm or constituting a serious attack on human dignity. The acts or omissions of the perpetrator must be of a nature and gravity similar to the other crimes against humanity enumerated under Article 5 of the ECCC Law, assessed on a case-by-case basis, with due regard to the individual circumstances of the case. The effect of the suffering is not required to be long-term, although this may be a relevant factor for the determination of the seriousness of the act.

(b) *Mens rea*: the perpetrator must have deliberately performed the act or omission with the intent to inflict serious bodily or mental harm or commit a serious attack upon the human dignity of the victim at the time of the act or omission.<sup>720</sup>

271. After finding that enforced disappearances may qualify as other inhumane acts,<sup>721</sup> the Co-Investigating Judges went on to define specific elements for enforced disappearances in paragraph 76 of the Closing Order (Reasons):

*Enforced disappearances* – The elements of enforced disappearances are: (i) an individual is deprived of his or her liberty; (ii) the deprivation of liberty is followed by the refusal to disclose information regarding the fate or whereabouts of the person concerned, or to acknowledge the deprivation of liberty; (iii) the individual is denied recourse to the applicable legal remedies and procedural guarantees; and (iv) the first and second elements were carried out by state agents, or with the authorization, support or acquiescence of a state or political organisation.<sup>722</sup>

272. The Undersigned Judges endorse the Supreme Court Chamber's holding that enforced disappearances had not yet crystallised into a discrete category of crimes against humanity in 1975-1979, and that such conduct may qualify as other inhumane acts under Article 5 of the ECCC Law if it satisfies the elements of that crime.<sup>723</sup> They also concur that "stipulating

<sup>719</sup> Reply, para. 50 referring to Response, para. 92. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), p. 71.

<sup>720</sup> Closing Order (Reasons), para. 74 (footnotes omitted). See also Case 002/1 Appeal Judgement (F36), paras 578-580, 586; Case 002/1 Trial Judgement (E313), paras 437-439; Case 001 Trial Judgement (E188), paras 367-371; ICTY, *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, Trial Chamber, 29 November 2002 ("*Vasiljević* Trial Judgment"), paras 234-236; ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment, Appeals Chamber, 17 December 2004, para. 117; ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, Trial Chamber, 21 May 1999, paras 151, 154.

<sup>721</sup> Closing Order (Reasons), para. 75 referring to, *inter alia*, to Case 002/1 Trial Judgement (E313), para. 448.

<sup>722</sup> Closing Order (Reasons), para. 76 referring to Case 002/1 Trial Judgement (E313), para. 448.

<sup>723</sup> Case 002/1 Appeal Judgement (F36), para. 589.



elements of enforced disappearance [...] as though they constituted separate categories of crimes against humanity [is] anachronistic and legally incorrect”.<sup>724</sup> Rather, the only relevant guiding issue, as explicitly held by the Supreme Court Chamber, is whether the conduct in question fulfils the definition of other inhumane acts, considering the specific circumstances of the case at hand.<sup>725</sup>

273. In light of the foregoing, the Undersigned Judges consider that the Co-Investigating Judges erred in stipulating elements of enforced disappearances in paragraph 76 of the Closing Order (Reasons) in addition to those of other inhumane acts.

274. The Undersigned Judges further find that the Co-Investigating Judges incorrectly applied this anachronistic definition of enforced disappearances, instead of the elements of other inhumane acts, in determining whether crimes had been committed at Spean Sreng Canal Worksite. In particular, they erred by failing to draw conclusions regarding the commission of the crime against humanity of other inhumane acts by enforced disappearances for the sole reason that “there is no evidence to indicate that inquiries to that effect were made of the authorities in charge at the site”.<sup>726</sup> The Undersigned Judges note that the Co-Investigating Judges made similar findings regarding the crime against humanity of other inhumane acts at Phnom Trayoung Security Centre, considering as “a key element of the crime of enforced disappearance” the fact that “authorities denied requests to disclose information about the whereabouts and fate of victims”.<sup>727</sup> This holding, although not appealed, confirms that the Co-Investigating Judges applied a legally incorrect definition of enforced disappearances throughout the Closing Order (Reasons).

275. In sum, the Undersigned Judges consider that the findings at paragraphs 294 and 302 of the Closing Order (Reasons) evince errors of law. The requirement that persons have enquired as to the victims’ whereabouts and the authorities have refused to disclose information is not a legal element of the crime against humanity of other inhumane acts. The International Co-Prosecutor’s related argument, according to which the Co-Investigating Judges failed to take into account the coercive circumstances prevailing at the time when imposing this

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<sup>724</sup> Case 002/1 Appeal Judgement (F36), para. 589.

<sup>725</sup> Case 002/1 Appeal Judgement (F36), para 584, 589, 651. *See also* Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15), paras 156, 160-161.

<sup>726</sup> Closing Order (Reasons), para. 302.

<sup>727</sup> Closing Order (Reasons), para. 294.



requirement,<sup>728</sup> thus need not be addressed.

276. The Undersigned Judges now turn to determine whether there is sufficient evidence of the crime against humanity of other inhumane acts at Spean Sreng Canal Worksite and of IM Chaem's responsibility therefor. Rather than dissecting elements of the conduct and testing them separately, as if enforced disappearances were a discrete crime, the conduct in question at Spean Sreng Canal Worksite should be considered holistically, with a view to determining whether its nature and gravity were similar to those of enumerated crimes against humanity.<sup>729</sup>

277. The Undersigned Judges recall, at the outset, that the assessment of the gravity of the prohibited act must be case specific. Although it need not have been expressly criminalised under international law,<sup>730</sup> "an inhumane act reaching the gravity of other crimes against humanity usually will also violate the broad tenets of human rights".<sup>731</sup> Of particular relevance are the rights to life, liberty and security of person, and the prohibition of cruel, inhuman or degrading treatment or punishment, arbitrary arrest, detention or exile, and arbitrary interference with privacy, family, home or correspondence.<sup>732</sup> The relevant conduct must in fact cause serious physical or mental suffering or constitute a serious attack on human dignity.<sup>733</sup> The seriousness is to be assessed in light of circumstances such as the nature of the act or omission, its duration and/or repetition, as well as the personal circumstances of and the physical, mental and moral effects upon the victim(s).<sup>734</sup>

278. In the present case, the Co-Investigating Judges found "ample evidence that labourers were arrested, taken away, or disappeared from the Spean Sreng Canal worksite; and that those who disappeared from the site may have been executed at Phnom Trayoung security centre."<sup>735</sup> This involved, at a minimum, a violation of the right to life, liberty and security of person, freedom from arbitrary arrest and detention, and the right to a fair and public trial and to recognition before the law. The Closing Order (Reasons) further established that thousands of

<sup>728</sup> See Appeal, paras 52-57.

<sup>729</sup> Case 002/1 Appeal Judgement (F36), para. 590.

<sup>730</sup> Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15), para. 156.

<sup>731</sup> Case 002/1 Appeal Judgement (F36), paras 582-585. See also ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, Trial Chamber, 14 January 2000 ("*Kupreškić* Trial Judgement"), paras 566, 818.

<sup>732</sup> Case 002/1 Appeal Judgement (F36), paras 582-585.

<sup>733</sup> Case 002/1 Appeal Judgement (F36), paras 579-580; ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para. 269.

<sup>734</sup> Case 001 Trial Judgement (E188), para. 369; Case 002/1 Trial Judgement (E313), para. 438; Case 002/1 Appeal Judgement (F36), para. 586; *Krnojelac* Trial Judgment, para. 131; *Vasiljević* Trial Judgment, para. 235.

<sup>735</sup> Closing Order (Reasons), para. 302; see also paras 231-232, 237-240, 242.





people were forced to work in dire conditions at Spean Sreng Canal Worksite,<sup>736</sup> that “[a]rrests and disappearances of workers were common occurrences”<sup>737</sup> carried out in and contributing to a climate of fear,<sup>738</sup> and “that disappeared labourers’ families were unable to determine their fate or whereabouts”.<sup>739</sup>

279. Based on these circumstances, the Undersigned Judges find that acts of enforced disappearances must be considered as being of extreme gravity and as violating international human rights standards. This conclusion is supported by pre- and post-1975 instruments and jurisprudence,<sup>740</sup> and by the fact that enforced disappearance has more recently been criminalised under international law.<sup>741</sup> The circumstances evinced in the Closing Order (Reasons) with regard to Spean Sreng Canal Worksite also provide sufficient evidence that the conduct in question caused serious mental suffering and constituted an attack on human dignity, thereby reaching the level of gravity necessary to constitute other inhumane acts.<sup>742</sup>

<sup>736</sup> Closing Order (Reasons), paras 224, 230, 234-237, 241.

<sup>737</sup> Closing Order (Reasons), para. 238.

<sup>738</sup> Closing Order (Reasons), paras 232-234, 239, 242.

<sup>739</sup> Closing Order (Reasons), para. 302.

<sup>740</sup> See, e.g., Case 002/1 Trial Judgement (E313), paras 444-447 referring to, *inter alia*, Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, Vol. I, pp. 232-233, 290-291; Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. III, pp. 954-1177, *The United States of America v. Altstoetter et al.*, Opinion and Judgment, 3-4 December 1947 (“Nuernberg Military Tribunals, *Justice Case*”), at pp. 75, 1042, 1057-1058, 1061; United Nations General Assembly, Resolution on Disappeared Persons, A/RES/33/173, 20 December 1978; IACtHR, *Velásquez-Rodríguez v. Honduras*, Judgment (Merits), 29 July 1988, paras 155-157; Human Rights Committee, *Mojica v. Dominican Republic*, Communication No. 449/1991, 15 July 1994, para. 5.7; Human Rights Committee, *Laureano Atachahua v. Peru*, Communication No. 540/1993, 25 March 1996, para. 8.5. See also *Kupreškić* Trial Judgement, para. 566 referring to United Nations General Assembly, Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992; Inter-American Convention on Forced Disappearance of Persons, adopted on 9 June 1994 and entered into force on 28 March 1996.

