



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

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

D381/45 & D382/43

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. Case 004/07-09-2009-ECCC/OCIJ (PTC61)

THE PRE-TRIAL CHAMBER

Before:

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

Date:

17 September 2021

Original Language(s):

Khmer/English/French

Classification:

PUBLIC

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de réception):
17 / 09 / 2021
ម៉ោង (Time/Heure):
14:39
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:
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CONSIDERATIONS ON APPEALS AGAINST CLOSING ORDERS

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TABLE OF ACRONYMS

Term	Abbreviation / Acronym
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	ECCC Agreement /or/ the Agreement
Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (as amended)	ECCC Law
Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (as revised)	Internal Rules
International Covenant on Civil and Political Rights	ICCPR
Convention on the Prevention and Punishment of the Crime of Genocide	Genocide Convention
International Court of Justice	ICJ
International Criminal Court	ICC
International Criminal Tribunal for Rwanda	ICTR
International Criminal Tribunal for the Former Yugoslavia	ICTY
Special Court for Sierra Leone	SCSL
Court of Justice of the Economic Community of West African States	ECOWAS Court of Justice
Vienna Convention on the Law of Treaties	Vienna Convention
Penal Code of the Kingdom of Cambodia of 1956	1956 Penal Code
Communist Party of Kampuchea	CPK



Documentation Center of Cambodia	DC-Cam
Democratic Kampuchea	DK
Joint Criminal Enterprise	JCE



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of five Appeals against the two conflicting Closing Orders—the National Co-Investigating Judge’s Closing Order (Dismissal)¹ and the International Co-Investigating Judge’s Closing Order (Indictment).² These five Appeals are:

- (1) National Co-Prosecutor’s Appeal against the International Co-Investigating Judge’s Closing Order (Indictment) in Case 004, filed on 13 September 2019 (“National Co-Prosecutor’s Appeal”),³
- (2) YIM Tith’s Appeal of the Issuance of Two Closing Orders in Case 004, filed on 2 December 2019 (“YIM Tith’s Appeal (Two Closing Orders)”);⁴
- (3) YIM Tith’s Appeal of the International Co-Investigating Judge’s Closing Order in Case 004, filed on 4 December 2019 (“YIM Tith’s Appeal (Indictment)”);⁵
- (4) International Co-Prosecutor’s Appeal of the Order Dismissing the Case against YIM Tith (D381), filed on 5 December 2019 (“International Co-Prosecutor’s Appeal”),⁶ and
- (5) Civil Party Co-Lawyers’ Appeal against the National Co-Investigating Judge’s Closing Order in Case 004, filed on 6 December 2019 (“Civil Parties’ Appeal”).⁷

I. PROCEDURAL HISTORY

1. On 20 November 2008, the International Co-Prosecutor brought a disagreement pursuant to Internal Rule 71(2) before the Pre-Trial Chamber, reporting that the National Co-

¹ Case 004/07-09-2009-ECCC/OCIJ (“Case 004”), Order Dismissing the Case against YIM Tith, 28 June 2019, D381 (“Dismissal (D381)”).

² Case 004, Closing Order, 28 June 2019, D382 (“Indictment (D382)”).

³ Case 004, National Co-Prosecutor’s Appeal against the International Co-Investigating Judge’s Closing Order (Indictment) in Case 004, 13 September 2019, D382/4/1 (“National Co-Prosecutor’s Appeal (D382/4/1)”).

⁴ Case 004, YIM Tith’s Appeal of the Issuance of Two Closing Orders in Case 004, 2 December 2019, D381/18 & D382/21 (“YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21)”).

⁵ Case 004, YIM Tith’s Appeal of the International Co-Investigating Judge’s Closing Order in Case 004, 2 December 2019, D382/22 (filed on 4 December 2019) (“YIM Tith’s Appeal (Indictment) (D382/22)”).

⁶ Case 004, International Co-Prosecutor’s Appeal of the Order Dismissing the Case against YIM Tith (D381), 2 December 2019, D381/19 (filed on 5 December 2019) (“International Co-Prosecutor’s Appeal (D381/19)”).

⁷ Case 004, Civil Party Co-Lawyers’ Appeal against the National Co-Investigating Judge’s Closing Order in Case 004, 1 December 2019, D381/20 (filed on 6 December 2019) (“Civil Parties’ Appeal (D381/20)”).



Prosecutor disagreed with prosecuting new crimes identified in new introductory submissions.⁸ On the same day, the International Co-Prosecutor issued the Third Introductory Submission, seeking to open a judicial investigation against YIM Tith as part of Case 004, involving allegations of crimes against humanity and violations of the 1956 Penal Code.⁹

2. On 18 August 2009, unable to reach a supermajority of votes on the decision concerning the Disagreement, the Pre-Trial Chamber directed the International Co-Prosecutor to forward the New Introductory Submissions to the Co-Investigating Judges pursuant to Internal Rule 53(1).¹⁰

3. On 7 September 2009, the Acting International Co-Prosecutor filed the Third Introductory Submission, requesting the Co-Investigating Judges to initiate the judicial investigation against YIM Tith as part of Case 004.¹¹ The International Co-Prosecutor subsequently filed four Supplementary Submissions to broaden the scope of the investigation pursuant to Internal Rule 55(3).¹²

4. YIM Tith's case was subject to a series of confidential disagreements between the Co-Investigating Judges (registered on 22 February 2013, 5 April 2013, 21 October 2015 and 16 January 2017).¹³ None of these disagreements were brought before the Pre-Trial Chamber.

5. On 9 December 2015, the International Co-Investigating Judge charged YIM Tith with violations of Articles 501 and 506 (premeditated homicide) of the 1956 Penal Code, genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949.¹⁴ Neither

⁸ 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, Doc. No. 1 (forwarded by the Office of Administration to the Pre-Trial Chamber on 3 December 2008).

⁹ Case 004/20-11-2008/ECCC/OCIJ, Co-Prosecutors' Third Introductory Submission, 20 November 2008, D1 ("Third Introductory Submission (D1)").

¹⁰ 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 ("Considerations regarding the Co-Prosecutors' Disagreement (D1/1.3)"), para. 45.

¹¹ Case 004, Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

¹² Case 004, Co-Prosecutors' Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65 ("First Supplementary Submission (D65)"); Case 004, Co-Prosecutors' Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191 ("Second Supplementary Submission (D191)"); Case 004, Response to Forwarding Order and Supplementary Submission regarding Wat Ta Meak, 4 August 2015, D254/1; Case 004, Response to Forwarding Order Dated 5 November 2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015, D272/1.

¹³ See Indictment (D382), paras 3, 7, 21; Dismissal (D381), para. 13.

¹⁴ Case 004, Written Record of Initial Appearance of YIM Tith, 9 December 2015, D281 ("Written Record of Initial Appearance of YIM Tith (D281)").



YIM Tith nor his Co-Lawyers elected to make a statement during the Initial Appearance.¹⁵

6. On 4 March 2016, by his Request for Comments regarding Alleged Facts Not To Be Investigated Further, the International Co-Investigating Judge informed the parties that he was inclined to exclude certain facts from the investigation and requested the parties' views on the matter.¹⁶ On 25 August 2016, after receiving comments from the Co-Lawyers for YIM Tith ("Co-Lawyers") and the International Co-Prosecutor,¹⁷ the International Co-Investigating Judge notified the parties that certain alleged facts *prima facie* appeared to be subject to Internal Rule 66*bis* and certain other alleged facts appeared to be subject to a dismissal pursuant to Internal Rule 67.¹⁸ The International Co-Investigating Judge provisionally discontinued the investigation into these facts and informed the parties that a final decision on partial dismissal pursuant to Internal Rule 67 or application of Internal Rule 66*bis* would be taken at the conclusion of the investigation.¹⁹

7. On 20 January 2017, 17 March 2017 and 4 May 2017, the International Co-Investigating Judge issued further notices of Provisional Discontinuance and informed the parties of his intention to discontinue the investigation into additional facts that *prima facie* appeared to be subject to Internal Rule 66*bis*.²⁰

8. On 29 March 2017, the International Co-Investigating Judge, by judicial order, amended the charges against YIM Tith and added modes of liability in relation to the crimes previously charged on 9 December 2015.²¹

9. On 13 June 2017, the Co-Investigating Judges notified the parties of the conclusion of

¹⁵ Written Record of Initial Appearance of YIM Tith (D281).

¹⁶ Case 004, Request for Comments regarding Alleged Facts not to be Investigated Further, 4 March 2016, D302.

¹⁷ Case 004, YIM Tith's Submissions on Alleged Facts Not to Be Investigated Further, 8 April 2016, D302/1; Case 004, International Co-Prosecutor's Response to the International Co-Investigating Judge's Request for Comments regarding Alleged Facts Not to Be Investigated Further, 11 April 2016, D302/2.

¹⁸ Case 004, Notice of Provisional Discontinuance regarding Individual Allegations, 25 August 2016, D302/3 ("Case 004 Notice of Provisional Discontinuance (D302/3)"), paras 8-16.

¹⁹ Case 004 Notice of Provisional Discontinuance (D302/3), paras 34-36.

²⁰ Case 004, Notice of Intention to Add Modes of Liability by Way of Judicial Order and of Provisional Discontinuance, 20 January 2017, D342 ("Case 004 Notice of Intention and Provisional Discontinuance (D342)"); Case 004, Notice of Provisional Discontinuance regarding Facts Relating to Six Crime Sites, 17 March 2017, D349 ("Case 004 Notice of Provisional Discontinuance (Six Crime Sites) (D349)"); Case 004, Notification pursuant to Internal Rule 66*bis* (2), 4 May 2017, D354 ("Case 004 Internal Rule 66*bis* (2) (D354)").

²¹ Case 004, Order Amending the Charges against YIM Tith, 29 March 2017, D350 ("Order Amending the Charges (D350)"); Case 004, Notification of Amended Charges against YIM Tith, Annex 1 to Order Amending the Charges, 29 March 2017, D350.1. *See also* Case 004 Notice of Intention and Provisional Discontinuance (D342).



the judicial investigation against YIM Tith pursuant to Internal Rule 66(1).²² On the same day, the International Co-Investigating Judge reduced the scope of the investigation by excluding certain alleged facts pursuant to Internal Rule 66*bis*.²³

10. On 5 September 2017, the Co-Investigating Judges issued a Second Notice of Conclusion of the Judicial Investigation against YIM Tith.²⁴

11. On 18 September 2017, the Co-Investigating Judges informed the parties to Case 004/2 that they considered separate and opposing closing orders to be generally permitted under the applicable law.²⁵ The parties to Case 004 were notified of this decision, which was later re-classified as public.²⁶

12. On 1 March 2018, the Co-Investigating Judges forwarded the Case File to the Co-Prosecutors pursuant to Internal Rule 66(4), inviting them to file their final submissions within three months.²⁷

13. On 31 May 2018, the National Co-Prosecutor filed a final submission, requesting dismissal of all allegations against YIM Tith;²⁸ the International Co-Prosecutor in his Final Submissions of 4 June 2018, on the other hand, requested YIM Tith to be indicted and committed to trial (collectively, “Final Submissions”).²⁹ On 26 November 2018, the Co-Lawyers filed a Response to the Co-Prosecutors’ Final Submissions requesting a dismissal of the case against YIM Tith.³⁰

14. The Co-Investigating Judges registered a disagreement regarding the issuance of separate and opposing closing orders on 21 January 2019.³¹ This disagreement was not brought

²² Case 004, Notice of Conclusion of Judicial Investigation against YIM Tith, 13 June 2017, D358.

²³ Case 004, Decision to Reduce the Scope of the Judicial Investigation pursuant to Internal Rule 66 *bis*, 13 June 2017, D359. *See also* Case 004, Notice of Provisional Discontinuance regarding Individual Allegations, 25 August 2016, D302/3; Case 004 Notice of Intention and Provisional Discontinuance (D342); Case 004 Notice of Provisional Discontinuance (Six Crime Sites) (D349); Case 004 Internal Rule 66*bis* (2) (D354).

²⁴ Case 004, Second Notice of Conclusion of Judicial Investigation against YIM Tith, 5 September 2017, D368 (“Second Notice of Conclusion of Investigation (D368)”).

²⁵ Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”), Decision on AO An’s Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D355/1 (“Decision on Disclosure Concerning Disagreements (D355/1)”), paras 13-16.

²⁶ *See* Indictment (D382), para. 13.

²⁷ Case 004, Forwarding Order Pursuant to Internal Rule 66(4), 1 March 2018, D378.

²⁸ Case 004, Final Submission concerning YIM Tith pursuant to Internal Rule 66, 31 May 2018, D378/1.

²⁹ Case 004, International Co-Prosecutor’s Rule 66 Final Submission against YIM Tith, 4 June 2018, D378/2.

³⁰ Case 004, YIM Tith’s Combined Response to the National and International Co-Prosecutors’ Final Submissions, 26 November 2018, D378/5.

³¹ *See* Indictment (D382), para. 21; Dismissal (D381), para. 13.



before the Pre-Trial Chamber.

15. On 28 June 2019, the Co-Investigating Judges issued two conflicting Closing Orders. The National Co-Investigating Judge issued the Order Dismissing the Case against YIM Tith (“Dismissal”), dismissing all charges against YIM Tith on the ground that he is not subject to the ECCC’s personal jurisdiction as a “senior leader” or among those “most responsible”.³² The International Co-Investigating Judge, in contrast, issued a Closing Order (“Indictment”), indicting YIM Tith and sending him for trial on counts of genocide, crimes against humanity, war crimes and violations of the 1956 Penal Code and finding that YIM Tith falls under the ECCC’s jurisdiction as one of those “most responsible” for Khmer Rouge-era crimes.³³ The Closing Orders were filed in Khmer and English, respectively, with translations to follow.

16. On 19 July 2019, the Pre-Trial Chamber ordered the parties to file any notices of appeal against the Closing Orders in Case 004 within fourteen days after notification of the translation of both Closing Orders.³⁴ The Khmer translation of the Indictment and the English translation of the Dismissal were notified on 15 August 2019 and 5 September 2019, respectively.

17. On 23 August 2019, the National Co-Prosecutor filed a notice of appeal against the Indictment.³⁵ On 10 September 2019 and 19 September 2019, the International Co-Prosecutor and the Co-Lawyers for the Civil Parties, respectively, filed notices of appeal against the Dismissal.³⁶ On 17 September 2019, the Co-Lawyers filed a notice of appeal against both Closing Orders.³⁷

18. On 13 September 2019, the National Co-Prosecutor filed her submissions on Appeal against the Indictment in Khmer only, requesting the Pre-Trial Chamber to dismiss the case

³² Dismissal (D381).

³³ Indictment (D382) (In addition to the Indictment, the International Co-Investigating Judge formally terminated the judicial investigation into the facts excluded in the Rule 66*bis* Decision and issued a Partial Dismissal Order, dismissing certain charges against YIM Tith).

³⁴ Case 004, Decision on YIM Tith’s Request for Extension of Deadline for Notice of Appeal of Closing Orders in Case 004, 19 July 2019, D381/3 & D382/3. *See also* Case 004, YIM Tith’s Request for Extension of Deadline for Notice of Appeal of Closing Orders, 8 July 2019, D381/1 & D382/1; Case 004, Co-Prosecutors’ Response to YIM Tith’s Request for Extension of Deadline for Notice of Appeal of Closing Orders D381 & D382 (D381/1 & D382/1), 17 July 2019, D381/2 & D382/2.