<sup>741</sup> Case 002/1 Appeal Judgement (F36), para. 585. See also, e.g., Case 002/1 Trial Judgement (E313), para. 447; Rome Statute of the International Criminal Court, adopted on 17 July 1998 and entered into force on 1 July 2002, Art. 7(1)(i); International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006 and entered into force on 23 December 2010.

<sup>742</sup> Compare with, e.g., Case 002/1 Appeal Judgement (F36), paras 652, 658-659 (the finding that families were separated and never heard of the fate of their disappeared family members was relevant to establishing other inhumane acts occurred), 656 (similar nature and gravity can also be evidenced by the fact that a large number of individuals were affected by the conduct and that some were killed or died as a result thereof); Case 002/1 Trial Judgement (E313), para. 445 (conduct would amount to inhumane treatment in light of its impact not only on the individuals who disappeared, but also on prisoners’ families who were denied any information as to their relatives’ fate); Case 001 Trial Judgement (E188), para. 373 (acts left detainees in constant state of fear); Nuernberg Military Tribunals, *Justice Case*, p. 1058 (disappearances constituted inhumane treatment not only to the prisoners themselves but also to their families, friends, and relatives who were in constant fear and anxiety as to the whereabouts and fate of the disappeared); *Kupreškić* Trial Judgement, paras 819-820 (witnessing the death of a loved one would cause serious mental suffering); ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-T, Judgement with Confidential Annex, Trial Chamber, 23 February 2011, para. 1703 (finding similar seriousness and gravity where acts involved a forced departure from the people’s homes and communities, and often gave physical and emotional disruption and uncertain prospects for their return); ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Trial Chamber, 29 May 2013, Vol. 3, paras 1059, 1236 (climate of fear and terror among detainees); *Krnjelac* Trial



The Undersigned Judges indeed observe that such conduct is comparable to that of enumerated crimes against humanity, such as imprisonment and deportation, in terms of the rights involved (*e.g.* right to life, liberty and security of person) and the impact on the victims (*e.g.* uncertainty, fear, separation from families and homes).<sup>743</sup>

280. The Undersigned Judges finally note that the Co-Investigating Judges explicitly found that IM Chaem was in overall charge of the project at Spean Sreng Canal Worksite,<sup>744</sup> ordered arrests,<sup>745</sup> threatened workers with arrest as punishment for failing to meet quotas,<sup>746</sup> and generally could be found responsible for other inhumane acts at Spean Sreng Canal Worksite,<sup>747</sup> her intent being evinced by her continued participation in those crimes.<sup>748</sup> They also found the chapeau elements of crimes against humanity to be established for the crimes committed in Sector 5 and relevant to this Ground of Appeal.<sup>749</sup>

281. The Undersigned Judges further note, *ex officio*, regarding crimes committed at Phnom Trayoung Security Centre, that the Co-Investigating Judges acknowledged “reports of prisoners who disappeared and were never seen again”.<sup>750</sup> Such disappearances are sufficiently established by the evidence on the Case File,<sup>751</sup> as is IM Chaem’s overall authority over the prison.<sup>752</sup>

282. In light of the foregoing, the Undersigned Judges find that, had the correct legal elements of other inhumane acts been applied, no reasonable trier of fact could have found that there is insufficient evidence of other inhumane acts by enforced disappearances at Spean Sreng Canal Worksite and Phnom Trayoung Security Centre, or of IM Chaem’s responsibility

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Judgment, para. 143 (finding serious psychological suffering where detainees were exposed to the sounds of torture and beatings over a period of months, became nervous and panicky and could not sleep at night as a result of these sounds, they could not identify the criteria for the selection for beatings, they constantly feared that they would be the next to be selected, some feared they would not survive, and some witnessed family members being taken out and heard them being subjected to severe beatings).

<sup>743</sup> See Case 002/1 Appeal Judgement (F36), paras 656, 659.

<sup>744</sup> See Closing Order (Reasons), para. 229.

<sup>745</sup> See Closing Order (Reasons), paras 309-310.

<sup>746</sup> See Closing Order (Reasons), paras 238, 243.

<sup>747</sup> See Closing Order (Reasons), paras 306-311.

<sup>748</sup> See, *e.g.*, Closing Order (Reasons), para. 309; *see also* paras 238, 243.

<sup>749</sup> Closing Order (Reasons), paras 281-284.

<sup>750</sup> Closing Order (Reasons), para. 294.

<sup>751</sup> See, *e.g.*, Case 004/1, Written Record of Interview of HEM Soeun, 30 October 2015, D219/567, at ERN (EN) 01182703 (A74), 01182713 (A157) 01182714 (A161); Case 004/1, Written Record of Interview of MI Tal, 2 April 2015, D219/256, at ERN (EN) 01095825 (A27); Case 004/1, Written Record of Interview of TOR Pinthang, 2 September 2011, D101/1.2, at ERN (EN) 00751068; Case 004/1, DC-Cam Interview of BIN Nan and RIN Kheng, 11 September 2011, D123/1/2.65, at ERN (EN) 00985042.

<sup>752</sup> See, *e.g.*, Closing Order (Reasons), paras 175, 189, 192-195.



therefor. The impact of this error on the finding that she did not meet the personal jurisdiction of this Court will be assessed in the conclusion.

### **E. Grounds 5 and 6: Alleged Errors in Relation to Functions in the Southwest Zone**

283. The Undersigned Judges will consider Grounds 5 and 6 of the Appeal together, as both allege errors in relation to the Co-Investigating Judges' findings on IM Chaem's role and authority in the Southwest Zone.

#### **1. Submissions**

284. The International Co-Prosecutor asserts that the Co-Investigating Judges erred in finding that IM Chaem was neither Secretary of Koh Andet District (Ground 5 of the Appeal) nor a member of the Sector 13 Committee (Ground 6 of the Appeal), and that the only position she held in the Southwest Zone was chief of the Sector 13 Women's Association.<sup>753</sup> According to him, no reasonable trier of fact could have come to this conclusion based on a proper review of the evidence.<sup>754</sup>

285. In relation to Ground 5 of the Appeal, the International Co-Prosecutor alleges that the Co-Investigating Judges failed to properly assess IM Chaem's statements regarding her position as Secretary of Koh Andet District<sup>755</sup> and omitted to assess corroborative evidence.<sup>756</sup> With regard to Ground 6 of the Appeal, the International Co-Prosecutor submits that the Co-Investigating Judges erred in disregarding, without explanation, IM Chaem's admission that she was a member of the Sector 13 Committee for a year before being transferred to the Northwest Zone,<sup>757</sup> thus discounting the evidence of the person who best knew what position she held: IM Chaem herself.<sup>758</sup> The Co-Investigating Judges further failed to properly assess several witnesses' specific and unequivocal evidence corroborating that IM Chaem had a role

<sup>753</sup> Appeal, paras 58-59, 70-71 referring to Closing Order (Reasons), paras 143-150. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 71-72.

<sup>754</sup> Appeal, paras 58, 70.

<sup>755</sup> Appeal, paras 59-62.

<sup>756</sup> Appeal, paras 63-69 referring to Closing Order (Reasons), paras 138, 145, 148-149. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 72-78.

<sup>757</sup> Appeal, paras 71-73 referring to Closing Order (Reasons), paras 147-148, 152; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951849. See also Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 78-80.

<sup>758</sup> Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 71-72.



on the Sector 13 Committee, in addition to her position as head of the Women's Association,<sup>759</sup> and failed to explain how evidence demonstrating her range and level of authority could be reconciled with the conclusion that her only role was as chief of the Women's Association.<sup>760</sup> Finally, they erred in omitting clear and relevant evidence demonstrating IM Chaem's position on the Sector Committee,<sup>761</sup> as well as a number of civil party applications – including one containing personal experiences – referring to her holding this position.<sup>762</sup>

286. The International Co-Prosecutor contends that the Co-Investigating Judges' failure to find that IM Chaem was Secretary of Koh Andet District and a member of the Sector 13 Committee requires a re-evaluation of her responsibility under joint criminal enterprise for crimes in the Southwest Zone.<sup>763</sup>

287. The Co-Lawyers respond that Grounds 5 and 6 of the Appeal should be summarily dismissed.<sup>764</sup> They submit that the International Co-Prosecutor's approach amounts to an attempt to persuade the Pre-Trial Chamber to re-litigate the facts and replace the Co-Investigating Judges' view with its own, urges an incomplete and fragmented reading of the Closing Order (Reasons), and abandons any attempt to address the appellate standard of review.<sup>765</sup> In particular, the International Co-Prosecutor fails to show how the Co-Investigating Judges committed an error in finding that IM Chaem was not a district secretary or a sector committee member in the Southwest Zone, and how such findings would have been relevant or probative of any assessment of personal jurisdiction.<sup>766</sup>

288. In the Co-Lawyers' view, the Co-Investigating Judges' approach to the evidence was reasonable.<sup>767</sup> With regard to Ground 5 of the Appeal, the Co-Lawyers argue, first, that IM Chaem's interviews with DC-Cam were correctly given less weight by the Co-Investigating Judges than interviews conducted by their Office, and that the former may be relied on only when corroborated by other sources.<sup>768</sup> The Co-Investigating Judges reasonably concluded

<sup>759</sup> Appeal, paras 74-76, 80. *See also* Transcript of 11 December 2017 (D308/3/1/19/1.2), pp. 80-85.

<sup>760</sup> Appeal, paras 77, 80.

<sup>761</sup> Appeal, para. 78.

<sup>762</sup> Appeal, para. 79.

<sup>763</sup> Appeal, para. 81.

<sup>764</sup> Response, para. 101.

<sup>765</sup> Response, paras 103, 105. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 75-77.

<sup>766</sup> Response, paras 102, 104 *referring to* Closing Order (Reasons), paras 245-246.

<sup>767</sup> Response, paras 106, 119.