³⁵ Case 004, National Co-Prosecutor’s Notice of Appeal against the International Co-Investigating Judge’s Closing Order (Indictment), 23 August 2019, D382/4.

³⁶ Case 004, International Co-Prosecutor’s Notice of Appeal against the Order Dismissing the Case against YIM Tith (D381), 10 September 2019, D381/4; Case 004, Civil Party Notice of Appeal against the Order Dismissing the Case against YIM Tith (D381), 19 September 2019, D381/11.

³⁷ Case 004, YIM Tith’s Notice of Appeal against the Closing Orders, 17 September 2019, D381/7 & D382/9.



against YIM Tith for lack of personal jurisdiction.³⁸ The English translation of the National Co-Prosecutor's Appeal was notified on 20 September 2019. The International Co-Prosecutor responded to the National Co-Prosecutor's Appeal on 30 September 2019.³⁹ The National Co-Prosecutor did not file a reply.

19. On 26 September 2019, the Pre-Trial Chamber ordered the suspension of the time limits for the parties to file their appeals against the Closing Orders until the notification of a corrected English translation of the Dismissal.⁴⁰ The corrected English translation of the Dismissal was filed and notified on 16 October 2019.

20. On 30 October 2019, the Pre-Trial Chamber partially granted YIM Tith's page and time limit extension request,⁴¹ ordering the parties to file separate appeals against each Closing Order, and allowing the parties to file 100-page submissions within 45 days from the notification of the corrected English translation of the Dismissal.⁴²

21. On 2 December 2019, the Co-Lawyers filed the Appeal of the Issuance of Two Closing Orders in English only, asserting that the Co-Investigating Judges erred in law by issuing two separate and conflicting Closing Orders and urging the Pre-Trial Chamber to dismiss both.⁴³

³⁸ National Co-Prosecutor's Appeal (D382/4/1). *See also* Case 004, National Co-Prosecutor's Request for Filing her Appeal Brief against the International Co-Investigating Judge's Closing Order (Indictment) in Khmer First, 12 September 2019, D382/7; Case 004, International Co-Prosecutor's Response to the National Co-Prosecutor's Request to File her Appeal against the [International Co-Investigating Judge's] Indictment in Khmer First, 13 September 2019, D382/8.

³⁹ Case 004, International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal of the Case 004 Indictment (D382), 30 September 2019, D382/16 ("International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16)").

⁴⁰ Case 004, Decision on YIM Tith's [*sic*] Request that the Pre-Trial Chamber Order the Urgent Provision of an Accurate English Translation of the Order Dismissing the Case against YIM Tith and Suspend the Closing Order Appeal Time Limits, 26 September 2019, D381/12 & D382/13. *See also* Case 004, YIM Tith's Request that the Pre-Trial Chamber Order the Urgent Provision of an Accurate English Translation of the Order Dismissing the Case against YIM Tith and Suspend the Closing Order Appeal Time Limits, 11 September 2019, D381/5 & D382/5; Case 004, The Office of the Co-Prosecutor's Email concerning Correction of Case 004 Dismissal Order (D381), 11 September 2019, D381/6 & D382/6; Case 004, International Co-Prosecutor's Response to YIM Tith's Requests regarding the English Translation of the Order Dismissing the Case against YIM Tith (D381), 19 September 2019, D381/9 & D382/11.

⁴¹ Case 004, YIM Tith's Request for Extension of Page and Time Limits for his Appeal of the Closing Orders, 17 September 2019, D381/8 & D382/10; Case 004, International Co-Prosecutor's Response to YIM Tith's Request for Extension of Page and Time Limits for his Appeal of the Closing Orders, 25 September 2019, D381/13 & D382/15; Case 004, YIM Tith's Reply to the International Co-Prosecutor's Response to YIM Tith's Request for Extension of Page and Time Limits for his Appeal of the Closing Orders, 4 October 2019, D381/15 & D382/18. *See also* Case 004, Request to File YIM Tith's Reply to the International Co-Prosecutor's Response to YIM Tith's Request for Extension of Page and Time Limits for his Appeal of the Closing Orders in One Language, 4 October 2019, D381/14 & D382/17.

⁴² Case 004, Decision on YIM Tith's Request for Extension of Page and Time Limits for His Appeal of the Closing Orders in Case 004, 30 October 2019, D381/16 & D382/19 ("Second Decision on Requests for Extensions (D381/16 & D382/19)").

⁴³ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21).



On 4 December 2019, the Co-Lawyers filed the Appeal of the International Co-Investigating Judge's Closing Order (Indictment) in English only,⁴⁴ alleging that the International Co-Investigating Judge erred in finding that YIM Tith was among the "most responsible" for DK-era crimes and requesting the Pre-Trial Chamber to dismiss the Indictment and the case against YIM Tith.⁴⁵ The Khmer translations of YIM Tith's Appeals were notified on 6 February 2020 and 11 February 2020, respectively.

22. On 5 December 2019, the International Co-Prosecutor filed her submissions on Appeal against the Dismissal in English only, arguing that the Dismissal contains numerous legal and factual errors resulting in the "manifestly" erroneous finding that YIM Tith is not subject to the ECCC's personal jurisdiction. In the Appeal, the International Co-Prosecutor requests the Pre-Trial Chamber to reverse the Dismissal and send YIM Tith for trial on the basis of the Indictment.⁴⁶ The Khmer translation of the International Co-Prosecutor's Appeal was filed on 3 January 2020 and notified on 6 January 2020.

23. On 6 December 2019, the Co-Lawyers for the Civil Parties filed their submissions on Appeal against the Dismissal in English and Khmer.⁴⁷ In their Appeal, the Co-Lawyers for Civil Parties submit that the National Co-Investigating Judge erred in law and fact in concluding that YIM Tith does not fall within the ECCC's personal jurisdiction, and in the alternative, if the Pre-Trial Chamber is unable to reach a supermajority decision, that the ECCC legal framework requires that the Indictment be advanced to the Trial Chamber.⁴⁸ None of the parties filed responses to the Civil Parties' Appeal.

24. On 6 January 2020, the Pre-Trial Chamber partially granted the parties' page and time limit extension requests,⁴⁹ permitting the parties to file in a single language with translations to follow, and allowing 60-page responses within 45 days from notification of the translation of

⁴⁴ See Case 004, Request to File YIM Tith's Appeals of the Closing Orders in One Language, 2 December 2019, D381/17 & D382/20.

⁴⁵ YIM Tith's Appeal (Indictment) (D382/22).

⁴⁶ International Co-Prosecutor's Appeal (D381/19).

⁴⁷ Civil Parties' Appeal (D381/20).

⁴⁸ Civil Parties' Appeal (D381/20).

⁴⁹ Case 004, YIM Tith's Urgent Request for Extension of Page and Time Limits for his Responses to the Appeals of the Closing Orders, 11 December 2019, D381/21 & D382/23; Case 004, International Co-Prosecutor's Request for Extensions for her Response and Reply relating to the Appeals in Case 004, 16 December 2019, D381/22 & D383/24; Case 004, International Co-Prosecutor's Response to YIM Tith's Extension Requests Relating to the Appeals in Case 004, 20 December 2019, D381/23 & D382/25.



each appeal and 30-page replies within 25 days from the notification of each response.⁵⁰

25. On 14 February 2020 and 17 February 2020, the International Co-Prosecutor responded to YIM Tith's Appeal (Indictment)⁵¹ and YIM Tith's Appeal (Two Closing Orders),⁵² respectively, in English and Khmer. On 20 February 2020, the Co-Lawyers responded to the International Co-Prosecutor's Appeal, in English only.⁵³ The Khmer translation of the Co-Lawyers' Response was filed on 2 March 2020 and notified on 5 March 2020.

26. On 13 March 2020 and 16 March 2020, the Co-Lawyers replied to the International Co-Prosecutor's Response to YIM Tith's Appeal (Indictment)⁵⁴ and YIM Tith's Appeal (Two Closing Orders).⁵⁵ The Khmer translations of the replies were notified on 24 March 2020 and 14 April 2020, respectively. The International Co-Prosecutor replied to the Co-Lawyers' Response to her Appeal of the Dismissal on 25 March 2020, in English and Khmer (notified on 27 March 2020).⁵⁶

27. On 26 August 2020, the International Co-Prosecutor requested to file additional submissions on her Appeal of the Dismissal, in light of the Supreme Court Chamber's Decision in Case 004/2,⁵⁷ which she alleges directly impacts the Pre-Trial Chamber's deliberations in Case 004.⁵⁸ On 7 September 2020, the Co-Lawyers responded that the Request should be

⁵⁰ Case 004, Decision on Requests for Extensions of Page and Time Limits for Responses Relating to Appeals in Case 004, 6 January 2019 [*sic*], D381/24 & D382/26 (filed on 6 January 2020).

⁵¹ Case 004, International Co-Prosecutor's Response to YIM Tith's Appeal of the Case 004 Indictment, 14 February 2020, D382/27 (notified in English and Khmer on 17 February 2020) ("International Co-Prosecutor's Response (Indictment) (D382/27)").

⁵² Case 004, International Co-Prosecutor's Response to YIM Tith's Appeal against the Issuance of Two Closing Orders in Case 004, 17 February 2020, D381/25 & D382/28 (notified in English and Khmer on 18 February 2020) ("International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28)").

⁵³ Case 004, YIM Tith's Response to the International Co-Prosecutor's Appeal of the National Co-Investigating Judge's Closing Order, 20 February 2020, D381/26 ("YIM Tith's Response to the International Co-Prosecutor's Appeal (D381/26)").

⁵⁴ Case 004, YIM Tith's Reply to the International Co-Prosecutor's Response to YIM Tith's Appeal of International Co-Investigating Judge's Closing Order in Case 004, 13 March 2020, D382/29 ("YIM Tith's Reply (Indictment) (D382/29)").

⁵⁵ Case 004, YIM Tith's Reply to the International Co-Prosecutor's Response to YIM Tith's Appeal of the Issuance of Two Closing Orders in Case 004, 16 March 2020, D381/27 & D382/30 ("YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30)").

⁵⁶ Case 004, International Co-Prosecutor's Reply to YIM Tith's Response to Her Appeal of the Order Dismissing the Case against YIM Tith (D381), 25 March 2020, D381/28 ("International Co-Prosecutor's Reply (D381/28)").

⁵⁷ Case 004/07-09-2009-ECCC/TC/SC, Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, 10 August 2020, E004/2/1/1/2 ("Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2)").

⁵⁸ Case 004, International Co-Prosecutor's Request to File Additional Submissions on Her Appeal of the Order Dismissing the Case against YIM Tith, 26 August 2020, D381/29.



summarily dismissed as inadmissible.⁵⁹ On 21 July 2021, the Pre-Trial Chamber issued its Decision on International Co-Prosecutor's Request to File Additional Submissions on Her Appeal of the Order Dismissing the Case against YIM Tith, holding that this Request was inadmissible.⁶⁰

28. On 1 March 2021, the Pre-Trial Chamber invited the parties to Case 004, *via* email, to file submissions on whether the Pre-Trial Chamber should conduct an oral hearing on the Appeals against the Closing Orders in Case 004.⁶¹ Between 3 March 2021 and 5 March 2021, the various parties filed their submissions.⁶²

29. On 18 March 2021, the Pre-Trial Chamber, pursuant to Internal Rule 77(3)(b), decided to determine the Appeals against the Closing Orders in Case 004 on the basis of the written submissions only and to proceed without an oral hearing.⁶³

II. JOINDER

30. As noted above,⁶⁴ the Pre-Trial Chamber is currently seised of five Appeals against the two Closing Orders concluding the investigation of Case 004.

31. Article 12(1) of the ECCC Agreement⁶⁵ and Internal Rule 2 provide that where in the course of proceedings a question arises, which is not addressed by the ECCC legal texts, the Chambers shall decide in accordance with Cambodian law. In this respect, the Pre-Trial

⁵⁹ Case 004, YIM Tith's Response to the International Co-Prosecutor's Request to File Additional Submissions on Her Appeal of the Order Dismissing the Case against YIM Tith, 7 September 2020, D381/31. *See also* Case 004, Request to File YIM Tith's Response to the International Co-Prosecutor's Request to File Additional Submissions on Her Appeal of the Order Dismissing the Case against YIM Tith in One Language, 7 September 2020, D381/30.

⁶⁰ Case 004, Decision on International Co-Prosecutor's Request to File Additional Submissions on Her Appeal of the Order Dismissing the Case Against YIM Tith, 21 July 2021, D381/44.

⁶¹ Case 004, Pre-Trial Chamber Instructions to the Parties, Email dated 1 March 2021.

⁶² Case 004, International Co-Prosecutor's Submissions regarding an Oral Hearing on the Appeals against the Closing Orders in Case 004 (YIM Tith), 3 March 2021, D381/36 & D382/35; Case 004, National Co-Prosecutor's Submissions regarding an Oral Hearing on the Appeals against the Closing Orders, Email dated 4 March 2021, D381/40 & D382/39; Case 004, YIM Tith's Submissions to the Pre-Trial Chamber on the Necessity for an Oral Hearing in Case 004, 4 March 2021, D381/38 & D382/37; Case 004, Civil Party Co-Lawyers' Views on Oral Hearings on Appeals to the Closing Order in Case 004, 5 March 2020, D381/39 & D382/38.

⁶³ Case 004, Decision on Oral Hearing in Case 004, 18 March 2021, D381/41 & D382/40.

⁶⁴ *See supra* p. 8.

⁶⁵ *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*, 6 June 2003, entered into force 29 April 2005 ("ECCC Agreement"), Art. 12(1).



Chamber recalls⁶⁶ that Article 299 of the Cambodian Code of Criminal Procedure states that “[w]hen the court has been seised with several related cases, it may issue an order to join them.”⁶⁷

32. In this case, the Pre-Trial Chamber is not seised with several related cases. Rather, it is seised of one case characterised by the issuance of two conflicting Closing Orders, giving rise to different but related appeal proceedings. Considering the Chamber’s power to issue an order to join several related cases, its obligation to ensure fair and expeditious administration of justice, and the approach previously adopted in Case 004/2⁶⁸ and Case 003,⁶⁹ the Pre-Trial Chamber finds that a joinder is warranted in Case 004.

33. Consequently, the Pre-Trial Chamber orders a joinder of the appeal proceedings in this case and will jointly address the Appeals against both Closing Orders in these Considerations.

III. STANDARD OF REVIEW

34. The determination of whether YIM Tith was among those “most responsible”, and therefore falls within the personal jurisdiction of the ECCC, is a discretionary decision.⁷⁰ However, the Pre-Trial Chamber has consistently held that the discretion of the Co-Investigating Judges in making this determination is a judicial one that does not permit arbitrary action, but should rather be exercised in accordance with well-settled legal principles.⁷¹ In this regard, the terms “senior leaders” and “those who were most responsible” represent the limits

⁶⁶ Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 & D360/33 (“Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33)”), para. 25; Case 003/07-09-2009-ECCC/OCIJ (“Case 003”) (PTC35), Considerations on Appeals against Closing Orders, 7 April 2021, D266/27 & D267/35, para. 38 (“Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35)”).

⁶⁷ *Code of Criminal Procedure of the Kingdom of Cambodia* (7 June 2007) (“Cambodian Code of Criminal Procedure”), Art. 299.

⁶⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 24-27.

⁶⁹ Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), paras 37-40.

⁷⁰ Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 44 *referring to* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 28; Case 004/1/07-09-2009-ECCC/OCIJ (“Case 004/1”), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (“Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20)”), para. 20; Case 001/18-07-2007-ECCC/SC (“Case 001”), Appeal Judgement, 3 February 2012, F28 (“Case 001 Appeal Judgment (F28)”), paras 62-74, 79.

⁷¹ Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 45; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 28 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20; International Military Tribunal, Judgment of 1 October 1946, Trial of the Major War Criminals before the International Military Tribunal, Vol. I (“Nuremberg Judgment”), pp. 171-367, 256.



of the ECCC's personal jurisdiction.⁷² 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.⁷³ Accordingly, the Pre-Trial Chamber will review the Co-Investigating Judges' determination that YIM Tith falls or does not fall under the Court's personal jurisdiction pursuant to the standard of review applicable to discretionary decisions.

35. A discretionary decision may be reversed where it was: (i) based on an incorrect interpretation of the governing law (*i.e.* an error of law) invalidating the decision; (ii) based on a patently incorrect conclusion of fact (*i.e.* an error of fact) occasioning a miscarriage of justice; and/or (iii) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion to force the conclusion that the Judges 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.⁷⁴

36. The Pre-Trial Chamber will normally remit the decision back to the Co-Investigating Judges for reconsideration,⁷⁵ and will substitute its decision only in exceptional circumstances.⁷⁶ 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

⁷² Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 45; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 28; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20 referring to 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, NS/RKM/1004/006, as amended 27 October 2004 ("ECCC Law"), Art. 2new.

⁷³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 28; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 46.

⁷⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 29 referring to Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 21 referring to, *inter alia*, 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, para. 15. See also Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 47.

⁷⁵ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 30 referring to Case 002/19-09-2007-ECCC/OCIJ ("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, para. 16; 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, paras 19, 26.

⁷⁶ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 30 referring to 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, para. 67. See also Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 48.



will serve as a basis for the trial.⁷⁷

IV. ADMISSIBILITY

FORMAL ADMISSIBILITY

37. Noting Internal Rule 75, governing the filing of appeals before the Pre-Trial Chamber, and that the Notices of Appeal and Submissions were lodged within the requisite time limits and pursuant to the instructions,⁷⁸ the Chamber finds that the five Appeals against the two Closing Orders are formally admissible.

THE NATIONAL CO-PROSECUTOR'S APPEAL

38. The National Co-Prosecutor appeals the International Co-Investigating Judge's Indictment under Internal Rules 67(5), 73(a) and 74(2).⁷⁹ The International Co-Prosecutor does not challenge the admissibility of this Appeal.⁸⁰

39. Noting that the Co-Prosecutors may appeal against all orders by the Co-Investigating Judges,⁸¹ the Pre-Trial Chamber finds the National Co-Prosecutor's Appeal admissible.

THE INTERNATIONAL CO-PROSECUTOR'S APPEAL

40. The International Co-Prosecutor appeals the National Co-Investigating Judge's Dismissal under Internal Rules 67(5) and 74(2).⁸² The Co-Lawyers do not challenge the admissibility of this Appeal.⁸³

41. The Chamber observes that the Co-Prosecutors may appeal against all orders by the

⁷⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 30 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 22; 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. *See also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 48.

⁷⁸ *Internal Rules of the Extraordinary Courts of Cambodia* (Rev. 9), as revised 16 January 2015 ("Internal Rules"), 75; Decision on Requests for Extensions (D381/24 & D382/26); Second Decision on Requests for Extensions (D381/16 & D382/19).

⁷⁹ National Co-Prosecutor's Appeal (D382/4/1), para. 5.

⁸⁰ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16).

⁸¹ Internal Rules 67(5), 74(2).

⁸² International Co-Prosecutor's Appeal (D381/19), para. 3.

⁸³ YIM Tith's Response to the International Co-Prosecutor's Appeal (D381/26).



Co-Investigating Judges.⁸⁴ Accordingly, the International Co-Prosecutor's Appeal is admissible.

THE CO-LAWYERS FOR CIVIL PARTIES' APPEAL

42. The Co-Lawyers for Civil Parties appeal the National Co-Investigating Judge's Dismissal, referring to the International Co-Prosecutor's filing of her Notice of Appeal against the Order Dismissing the Case against YIM Tith and the Chamber's instructions.⁸⁵

43. Pursuant to Internal Rules 67(5) and 74(4)(f), the Co-Lawyers for Civil Parties may appeal against a dismissal order from the Co-Investigating Judges where the Co-Prosecutors have appealed.⁸⁶ The Pre-Trial Chamber observes that the International Co-Prosecutor has appealed the Dismissal⁸⁷ and, thus, finds the Co-Lawyers for Civil Parties' Appeal admissible.

THE CO-LAWYERS FOR YIM TITH'S APPEAL OF THE ISSUANCE OF TWO CLOSING ORDERS IN CASE 004

44. The Co-Lawyers submit their Appeal (Two Closing Orders) under Internal Rules 21, 67(5) and 74.⁸⁸ The Co-Lawyers make two related arguments in favour of admissibility: (i) the issuance of two defective Closing Orders, which disagree on findings of personal jurisdiction, is a matter that concerns whether the ECCC legitimately holds jurisdiction over YIM Tith and thus appealable under Internal Rule 74(3)(a); and (ii) by issuing two Closing Orders, the Co-Investigating Judges have irreparably harmed YIM Tith's fundamental fair trial rights, thus violating Internal Rule 21 and other international instruments.⁸⁹ Referring to the Pre-Trial Chamber's unanimous ruling in Case 004/2—that an appeal contesting the issuance of two Closing Orders is admissible under Internal Rule 74(3) in light of Internal Rule 21—the International Co-Prosecutor does not contest the admissibility of this Appeal.⁹⁰

⁸⁴ Internal Rules 67(5), 74(2).

⁸⁵ Civil Parties' Appeal (D381/20), para. 3 *referring to* International Co-Prosecutor's Notice of Appeal (D381/4); Second Decision on Requests for Extensions (D381/16 & D382/19). Neither party filed a response.

⁸⁶ Internal Rules 67(5), 74(4)(f).

⁸⁷ International Co-Prosecutor's Appeal (D381/19).

⁸⁸ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 12.

⁸⁹ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), paras 14-16 *referring to* International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976 ("ICCPR"), Art. 14(1), (3)(a), (3)(c); ECCC Law, 35^{new}(a), (c).

⁹⁰ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 24 *referring to* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 133, 149.



45. The Chamber reaffirms that since “the issuance of two Closing Orders is unforeseen in the Internal Rules and may require a resolution prior to trial to prevent irremediable impact on the fair trial rights of the Accused”, Internal Rule 74(3) should be interpreted broadly in light of Internal Rule 21.⁹¹ Accordingly, the Pre-Trial Chamber finds this Appeal admissible under a broad interpretation of Internal Rule 74(3) in light of Internal Rule 21.

THE CO-LAWYERS FOR YIM TITH’S APPEAL OF THE INDICTMENT

1. Submissions

46. The Co-Lawyers submit that their Appeal is admissible under Internal Rules 21, 67(5), and 74.⁹² The Co-Lawyers argue that Internal Rules 67(5) and 74(3)(a) permit the Accused to appeal orders “confirming the jurisdiction of the ECCC”, including all decisions concerning personal, temporal and subject matter jurisdiction.⁹³ While Internal Rule 21 does not explicitly provide grounds for appeal, the Pre-Trial Chamber has held that this Internal Rule may, on a case-by-case basis, broaden the scope of Internal Rule 74 in order to ensure that the proceedings are fair and adversarial.⁹⁴ The Co-Lawyers incorporate submissions on breaches of Internal Rule 21 into the relevant appeal grounds.⁹⁵

47. The Co-Lawyers submit that they file the Appeal of the Indictment separately from the Appeal of the Issuance of Two Closing Orders for reasons of judicial and procedural efficiency and because the appeal submissions relating to the two separate Closing Orders may require different procedural steps.⁹⁶

48. In the Response, the International Co-Prosecutor submits that Grounds 1, 2 and 3 of the Appeal are inadmissible.⁹⁷ First, the International Co-Prosecutor argues that Internal Rule 21 does not automatically confer the Pre-Trial Chamber with appellate jurisdiction to consider arguments based on violations of fair trial rights.⁹⁸ Instead, the moving party must demonstrate that the particular circumstances require the Chamber’s intervention to prevent irremediable

⁹¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 149.

⁹² YIM Tith’s Appeal (Indictment) (D382/22), para. 11.

⁹³ YIM Tith’s Appeal (Indictment) (D382/22), para. 12.

⁹⁴ YIM Tith’s Appeal (Indictment) (D382/22), para. 13.

⁹⁵ YIM Tith’s Appeal (Indictment) (D382/22), para. 13.

⁹⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 14 *referring to* Second Decision on Requests for Extensions (D381/16 & D382/19), para. 12.

⁹⁷ International Co-Prosecutor’s Response (Indictment) (D382/27), paras 5-7.

⁹⁸ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 4 *referring to* Internal Rule 21.



damage to the fairness of proceedings or to fundamental fair trial rights.⁹⁹

49. Accordingly, the International Co-Prosecutor avers that Ground 1 is inadmissible because the claims of fair trial rights violations are speculative and the Co-Lawyers have not demonstrated that these alleged violations undermine the integrity of the proceedings in a manner as to render a fair trial impossible.¹⁰⁰ Further, the International Co-Prosecutor contends that Ground 2 is inadmissible as the Co-Lawyers' claim of a defective Indictment runs counter to the Pre-Trial Chamber's holding that such defects are non-jurisdictional in nature.¹⁰¹ Finally, Ground 3 is inadmissible because the Co-Lawyers' claim that the Indictment exceeds the "temporal and geographic scope of the investigation"¹⁰² does not constitute a challenge to personal jurisdiction according to the Pre-Trial Chamber's prior holdings.¹⁰³

50. In the Reply, the Co-Lawyers do not address the issue of admissibility of this Appeal.¹⁰⁴

2. Discussion

51. At the outset, the Pre-Trial Chamber observes that Chapter II of the ECCC Law defines the personal, temporal and subject matter jurisdiction of the ECCC.¹⁰⁵ The Chamber notes that pursuant to Internal Rule 74(3), a charged person or an accused may appeal only against the Co-Investigating Judges' orders and decisions listed in this provision.¹⁰⁶ Specifically, Internal Rule 74(3)(a) prescribes that the orders or decisions of the Co-Investigating Judges that may be challenged include those "confirming the jurisdiction of the ECCC".¹⁰⁷ In this regard, the Pre-Trial Chamber recalls that an indictment is "clearly subject to appeal on jurisdictional issues decided by the Co-Investigating Judges."¹⁰⁸

⁹⁹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 4 *referring to* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 147.

¹⁰⁰ International Co-Prosecutor's Response (Indictment) (D382/27), paras 4-5.

¹⁰¹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 6 *referring to* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 139.

¹⁰² International Co-Prosecutor's Response (Indictment) (D382/27), para. 7 *referring to* YIM Tith's Appeal (Indictment) (D382/22), para. 97.

¹⁰³ International Co-Prosecutor's Response (Indictment) (D382/27), para. 7 *referring to* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 156.

¹⁰⁴ YIM Tith's Reply (Indictment) (D382/29).

¹⁰⁵ ECCC Law, Chapter II, Arts 2*new*-8; Case 002 (PTC 145 & 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 (NUON Chea and IENG Thirith) (D427/2/15 & D427/3/15)"), para. 63.

¹⁰⁶ Internal Rule 74(3).

¹⁰⁷ Internal Rule 74(3)(a).

¹⁰⁸ Case 002 (PTC104), Decision on KHIEU Samphân's Appeal against the Closing Order, 21 January 2011, D427/4/15, para. 14 (footnote omitted). *See also* Case 002 (PTC75), Decision on IENG Sary's Appeal against the



52. Accordingly, an appeal of the accused against the indictment is admissible if it relates, *inter alia*, to: (i) subject matter jurisdiction under Internal Rule 74(3)(a); (ii) personal jurisdiction under Internal Rule 74(3)(a); or (iii) exceptional fair trial rights issues, examined case-by-case, which may merit the broadening of Internal Rule 74(3)(a) in light of Internal Rule 21.¹⁰⁹ In the present case, the Co-Lawyers raise personal jurisdiction challenges, as well as exceptional fair trial rights issues in the Indictment under Internal Rules 74(3)(a) and 21, which the Chamber will examine below.

53. Concerning the personal jurisdiction issues, the Pre-Trial Chamber notes that the personal jurisdiction of the ECCC is confined to “senior leaders” and to “those who were most responsible” for the crimes.¹¹⁰ Further, the Chamber observes that although the term “most responsible” is not defined by the ECCC Agreement or the ECCC Law, guidance for its interpretation can be discerned by looking, *inter alia*, to international jurisprudence in light of the object and purpose of the Court’s founding instruments.¹¹¹ As multiple ECCC Chambers have found, international jurisprudence establishes that the identification of those falling into the “most responsible” category includes a quantitative and qualitative assessment of both the gravity of the crimes (alleged or charged) and the level of responsibility of the suspect.¹¹² Accordingly, when facing challenges to personal jurisdiction regarding “those who were most responsible”, the Pre-Trial Chamber shall limit its evaluation to matters crucial to the determination and assessment of personal jurisdiction – that is, the gravity of crimes and/or level of responsibility of the accused.¹¹³ The Pre-Trial Chamber reaffirms that challenges involving matters beyond this limitation cannot be framed as challenges to personal jurisdiction

Closing Order, 11 April 2011, D427/1/30 (“Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30)”), paras 44-45; Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 & D427/3/15), paras 59-60; Case 002 (PTC38), Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, paras 19, 21.

¹⁰⁹ Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 63.

¹¹⁰ ECCC Agreement, Art. 2(1); ECCC Law, Art. 2^{new}.

¹¹¹ See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980 (“Vienna Convention”), Art. 31(1), (2) (providing that the terms of an instrument shall primarily be interpreted in their context, which comprises, *inter alia*, the instrument’s text, in light of its object and purpose); ECCC Agreement, Art. 12(1) (providing that in the case of a *lacunae* in the applicable law, “guidance may also be sought in procedural rules established at the international level”); ECCC Law, Art. 23^{new} (providing that the Co-Investigating Judges may seek guidance in procedural rules at the international level). See also Case 002, Decision on Appeals against Order of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 58-60.

¹¹² See, e.g., Case 001, Judgement, 26 July 2010, E188 (“Case 001 Trial Judgment (E188)”), para. 22 and footnotes 28-30; Case 001 Appeal Judgment (F28), para. 71; Case 003, Decision on Personal Jurisdiction and Investigative Policy regarding Suspect MEAS Mut[h], 2 May 2012, D48 (“Case 003 Decision on Personal Jurisdiction (D48)”), para. 15 and footnote 25; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321.