<sup>768</sup> Response, para. 107 *referring to* Closing Order (Reasons), paras 104, 108, 139. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 77-80.



that, at best, the totality of IM Chaem's statements provide ambiguous evidence in light of the standard and burden of proof, considering that she also stated that she was not the secretary of the district and instead was in charge of women.<sup>769</sup> Second, the Co-Lawyers argue that the International Co-Prosecutor merely reprises a partisan view by selectively referring to the statements of five witnesses,<sup>770</sup> and fails to demonstrate how the Co-Investigating Judges erred in weighing the totality of the evidence.<sup>771</sup>

289. In response to Ground 6 of the Appeal, the Co-Lawyers reiterate that IM Chaem's statements to DC-Cam may only be relied on when corroborated by other sources<sup>772</sup> and that the International Co-Prosecutor takes a selective approach to the assessment of the evidence.<sup>773</sup> In particular, civil party applications representing a "common narrative", like those cited by the International Co-Prosecutor, are insufficient to establish relevant facts,<sup>774</sup> and seven witnesses provided indirect evidence that is speculative and inconsistent.<sup>775</sup> In their view, only one witness lent "meaningful support" to the allegation concerning IM Chaem's position in Sector 13,<sup>776</sup> and this constitutes an inadequate basis for drawing conclusions in light of the standard of proof.<sup>777</sup> In the context of the totality of the evidence, the Co-Investigating Judges' conclusion was reasonable,<sup>778</sup> and they cannot be found to have abused their discretion.<sup>779</sup>

290. In reply, the International Co-Prosecutor recalls that the standard of proof for factual findings at the closing order stage is a probability standard, rather than the "beyond reasonable doubt" standard,<sup>780</sup> and argues that IM Chaem's admissions regarding her positions, coupled with corroborating witness statements, readily surpass this standard of proof.<sup>781</sup> In particular, contrary to the Co-Lawyers' assertion, the Closing Order (Reasons) made no unequivocal determination that IM Chaem's DC-Cam interviews may only be relied on when corroborated

<sup>769</sup> Response, para. 109 *referring to* Closing Order (Reasons), para. 139; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951795.

<sup>770</sup> Response, para. 111 *referring to* Appeal, paras 64-68.

<sup>771</sup> Response, para. 110.

<sup>772</sup> Response, para. 120. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 77-80.

<sup>773</sup> Response, para. 121. *See also* Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 87-88.

<sup>774</sup> Response, paras 122-123 *referring to* Appeal, para. 79, footnote 196.

<sup>775</sup> Response, para. 123; *see also* paras 124-127 *referring to* Appeal, paras 74-78.

<sup>776</sup> Response, paras 128-130 *referring to* Appeal, paras 75, 77-78; Case 004/1, Written Record of Interview of KHOEM Vai, 21 December 2015, D219/636, at ERN (EN) 01207672 (A38).

<sup>777</sup> Response, para. 130.

<sup>778</sup> Response, para. 130.

<sup>779</sup> Response, paras 123, 125.

<sup>780</sup> Reply, para. 54 *referring to* Closing Order (Reasons), para. 2.

<sup>781</sup> Reply, paras 54, 64.



by other sources.<sup>782</sup> The Co-Lawyers also fail to note that these interviews were recorded and do not explain why her own statements should not be considered reliable.<sup>783</sup> The International Co-Prosecutor stresses that the Supreme Court Chamber in Case 002/1 endorsed the use of NUON Chea's out-of-court statements.<sup>784</sup>

291. The International Co-Prosecutor further replies that IM Chaem's admissions regarding her positions in the Southwest Zone are in any case corroborated by written records of interview generated by the Office of the Co-Investigating Judges.<sup>785</sup> He claims that the Co-Lawyers' assessment of the corroborative evidence cited in Ground 5 of the Appeal is erroneous and betrays a misunderstanding of the facts and evidence.<sup>786</sup> With regard to Ground 6 of the Appeal, the Co-Lawyers' assertions regarding the relevance and probative value of the witnesses' evidence demonstrating IM Chaem's position on the Sector 13 Committee are generally unsupported and inaccurate.<sup>787</sup> In particular, their allegations regarding civil party applications are misplaced, since they are only referred to in the Appeal as corroborative of other evidence.<sup>788</sup>

## 2. Discussion

292. The Undersigned Judges will examine (a) whether the Co-Investigating Judges erred in disregarding IM Chaem's declarations, given outside of the judicial process, on her position(s) in the Southwest Zone and, (b) after briefly setting out her personal background prior to 1975, (c) whether they erred in finding that her only position in the Southwest Zone was that of head of the Sector 13 Women's Association. The Undersigned Judges will then determine whether there is sufficient evidence, on a balance of probabilities, to demonstrate that IM Chaem was (d) the Secretary of Koh Andet District and (e) a member of the Sector 13 Committee.

### a. Reliance on IM Chaem's Declarations Given Outside of the Judicial Process

293. The Undersigned Judges note that much of the relevant evidence with regard to

<sup>782</sup> Reply, para. 59 referring to Response, para. 120; Closing Order (Reasons), para. 108.

<sup>783</sup> Reply, para. 59.

<sup>784</sup> Reply, para. 55 referring to Case 002/1 Appeal Judgement (F36), paras 358-359.

<sup>785</sup> Reply, para. 55 referring to Appeal, paras 58-81.

<sup>786</sup> Reply, paras 56-58 referring to Response, paras 115-116.

<sup>787</sup> Reply, paras 61-63 referring to Response, paras 124-130.

<sup>788</sup> Reply, para. 60 referring to Response, para. 122.



IM Chaem's positions, roles and responsibilities in the Southwest Zone comes from public statements she has given outside of the judicial process. In the section of the Closing Order (Reasons) dealing with IM Chaem's role and authority in the Southwest Zone, the Co-Investigating Judges implicitly disregarded these relevant statements, without specific reasoning,<sup>789</sup> and relied on them only for confirming her position as head of the Sector 13 Women's Association.<sup>790</sup> The weight given to IM Chaem's DC-Cam and other interviews is thus at the core of the parties' contentions in Grounds 5 and 6 of the Appeal.<sup>791</sup>

294. The Undersigned Judges recall the Pre-Trial Chamber's finding that it is an error to assess the probative value of evidence based on its provenance, rather than its intrinsic value, and thus to give less weight to IM Chaem's statements to DC-Cam and other entities than that afforded to statements generally taken by the Office of the Co-Investigating Judges.<sup>792</sup> The Undersigned Judges further recall the Supreme Court Chamber's holding that an accused person's inculpatory statements, corroborated by other evidence, can be relied on in the judicial process.<sup>793</sup> The Undersigned Judges thus consider that the public statements of the Charged Person provide a sufficient evidentiary basis in view of the applicable standard of proof at the pre-trial stage. Indeed, IM Chaem is the best witness to provide information regarding her own roles and responsibilities in the Southwest Zone, and her statements regarding her role and relationships were relied upon by the Co-Investigating Judges elsewhere in the Closing Order (Reasons).<sup>794</sup>

295. The Undersigned Judges thus find IM Chaem's statements regarding her personal history and position(s) in the Southwest Zone highly relevant and will rely on them – assessing their intrinsic value on a case-by-case basis – when examining Grounds 5 and 6.

b. Personal Background of IM Chaem before 1975

296. The Undersigned Judges deem it necessary to briefly set out IM Chaem's personal

<sup>789</sup> Closing Order (Reasons), paras 143-150.

<sup>790</sup> Closing Order (Reasons), para. 148.

<sup>791</sup> See Response, paras 107, 120; Reply, paras 55, 59. See also Transcript of 12 December 2017 (D308/3/1/19/2.1), pp. 77-80.

<sup>792</sup> See *supra* paras 49-59; Closing Order (Reasons), para. 139.

<sup>793</sup> Case 002/1 Appeal Judgement (F36), paras 358-359 referring to Case 002/1 Trial Judgement (E313), paras 501-503.

<sup>794</sup> See Closing Order (Reasons), paras 148, 155.



history prior to 1975 as relevant background to considering Grounds 5 and 6 of the Appeal.

297. IM Chaem was born in 1946 in Kbal O Village, Cheang Torng Commune, Tram Kak District, Takeo Province,<sup>795</sup> and is the eldest of ten siblings.<sup>796</sup> When she was ten years old, her mother passed away and she was forced to leave school to support her brothers and sisters.<sup>797</sup> IM Chaem got engaged to NOP Nhen, the son of her father's cousin, at twelve or fifteen years old, and she married him in 1964 or 1965 at the age of nineteen.<sup>798</sup> They had eight children, but four died at a young age; IM Chaem has explained that during the Democratic Kampuchea period, she did not have enough time to take care of her children, as she was busy in the struggle "for [her] nation and race."<sup>799</sup>

298. In 1966-1967, IM Chaem went to settle land to grow rice around Kampong Speu at Dach Mountain, along with ten other families from Kbal O Village.<sup>800</sup> She had not yet joined the Revolution at that time.<sup>801</sup> She said she worked on the farm and rice paddy in the forest, returning to her home village when the first armed uprising took place in Battambang.<sup>802</sup> At that time, the secret police in Kampong Speu Province accused her family of being part of the Khmer Rouge.<sup>803</sup> At the end of 1968 or early 1969, her brother IM Y, who was a messenger for *Ta Mok*,<sup>804</sup> was arrested while delivering documents,<sup>805</sup> detained and executed.<sup>806</sup>

299. In 1969, IM Chaem was arrested for being a Khmer rebel and detained by the regular military in Cheang Torng Commune for at least one year; she was released in 1970.<sup>807</sup> After

<sup>795</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951825; Notification of Charges (D239.1), para. 1.

<sup>796</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951829.

<sup>797</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951828, 00951831; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951790.

<sup>798</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951825, 00951831-00951832; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951790.

<sup>799</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951826.

<sup>800</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951832-00951833; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951790.

<sup>801</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951833.

<sup>802</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951791.

<sup>803</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951791.

<sup>804</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951833-00951835.

<sup>805</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951833-00951835; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951791.

<sup>806</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951791; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951834.