¹¹³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 144.



and are thus inadmissible under Internal Rule 74(3)(a).¹¹⁴

54. As for purported defects in the form of the indictment, the Chamber emphasises that such challenges are “clearly non-jurisdictional in nature and are therefore inadmissible at the pre-trial stage of the proceedings in light of the plain meaning of Internal Rule 74(3)(a) and Chapter II of the ECCC [L]aw.”¹¹⁵ Instead, these arguments may be brought before the Trial Chamber to be considered on the merits at trial.¹¹⁶

55. Regarding an appeal filed under Internal Rule 21, the Pre-Trial Chamber recalls that to ensure the fairness of the proceedings, as provided in Internal Rule 21(1)(a),¹¹⁷ “where the facts and circumstances of an appeal require it, the Pre-Trial Chamber has found it has competence to consider grounds raised by the [Accused] that are not explicitly listed under Internal Rule 74(3) through a liberal interpretation of a Charged Persons’ [sic] right to appeal in light of Internal Rule 21.”¹¹⁸ Nevertheless, the Pre-Trial Chamber reaffirms, as the International Co-Prosecutor acknowledges,¹¹⁹ that Internal Rule 21 does not open an automatic avenue for appeal even where an appeal raises fair trial rights issues.¹²⁰ The moving party must demonstrate that particular circumstances of its case require the Chamber’s intervention at the stage where the appeal is filed to avoid irremediable damage to the fairness of proceedings or fundamental fair trial rights.¹²¹ In particular, the Chamber recalls that when an appeal lodged

¹¹⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 145.

¹¹⁵ Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 47; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 63 *referring to* ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, Decision on Ante Gotovina’s Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, Appeals Chamber, 6 June 2007, paras 21, 24; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR72.1, Decision on Petković’s Interlocutory Appeal against the Trial Chamber’s Decision on Jurisdiction, Appeals Chamber, 16 November 2005, para. 13.

¹¹⁶ Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 47; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 63.

¹¹⁷ Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 49 *quoting* Case 002 (PTC42), Decision on IENG Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, 10 August 2010, D264/2/6, paras 13-14; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 71.

¹¹⁸ Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 70; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 146 *referring to* Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 49; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 71.

¹¹⁹ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 4.

¹²⁰ *See, e.g.*, Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 & D427/3/15), para. 73; Case 004, Considerations on IM Chaem’s Appeal against the International Co Investigating Judge’s Decision to Charge Her *in Absentia*, 1 March 2016, D239/1/8 (“Considerations on Charging *in Absentia* (D239/1/8)”), para. 17; Case 003 (PTC21), Considerations on MEAS Muth’s Appeal against Co-Investigating Judge HARMON’s Decision to Charge MEAS Muth *in Absentia*, 30 March 2016, D128/1/9 (“Case 003 Considerations on Charging *in Absentia* (D128/1/9)”), para. 20.

¹²¹ *See, e.g.*, Considerations on Charging *in Absentia* (D239/1/8), para. 17; Considerations on Charging *in Absentia* (D128/1/9), para. 20; Case 003 (PTC29), Considerations on MEAS Muth’s Appeal against the International Co-



against an indictment under Internal Rule 74(3) raises a matter which cannot be rectified by the Trial Chamber and denying the appeal would “irreparably harm the fair trial rights of the accused”, Internal Rule 21 may warrant a broadening of Internal Rule 74(3).¹²² Accordingly, the Chamber will assess whether the circumstances of the present case merit an extensive interpretation of Internal Rule 74(3) in light of Internal Rule 21.

56. The Pre-Trial Chamber will now determine whether YIM Tith’s Appeal (Indictment) is admissible under Internal Rules 74(3) and 21. Preliminarily, the Chamber observes that the Co-Lawyers make several separate arguments that are identified as “sub-grounds” in Grounds 1, 2 and 5.¹²³ The Chamber will address them in detail below.

ADMISSIBLE GROUNDS OF APPEAL

57. The Pre-Trial Chamber finds that Grounds 2.2, 3, 4, 5.1, 5.2 and 5.3 are admissible.

Ground 2.2 is Admissible

58. The Co-Lawyers challenge the International Co-Investigating Judge’s failure to set out the legal elements of genocide, the factual basis of the charges and the supporting evidence pertaining to the findings that: (i) the Khmer Krom were a distinct group, and (ii) YIM Tith held the requisite special intent.¹²⁴ The Pre-Trial Chamber observes that an issue of defect in the Indictment¹²⁵ is clearly non-jurisdictional in nature¹²⁶ and would not be admissible as Grounds 2.1 and 2.3.¹²⁷

59. Nonetheless, the Chamber notes that the Co-Lawyers also assert that this sub-ground of the Appeal is admissible as a jurisdictional challenge under Internal Rule 74(3)(a) due to the International Co-Investigating Judge’s finding that YIM Tith’s participation and orchestration of genocide of the Khmer Krom alone placed him “solidly within the bracket of personal

Investigating Judge’s Decision to Charge MEAS Muth with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, D174/1/4, Opinion of Judges BEAUVALLET and BAIK, para. 19.

¹²² Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 48.

¹²³ YIM Tith’s Appeal (Indictment) (D382/22), paras 20-94, 121-265.

¹²⁴ YIM Tith’s Appeal (Indictment) (D382/22), para. 64.

¹²⁵ YIM Tith’s Appeal (Indictment) (D382/22), para. 79.

¹²⁶ See *supra* para. 54.

¹²⁷ See *infra* paras 80-83.



jurisdiction.”¹²⁸ The Pre-Trial Chamber recalls its ruling in Case 004/2 where it held that the challenges concerning the same substantive legal issues¹²⁹—identification of targeted “group” and specific genocidal intent—implicate the gravity of crimes and the responsibility for crimes and, thus, are “admissible as proper personal jurisdiction challenges”.¹³⁰ Therefore, the Pre-Trial Chamber finds that Ground 2.2 is admissible as a personal jurisdiction challenge under Internal Rule 74(3)(a).

Ground 3 is Admissible

60. Ground 3 challenges the International Co-Investigating Judge’s alleged exceeding of the factual scope of the investigation by indicting YIM Tith for crimes based on allegations said to be outside of the temporal and geographical scope of the investigation.¹³¹ Specifically, the International Co-Investigating Judge indicted YIM Tith for crimes, on the basis of his membership in three JCEs, in the Southwest Zone from “at least September-October 1975 until 6 January 1979” and in the Northwest Zone from “at least early 1977 until at least 6 January 1979”.¹³² The Co-Lawyers request the invalidation of charges that are: (i) after “early 1978” for Southwest Zone crimes; (ii) prior to January “1976” for crimes committed at Wat Pratheat Security Centre in the Southwest Zone; and (iii) prior to “mid-1977” for Northwest Zone crimes.¹³³

61. In the Response, the International Co-Prosecutor asserts that Ground 3 amounts to an impermissible challenge to the form of the Indictment and, thus, cannot constitute a proper personal jurisdiction challenge.¹³⁴

62. The Chamber considers that Ground 3 may be regarded as submitted under Internal Rules 21, 67(5) and 74.¹³⁵ Further, the Pre-Trial Chamber observes that while Ground 3 may not be deemed as a proper personal jurisdictional challenge, it raises issues of fair trial rights

¹²⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 63 *citing* Indictment (D382), para. 996.

¹²⁹ YIM Tith’s Appeal (Indictment) (D382/22), paras 63-78.

¹³⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 155.

¹³¹ YIM Tith’s Appeal (Indictment) (D382/22), paras 95-103.

¹³² Indictment (D382), paras 1016-1017.

¹³³ YIM Tith’s Appeal (Indictment) (D382/22), para. 103.

¹³⁴ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 7 *citing* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 156 (“the alleged defects do not directly implicate the gravity of the alleged crimes or AO An’s responsibility and, therefore, cannot constitute personal jurisdiction challenges.”).

¹³⁵ YIM Tith’s Appeal (Indictment) (D382/22), paras 11-13.



and the legality of the ECCC pre-trial procedure warranting intervention by the Pre-Trial Chamber. In this respect, the Chamber considers that sending an indictment against YIM Tith to the Trial Chamber with criminal counts beyond the temporal scope of the investigation would “irreparably harm the fair trial rights of the accused”, thus justifying a broad interpretation of Internal Rule 74(3) in light of Internal Rule 21.¹³⁶ Accordingly, the Pre-Trial Chamber finds that Ground 3 is admissible under a broad interpretation of Internal Rule 74(3) in light of Internal Rule 21.

Ground 4 is Admissible

63. Ground 4 challenges the International Co-Investigating Judge’s alleged reliance on JCE liability as a factor to find that YIM Tith was “most responsible”.¹³⁷ According to the Co-Lawyers, the relevant factors for determining “most responsible” must be based on factors of individual conduct, not membership in a JCE, which is so broad and unfair as to constitute an abuse of discretion.¹³⁸ The Co-Lawyers submit that this ground is admissible pursuant to Internal Rule 74(3)(a) and Internal Rule 21.¹³⁹

64. The Chamber considers that the International Co-Investigating Judge’s alleged reliance on YIM Tith’s membership in JCEs as a relevant consideration in determining YIM Tith as among those “most responsible”¹⁴⁰ is directly tied to the ECCC’s ability to exercise personal jurisdiction. Accordingly, the Pre-Trial Chamber finds that, under Internal Rule 74(3)(a), Ground 4 is an admissible personal jurisdiction challenge.

Grounds 5.1, 5.2 and 5.3 are Admissible

65. Ground 5 challenges the determination that YIM Tith was “most responsible” and thus within the ECCC’s personal jurisdiction.¹⁴¹ In particular, Ground 5.1 challenges alleged errors concerning YIM Tith’s family relationship with *Ta Mok* and consequent *de facto* authority in the Southwest and Northwest Zones, which is purportedly determinative of the International

¹³⁶ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 147.

¹³⁷ YIM Tith’s Appeal (Indictment) (D382/22), paras 108-120.

¹³⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 120.

¹³⁹ YIM Tith’s Appeal (Indictment) (D382/22), paras 105-107, 120.

¹⁴⁰ YIM Tith’s Appeal (Indictment) (D382/22), paras 108, 115 *referring to, inter alia*, Indictment (D382), paras 992-999.

¹⁴¹ YIM Tith’s Appeal (Indictment) (D382/22), paras 121-265.



Co-Investigating Judge's finding that YIM Tith was "most responsible".¹⁴² Ground 5.2 challenges findings regarding YIM Tith's *de jure* positions and *de facto* authority in the Southwest and Northwest Zones during the DK regime, impinging on the "most responsible" personal jurisdiction determination.¹⁴³ Finally, Ground 5.3 challenges alleged errors concerning YIM Tith's contribution to certain JCEs, having a direct effect on the "most responsible" determination.¹⁴⁴

66. The Pre-Trial Chamber considers that the alleged factual and legal errors relating to YIM Tith's authority, positions, roles and contributions to alleged JCEs in the Southwest and Northwest Zones¹⁴⁵ are directly material in determining personal jurisdiction. Therefore, the Chamber finds that Ground 5 in its entirety is admissible as personal jurisdiction challenges under Internal Rule 74(3)(a).

INADMISSIBLE GROUNDS OF APPEAL

Grounds 1.1 and 1.2 are Inadmissible

67. The Co-Lawyers submit that Ground 1, which raises an assortment of fair trial rights violations, is admissible under Internal Rule 21.¹⁴⁶ Specifically, Ground 1.1 challenges the alleged invalidity of the Third Introductory Submission because it was unilaterally filed by the International Co-Prosecutor and not signed by the National Co-Prosecutor.¹⁴⁷ For the Co-Lawyers, the International Co-Investigating Judge erred in law by proceeding with an investigation based on the invalid Introductory Submission.¹⁴⁸

68. Ground 1.2 advances various alleged fair trial rights violations.¹⁴⁹ Under the category of "effective interference with the administration of justice", the Co-Lawyers challenge (i) the leaking of the Third Introductory Submission;¹⁵⁰ (ii) contamination of the investigation through

¹⁴² YIM Tith's Appeal (Indictment) (D382/22), paras 124-141.

¹⁴³ YIM Tith's Appeal (Indictment) (D382/22), paras 142-220.

¹⁴⁴ YIM Tith's Appeal (Indictment) (D382/22), paras 221-265.

¹⁴⁵ YIM Tith's Appeal (Indictment) (D382/22), paras 121-265.

¹⁴⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 20.

¹⁴⁷ YIM Tith's Appeal (Indictment) (D382/22), paras 21-25.

¹⁴⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 25.

¹⁴⁹ YIM Tith's Appeal (Indictment) (D382/22), paras 26-53.

¹⁵⁰ YIM Tith's Appeal (Indictment) (D382/22), paras 27-29.



external parties, including the DC-Cam;¹⁵¹ and (iii) late admission of YIM Tith to Case 004.¹⁵² Under the category of “undue delay”, the Co-Lawyers emphasise various delays in the Case 004 investigation and the purported inability to conduct a fair trial due to the passage of over 40 years since the crimes.¹⁵³

69. First, concerning the alleged invalidity of the Third Introductory Submission, the Pre-Trial Chamber recalls its Considerations regarding the Co-Prosecutors’ disagreement on filing of the Third Introductory Submission.¹⁵⁴ The Chamber unanimously concluded that the action of the International Co-Prosecutor shall be executed and that the International Co-Prosecutor shall forward the Third Introductory Submission to the Co-Investigating Judges to open a judicial investigation in Case 004.¹⁵⁵ Therefore, this sub-ground is summarily dismissed.

70. Second, regarding the leak of the confidential Third Introductory Submission in May 2011,¹⁵⁶ while the Pre-Trial Chamber considers it regrettable, there is no demonstration of specific prejudice from the leak on YIM Tith’s fair trial rights, including the presumption of innocence or integrity of evidence as alleged by the Co-Lawyers,¹⁵⁷ and thus the Co-Lawyers have not satisfied their burden to justify the Pre-Trial Chamber’s intervention to prevent irreparable damage¹⁵⁸ meeting the applicable threshold for admissibility.¹⁵⁹

71. Third, the Pre-Trial Chamber considers that the Co-Lawyers’ argument that DC-Cam’s interview activities led to “potentially-contaminated testimony”¹⁶⁰ is unsubstantiated and speculative. In particular, the Co-Lawyers do not demonstrate any specific error in the International Co-Investigating Judge’s assessment of the credibility and probative value of interview evidence, including those relying upon DC-Cam statements as a basis for questioning.¹⁶¹ Further, the Pre-Trial Chamber has upheld the practice of confronting witnesses

¹⁵¹ YIM Tith’s Appeal (Indictment) (D382/22), paras 30-35.

¹⁵² YIM Tith’s Appeal (Indictment) (D382/22), para. 36.

¹⁵³ YIM Tith’s Appeal (Indictment) (D382/22), paras 37-53.

¹⁵⁴ Considerations regarding the Co-Prosecutors’ Disagreement (D1/1.3).

¹⁵⁵ Considerations regarding the Co-Prosecutors’ Disagreement (D1/1.3), para. 45.

¹⁵⁶ Written Record of Investigative Action, 2 September 2011, D72/1.1.11, at ERN (EN) 00749869.

¹⁵⁷ YIM Tith’s Appeal (Indictment) (D382/22), paras 27-29.

¹⁵⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 163 (“[t]he Chamber emphasises that the instant proceedings are in the pre-trial stage, which does not involve any determination of guilt or innocence. The Pre-Trial Chamber finds that the presumption of innocence is sufficiently safeguarded as, pursuant to Internal Rule 98(4), a conviction at trial requires the affirmative vote of at least four judges, and without the required majority, ‘the default decision shall be that the Accused is acquitted.’”).

¹⁵⁹ See *supra* para. 55.

¹⁶⁰ YIM Tith’s Appeal (Indictment) (D382/22), para. 33.

¹⁶¹ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 419-421.



with other evidence on the record as a “legitimate investigative practice”.¹⁶² Moreover, the Chamber notes that, had the Co-Lawyers considered any Written Records of Interviews to be “contaminated”,¹⁶³ they could have submitted an application for annulment under Internal Rule 76.¹⁶⁴ Lastly, at any subsequent trial, the Co-Lawyers would be afforded the opportunity to cross-examine witnesses, allowing them to probe the credibility or alleged “contamination” of witness testimony,¹⁶⁵ and, hence, the Pre-Trial Chamber’s intervention is not called for at this stage.

72. Fourth, the Pre-Trial Chamber summarily dismisses YIM Tith’s alleged belated access to the Case File,¹⁶⁶ since the issue has previously been litigated and rejected,¹⁶⁷ nor has a sufficient basis for reconsideration been shown by the Co-Lawyers.

73. Turning to the Co-Lawyers’ allegations regarding “undue delay” in the conclusion of the investigation and the issuance of the Closing Orders in Case 004, the Pre-Trial Chamber preliminarily notes that Internal Rule 21(4) requires the proceedings be brought to a conclusion “within a reasonable time”.¹⁶⁸ While the Internal Rules do not set out a specific deadline for issuing a closing order, the Co-Investigating Judges are nevertheless obliged to issue closing orders within a reasonable time, since this principle, with its counterpart in Article 35^{new} of the ECCC Law, is a fundamental principle enshrined in Article 14(3)(c) of the ICCPR.¹⁶⁹ The Chamber reaffirms its findings on the law concerning the delays in the issuance of Closing Orders in Cases 004/1 and 004/2.¹⁷⁰

74. The Pre-Trial Chamber observes that in the present case, the International Co-Investigating Judge issued the Indictment on 28 June 2019, thereby terminating the investigation more than 21 months after having issued the Second Rule 66(1) Notification, which concluded the judicial investigation on 5 September 2017.¹⁷¹ The National Co-

¹⁶² Case 004/2, Decision on AO An’s Application to Annul Written Records of Interview of Three Investigators, 11 May 2017, D338/1/5, para. 21.

¹⁶³ YIM Tith’s Appeal (Indictment) (D382/22), paras 30-35.

¹⁶⁴ See Internal Rule 76.

¹⁶⁵ See Internal Rules 84, 87(4).

¹⁶⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 36.

¹⁶⁷ Case 004, Decision on YIM Tith’s Appeal Against the Decision on YIM Tith’s Request for Adequate Preparation Time, 13 November 2017, D361/4/1/10, para. 30.

¹⁶⁸ Internal Rule 21(4).

¹⁶⁹ ICCPR, Art. 14(3)(c).

¹⁷⁰ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 28-31; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 60-72.

¹⁷¹ Second Notice of Conclusion of Investigation (D368).



Investigating Judge issued the Dismissal on the same date of 28 June 2019.¹⁷²

75. The Pre-Trial Chamber recalls the Chamber's previous finding in Cases 004/1 and 004/2 that periods of 18 and 16 months, respectively, for issuing the Closing Orders after the conclusion of the investigations were excessive, in comparison especially with the Closing Orders issued in Cases 001 and 002 within periods of three and eight months, respectively.¹⁷³ In Case 003, the International Co-Investigating Judge issued his Closing Order more than 18 months after having concluded the judicial investigation; the National Co-Investigating Judge issued his Closing Order on the same date while considering that the judicial investigation was concluded more than seven years before.¹⁷⁴ In Case 003, the International Judges held that the Co-Investigating Judges failed to issue the Closing Orders within a reasonable time.¹⁷⁵

76. Having given due consideration to the complexity of Case 004 and the volume of its record, compared with Cases 001, 002, 003, 004/1 and 004/2, the Pre-Trial Chamber finds that the Co-Investigating Judges failed to issue the Closing Orders within a reasonable time in this case. Further, the Pre-Trial Chamber considers that the difficulties listed in the annexes to the Indictment¹⁷⁶ fail to provide any justification for such delay since, *inter alia*, the issues concerning staff and translations¹⁷⁷ were foreseeable from their previous experience in other Cases before the ECCC and, thus, the delays could have been mitigated.

77. The Pre-Trial Chamber also finds that the Co-Investigating Judges' separate issuance of two conflicting Closing Orders, each over 300 pages, in only one of the working languages of the ECCC¹⁷⁸ is not only in violation of Article 7 of the Practice Directions on Filing of Documents before the ECCC,¹⁷⁹ but, more significantly, has instigated further undue delays in

¹⁷² Dismissal (D381).

¹⁷³ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 30; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 71.

¹⁷⁴ Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 145.

¹⁷⁵ Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 147.

¹⁷⁶ See Case 004, Completion Plan Chronology, Annex I to Indictment, 28 June 2019, D382.1 ("Annex I to Indictment (D382.1)"); Case 004, Motions and Requests Filed with the [Co-Investigating Judges], Annex II to the Indictment, 28 June 2019, D382.2.

¹⁷⁷ See, e.g., Annex I to Indictment (D382.1), ERN (EN) 01620075, paras 25-26.

¹⁷⁸ The National Co-Investigating Judge issued the Dismissal in Khmer only, and the International Co-Investigating Judge issued the Indictment in English only.

¹⁷⁹ Practice Direction on Filing of Documents before the ECCC, ECCC/01/2007/Rev.8, as amended 7 March 2012, Art. 7.1. The Pre-Trial Chamber notes that for appeals against closing orders to be fully briefed, pursuant to Article 7.1, which states that "[a]ll documents shall be filed in Khmer as well as in English or French", all submissions on appeal, responses to those submission, and replies to those responses must be filed in both Khmer and either English or French.



the Case 004 proceedings, which could have been avoided by a strict adherence to the ECCC's legal framework.

78. Having considered the undue delay which occurred in Case 004, the Pre-Trial Chamber stresses that Internal Rule 21 does not open an automatic avenue for appeal even where an appeal raises fair trial rights issues.¹⁸⁰ Notwithstanding excessive length of the delay which could have been mitigated in this case, the Chamber is not convinced that the delay in this case "so seriously erode[d] the fairness of the proceedings that it would be oppressive to continue"¹⁸¹ and that it merits a broadening of Internal Rule 74(3) in light of Internal Rule 21.¹⁸² Similarly, the Pre-Trial Chamber considers that the Co-Lawyers' arguments concerning the overall duration of Case 004, alleged periods of unjustified inactivity, potential deterioration and unavailability of witness evidence and other related complaints¹⁸³ do not sufficiently demonstrate, individually or cumulatively, that a fair trial by the Trial Chamber is impossible or the proceedings in the present case are irremediably vitiated.¹⁸⁴

79. In conclusion, without any particular showing of irremediable prejudice to fair trial rights, the Pre-Trial Chamber finds that Grounds 1.1 and 1.2 concerning the individual or cumulative impact of fair trial rights violations are inadmissible.

Grounds 2.1 and 2.3 are Inadmissible

80. Ground 2.1 challenges the Indictment's alleged failure to set out the relevant considerations, factual basis and supporting evidence used to determine YIM Tith was "most responsible".¹⁸⁵ The Co-Lawyers submit that this is a defect on the face of the indictment under Internal Rule 67(2), and this is so serious that it falls within Internal Rule 74(3)(a) read in light of Internal Rule 21(1)(d) as it undermines YIM Tith's fair trial right to have an adequate opportunity to be informed and to prepare his defence.¹⁸⁶

81. Ground 2.3 challenges the alleged legal error of the Indictment in failing to set out the

¹⁸⁰ See, e.g., Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 & D427/3/15), para. 73; Considerations on Charging *in Absentia* (D239/1/8), para. 17; Considerations on Charging *in Absentia* (D128/1/9), para. 20.

¹⁸¹ YIM Tith's Appeal (Indictment) (D382/22), para. 51.

¹⁸² See *supra* para. 55.

¹⁸³ YIM Tith's Appeal (Indictment) (D382/22), paras 40-42, 45-53.

¹⁸⁴ *Contra* YIM Tith's Appeal (Indictment) (D382/22), paras 54-55.

¹⁸⁵ YIM Tith's Appeal (Indictment) (D382/22), paras 59-62.

¹⁸⁶ YIM Tith's Appeal (Indictment) (D382/22), paras 58, 62.



indicators of effective control for superior responsibility and alleged requirement for proof of a causal link.¹⁸⁷ For the Co-Lawyers, these result in serious defects on the face of the Indictment, violating the basic form requirements of Internal Rule 67(2) and also YIM Tith's fair trial rights by insufficiently specifying the material facts and evidence and making it "impossible" to discern the charges and prepare for trial.¹⁸⁸

82. The Pre-Trial Chamber finds that Grounds 2.1 and 2.3 raise inadmissible purported defects in the form of the Indictment, which are "clearly non-jurisdictional in nature".¹⁸⁹ Moreover, the Chamber recalls its ruling in Case 004/2, where it found inadmissible the appeal grounds which "challenge the contours of crimes and modes of liability and their application in reality rather than their existence in law at the time relevant to the Indictment."¹⁹⁰ The Chamber notes that the Co-Lawyers' Appeal does not challenge the existence of superior responsibility in law, which could implicate the Court's ability to exercise jurisdiction, but whether the International Co-Investigating Judge applied all the indicative factors of effective control and supported it with sufficient evidence¹⁹¹ or whether he acknowledged the alleged causation requirement and provided an evidentiary basis for the causal link.¹⁹² The Pre-Trial Chamber considers it to be a challenge to the "application in reality" of effective control and causation requirement, which "should be addressed at trial."¹⁹³ Regarding the Co-Lawyers' arguments pertaining to the admissibility of these sub-grounds under Internal Rule 21, the Pre-Trial Chamber finds that the efforts to frame this appeal ground as a fair trial rights matter as unpersuasive.¹⁹⁴

¹⁸⁷ YIM Tith's Appeal (Indictment) (D382/22), paras 80-93.

¹⁸⁸ YIM Tith's Appeal (Indictment) (D382/22), paras 93-94.

¹⁸⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 139.

¹⁹⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 157.

¹⁹¹ YIM Tith's Appeal (Indictment) (D382/22), paras 85-87.

¹⁹² YIM Tith's Appeal (Indictment) (D382/22), para. 92.

¹⁹³ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 139. In Case 004/2, the Pre-Trial Chamber similarly found an appeal sub-ground inadmissible "because it relates to the contours of superior responsibility", see para. 158, and another appeal sub-ground asserting the existence of a contextual element of genocide, including the need to demonstrate the existence of a State policy or plan, which the Chamber considered as implicating "contours of the elements of crimes" and not acceptable jurisdiction challenges. See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 161.

¹⁹⁴ Regarding the right to be informed of the charges and to prepare for trial, the Pre-Trial Chamber observes that the Indictment sets out in detail the relevant considerations used to find YIM Tith as amongst the "most responsible". See, e.g., Indictment (D382), paras 992-997 (discussing, *inter alia*, YIM Tith's rank, *de facto* authority, gravity of conduct, participation in genocide of Khmer Krom and number of victims). Specifically, in relation to superior responsibility, the Indictment also extensively sets out YIM Tith's effective control over subordinates through his *de jure* positions and *de facto* authority in the Southwest and Northwest Zones. See, e.g., Indictment (D382), pp. 167-191.



83. Consequently, the Pre-Trial Chamber finds that Grounds 2.1 and 2.3 are inadmissible.

V. THE SIMULTANEOUS ISSUANCE OF TWO CONFLICTING CLOSING ORDERS

84. In the present case, the Co-Investigating Judges could not reach a common position on the key issue of whether YIM Tith falls within the ECCC's personal jurisdiction and decided to simultaneously issue two conflicting Closing Orders on 28 June 2019. Instead of referring their disagreement to the Pre-Trial Chamber or abiding by the default position, the National Co-Investigating Judge issued the Dismissal, dismissing all charges against YIM Tith,¹⁹⁵ while the International Co-Investigating Judge issued the Indictment, sending him to trial.¹⁹⁶ The Pre-Trial Chamber must determine whether the action of simultaneously issuing two conflicting orders in one single case is permitted under the ECCC legal framework. To this end, the Chamber will (i) recall the law governing this matter, (ii) assess the legal reasons provided by the Co-Investigating Judges to justify the issuance of conflicting Closing Orders and (iii) discuss the case at hand.

APPLICABLE LAW

85. Regarding the law generally governing the matter under consideration, the Pre-Trial Chamber firstly recalls the importance of the joint responsibility of the two Co-Investigating Judges in conducting judicial investigations at the ECCC, as Article 14^{new}(1) of the ECCC Law, in relevant part, states that "[these] judges shall attempt to achieve unanimity in their decisions." More specifically, Article 23^{new} of the ECCC Law provides:

All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, [...], and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

86. Regarding the issuance of closing orders by the Co-Investigating Judges, the Pre-Trial Chamber recalls that Internal Rule 67, in relevant part, provides:

¹⁹⁵ Dismissal (D381).

¹⁹⁶ Indictment (D382).



Rule 67. Closing Orders by the Co-Investigating Judges

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
 - c) There is not sufficient evidence against the Charged Person or persons of the charges.
4. The Closing Order shall state the reasons for the decision. [...].

87. Concerning disagreements between the Co-Prosecutors and/or between the Co-Investigating Judges, the Pre-Trial Chamber recalls that Articles 5(1), (4) and 7 of the ECCC Agreement, in relevant part, state:

Article 5: Investigating judges

1. There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.

[...]

4. The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

Article 7: Settlement of differences between the co-investigating judges or the co-prosecutors

1. In case the co-investigating judges or the co-prosecutors have made a request in accordance with Article 5, paragraph 4 [...], they shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.



2. The difference shall be settled forthwith by a Pre-Trial Chamber of five judges [...].
 3. Upon receipt of the statements referred to in paragraph 1, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.
 4. A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.
88. Internal Rule 72 specifies the disagreement settlement procedures as follows:

Rule 72. Settlement of Disagreements between the Co-Investigating Judges

1. In the event of disagreement between the Co-Investigating Judges, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges.

2. Within 30 (thirty) days, either Co-Investigating Judge may bring the disagreement before the Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Chamber and communicate the statements to its judges, with a copy to the other Co-Investigating Judge. [...] The written statement of the facts and reasons for the disagreement shall not be placed on the case file, except in cases [where the disagreement relates to a decision against which a party to the proceedings would have the right to appeal to the Chamber under these IRs]. The Greffier of the Co-Investigating Judges shall forward a copy of the case file to the Chamber immediately.