<sup>807</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951835-00951836; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951791.





the *coup d'état*, she joined the Khmer Rouge movement in Takeo Province.<sup>808</sup> In 1971, those who had fled to the forest one year prior secretly returned.<sup>809</sup> She was then tasked with organising an association for mutual support in cultivating rice and with leading villagers.<sup>810</sup> From that time she thus knew how to manage meetings.<sup>811</sup> The organisation spread to the whole of Cheang Torng Commune and IM Chaem became commune chief.<sup>812</sup> The Undersigned Judges further note that IM Chaem had a close relationship with *Ta Mok*,<sup>813</sup> who came from the same home village and whom she had known since the 1970s.<sup>814</sup>

300. The Undersigned Judges find that the evidence related to IM Chaem's personal history, on the whole, shows that she was part of the upper echelon<sup>815</sup> and had been a full party member for a long time when she was active in Sector 13.<sup>816</sup> IM Chaem therefore reportedly had the capacity to be a district secretary or sector committee member.<sup>817</sup> Indeed, full-rights party members were assigned to the district level or above.<sup>818</sup>

c. Functions as Head of the Sector 13 Women's Association

301. The Co-Investigating Judges found that IM Chaem was neither Koh Andet District Secretary nor a member of the Sector 13 Committee, but was instead the secretary of the Sector 13 Women's Association.<sup>819</sup>

<sup>808</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951791; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951835, 00951837-00951838.

<sup>809</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951837-00951838.

<sup>810</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951838; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951792-00951793.

<sup>811</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951838.

<sup>812</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951793-00951794; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951838; Case 004/1, Smiling Toad Productions Interview of IM Chaem, 26 April 2007, D1.3.12.1, at ERN (EN) 00217514-00217515; Case 004/1, Transcript of an Interview with IM Chaem, undated, D6.1.75, at ERN (EN) 01040635.

<sup>813</sup> Closing Order (Reasons), para. 155.

<sup>814</sup> Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089783, 00089786; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951834-00951835.

<sup>815</sup> Case 004/1, Written Record of Interview of BUN Thoeun, 10 July 2014, D118/274, at ERN (EN) 01031979 (A55); Case 004/1, Written Record of Interview of KHOEM Boeurn, 21 May 2014, D118/242, at ERN (EN) 01057694 (A105).

<sup>816</sup> Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000676 (A81).

<sup>817</sup> Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000677 (A83, A85).

<sup>818</sup> Case 004/1, Written Record of Interview of KHOEM Boeurn, 21 May 2014, D118/242, at ERN (EN) 01057691 (A93).

<sup>819</sup> Closing Order (Reasons), paras 143, 146, 148, 150.



302. The Undersigned Judges find this implicit conclusion that IM Chaem could not have held any other post than that of head of the Women's Association to be unreasonable. None of the evidence cited in the Closing Order (Reasons)<sup>820</sup> says that this was her only position in the Southwest Zone. Rather, the quoted records either provide evidence of her position as head of the Women's Association, without saying she did not have any other role,<sup>821</sup> or provide contradictory evidence that she held this position in conjunction with other(s)<sup>822</sup> and/or had many duties that went beyond leading that association.<sup>823</sup> For instance, the Co-Investigating Judges relied on evidence from witness PECH Chim in finding that IM Chaem only had this one role, while disregarding the same witness's statement that she was not only in charge of women's affairs, but was also Deputy Chairwoman of Angkor Chey District and reportedly on the sector committee.<sup>824</sup> The Co-Investigating Judges also failed to note that, on 22 March 1976, IM Chaem also became one of 250 Members of the People's Representative Assembly,<sup>825</sup> which is a relevant factor in assessing her level of influence. Overall, she had broad competencies and authority over many "branches" under the Sector.<sup>826</sup>

303. The Undersigned Judges further note the lack of findings in the Closing Order (Reasons) as to the level of authority IM Chaem enjoyed as head of the Women's Association in Sector 13.<sup>827</sup> While some evidence on the Case File suggests this may not have been a

<sup>820</sup> Closing Order (Reasons), paras 148, 150.

<sup>821</sup> See, e.g., Case 004/1, Written Record of Interview of TOEB Phy, 14 September 2015, D219/521 at ERN (EN) 01167997 (A63); Case 004/1, Written Record of Interview of BUN Thoeun, 26 August 2014, D119/149, at ERN (EN) 01031913 (A32); Case 004/1, Written Record of Interview of BUN Thoeun, 17 August 2009, D6.1.688, at ERN (EN) 00384405.

<sup>822</sup> Case 004/1, Written Record of Interview of BUN Thoeun, 10 July 2014, D118/274, at ERN (EN) 01031975 (A28-A29); Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000667-01000668 (A18-A19), 01000671-01000672 (A40-A45); Case 004/1, Written Record of Interview of MOENG Vet, 10 February 2014, D119/83, at ERN (EN) 00982073 (A18-A19); Case 004/1, Written Record of Interview of MOENG Vet, 11 February 2014, D119/84, at ERN (EN) 00982703-00982704 (A20), 00982707 (A33).

<sup>823</sup> See, e.g., Case 004/1, Written Record of Interview of BUN Thoeun, 17 August 2009, D6.1.688, at ERN (EN) 00384406; Case 004/1, Written Record of Interview of BUN Thoeun, 10 July 2014, D118/274, at ERN (EN) 01031977 (A41-A42), 01031982 (A72); Case 004/1, Written Record of Interview of CHHOENG Choeun, 4 September 2014, D119/156, at ERN (EN) 01044843-01044844 (A15-A19); Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000671-01000672 (A40-A45), 01000677 (A85).

<sup>824</sup> See Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000671 (A40).

<sup>825</sup> Case 004/1, Transcript of Radio Broadcast from 22 March 1976, D119/84.1, at ERN (EN) 01192862. See also Case 004/1, Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111840-01111841 (A128-A139).

<sup>826</sup> Case 004/1, Written Record of Interview of SUON Mot, 16 October 2014, D219/37, at ERN (EN) 01053616 (A25).

<sup>827</sup> Closing Order (Reasons), para. 148.



powerful role,<sup>828</sup> most witnesses reported that the Sector Women's Association was a major organisation and that IM Chaem was in charge of thousands of women,<sup>829</sup> whom she assigned to positions at all levels of the administrative structure.<sup>830</sup> Closer scrutiny of the evidence actually reveals that the sector's Women's Association would likely have been part of the Sector Committee,<sup>831</sup> and that IM Chaem was present at all sector-level meetings<sup>832</sup> and reported directly to the secretary of Sector 13.<sup>833</sup>

304. In light of the above, the Undersigned Judges consider that there is no reasonable justification for the Co-Investigating Judges to treat evidence that IM Chaem was chief of the Sector 13 Women's Association as excluding or outweighing evidence that she held other positions in the Southwest Zone. Indeed, the evidence is more indicative of her holding multiple positions of authority in Sector 13.

d. Functions as Koh Andet District Secretary

305. The Undersigned Judges consider that the Co-Investigating Judges erred in their interpretation of the available evidence when finding that IM Chaem was not the Koh Andet District Secretary.<sup>834</sup> The evidence on the Case File, when reasonably assessed, is sufficiently serious and corroborative to establish that she held this position.

306. At the core of Grounds 5 and 6 of the Appeal is the contention that the Co-Investigating Judges failed to properly assess or fully consider the evidence on the Case File. In this regard,

<sup>828</sup> Case 004/1, Written Record of Interview of BUN Thoeun, 10 July 2014, D118/274, at ERN (EN) 01031980 (A56-A57).

<sup>829</sup> Case 004/1, Written Record of Interview of TOEB Phy, 14 September 2015, D219/521, at ERN (EN) 01167996 (A53); Case 004/1, Written Record of Interview of MOENG Vet, 11 February 2014, D119/84, at ERN (EN) 00982706 (A30); Case 004/1, Written Record of Interview of KHOEM Boeurn, 21 May 2014, D118/242, at ERN (EN) 01057694 (A109).

<sup>830</sup> Case 004/1, Written Record of Interview of MOENG Vet, 11 February 2014, D119/84, at ERN (EN) 00982706 (A29).

<sup>831</sup> See, e.g., Case 004/1, Written Record of Interview of MOENG Vet, 10 February 2014, D119/83, at ERN (EN) 00982073 (A19); Case 004/1, Written Record of Interview of MOENG Vet, 11 February 2014, D119/84, at ERN (EN) 00982706 (A29-A31); Case 004/1, Written Record of Interview of MOENG Vet, 1 September 2015, D219/488, at ERN (EN) 01170586-01170587 (A36); Case 004/1, Written Record of Interview of KHOEM Boeurn, 21 May 2014, D118/242, at ERN (EN) 01057688-01057689 (A74-A79), 01057694 (A105-A109).

<sup>832</sup> Case 004/1, Written Record of Interview of BUN Thoeun, 10 July 2014, D118/274, at ERN (EN) 01031982 (A72).

<sup>833</sup> Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000682 (A124).

<sup>834</sup> Closing Order (Reasons), paras 143-146, 149-150.



the Undersigned Judges recall the presumption that the Co-Investigating Judges have evaluated all the evidence and need not mention every piece of evidence on the Case File, as long as there is no indication that they completely disregarded any particular piece of evidence. This presumption may be rebutted when evidence which is clearly relevant to the findings is not addressed by their reasoning.<sup>835</sup> Regarding the issue at stake, the Co-Investigating Judges impermissibly disregarded IM Chaem's statements<sup>836</sup> and other clearly relevant corroborative evidence, as detailed hereafter.

307. At the outset, the Undersigned Judges note that IM Chaem explained that she was "continually promoted to a leading level" in her career and "chosen to be a leader".<sup>837</sup> From 1972, she was in charge of the women's units for the whole of Takeo Province.<sup>838</sup> She was then assigned to take charge of organising people in the districts of Angkor Chey and Koh Andet.<sup>839</sup> In 1974, *Ta Mok* sent her to Angkor Chey and she was appointed to work at the District Office,<sup>840</sup> where she was the only one in charge<sup>841</sup> of organising and supervising people.<sup>842</sup> At least two witnesses corroborate IM Chaem having a leadership role in Angkor Chey.<sup>843</sup> She organised the people and focused on the economy,<sup>844</sup> especially agricultural production,<sup>845</sup> and was successful in reaching the production targets set by POL Pot.<sup>846</sup> In 1976,

<sup>835</sup> ICTR, *Prosecutor v. Zigiranyirazo*, ICTR-01-73-A, Judgement, Appeals Chamber, 16 November 2009 ("*Zigiranyirazo* Appeal Judgement"), para. 45; ICTY, *Prosecutor v. Perišić*, IT-04-81-A, Judgement, Appeals Chamber, 28 February 2013 ("*Perišić* Appeal Judgement"), para. 92.

<sup>836</sup> See *supra* paras 49-59, 293-295.

<sup>837</sup> Case 004/1, Smiling Toad Productions Interview of IM Chaem, 26 April 2007, D1.3.12.1, at ERN (EN) 00217516, 00217525.

<sup>838</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951839; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951794. See also Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000672 (A45).

<sup>839</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951795; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951841; Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089777.

<sup>840</sup> Case 004/1, Smiling Toad Productions Interview of IM Chaem, 26 April 2007, D1.3.12.1, at ERN (EN) 00217518; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951842.

<sup>841</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951842.

<sup>842</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951795; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951842.

<sup>843</sup> See Case 004/1, Written Record of Interview of UL Hoeun, 4 March 2014, D118/208, at ERN (EN) 00981818 (A60-A64); Case 004/1, Written Record of Interview of UL Hoeun, 19 March 2014, D118/209, at ERN (EN) 00983583 (A128-A129); Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000667-01000668 (A18), 01000671 (A40).

<sup>844</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951845.

<sup>845</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951842.

<sup>846</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951841-00951843.



she was thus deployed to Koh Andet by *Ta Mok* and POL Pot due to her good results.<sup>847</sup>

308. After initially denying having been District Secretary in Koh Andet,<sup>848</sup> IM Chaem herself admitted to having been appointed leader of the district when Sieng, the previous Secretary, was transferred to Kiri Vong District due to frequent conflicts among the Committee.<sup>849</sup> She specified that her deputy was *Ta San*, *Ta Mok*'s brother-in-law, while the Committee member was *Ta Chan*.<sup>850</sup> As Secretary of Koh Andet, IM Chaem met with and received instructions from *Ta Mok*,<sup>851</sup> organised people and work,<sup>852</sup> and held large meetings.<sup>853</sup> IM Chaem further said she stayed in Koh Andet for a year before *Ta Mok* transferred her to Takeo town,<sup>854</sup> the headquarters of Sector 13.<sup>855</sup> In Takeo she continued to act as Koh Andet District Secretary.<sup>856</sup>

309. The evidence on the Case File corroborates IM Chaem's admissions regarding her leadership role in Koh Andet District. NEANG Ouch *alias* San acknowledged that IM Chaem "came to work as the District Chairperson," before backtracking and stating that he did not know whether she held this position.<sup>857</sup> KAO Chheng thought IM Chaem worked at the District 108 (*i.e.* Koh Andet District) level.<sup>858</sup> SOK Rum, whose evidence was not considered by the Co-Investigating Judges with regard to IM Chaem's functions, but who herself worked in Koh Andet District, stated that IM Chaem "was District Committee".<sup>859</sup> She recalled seeing her in 1976 holding a meeting in Koh Andet District, which was attended by 1,500 people, both

<sup>847</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951844-00951848; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951796; Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a, at ERN (EN) 00089783-00089784.

<sup>848</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951795.

<sup>849</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951845-00951846.

<sup>850</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951846-00951848.

<sup>851</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951847.

<sup>852</sup> See Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951795; Case 004/1, Youth for Peace Interview of IM Chaem, 2011, D219/264.1, at ERN (EN) 01117945-01117946.

<sup>853</sup> See Case 004/1, Written Record of Interview of SOK Rum, 19 March 2014, D119/108, at ERN (EN) 00986255 (A47-A48).

<sup>854</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951846-00951849.

<sup>855</sup> Case 004/1, Written Record of Interview of MOENG Vet, 11 February 2014, D119/84, at ERN (EN) 00982703 (A18); Case 004/1, Written Record of Interview of KHOEM Boeurn, 21 May 2014, D118/242, at ERN (EN) 01057687 (A64).

<sup>856</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951848-00951849.

<sup>857</sup> Case 004/1, Written Record of Interview of NEANG Ouch, 28 January 2014, D119/82, at ERN (EN) 00981147-00981148 (A64-A65).

<sup>858</sup> Case 004/1, Office of the Co-Prosecutors' Interview of KAO Cheng, 14 August 2008, D1.3.11.19, at ERN (EN) 00219264; Case 004/1, Written Record of Interview of KAO Chheng, 28 February 2013, D119/16, at ERN (EN) 00919151 (A26).

<sup>859</sup> Case 004/1, Written Record of Interview of SOK Rum, 19 March 2014, D119/108, at ERN (EN) 00986268 (A105).



men and women.<sup>860</sup> RIEL Son, a medic who was responsible for economics at a workshop in a nearby district,<sup>861</sup> and who claimed he knew IM Chaem well, also stated that she was on the Commune Committee and later on appointed to the District Committee,<sup>862</sup> and that she was “much more powerful than *Yeay Boeun*”,<sup>863</sup> herself on the District 105 and later District 106 Committees.<sup>864</sup> The Undersigned Judges find this statement corroborative of IM Chaem’s statements wherein she admitted to having first been in charge of the villages of Cheang Torng Commune,<sup>865</sup> before moving up to the district level.<sup>866</sup>

310. IM Chaem’s statements regarding the composition of the Koh Andet District Committee are also generally corroborated by other evidence on the Case File. Several witnesses confirmed that Sieng was Koh Andet District Secretary at one point,<sup>867</sup> but that over time there were many changes in Koh Andet District.<sup>868</sup> Witnesses also reported that NEANG Ouch *alias* San was on the Koh Andet Committee,<sup>869</sup> although he only admitted to

<sup>860</sup> Case 004/1, Written Record of Interview of SOK Rum, 19 March 2014, D119/108, at ERN (EN) 00986255-00986256 (A47-A49).

<sup>861</sup> Case 004/1, Written Record of Interview of RIEL Son, 18 February 2014, D118/181, at ERN (EN) 00982636 (A8-A13).

<sup>862</sup> Case 004/1, Written Record of Interview of RIEL Son, 18 February 2014, D118/181, at ERN (EN) 00982662 (A224).

<sup>863</sup> Case 004/1, Written Record of Interview of RIEL Son, 18 February 2014, D118/181, at ERN (EN) 00982662 (A227-A228).

<sup>864</sup> Case 004/1, Written Record of Interview of RIEL Son, 18 February 2014, D118/181, at ERN (EN) 00982657 (A180).

<sup>865</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951838; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951793-00951794; Case 004/1, Smiling Toad Productions Interview of IM Chaem, 26 April 2007, D1.3.12.1, at ERN (EN) 00217515; Case 004/1, Transcript of an Interview with IM Chaem, undated, D6.1.75, at ERN (EN) 01040635.

<sup>866</sup> Case 004/1, Smiling Toad Productions Interview of IM Chaem, 26 April 2007, D1.3.12.1, at ERN (EN) 00217518; Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951841; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951795.

<sup>867</sup> *See, e.g.*, Case 004/1, Written Record of Interview of PECH Chim, 26 August 2009, D6.1.651, at ERN (EN) 00379303; Case 004/1, Written Record of Interview of MOENG Vet, 11 February 2014, D119/84, at ERN (EN) 00982704 (A21); Case 004/1, Written Record of Interview of NEANG Ouch, 29 January 2014, D118/172, at ERN (EN) 00980868 (A6); Case 004/1, Written Record of Interview of NEANG Ouch, 28 January 2014, D119/82, at ERN (EN) 00981139 (A17), 00981141 (A27).

<sup>868</sup> Case 004/1, Written Record of Interview of KHOEM Boeurn, 21 May 2014, D118/242, at ERN (EN) 01057689 (A81).

<sup>869</sup> Case 004/1, Written Record of Interview of KAO Chheng, 28 February 2013, D119/16, at ERN (EN) 00919149 (A6); Case 004/1, Written Record of Interview of PECH Chim, 26 August 2009, D6.1.651, at ERN (EN) 00379303; Case 004/1, Written Record of Interview of UL Houen, 13 October 2014, D219/34, at ERN (EN) 01053573 (A18); Case 004/1, Written Record of Interview of BAV Nem, 25 September 2013, D119/63, at ERN (EN) 00966768 (A4); Case 004/1, Written Record of Interview of KHOEM Boeurn, 21 May 2014, D118/242, at ERN (EN) 01057682 (A30).



being “an assistant in Koh Andet district” from 1975 to 1977.<sup>870</sup>

311. By contrast, the Co-Investigating Judges’ conclusion that IM Chaem was not Koh Andet District Secretary relied mainly on the evidence of witnesses<sup>871</sup> who appear to lack information. In particular, BUN Thoeun explained that he never went to Koh Andet District and thus gave no information as to IM Chaem’s role there.<sup>872</sup> UL Hoeun, who asserted that IM Chaem was the Secretary of the nearby District 106 (*i.e.* Angkor Chey District),<sup>873</sup> was “not sure” whether she was appointed to the Koh Andet District Committee.<sup>874</sup> PECH Chim said he knew that IM Chaem had been Deputy Chairwoman of Angkor Chey District<sup>875</sup> and that Sieng had been Secretary of Koh Andet District,<sup>876</sup> but it is unclear whether he had knowledge of IM Chaem’s functions on the latter District Committee or of its composition after Sieng was removed in 1976.<sup>877</sup>

312. In light of the foregoing, the Undersigned Judges find that the evidence on the Case File provides sufficient corroboration of IM Chaem’s admissions regarding her position as Koh Andet District Secretary, and that there are reasonable grounds to believe, on a balance of probabilities, that she held this position.

e. Functions as Sector 13 Committee Member

313. The Undersigned Judges also consider that the Co-Investigating Judges erred in finding that there is not sufficient evidence to support the conclusion that IM Chaem was a member of the Sector 13 Committee.<sup>878</sup> The evidence on the Case File, when reasonably assessed, is

<sup>870</sup> Case 004/1, Written Record of Interview of NEANG Ouch, 28 January 2014, D119/82, at ERN (EN) 00981139-00981140 (A17-A18, A20), 00981151 (A84); Case 004/1, Written Record of Interview of NEANG Ouch, 29 January 2014, D118/172, at ERN (EN) 00980867 (A3-A4).