3. Throughout this dispute settlement period, the Co-Investigating Judges shall continue to seek consensus. However the action or decision which is the subject of the disagreement shall be executed, except for disagreements concerning:

- a) any decision that would be open to appeal by the Charged Person or a Civil Party under these IRs;
- b) notification of charges; or
- c) an Arrest and Detention Order,

in which case, no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Chamber has been seised and the dispute settlement procedure has been completed, as appropriate.



4. The Chamber shall settle the disagreement forthwith, as follows:

[...]

d) A decision of the Chamber shall require the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Chamber, in accordance with Article 23 new of the ECCC law, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed. [...].

89. Finally, the Pre-Trial Chamber recalls that Article 12(1) of the ECCC Agreement and Internal Rule 2 require that the procedure before the ECCC must be in accordance with both Cambodian law and international standards. In this respect, Article 1(1) of the Cambodian Code of Criminal Procedure, *inter alia*, provides that this Code “aims at defining the rules to be strictly followed and applied in order to clearly determine the existence of any criminal offense.” Articles 20^{new}, 23^{new}, 33^{new} and 37^{new} of the ECCC Law all make it clear that ECCC organs must follow all existing procedures in force. The Chamber already determined that these provisions “aim to guarantee the legality, fairness and effectiveness of ECCC proceedings.”¹⁹⁷

THE CO-INVESTIGATING JUDGES’ REASONS FOR ISSUING CONFLICTING CLOSING ORDERS

90. Regarding the legal reasons provided by the Co-Investigating Judges to justify the issuance of conflicting Closing Orders in this case, the Pre-Trial Chamber firstly notes that the Case 004 procedure was subject to several confidential disagreements between the Co-Investigating Judges, including a disagreement registered on 21 January 2019 “regarding the issuance of separate and opposing closing orders”.¹⁹⁸ None of the disagreements was brought before this Chamber, but on 18 September 2017, the Co-Investigating Judges informed the Parties to Case 004/2 that they considered separate and opposing closing orders based on a disagreement between them to be generally permitted under the applicable law¹⁹⁹ and the likely consequence for the appellate process, remarking that Internal Rule 77(13) did not address or

¹⁹⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 95; Case 003 Considerations on Closing Orders Appeals, (D266/27 & D267/35), para. 83.

¹⁹⁸ See Indictment (D382), para. 21; Dismissal (D381), para. 13.

¹⁹⁹ Decision on Disclosure concerning Disagreements (D355/1), paras 13-16.



prohibit split closing orders.²⁰⁰ The parties to Case 004 were notified of this Decision, which was later re-classified as public.²⁰¹ The Chamber considers that the Co-Investigating Judges' filing of separate and conflicting Closing Orders in Case 004 evidences an unresolved disagreement between them over at least the issue of whether or not YIM Tith falls within the ECCC's personal jurisdiction.

91. The two Co-Investigating Judges delineated their reasoning for issuing separate and opposing closing orders in earlier Decisions,²⁰² originally issued in Case 004/2 and then placed onto Case File 004²⁰³ or notified to the parties of Case 004,²⁰⁴ finding that (i) the filing by the Co-Prosecutors of separate and conflicting final submissions is legal under the ECCC legal framework ("Decision on Request for Clarification")²⁰⁵ and (ii) the filing of separate and opposing closing orders was also permitted in their view ("Decision on Disclosure concerning Disagreements").²⁰⁶ The Chamber deems it relevant to reproduce large excerpts of these reasons, starting with the Decision on Disclosure concerning Disagreements:

14. To pre-empt any future litigation [...] and in order to save the Parties time, we hereby state that we consider separate and opposing closing orders as generally permitted under the applicable law, for very much the same reasons which we found regarding opposing final submissions. [...]

15. We are aware of the problem this raises at the appeals stage. Internal Rule 77(13) only addresses the scenario of a joint dismissal or indictment; not that of split closing orders. However, this is no justification to argue that therefore split closing orders are prohibited. On the contrary, the Supreme Court Chamber in its appeal judgement in Case 001 explicitly acknowledged the scenario of the [Co-Investigating Judges] reasonably disagreeing over personal jurisdiction, for example, and that in the context of the disagreement procedure the investigation shall proceed.

16. We are of the view that the investigation stage ends at the very latest with the decision of the [Pre-Trial Chamber] on any appeal against the closing order. If there were to be no supermajority in the [Pre-Trial Chamber] for upholding one of the closing orders, both would appear to stand under the application of Internal Rule

²⁰⁰ Decision on Disclosure concerning Disagreements (D355/1), paras 13-16.

²⁰¹ Indictment (D382), para. 13; Decision on Disclosure concerning Disagreements (D355/1).

²⁰² See Case 004/2, Decision on AO An's Request for Clarification (D353/1); Case 004, Decision on AO An's Request for Clarification, 5 September 2017, D369 ("Decision on Request for Clarification (D369)"); Decision on Disclosure concerning Disagreements (D355/1).

²⁰³ Decision on Request for Clarification (D369). See also Decision on AO An's Request for Clarification (D353/1), para. 44 (holding that for the foregoing reasons, [the Co-Investigating Judges] INSTRUCT the OCIJ Greffier to place this decision on Case File 004).

²⁰⁴ Decision on Disclosure concerning Disagreements (D355/1), para. 20 (holding that for the foregoing reasons, [the Co-Investigating Judges] INSTRUCT the Greffier to place a confidential copy of this decision on Case File 004).

²⁰⁵ Decision on Request for Clarification (D369), paras 32-37.

²⁰⁶ Decision on Disclosure concerning Disagreements (D355/1), paras 13-16.



77(13) [...].²⁰⁷

92. In their Decision on Request for Clarification, the Co-Investigating Judges stated with respect to the disagreement procedure:

23. As the filing of two final submissions evidences a disagreement between the Co-Prosecutors, the question of whether the Co-Prosecutors are obliged to use the full complement of disagreement settlement measures, in other words, whether the mechanisms in Internal Rule 71 are mandatory or discretionary, does [...] fall within [the Co-Investigating Judges'] remit, as it relates to the admissibility of the final submissions. [...].

[...]

27. [...] We [...] consider that it is clear [...] that under the ECCC Law and the Internal Rules the recording of disagreements between the Co-Prosecutors is discretionary. Therefore we do not consider that the Co-Prosecutors have an obligation to use the full complement of settlement measures [...].²⁰⁸

93. Regarding the possibility to file multiple final submissions, the Co-Investigating Judges stated in the same Decision:

32. While we agree [...] that one reading of Internal Rule 66(5) envisages one final submission, the language does not *require* a joint final submission, nor does it *exclude* the filing of separate submissions [...]. While the Co-Prosecutors are required to work together to prepare indictments, that they may disagree is recognised in the [Agreement] which requires them to “*cooperate with a view to arriving at a common approach to the prosecution*” and, of course, in the fact that a disagreement resolution mechanism is provided for, which, in the [Agreement], explicitly envisages a disagreement on “*whether to proceed with a prosecution*”.

33. A further consideration is that [...] [the Co-Investigating Judges] are not bound to accept the contents of any final submissions [...]. [...]

34. Regarding the submission that filing two final submissions effectively usurps the [Pre-Trial Chamber]'s “*exclusive authority*” to settle disputes [...], we do not consider that seising the [Pre-Trial Chamber] is mandatory, and accordingly, there is no exclusive authority to be usurped.²⁰⁹

94. At the outset, the Pre-Trial Chamber observes that the Co-Prosecutors' filing of two separate final submissions, which the Chamber regards as the first procedural anomaly in the closing phase of the investigation in this case, also occurred in Case 004/1 and did not prevent the Co-Investigating Judges' issuance of one single Closing Order in that other case. In this

²⁰⁷ Decision on Disclosure concerning Disagreements (D355/1), paras 14-16 (footnotes omitted).

²⁰⁸ Decision on Request for Clarification (D369), paras 23, 27.

²⁰⁹ Decision on Request for Clarification (D369), paras 32-34 (footnotes omitted).



respect, the Chamber stresses, as a preliminary matter, that fundamental differences exist, in function and authority, between parties' submissions and judicial decisions reached by judges, such as closing orders.²¹⁰ Independent of the question of whether the filing of separate final submissions by the Co-Prosecutors is permitted in the ECCC legal system, the Chamber finds that the Co-Investigating Judges committed a gross error of law in this case by finding that the ECCC legal framework permits the issuance of separate and opposing Closing Orders.

DISCUSSION

95. As noted above, the Pre-Trial Chamber considers that the Co-Investigating Judges' filing of separate and opposing Closing Orders in this case exposes an unresolved disagreement between them over whether or not YIM Tith falls within the ECCC's personal jurisdiction. The Chamber has already determined in another case that the ECCC legal framework does not permit the issuance of conflicting closing orders.²¹¹ The Pre-Trial Chamber will refer to its jurisprudence in considering the case at hand, firstly correcting the legal interpretation reached by the Co-Investigating Judges, and secondly clarifying the nature of the errors they committed in this case.

96. First, the Pre-Trial Chamber recalls that as is the case with any other legal systems, the law governing the ECCC does not necessarily resolve all the legal uncertainties that may arise regarding procedural and/or substantive matters.²¹² However, this law not only prescribes procedures applicable in case of *lacunae* in the legal framework,²¹³ but also openly contemplates that disagreements may arise in the ECCC hybrid context and enacts specific procedures to handle and settle such disagreements in order to, *inter alia*, avoid procedural stalemates. Under the ECCC Agreement, the primary function that is entrusted to the Pre-Trial Chamber is precisely to provide for an effective mechanism to conclusively resolve disagreements between the Co-Prosecutors and between the Co-Investigating Judges. As stressed above, the Co-Investigating Judges have wilfully decided to evade this mechanism and, instead, issued separate and opposing Closing Orders with the full knowledge of the

²¹⁰ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 122; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 88.

²¹¹ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 88-124; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), paras 89-109.

²¹² Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 101; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 90.

²¹³ See ECCC Agreement, Art. 12; Internal Rule 2. See also ECCC Law, Art. 23^{new} (specifically regarding the practice of the Co-Investigating Judges).



problems that their action would be causing for the ensuing proceedings within the ECCC legal system.

97. The Pre-Trial Chamber must make findings on whether this course of action complied with the ECCC legal framework in this case. For reasons detailed hereafter, the Chamber finds that the Co-Investigating Judges' issuance of conflicting Closing Orders violated the very foundations of the ECCC legal system. The Chamber will (a) reaffirm the fundamental principles governing the disagreements between the Co-Investigating Judges and (b) recall the different procedures available to settle disagreements between them, before (c) providing its observations on the impermissible simultaneous issuance of two conflicting closing orders in the instant case.

1. Fundamental Principles Governing Disagreements between the Co-Investigating Judges

98. First, the Pre-Trial Chamber recalls that the joint conduct of investigations by the National and the International Co-Investigating Judges is a primary fundamental legal principle at the ECCC, as Article 5(1) of the ECCC Agreement provides that “[t]here shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.”

99. The ECCC Law strengthens this fundamental principle as Article 14^{new}(1) of this Law mandates that “[t]he judges shall attempt to achieve unanimity in their decisions.” Article 23^{new} of the ECCC Law specifies how the principle must be implemented by requiring that “[a]ll investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force.” The Pre-Trial Chamber has held that this provision, which mirrors Article 1 of the Cambodian Code of Criminal Procedure, providing that the Code “aims at defining the rules to be strictly followed and applied in order to clearly determine the existence of a criminal offense”, dictates that the Co-Investigating Judges must conduct the investigations jointly and in compliance with the law applicable at the ECCC.²¹⁴

100. The Pre-Trial Chamber has further clarified that “[t]he Co-Investigating Judges are

²¹⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 104; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 93.



under no obligation to seise the Pre-Trial Chamber when they do not agree on an issue before them” insofar as they agree on a course of action that is “coherent” with the “default position” embedded in the ECCC framework, “being that the ‘investigation shall proceed’”.²¹⁵ Relatedly, the Chamber observed that Article 23^{new} of the ECCC Law specifies Article 5(4) of the ECCC Agreement, by stipulating that “[i]n the event of disagreement between the Co-Investigating Judges, [...] [t]he investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled”.²¹⁶ Internal Rule 72(4)(d), which governs the settlement of disagreements between the Co-Investigating Judges by the Pre-Trial Chamber, reinforces this fundamental position by providing that:

4. The Chamber shall settle the disagreement forthwith, as follows: [...]

d) A decision of the Chamber shall require the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Chamber, in accordance with Article 23 new of the ECCC law, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed. [...].

101. In this case, the Chamber must state whether these legal principles permitted the Co-Investigating Judges to issue conflicting Closing Orders under Internal Rule 67, instead of referring the matters over which they disagreed to the Pre-Trial Chamber pursuant to Internal Rule 72.

2. Settlement of Disagreements between the Co-Investigating Judges

102. As a general matter, the Pre-Trial Chamber considers that the issue of whether the Co-Investigating Judges are obliged to refer their disagreement to this Chamber under Internal Rule 72 is governed by the overriding principle that ECCC proceedings must comply with the legality, fairness and effectiveness requirements of the ECCC legal framework. In this case, the requirement of effective criminal justice is worthy of particular attention by this Chamber.

103. One way in which the Royal Government of Cambodia and the United Nations secured effective justice in the ECCC context was by making sure that procedures were available not

²¹⁵ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 106 *referring to* Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 274; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 94.

²¹⁶ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 107; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 94.



only to handle disagreements arising in the course of investigations and prosecutions, but also to effectively resolve such disagreements in order to avoid procedural stalemates that would, *inter alia*, hamper the effectiveness of the ECCC's proceedings. At the pre-trial stage, these procedures are underlined and ultimately governed by the aforesaid "default position" prescribed, *inter alia*, by Article 5(4) of the ECCC Agreement, which unambiguously states that when "the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests [...] that the difference shall be settled" by the Pre-Trial Chamber.

104. In light of this, the Pre-Trial Chamber has determined that the issue of whether the Co-Investigating Judges have the prerogative to issue conflicting closing orders, instead of referring their disagreement to this Chamber, hinges on whether their avoidance of the disagreement settlement procedure provided for under Internal Rule 72 circumvents or not the practical effect of the default position intrinsic to the ECCC legal system.²¹⁷ In this respect, the Chamber has stressed that a principle as fundamental and determinative as the default position cannot be overridden or deprived of its fullest weight and effect by interpretative constructions taking advantage of possible ambiguities in the ECCC Law and Internal Rules to render this core principle of the ECCC Agreement meaningless.²¹⁸ Concluding otherwise would lead to a manifestly unreasonable legal result, violating both international law and Cambodian law.

105. On this basis, the Pre-Trial Chamber specified in a prior decision the diverse array of procedures available to the Co-Investigating Judges for handling their disagreements in full compliance with the ECCC legal framework.²¹⁹ In this regard, the Chamber emphasised that the nature and the severity of the disagreement between them must inform their choice of the most appropriate procedure to be followed in any given case.²²⁰ The Chamber recalls that depending on the particular circumstances of each case, the procedures available to the Co-Investigating Judges may range from the tacit toleration of an act or decision taken by the other

²¹⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 112. *See also* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 110-111; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 98.

²¹⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 112; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 98.