<sup>871</sup> See Closing Order (Reasons), paras 146, 149.

<sup>872</sup> Case 004/1, Written Record of Interview of BUN Thoeun, 26 August 2014, D119/149, at ERN (EN) 01031912 (A29-A31).

<sup>873</sup> See Case 004/1, Written Record of Interview of UL Hoeun, 4 March 2014, D118/208, at ERN (EN) 00981818 (A60-A64); Case 004/1, Written Record of Interview of UL Hoeun, 19 March 2014, D118/209, at ERN (EN) 00983583 (A128-A130).

<sup>874</sup> Case 004/1, Written Record of Interview of UL Houen, 13 October 2014, D219/34, at ERN (EN) 01053572 (A13).

<sup>875</sup> Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000671 (A40).

<sup>876</sup> Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000671 (A39).

<sup>877</sup> Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000671-01000672 (A43).

<sup>878</sup> Closing Order (Reasons), paras 143-144, 147-148, 150.



sufficiently serious and corroborative to establish that she held this position, and this conclusion is not outweighed by evidence of her role leading the Women's Association.<sup>879</sup>

314. First, the Undersigned Judges observe that IM Chaem herself admitted to having replaced “[her] chairman”, Uncle Saom, and to having been promoted as a member of Sector 13 for a short time, around one year, before being transferred by *Ta Mok* to Battambang.<sup>880</sup> The Undersigned Judges find IM Chaem's admissions regarding her position(s) in the Southwest Zone highly relevant, as her other statements regarding her role and relationships on which the Co-Investigating Judges did rely elsewhere in the Closing Order (Reasons).<sup>881</sup>

315. Second, the Undersigned Judges find IM Chaem's admissions largely corroborated by evidence on the Case File. The Co-Investigating Judges acknowledged that three witnesses stated that IM Chaem was a member of the Sector 13 Committee.<sup>882</sup> CHEAM Chreav confirmed that “everyone knew” IM Chaem had a position in the “Takeo Provincial Committee”, that she had him call people in the villages and commune to a meeting at a mobile worksite,<sup>883</sup> and that that she came once in a while to examine his production unit.<sup>884</sup> SUON Mot also knew that IM Chaem was a member of the Sector Committee in Takeo Province and stated that she came to where he lived to chair meetings and work.<sup>885</sup> Both witnesses had interactions with IM Chaem during the relevant period and had personal knowledge of her functions.<sup>886</sup> ON Sopheap further described a photo of IM Chaem that she had seen in a magazine in 1975 or 1976, with the subtitle, “IM [Chaem], Sector 13 Committee”.<sup>887</sup> While the Undersigned Judges concur that these statements were made “with different degrees of certainty and specificity”,<sup>888</sup> they consider them relevant and collectively

<sup>879</sup> See *supra* paras 301-304.

<sup>880</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951849.

<sup>881</sup> Closing Order (Reasons), paras 148, 155 referring to Case 004/1, DC-Cam Interview of IM Chaem, 4 March 2007, D123/1/5.1a; Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b.

<sup>882</sup> Closing Order (Reasons), para. 148.

<sup>883</sup> Case 004/1, Written Record of Interview of CHEAM Chreav, 26 February 2013, D119/13, at ERN (EN) 00900310 (A6).

<sup>884</sup> Case 004/1, Written Record of Interview of CHEAM Chreav, 26 February 2013, D119/13, at ERN (EN) 00900311 (A17).

<sup>885</sup> Case 004/1, Written Record of Interview of SUON Mot, 16 October 2014, D219/37 at ERN (EN) 01053613-01053615 (A11-A22).

<sup>886</sup> Case 004/1, Written Record of Interview of CHEAM Chreav, 26 February 2013, D119/13, at ERN (EN) 00900310 (A6), 00900311 (A17); Case 004, Written Record of Interview of SUON Mot, 16 October 2014, D219/37, at ERN (EN) 01053613-01053615 (A11-A22).

<sup>887</sup> Case 004/1, Written Record of Interview of ON Sopheap, 25 June 2013, D118/78, at ERN (EN) 00976636 (A8-A9).

<sup>888</sup> Closing Order (Reasons), para. 148.





corroborative of IM Chaem's own admission that she was on the Sector 13 Committee. By contrast, the Undersigned Judges observe that the Co-Investigating Judges cited no evidence supporting their finding that IM Chaem was not on the Sector 13 Committee.

316. The Undersigned Judges also observe that a number of witnesses on whom the Co-Investigating Judges relied to conclude that IM Chaem was head of the Women's Association,<sup>889</sup> provided evidence that the sector's Women's Association would have been part of the Sector Committee,<sup>890</sup> that IM Chaem was indeed on the Sector 13 Committee,<sup>891</sup> that she was present at all sector-level meetings,<sup>892</sup> or at least that her role and responsibilities at the sector level went beyond heading the Women's Association.<sup>893</sup> In particular, MOENG Vet, as a messenger in Sector 13, was well placed to say that IM Chaem was a member of the Sector Standing Committee,<sup>894</sup> and he personally saw a letter from *Ta Saom* addressed to "*Comrade [Chaem], Sector 13 Standing Committee*".<sup>895</sup> The Undersigned Judges consider this evidence as specific and compelling as that evincing IM Chaem's position as head of the Women's Association.

317. In addition, the Undersigned Judges observe that the Closing Order (Reasons) failed to mention other relevant evidence, which was clearly pertinent and contradictory to the

<sup>889</sup> See *supra*, paras 301-304.

<sup>890</sup> See, e.g., Case 004/1, Written Record of Interview of MOENG Vet, 10 February 2014, D119/83, at ERN (EN) 00982073 (A19); Case 004/1, Written Record of Interview of MOENG Vet, 11 February 2014, D119/84, at ERN (EN) 00982706 (A29-A31); Case 004/1, Written Record of Interview of MOENG Vet, 1 September 2015, D219/488, at ERN (EN) 01170586-01170587 (A36); Case 004/1, Written Record of Interview of KHOEM Boeurn, 21 May 2014, D118/242, at ERN (EN) 01057688-01057689 (A74-A79), 01057694 (A105-A109).

<sup>891</sup> See, e.g., Case 004/1, Written Record of Interview of MOENG Vet, 10 February 2014, D119/83, at ERN (EN) 00982073 (A18-A19); Case 004/1, Written Record of Interview of MOENG Vet, 11 February 2014, D119/84, at ERN (EN) 00982703-00982704 (A19-A20), 00982707 (A33); Case 004/1, Written Record of Interview of MOENG Vet, 1 September 2015, D219/488, at ERN (EN) 01170586-01170587 (A36), 01170594 (A119); Case 004/1, DC-Cam Interview of MOENG Vet, 13 August 2013, D119/84.2, at ERN (EN) 00992985; Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01031975 (A40), 01031972 (A45).

<sup>892</sup> See, e.g., Case 004/1, Written Record of Interview of BUN Thoeun, 10 July 2014, D118/274, at ERN (EN) 01031982 (A72).

<sup>893</sup> Case 004/1, Written Record of Interview of BUN Thoeun, 17 August 2009, D6.1.688, at ERN (EN) 00384406; Case 004/1, Written Record of Interview of BUN Thoeun, 10 July 2014, D118/274, at ERN (EN) 01031977 (A41-A42), 01031979 (A55), 01031982 (A72); Case 004/1, Written Record of Interview of CHHOENG Choeun, 4 September 2014, D119/156, at ERN (EN) 01044843-01044844 (A15-A19); Case 004/1, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000671-01000672 (A40-A45), 01000677 (A85).

<sup>894</sup> Case 004/1, Written Record of Interview of MOENG Vet, 10 February 2014, D119/83, at ERN (EN) 00982073 (A18-A19). See also Case 004/1, Written Record of Interview of MOENG Vet, 1 September 2015, D219/488, at ERN (EN) 01170586-01170587 (A36).

<sup>895</sup> Case 004/1, Written Record of Interview of MOENG Vet, 11 February 2014, D119/84, at ERN (EN) 00982703-00982704 (A19-A20).



conclusion that IM Chaem was not on the Sector 13 Committee. This evidence includes that of KHOEM Vai, who was a messenger in Sector 13 before he travelled to the Northwest Zone with IM Chaem,<sup>896</sup> and who was thus in a good position to assert that IM Chaem was on the Sector 13 Committee.<sup>897</sup> MOUL Eng also affirmed that IM Chaem was a senior-ranking cadre<sup>898</sup> and held two positions, namely chairperson of the Women Leaders Committee and Secretary of Sector 13 along with *Ta Saom*,<sup>899</sup> which was reportedly common knowledge amongst the military personnel who knew her.<sup>900</sup> UL Houen<sup>901</sup> and SOK Rum<sup>902</sup> further corroborated that IM Chaem was Sector 13 Committee, and ranked at least third. The failure to analyse this evidence in the Closing Order (Reasons) tends to rebut the presumption that the Co-Investigating Judges duly evaluated all the evidence on the Case File.<sup>903</sup>

318. Finally, the Undersigned Judges recall the Pre-Trial Chamber's holding that civil party applications, which are filed with the aim to contribute to the judicial investigations, warrant thoughtful consideration and should not be afforded, as a category, "little or no probative value".<sup>904</sup> Scrutiny of the Case File shows that several civil party applicants identified IM Chaem as leading Sector 13 as secretary or a Committee member, and that it is in this capacity that they held her responsible for crimes.<sup>905</sup> The Undersigned Judges consider these together to be relevant in assessing whether IM Chaem's statements were corroborated.

319. Accordingly, the Undersigned Judges consider the evidence sufficiently serious and

<sup>896</sup> Case 004/1, Written Record of Interview of KHOEM Vai, 21 December 2015, D219/636, at ERN (EN) 01207675 (A62).

<sup>897</sup> Case 004/1, Written Record of Interview of KHOEM Vai, 21 December 2015, D219/636, at ERN (EN) 01207672 (A38).