²¹⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 113-121; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), paras 99-109.

²²⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 113; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 99.



Judge,²²¹ to the registration of a disagreement,²²² or referral of a disagreement to the Pre-Trial Chamber over a contested act or decision pursuant to Internal Rule 72.²²³

106. The Pre-Trial Chamber reaffirms that in any such situations, the Co-Investigating Judges' actions must always be within their individual capacity and performed according to the cooperation principle upheld by Article 5(4) of the ECCC Agreement, reflecting the equal status of the National and the International Co-Investigating Judges in the ECCC hybrid system.²²⁴ The Chamber further reiterates that the Co-Investigating Judges are obliged, under the ECCC legal framework, to continue to seek a common position during the disagreement process.²²⁵ The ECCC legal system was designed and is structured to manage the joint conduct

²²¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 115 ("The Chamber finds [...] that under Article 23^{new}(3) of the ECCC Law, stating that '[t]he investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions', a Co-Investigating Judge may validly allow the action of his colleague to be carried out by not associating with such action while not registering any disagreement, thus allowing the investigation to proceed" (footnote omitted)). See also Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 99.

²²² Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 116 ("Where the disagreement concerns a serious issue, such as a matter that is at the core of the investigation, a Co-Investigating Judge may raise an objection against his colleague's action or decision by formally registering a disagreement. The Chamber finds that the formalisation of disagreements pursuant to Article 23^{new}(3) of the ECCC Law and Internal Rule 72(1), or the reaching of consensus over matters at issue, is recognised and permitted in the ECCC legal system. In such cases, 'the Co-Investigating Judges, either one or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges' pursuant to Internal Rule 72(1). The Chamber considers that the disagreement is then contained between the Co-Investigating Judges and remains confidential. The Chamber further notes that Article 5(4) of the ECCC Agreement, Article 23^{new} of the ECCC Law and Internal Rule 72(3) clearly indicate that in such case, one Co-Investigating Judge may act without the consent of the other Judge where neither of them brings such formalised disagreement before the Pre-Trial Chamber within the prescribed time limit. This Co-Investigating Judge may then proceed with the contested decision once the required time limit has elapsed" (footnotes omitted)). See also Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 99.

²²³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 117 ("The Chamber notes that when the disagreement is so critical that one of the Co-Investigating Judges wishes to halt the implementation of his colleague's decision, this Judge's only available legal recourse is to bring the disagreement before the Pre-Trial Chamber, which is explicitly and specifically empowered to settle the differences between the Co-Investigating Judges. To trigger this effective disagreement resolution mechanism, the Co-Investigating Judge(s) must submit, in writing, a statement of the facts and reasons for the disagreement. The ECCC's applicable laws endow the Pre-Trial Chamber with the necessary power to conclusively resolve the matters in dispute between the two equal Co-Investigating Judges and determine whether or not the disputed decision should be carried out. In cases where the Pre-Trial Chamber cannot achieve the supermajority vote to conclusively settle the disagreement, the ECCC legal framework provides that the matter is then resolved by the default position, stipulating that the investigation must proceed" (footnotes omitted)). See also Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 99.

²²⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 114 referring to ECCC Agreement, Art. 5(1) read in conjunction with ECCC Law, Art. 27^{new}; see also Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 100.

²²⁵ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 118 (The Chamber remarked that the use of the present tense in Internal Rule 72(3) leaves no doubt that the Co-Investigating Judges are obliged to continue to seek a common legal reasoning or mutually agreed course of action during the disagreement settlement period and that the two Co-Investigating Judges have a reciprocal obligation in this sense



of judicial investigations by the Co-Investigating Judges who may thus reach an agreement at any stage of the investigation of cases of which they are seised. The crystallisation of any disagreements between them about such cases is permissible,²²⁶ but only insofar as it complies with existing procedures in force and remains coherent with the default position intrinsic to the ECCC legal system, which provides an effective way out of any possible procedural impasses.

107. Ultimately, the Pre-Trial Chamber reiterates that when the National and the International Co-Investigating Judges are unable to agree on a common position, and where the matter in dispute between them, or their prolonged disagreement over an issue, jeopardises the effectiveness of the judicial investigation, the ECCC legal framework does not permit that such disagreement be entrenched or sheltered from an effective resolution.²²⁷ The Chamber thus affirms its previous holding that where the disagreement settlement procedure provided for by Internal Rule 72 emerges as the only remaining course of action available to the Co-Investigating Judges to prevent the occurrence of a procedural stalemate and to safeguard the legality, fairness and effectiveness of a judicial investigation conducted at the ECCC, the Co-Investigating Judges must trigger this procedural mechanism by referring their disagreement to the Pre-Trial Chamber.²²⁸

3. Observations regarding the Issuance of Conflicting Closing Orders

108. In light of the foregoing principles, the Pre-Trial Chamber has found that where a disagreement relates to matters that must be determined by a closing order under Internal Rule 67, the ECCC legal framework allows only two courses of action pursuant to Article 23^{new} of the ECCC Law and Internal Rule 72(3). The Co-Investigating Judges are obliged either to reach a tacit or express consensus on those matters or to refer their disagreement on such matters to

under the ECCC legal framework); *see also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 100.

²²⁶ *See* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 119 (This Chamber acknowledged that the applicable law before the ECCC contemplates that despite their genuine efforts to reach a compromise or find a consensus, the two equal National and International Co-Investigating Judges may still be unable to agree on a common position); *see also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 100.

²²⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 119; *see also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 101.

²²⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 119; *see also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 101.



the Pre-Trial Chamber.²²⁹

109. Further, the Pre-Trial Chamber reaffirms that the ECCC's legal texts leave no significant ambiguity in this respect: Internal Rule 67(1) clearly stipulates that "[t]he Co-Investigating Judges *shall conclude* the investigation by issuing a Closing Order, *either* indicting a Charged Person [...], *or* dismissing the case." The Glossary of the Internal Rules adds that a Closing Order "refers to *the* final order made by the Co-Investigating Judges or the Pre-Trial Chamber at the end of the judicial investigation, *whether* Indictment *or* Dismissal Order."²³⁰

110. It follows from these provisions that a closing order of the Co-Investigating Judges is a single decision. As such, Internal Rule 1(2) – stating that in the Rules, the singular includes the plural, and a reference to the Co-Investigating Judges "includes both of them acting jointly and each of them acting individually" – does not offer a sufficient legal basis to override or undermine core principles of the ECCC Agreement, such as the default position, and the rule on strict construction of penal laws further prevents any interpretations in this sense.

111. For these reasons, the Pre-Trial Chamber rejects the Co-Investigating Judges' reasoning on the purported legal permissibility of issuing two separate and opposing closing orders. In addition to the manifest errors of law on which their reasoning is based, the Chamber recalls that the Co-Investigating Judges have a judicial duty to decide on matters in dispute of which they are seised.²³¹ When their disagreement prevents them from arriving at a common final determination of such matters, they must still discharge this joint judicial duty by following the procedures available in the ECCC legal system to make sure that a conclusive determination of the matters within their jurisdiction is attained.²³²

112. In sum, the Pre-Trial Chamber stresses that by issuing contradicting Closing Orders instead of referring their related disagreement to the Pre-Trial Chamber or abiding by the default position, the Co-Investigating Judges committed errors that undermine the foundations

²²⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 120; *see also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 102.

²³⁰ Internal Rules, Glossary, p. 83 (emphasis added). *See also* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 122; *see also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 103.

²³¹ *See* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 122; *see also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 105.

²³² Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 122; *see also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 105.



of the hybrid system and proper functioning of the ECCC. The Chamber further observes that despite the fundamental nature of the matter at stake, that is, whether or not YIM Tith falls within the ECCC's personal jurisdiction, the International Co-Investigating Judge issued the Indictment with remarkably minimal reasoning on this matter, recalling simply one of their prior Decisions.²³³ The National Co-Investigating Judge provided no reasoning or references in the Dismissal.²³⁴

113. Additionally, while it must be presumed that the Co-Investigating Judges may have committed these legal errors in good faith, it is obvious from their earlier Decisions that they knew that by refusing to refer their disagreement to the Pre-Trial Chamber, any matters over which they disagreed, including the key issue of whether or not YIM Tith falls within the ECCC's jurisdiction, would have to be addressed only as part of appellate proceedings before this Chamber, instead of through the procedural mechanism specifically provided for under the ECCC legal framework to conclusively settle disagreements between them. The Co-Investigating Judges were aware of the difficulties their actions would be causing not only on appeal, but beyond the pre-trial appellate stage of the Case 004 proceedings.²³⁵ The Pre-Trial Chamber also finds it disturbing that the conflicting Closing Orders were issued on the same day in only one language.²³⁶

114. Overall, the Pre-Trial Chamber considers that the Co-Investigating Judges' errors have jeopardised the whole system upheld by the Royal Government of Cambodia and the United Nations. More than a violation of the fundamental principles of the ECCC legal framework, the Chamber is of the view that the Co-Investigating Judges' *mauvaises pratiques* may amount to a denial of justice, especially since the Chamber is unable to exclude that they may have intended to defeat the default position and frustrate the authority of the Pre-Trial Chamber. The Chamber further notes that more than an isolated example, their actions in this case confirm a pattern that the Co-Investigating Judges have apparently adopted in dealing with all the final

²³³ Indictment (D382), para. 13 *referring to* Decision on Disclosure concerning Disagreements (D355/1), paras 13-16; The Chamber observes that this Decision (D355/1), which was initially issued to address the parties' requests in Case 004/2, was notified to the Parties in Case 004 without taking any measures, such as seeking tailored Parties' submissions, to address the singularity of this case, notwithstanding the far-reaching impacts of such action.

²³⁴ Dismissal (D381).

²³⁵ See Decision on Disclosure concerning Disagreements (D355/1), paras 15-16.

²³⁶ See *supra* Procedural History (On 28 June 2019, Dismissal (D381) was filed in Khmer only and the Indictment (D382) was filed in English only, with translations to follow).



cases on the ECCC's docket.²³⁷

115. The Chamber once more notes with regret that never, to its knowledge, have there been criminal cases in the history of other national and international legal systems that concluded with the simultaneous issuance of two contrary decisions emanating from one single judicial office. After ten years of investigation into crimes among the most atrocious and brutal committed during the twentieth century, the Pre-Trial Chamber can only condemn once again the legal predicament that the Co-Investigating Judges' unlawful actions precipitated upon yet another ECCC proceeding.

VI. MERITS

116. While the decision of the Pre-Trial Chamber in respect of the admissibility of the Appeals and the illegal character of the Co-Investigating Judges' agreement to issue separate Closing Orders is expressed in the preceding paragraphs, the Chamber, upon deliberation, has not attained the required majority of four affirmative votes to reach a decision based on common reasoning on the merits. Pursuant to Internal Rule 77(14), the Opinions of the various members of the Pre-Trial Chamber are attached to these Considerations.

²³⁷ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 88-124; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35); Dismissal (D381); Indictment (D382).



VII. DISPOSITION

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

- **ORDERS** a joinder of the Appeals against both Closing Orders;
- **DECIDES** that the National Co-Prosecutor's Appeal is admissible;
- **DECIDES** that the International Co-Prosecutor's Appeal is admissible;
- **DECIDES** that the Co-Lawyers for Civil Parties' Appeal is admissible;
- **DECIDES** that the Co-Lawyers for YIM Tith's Appeal (Two Closing Orders) is admissible;
- **DECIDES**, in respect of the Co-Lawyers for YIM Tith's Appeal (Indictment), that Grounds 2.2, 3, 4, and 5 thereof are admissible;
- **DECIDES** that the remaining Grounds in the Co-Lawyers for YIM Tith's Appeal (Indictment) are inadmissible;
- **DECLARES** that the Co-Investigating Judges' issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC;
- **DECLARES** that it has not assembled an affirmative vote of at least four judges for a decision based on common reasoning on the merits.

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

In accordance with Internal Rule 77(14), this Decision shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the parties by the Greffier of the Pre-Trial Chamber.



Phnom Penh, 17 September 2021

President

Pre-Trial Chamber



PRAK Kimsan

Olivier BEAUVALLET

NEY Thol

Kang Jin BAIK

HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion.

Judges Kang Jin BAIK and Olivier BEAUVALLET append their opinion.



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

117. Case 004, in which YIM Tith is the Charged Person, is the very last Case File among Cases 003 and 004 against the Charged Persons IM Chaem, AO An, MEAS Muth and YIM Tith. Cases 003 and 004 began with procedural differences from Cases 001 and 002, that is the International Co-Prosecutor unilaterally selected a number of individuals for preliminary investigation, hiding and failing to cooperate with the National Co-Prosecutor and, as a result, causing never-ending disruptions. The National Judges of the Pre-Trial Chamber have previously indicated in their detailed Opinion on the disruptions in the Case against the Charged Person AO An. At this time, based on some evidence in the Case against AO An, the National Judges of the Pre-Trial Chamber would like to submit additional opinion for the purpose of closing Case 004. In this regard, we have to review, one after the other, the purpose of the establishment of the ECCC, the session of the National Assembly to draft the law on the establishment of the ECCC, the acknowledgement of the outcomes of the session of the National Assembly of Cambodia, special features of the ECCC, senior leaders and those most responsible in DK, International Co-Prosecutor's concealment of the unilateral preliminary investigation, the admission of the International Deputy Co-Prosecutor and the National Judges of the Pre-Trial Chamber's considerations on the illegality of the International Co-Prosecutor's preliminary investigation as follows:

1. Purpose

118. According to Article 1 of the ECCC Agreement signed on 6 June 2003:

The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

119. Article 1 of the ECCC Law promulgated on 23 October 2004, which is based on the ECCC Agreement stipulates that:

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international



conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

120. Article 2^{new} of the ECCC Law recalls that the ECCC shall be established to “bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes [...] that were committed during the period from 17 April 1975 to 6 January 1979.”

121. Under the ECCC Agreement and ECCC Law, individuals who are brought to trial before the ECCC consist of two categories:

- Senior leaders and
- Those most responsible falling within the jurisdiction of the ECCC.

122. Therefore, the national and international parties should have cooperated and agreed to select these two categories of individuals for prosecution, initiating the preliminary investigation and charges submitted to the Co-Investigating Judges for the judicial investigation in accordance with all articles stated in the ECCC Law and all the rules set out in the Internal Rules, especially the purpose of establishing the ECCC, which was disclosed publicly during the session of the National Assembly to pass the draft law on the establishment of the ECCC.

2. The Session of the National Assembly to Pass the Draft Law on the Establishment of the ECCC²³⁸

123. Although the ECCC Agreement, the ECCC Law and the Internal Rules make no mention of the required number of senior leaders and those most responsible in DK to be brought to trial before the ECCC; during the session of the National Assembly to pass the draft law on the establishment of the ECCC, there was a debate between the parliamentarians and the defender of the draft law, H.E. SOK An, on the number of persons falling within the jurisdiction of the ECCC, and the clear purpose of the Agreement between the Royal Government of Cambodia and the United Nations is [to bring to trial] from four (4) to five (5) persons, all of whom are covered in Cases 001 and 002.