<sup>898</sup> Case 004/1, Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111829-01111830 (A24-A31), 01111839-01111842 (A127-A148).

<sup>899</sup> Case 004/1, Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111841 (A143).

<sup>900</sup> Case 004/1, Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111840 (A130), 01111841 (A140).

<sup>901</sup> Case 004/1, Written Record of Interview of UL Houen, 13 October 2014, D219/34, at ERN (EN) 0105371-0105372 (A10-A11), 01053574 (A22).

<sup>902</sup> Case 004/1, Written Record of Interview of SOK Rum, 19 March 2014, D119/108, at ERN (EN) 00986255 (A45).

<sup>903</sup> See *Zigiranyirazo* Appeal Judgement, para. 45; *Perišić* Appeal Judgement, para. 92.

<sup>904</sup> Closing Order (Reasons), para. 147. See also *supra* paras 49-56.

<sup>905</sup> See, e.g., Case 004/1, Civil Party Application of TEM Chrom, 1 October 2012, D5/1133, at ERN (EN) 01144435; Case 004/1, Civil Party Application of KONG Samy, 11 August 2013, D5/1303, at ERN (EN) 01191036; Case 004/1, Civil Party Application of PHLEU Ly, 13 August 2013, D5/1615, at ERN (EN) 01168228; Case 004/1, Civil Party Application of THORNG Phoun, 4 August 2013, D5/1304, at ERN (EN) 01144492; Case 004/1, Civil Party Application of YAY Kim Leang, 5 August 2013, D5/1528, at ERN (EN) 01133186.



corroborative, when properly assessed on a balance of probabilities, to demonstrate that IM Chaem was a member of the Sector 13 Committee.

### 3. Conclusion

320. The Undersigned Judges find that the Co-Investigating Judges erred in finding that there is insufficient evidence that IM Chaem held the positions of Koh Andet District Secretary and Sector 13 Committee member. These errors have implications regarding her responsibility for the crime sites in the Southwest Zone. Whether these errors were fundamentally determinative of the assessment of the ECCC's personal jurisdiction is addressed in the following concluding section.

#### F. Conclusion on Personal Jurisdiction

321. At the outset, the Undersigned Judges recall that, for the purpose of determining the ECCC's personal jurisdiction, the identification of those who were amongst the "most responsible" entails the assessment of both the gravity of the crimes alleged or charged and the level of responsibility of the suspect.<sup>906</sup> In the Undersigned Judges' view, this assessment must be done from both a quantitative and a qualitative perspective. There is no exhaustive list of factors to be considered in undertaking this review; nor is there a mathematical threshold for casualties, or a filtering standard in terms of positions in the hierarchy. The determination of personal jurisdiction rather requires a case-by-case assessment, taking into account the general context and the personal circumstances of the suspect.

322. The Undersigned Judges will now address, pursuant to the applicable standard of review on appeal, whether the errors of law and fact identified in the Closing Order (Reasons) were fundamentally determinative of the Co-Investigating Judges' assessment of the gravity of the alleged or charged crimes and of IM Chaem's role and responsibility, and, ultimately, of

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<sup>906</sup> Case 001 Trial Judgement (E188), para. 22. See also SCSL, *Prosecutor v. Fofana*, SCSL-04-14-PT-026, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, Trial Chamber, 3 March 2004, para. 38; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-169, Judgement on Prosecutor's Appeal Against the Decision of the Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrant of Arrest, Article 58", Appeals Chamber, 13 July 2006, para. 76; ICTY, *Prosecutor v. Lukić et al.*, IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11bis with Confidential Annex A and Annex B, ICTY Referral Bench, 5 April 2007, para. 26.



their overall determination on the ECCC's personal jurisdiction.

### 1. Summary of Findings

323. The Undersigned Judges recall their general conclusion that the Co-Investigating Judges failed to fully investigate and make proper legal determinations on all allegations of crimes committed in Sector 13 of the Southwest Zone and Sector 5 of the Northwest Zone, despite being duly seised by the Introductory and Supplementary Submissions. The Undersigned Judges further reviewed the evidence gathered during the investigation and found that it is sufficient to establish, to the requisite standard at the pre-trial stage, the commission of multiple alleged and charged crimes, as well as IM Chaem's responsibility therefor.

324. With regard to IM Chaem's role and conduct in the Southwest Zone, the Undersigned Judges found sufficiently established, in relation to Grounds 5 and 6 of the Appeal, that she held the positions of Koh Andet District Secretary and Sector 13 Committee member from 1976 to 1977.<sup>907</sup> The Undersigned Judges also found, in relation to Ground 2 of the Appeal, that IM Chaem could be held responsible for the crimes against humanity of imprisonment and other inhumane acts by enforced disappearances committed against Khmer Krom at Wat Ang Srei Mealy and Prey Sokhon.<sup>908</sup> The evidence could have further provided the Co-Prosecutors with reason to believe that crimes were committed against other people at these sites.<sup>909</sup>

325. With regard to IM Chaem's role and conduct in the Northwest Zone as Preah Net Preah District Secretary and as a Sector 5 Committee member from 1977 to 1979, the Undersigned Judges found sufficiently established, in relation to Ground 2 of the Appeal, that she could be held responsible as a member of a joint criminal enterprise for crimes against humanity resulting from the purge of the Northwest Zone. These crimes, committed not only against the cadres, but also against the general population in at least in all of Sector 5 of the Northwest Zone, included widespread killings, unlawful arrests and detentions, enforced disappearances and other inhumane acts, as well as persecutions against the Northwest Zone cadres,<sup>910</sup> the

<sup>907</sup> See *supra* paras 305-320.

<sup>908</sup> See *supra* para. 211.

<sup>909</sup> See *supra* para. 210.

<sup>910</sup> See *supra* paras 132-142, 171-172.



Vietnamese<sup>911</sup> and former Khmer Republic officials.<sup>912</sup>

326. In relation to Grounds 2, 3 and 4 of the Appeal, the Undersigned Judges further considered that, had the Co-Investigating Judges applied the correct definition of crimes and the requisite standard of evidence, they would have found that IM Chaem could be held responsible for several other crimes committed in Sector 5 of the Northwest Zone. These crimes included the crimes against humanity of torture,<sup>913</sup> extermination<sup>914</sup> and other inhumane acts by enforced disappearances at Phnom Trayoung Security Centre;<sup>915</sup> other inhumane acts by enforced disappearances at Spean Sreng Canal Worksite;<sup>916</sup> murder, extermination, enslavement and other inhumane acts at Trapeang Thma Dam Worksite;<sup>917</sup> imprisonment, murder, extermination and other inhumane acts at Wat Preah Net Preah and related sites;<sup>918</sup> imprisonment, murder and extermination at Phum Chakrey Security Centre and Prey Taruth Execution Site;<sup>919</sup> and torture,<sup>920</sup> murder, extermination, imprisonment and other inhumane acts at Wat Chamkar Khnol Security Centre and Execution Site.<sup>921</sup> The evidence could have also provided the Co-Prosecutors with reason to believe that crimes of forced marriage were committed in Sectors 5 and 13.<sup>922</sup>

## 2. Assessment of the Gravity of Alleged or Charged Crimes

327. The Undersigned Judges recall that the assessment of the gravity of alleged or charged crimes relies on factors such as, *inter alia*, the number of victims, the geographic and temporal scope and manner in which they were allegedly committed, as well as the number of separate incidents.<sup>923</sup> The nature and scale of the alleged or charged crimes, as well as their impact on

<sup>911</sup> See *supra* paras 132-142, 147-160.

<sup>912</sup> See *supra* paras 132-142, 173-179.

<sup>913</sup> See *supra* paras 194, 201.

<sup>914</sup> See *supra* para. 263.

<sup>915</sup> See *supra* para. 281.

<sup>916</sup> See *supra* para. 282.

<sup>917</sup> See *supra* para. 225.

<sup>918</sup> See *supra* para. 232.

<sup>919</sup> See *supra* para. 241.

<sup>920</sup> See *supra* para. 201.

<sup>921</sup> See *supra* para. 248.

<sup>922</sup> See *supra* para. 146.

<sup>923</sup> Case 001 Trial Judgement (E188), para. 22.



the victims, are also indicators of the gravity of the given conduct.<sup>924</sup>

328. In their determination that IM Chaem was not among those most responsible, the Co-Investigating Judges took into account the nature and number of the allegations, as well as the gravity of their effects and the extent to which they were borne out by the evidence on the Case File.<sup>925</sup> They relied on the “conservative minimum threshold” of 2,000 combined victims of murder for the two crime sites for which IM Chaem was charged, noting the impossibility of quantifying victims of other crimes and the “even more blurred” figures at uncharged crime sites.<sup>926</sup> They moreover noted that IM Chaem’s alleged contribution to the joint criminal enterprise was limited to one district,<sup>927</sup> and that the multiple possible legal characterisations of the same facts did not significantly enhance the gravity of her actions.<sup>928</sup>

329. The Undersigned Judges consider that the scale, scope and impact of the crimes for which IM Chaem could be held responsible, when her criminal conduct is considered in full, are significantly greater than what was taken into account in the Co-Investigating Judges’ assessment of gravity. Rather than being limited to two crime sites and “mainly” one district, and to the period after mid-1977,<sup>929</sup> IM Chaem’s responsibility extends to crimes committed at multiple locations throughout Sector 5 of the Northwest Zone as well as in Sector 13 of the Southwest Zone, during the whole period of the Democratic Kampuchea regime. In particular, the crimes against humanity committed in the context of the purge of the Northwest Zone,<sup>930</sup> a “major coordination task”,<sup>931</sup> resulted in widespread and systematic attacks against the civilian population across at least all of Sector 5 of the Northwest Zone. The nature and impact of this campaign and the multitude of crimes resulting therefrom, including the crimes against humanity of extermination, murder, persecution, torture, enslavement, imprisonment and other inhumane acts, at multiple locations, are strong indicators of the gravity of IM Chaem’s actions.

330. As assessed in detail in relation to Ground 2 of the Appeal, the evidence further sufficiently supports, under the requisite probability standard, the conclusion that not less than

<sup>924</sup> ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-34, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, Pre-Trial Chamber I, 16 July 2015, para. 21.

<sup>925</sup> Closing Order (Reasons), para. 317.

<sup>926</sup> Closing Order (Reasons), paras 320-322.

<sup>927</sup> Closing Order (Reasons), para. 313.

<sup>928</sup> Closing Order (Reasons), para. 323.

<sup>929</sup> Closing Order (Reasons), paras 306-311, 313.

<sup>930</sup> Closing Order (Reasons), paras 151-157, 316. *See also supra* paras 132-142.

<sup>931</sup> Closing Order (Reasons), para. 316.



tens of thousand of people were victims of crimes at charged and uncharged crime sites, for which IM Chaem could be held responsible. In this regard, the Undersigned Judges note that the death toll is not the only indicator of victim numbers or the impact of criminal conduct. For instance, there is sufficient evidence that at Trapeang Thma Dam Worksite alone, during the relevant temporal scope, at least thousands and up to tens of thousands of people were victims of forced labour and inhumane living and working conditions.<sup>932</sup> The Co-Investigating Judges' decision to rely on a conservative minimum threshold,<sup>933</sup> rather than appreciating, on a balance of probabilities, the range of victim numbers, as well as the varied conduct, scope and impact on direct and indirect victims, resulted in an incomplete assessment of the gravity of IM Chaem's actions.

331. The Undersigned Judges finally consider that the exclusion by the Co-Investigating Judges of certain legal characterisations, such as the crimes against humanity of extermination and other inhumane acts by enforced disappearances, as noted in detail in relation to Grounds 3 and 4 of the Appeal, left unnoticed the specific *mens rea* of the Charged Person and the particular injury caused by those acts, and failed to appreciate their overall impact on the victims.<sup>934</sup> Indeed, while those crimes might be based on the same underlying facts as the crime of murder, their inherent nature, scale and additional suffering caused to the victims are substantially different. The Undersigned Judges thus consider that multiple characterisations do enhance IM Chaem's overall responsibility.

### 3. Assessment of IM Chaem's Role and Responsibility

332. The Undersigned Judges recall that the level of responsibility of a suspect may be evaluated on the basis of considerations such as the level of participation in the crimes, the hierarchical rank or position, including the number of subordinates and hierarchical echelons above, and the permanence of the position.<sup>935</sup>

333. The Co-Investigating Judges determined that IM Chaem was neither a senior leader nor among the most responsible, and thus falls outside the jurisdiction of the ECCC, based on their

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<sup>932</sup> See *supra* paras 220-221, 223.

<sup>933</sup> Closing Order (Reasons), paras 320-322.

<sup>934</sup> Case 001 Appeal Judgement (F28), para. 299 referring to ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, Appeals Chamber, 5 July 2001, Partial Dissenting Opinion of Judge Shahabuddeen, para. 42.

<sup>935</sup> Case 001 Trial Judgement (E188), para. 22.



conclusion that her formal status was limited to that of a secretary in one district, amongst more than a hundred others in the country, with an unclear role and authority at the sector level.<sup>936</sup> Although her key role in the purge of the Northwest Zone, including her responsibility for the “major coordination task” of leading hundreds of families from the south to the north, “did not correspond to the average district secretary”, the Co-Investigating Judges found this was not determinative of their assessment.<sup>937</sup> They further considered that IM Chaem’s reputation as being “very cruel” did not significantly exceed the norm of “cruelty and horror” prevailing in Democratic Kampuchea, and thus did not enhance her responsibility.<sup>938</sup>

334. At the outset, the Undersigned Judges observe that the “obvious initial filtering effect” of a person’s formal position in the hierarchy, as applied by the Co-Investigating Judges,<sup>939</sup> should not automatically exclude those at lower levels who are directly implicated in the most serious atrocities.<sup>940</sup> The Undersigned Judges refer in this respect to their assessment, in relation to Grounds 2 to 6 of the Appeal, of the details of IM Chaem’s *de jure* and *de facto* leadership and participation in multiple alleged and charged crimes.

335. In particular, the Undersigned Judges consider it necessary to take into account the full extent of IM Chaem’s *de jure* positions throughout Democratic Kampuchea. As held in relation to Grounds 5 and 6, there is sufficient evidence that, in addition to her functions in the Northwest Zone, IM Chaem was also Koh Andet District Secretary and a Sector 13 Committee member prior to 1977 in the Southwest Zone, as well as chief of the Sector 13 Women’s Association. She therefore continuously held high-ranking positions in the hierarchy, in multiple geographic areas, throughout the Khmer Rouge regime’s rule.<sup>941</sup> In these roles of authority at the district and sector levels, IM Chaem would have been vital to the implementation of Democratic Kampuchea policies.<sup>942</sup> Moreover, as noted in relation to Grounds 2 to 4 of the Appeal, by virtue of these roles IM Chaem directly participated in the commission of multiple alleged and charged crimes, and gave orders regarding the commission

<sup>936</sup> Closing Order (Reasons), paras 309, 315-316.

<sup>937</sup> Closing Order (Reasons), paras 309, 316.

<sup>938</sup> Closing Order (Reasons), para. 324.

<sup>939</sup> Closing Order (Reasons), para. 39.

<sup>940</sup> Case 004/1, Annex B: Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135, 15 March 1999, D251/4.3, para. 110.

<sup>941</sup> See also Case 004/1, Smiling Toad Productions Interview of IM Chaem, 26 April 2007, D1.3.12.1, at ERN (EN) 00217516.

<sup>942</sup> Closing Order (Reasons), paras 168, 171-172.





of others.

336. The Undersigned Judges note that IM Chaem also had significant *de facto* roles and responsibilities that clearly exceeded those of the average district secretary. As detailed in relation to Ground 2 of the Appeal, a prime example of this is the key role she played in the joint criminal enterprise to purge the Northwest Zone, including by leading hundreds of families from Takeo to the Northwest Zone and by participating in the commission of the resulting widespread crimes against cadres and the general population in at least all of Sector 5.<sup>943</sup> The Undersigned Judges consider this major role in the purge of the Northwest Zone indicative of the high-level responsibilities with which IM Chaem was vested, and of her being “among the most responsible”.

337. Furthermore, the Undersigned Judges take into consideration the fact that IM Chaem, as per her own admissions, was part of the inner circle of the Khmer Rouge hierarchy. Due to her close relationship with *Ta Mok*,<sup>944</sup> she had direct access to *Angkar*’s upper level, including POL Pot,<sup>945</sup> from whom she received personal<sup>946</sup> support on a number of occasions.<sup>946</sup> Although not determinative of her being a senior leader,<sup>947</sup> this is indicative of her stature and of the unofficial powers and privileges she enjoyed going beyond those of a regular district secretary. For example, by her own admission, IM Chaem was able to resist *Ta Nhim*’s order to arrest her in the Northwest Zone, despite her opposition and disobedience to the Zone Committee’s instructions.<sup>948</sup> IM Chaem was also not afraid to confront *Ta Mok* or to report bad news, while other cadres did not dare to do so because of his reputation.<sup>949</sup> IM Chaem still describes *Ta Mok* as a saviour<sup>950</sup> and POL Pot as a person who was not cruel.<sup>951</sup>

338. The Undersigned Judges finally underline IM Chaem’s own admission that she was

<sup>943</sup> See *supra* paras 132-142. See also Closing Order (Reasons), paras 151-157, 316.

<sup>944</sup> Closing Order (Reasons), para. 155. See also Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951812.

<sup>945</sup> Case 004/1, Youth for Peace Interview of IM Chaem, 2011, D219/264.1, at ERN (EN) 01117970.

<sup>946</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951802-00951803, 00951809; Case 004/1, Smiling Toad Productions Interview of IM Chaem, 26 April 2007, D1.3.12.1, at ERN (EN) 00217524.

<sup>947</sup> See Closing Order (Reasons), para. 315.

<sup>948</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951800, 00951808-00951810. See also Case 004/1, Smiling Toad Productions Interview of IM Chaem, 26 April 2007, D1.3.12.1, at ERN (EN) 00217525.

<sup>949</sup> Case 004/1, DC-Cam Interview of IM Chaem, 20 June 2008, D123/1/5.1b, at ERN (EN) 00951812.

<sup>950</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951879.

<sup>951</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951880.



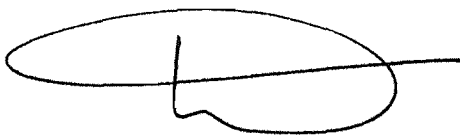
“continually promoted to a leading level” in her career and “always chosen to be a leader”.<sup>952</sup> She never denied her adhesion to the rules and practices of the Democratic Kampuchea regime,<sup>953</sup> or her struggle “for [her] nation and race”.<sup>954</sup>

#### 4. Conclusion

339. In light of the foregoing, the Undersigned Judges consider that the Co-Investigating Judges failed to take into account the full magnitude of the gravity of the crimes alleged or charged against IM Chaem, and of her full role and responsibilities during the Democratic Kampuchea regime. Having reviewed the scope of the allegations raised in the Introductory and Supplementary Submissions, as well as the extent to which they were supported by the evidence discovered during the investigation, the Undersigned Judges find IM Chaem to be amongst the most responsible and thus to fall under the ECCC’s personal jurisdiction.

340. The inability to reach a consensus in this Chamber on the ECCC’s personal jurisdiction over IM Chaem must not prevent the serious allegations against her from being addressed before a national court, since Cambodia has inherent jurisdiction over all Khmer Rouge-era cases of which the ECCC is not or cannot be seised.<sup>955</sup>

Phnom Penh, 28 June 2018



**Judge Olivier BEAUVALLET**



**Judge Kang Jin BAIK**

<sup>952</sup> Case 004/1, Smiling Toad Productions Interview of IM Chaem, 26 April 2007, D1.3.12.1, at ERN (EN) 00217516, 00217525.

<sup>953</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951879.

<sup>954</sup> Case 004/1, DC-Cam Interview of IM Chaem, 6 April 2012, D123/1/5.1c, at ERN (EN) 00951826.

<sup>955</sup> See *supra* para. 80.