²³⁸ *Searching for the Truth (DC-Cam Magazine)*, Special English Edition, Issue 13 (January 2001), p. 58; *Searching for the Truth (DC-Cam Magazine)*, Special English Edition, Issue 14 (February 2001), pp. 43-44 and pp. 46-47.



3. Request of the International Co-Investigating Judge

124. In order to understand further the objectives of the parties to the ECCC Agreement, the International Co-Investigating Judge requested from the United Nations Archives the minutes of the negotiations between the United Nations and the Royal Government of Cambodia. However, the United Nations refused to release most of the requested documents for confidentiality reasons.²³⁹

4. Acknowledgement of the Number of Persons Falling within the Jurisdiction of the ECCC²⁴⁰

125. In response to the National Co-Prosecutor's Appeal of the Case 004/2 Indictment, the International Co-Prosecutor stated that, "H.E. KEO Remy in his last sentence states that it is unfair if we try only three or four people (in response to H.E. SOK An). This evidence shows that, during the session of the Cambodian National Assembly to pass the draft law on the establishment of the ECCC, H.E. SOK An stated that the number of people to be brought to trial before the ECCC consisted of three or four people only, as what H.E. KEO Remy stated, which is the purpose of drafting the ECCC Agreement and the ECCC Law.

126. A number of perpetrators will not be brought to trial before the ECCC: The drafters of the Draft Law on the Establishment of the ECCC know that a large number of perpetrators will not be brought to trial before the ECCC.

5. Special Features of the ECCC

127. The National Judges of the Pre-Trial Chamber have considered the decision on the International Co-Prosecutor's Appeal against the Closing Order in the IM Chaem case and that the ECCC is a special tribunal whose prosecutorial and judicial investigatory procedures are different from those of Cambodia's national courts. Prosecution and judicial investigation

²³⁹ Case 003, Notice of Unsuccessful Attempt to Obtain Strictly Confidential United Nations' Archive Materials, 3 May 2016, D181/1.

²⁴⁰ Case 004/2, International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal of the Case 004/2 Indictment, 27 February 2019, D360/10, paras 11-12 *referring to* "Debate and Approval of the Agreement between the United Nations and the Royal Government of Cambodia and Debate and Approval of Amendments to Law on Trying Khmer Rouge Leaders" the First Session, the Third Term of the Cambodian National Assembly, Transcript of October 4-5th, 2004, D359/3/1.1.45, ERN (EN) 01598760-01598761.



under the national courts merely concern facts, *i.e.* investigating judges are only seised of factual allegations as set out in a Prosecutor's Introductory Submissions. On the contrary, at the ECCC, prosecution can proceed only where the two conditions are met:

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 who were most responsible for the crimes" within the jurisdiction of the ECCC.

6. Senior Leaders and Those "Most Responsible"

128. According to the Introductory Submission dated 18 July 2007 (D3), the senior leaders and those most responsible within the jurisdiction of the ECCC are recognised and agreed to be brought to trial before the ECCC by the national and international parties include:

1. KHIEU Samphan
2. NUON Chea
3. IENG Sary
4. IENG Thirith
5. KAING Guek Eav *alias* Duch

The number of the aforesaid persons who are in Cases 001 and 002 is consistent with the one mentioned by H.E. SOK An during the session of the National Assembly to pass the draft law on the establishment of the ECCC.

129. Therefore, no other persons remain to be prosecuted and tried before the ECCC.

7. International Co-Prosecutor's Concealment of the Initiation of Charges through the Preliminary Investigation

130. The National Judges of the Pre-Trial Chamber previously considered the illegality of the International Co-Prosecutor's preliminary investigation in Cases 003 and 004 on 18 August



2009 (Annex II: Excerpt from Considerations of the Pre-Trial Chamber regarding the disagreement by the Co-Prosecutors pursuant to Rule 71 of the Internal Rules):²⁴¹

According to the ECCC Law, for prosecution to be conducted on legal merit, both Co-Prosecutors, namely the National Co-Prosecutor and the International Co-Prosecutor must agree with each other to prosecute, whether at their own discretion or on the basis of a complaint. The Agreement and the ECCC Law specify that the ECCC shall have two prosecutors, known as the Co-Prosecutors, who must cooperate with each other in order to fulfil their duties. Therefore, it is seen that the National Co-Prosecutor did not participate in the International Co-Prosecutor's preliminary investigation to obtain evidence related to new suspects, nor did the National Co-Prosecutor delegate power to her staff to participate in such an investigation.

The National Co-Prosecutor and her staff never participated and/or supported the preliminary investigations aimed at identifying suspects for prosecution, as mentioned in the Second and Third Introductory Submissions carried out by the International Co-Prosecutor and his staff that there was unofficial information communicated about the fact that the international side had conducted preliminary investigations related to a number of affairs and that the investigations had already ended. After receiving this information, the National Co-Prosecutor went to meet with the International Co-Prosecutor. However, the International Co-Prosecutor was absent that day; so the National Co-Prosecutor went to meet with the International Deputy Co-Prosecutor, Mr William SMITH. When asked about the preliminary investigations, Mr William SMITH told the National Co-Prosecutor that preliminary investigations had indeed been conducted, as the National Co-Prosecutor had learned. Also, Mr William SMITH said "sorry" that the preliminary investigations were carried out unilaterally and promised to inform the National Co-Prosecutor if further investigations were to be conducted.

It was the International Co-Prosecutor alone who decided to initiate this preliminary investigation. The National Co-Prosecutor was not aware of it. The International Co-Prosecutor, in his response dated 22 May 2009, asserted that the preliminary investigation pertaining to the First, Second, and Third Introductory Submissions was principally done on the basis of an in-house analysis of documents collected from the

²⁴¹ See Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 260.



Documentation Center of Cambodia (DC-Cam) that were obtained prior to 18 July 2007, i.e. before the filing of the First Introductory Submission. Most of the authorisations for preliminary investigation, whenever given by any or both the Co-Prosecutors, were oral, which is permitted by law.

The International Co-Prosecutor initiated the preliminary investigation in Case 004 and other case files in Cases 003 and 004 unilaterally and in secret, in violation of the ECCC Agreement and the ECCC Law, thereby resulting in the illegality of the entire Case File.

8. Decision of the National Co-Investigating Judge in the Closing Order

131. Based on all the above-mentioned evidence, the Pre-Trial Chamber National Judges are of the view that the decision made by the National Co-Investigating Judge that:

- the ECCC has no personal jurisdiction over YIM Tith and
- the Case against him being dismissed is just.

However, the National and International Co-Investigating Judges' issuance of the Two Conflicting Closing Orders is illegal, violating the legal framework of the ECCC.

FOR THESE REASONS, THE NATIONAL JUDGES OF THE PRE-TRIAL CHAMBER HEREBY:

- **CLOSE** Case File 004 against the Charged Person YIM Tith, sending it to the ECCC archives.

Phnom Penh, 17 September 2021



President PRAK Kimsan



Judge NEY Thol



Judge HUOT Vuthy



IX. OPINION OF JUDGES KANG JIN BAIK AND OLIVIER BEAUVALLET

132. The International Judges will set out below their considerations in relation to each of the five Appeals.

THE CO-LAWYERS FOR YIM TITH'S APPEAL OF THE ISSUANCE OF TWO CLOSING ORDERS²⁴²

1. Submissions

a. The Co-Lawyers for YIM Tith's Appeal of the Issuance of Two Closing Orders

133. The Co-Lawyers for YIM Tith's Appeal (Two Closing Orders) impugn the validity of both Closing Orders in Case 004. In particular, the Co-Lawyers submit that the Co-Investigating Judges erred in law by issuing two separate and conflicting Closing Orders, since (i) this was impermissible under ECCC law; and (ii) violated the principle of *in dubio pro reo* and YIM Tith's fair trial rights. Consequently, the Co-Lawyers request that the Pre-Trial Chamber overturn both Closing Orders and dismiss the case.²⁴³

134. According to the Co-Lawyers, the ECCC legal framework does not allow the issuance of two separate and conflicting Closing Orders. First, Article 5(4) of the ECCC Agreement states that the Co-Investigating Judges shall cooperate to arrive at a common approach to the investigation. Second, Article 23^{new} of the ECCC Law dictates that investigations are a *joint*, not parallel responsibility.²⁴⁴ Third, Internal Rule 67 clearly envisages only a single Closing Order issued by both Co-Investigating Judges to conclude the investigation. Internal Rule 67's "language is mandatory and permits either and exclusively"²⁴⁵ an indictment or dismissal.

135. Fourth, Internal Rule 14 provides that the Co-Investigating Judges will act jointly and with equal authority, and does not make any reference to the *individual* issuance of a closing

²⁴² The other Parties also make dedicated submissions addressing the two conflicting Closing Orders issued in Case 004 and the appropriate legal consequences which the Pre-Trial Chamber should draw therefrom. See International Co-Prosecutor's Appeal (D381/19), paras 164-175; YIM Tith's Reply (Indictment) (D382/29), paras 8-27, 35-41; YIM Tith's Response to the International Co-Prosecutor's Appeal (D381/26), paras 7-26, 32-34; International Co-Prosecutor's Reply (D381/28), paras 1-8; Civil Parties' Appeal (D381/20), paras 13-38.

²⁴³ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 20.

²⁴⁴ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 23.

²⁴⁵ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 24.



order. Although Internal Rule 14(4) provides for a limited power to delegate judicial actions—the only situation where a Co-Investigating Judge may act individually—such delegation cannot occur without a “joint written decision” or for any action that must be taken jointly under the ECCC Law and Internal Rules.²⁴⁶ For the Co-Lawyers, the absence of any provision in the ECCC Agreement, ECCC Law or the Internal Rules referring to the possibility of two Closing Orders or the possibility of the Co-Investigating Judges acting unilaterally²⁴⁷ implies that the issuance of a Closing Order *must* be done jointly. Thus, no delegation under Internal Rule 14(4) was possible, and in any case, the Co-Lawyers note that no delegation of powers actually took place.²⁴⁸

136. In light of the above, the Co-Lawyers submit that the Co-Investigating Judges’ actions were impermissible.²⁴⁹ At the very least, they should have sought clarification on this issue from the Pre-Trial Chamber prior to issuing their separate orders.²⁵⁰

137. Alternatively, the Co-Lawyers argue that the two opposing Closing Orders violated the principle of *in dubio pro reo* and YIM Tith’s right to a fair trial. Since the Co-Investigating Judges assessed the same factual evidence but reached opposite conclusions, the Co-Lawyers submit that they were bound to apply the principle of *in dubio pro reo* to their assessment of the facts and dismiss the case. By not doing so, they undermined YIM Tith’s fair trial rights.²⁵¹

138. Citing relevant jurisprudence,²⁵² the Co-Lawyers recall the duty of the Co-Investigating Judges to preserve the integrity of investigations, ensuring compliance with basic principles and procedural safeguards.²⁵³ Further, the Co-Lawyers emphasise that the principle of *in dubio pro reo* is a central component of the presumption of innocence, guaranteed under Article 38 of the Constitution of Cambodia, Article 351 of the Cambodian Code of Criminal Procedure, and recognised in ECCC jurisprudence and international law.²⁵⁴ According to the Co-Lawyers, this principle demands that doubts in factual findings and determinations of personal

²⁴⁶ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), para. 27.

²⁴⁷ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), paras 26, 28.

²⁴⁸ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), para. 28.

²⁴⁹ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), para. 30.

²⁵⁰ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), para. 29.

²⁵¹ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), para. 31.

²⁵² See, e.g., Case 004, Decision on YIM Tith’s Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02, 12 August 2015, D229/3, para. 26; Case 004, Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004 and 004/2 and Related Submissions by the Defence for YIM Tith, 11 August 2017, D355/9, para. 17.

²⁵³ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), para. 32.

²⁵⁴ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), para. 33.



responsibility must be interpreted in favour of the accused.²⁵⁵ It applies to all stages of the proceedings, including the pre-trial stage.²⁵⁶

139. The Co-Lawyers aver that since two equal judges came to opposite conclusions regarding personal jurisdiction based on the same evidence, YIM Tith's case is "the embodiment of a situation of doubt that must be resolved in favour of the [A]ccused".²⁵⁷ For the Co-Lawyers, "the very existence of two conflicting Closing Orders raises doubts as to the findings of individual facts and the overall assessments of Mr YIM Tith's alleged personal responsibility".²⁵⁸ Hence, the Co-Investigating Judges were obligated to dismiss the case by applying *in dubio pro reo* in their role as arbiters of fact and as guardians of the investigation.²⁵⁹

140. The Co-Lawyers further submit that the Co-Investigating Judges, by issuing conflicting Closing Orders, created procedural uncertainty and further doubt. This violated YIM Tith's right to legal certainty, since he has an "unresolved indictment hanging over him perpetually".²⁶⁰ Additionally, by not seeking clarification from the Pre-Trial Chamber "before embarking on such a reckless and legally improper course of action", the resultant "complex web of appellate proceedings" has unreasonably prolonged the already unacceptably long proceedings of over thirteen years.²⁶¹

141. In conclusion, in the Co-Lawyers' view, since the ECCC legal framework does not permit two opposing Closing Orders and there was no delegation of powers, both the Closing Orders are null and void and, thus, procedurally defective under Internal Rule 67(2).²⁶² As a result, the Indictment is invalid and Internal Rule 77(13)(b) cannot apply.²⁶³ Hence, unless the Pre-Trial Chamber reaches a supermajority decision, the Trial Chamber cannot be seised based on an invalid Indictment.²⁶⁴

142. Consequently, the Co-Lawyers submit that this situation leaves only three options available to the Pre-Trial Chamber, namely:

²⁵⁵ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 33.

²⁵⁶ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 33 and footnote 34.

²⁵⁷ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 34.

²⁵⁸ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 34.

²⁵⁹ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), paras 34, 36.

²⁶⁰ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 35.

²⁶¹ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 35.

²⁶² YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 38.

²⁶³ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), paras 38, 40.

²⁶⁴ YIM Tith's Appeal (Two Closing Orders) (D381/18 & D382/21), para. 38.



- (i) dismissal of both Closing Orders with full prejudice; or
- (ii) dismissal of both Closing Orders and return of the Case File to the Co-Investigating Judges with an order to *jointly* issue a single Closing Order, noting that any disagreement must be resolved in favour of YIM Tith; or
- (iii) dismissal of both Closing Orders and issuance by the Pre-Trial Chamber of its own Closing Order based on its assessment of the Case File.²⁶⁵

143. The Co-Lawyers maintain that it is “absolutely *not* open” to the Pre-Trial Chamber to dismiss just one Closing Order, as the Co-Investigating Judges hold equal status and the applicable law does not allow the Chamber to determine that either Judge’s action should prevail over the other.²⁶⁶ The only exceptions are the presumption of innocence and *in dubio pro reo*, which dictate that the case be dismissed.²⁶⁷

b. The International Co-Prosecutor’s Response

144. In her Response, the International Co-Prosecutor requests that YIM Tith’s Appeal (Two Closing Orders) be dismissed on its merits and that Case 004 be sent to trial.²⁶⁸

145. As a preliminary matter, the International Co-Prosecutor notes the Pre-Trial Chamber’s unanimous declaration in Case 004/2 that the *issuance* of two conflicting closing orders was illegal;²⁶⁹ accordingly, she does not contest the part of the Appeal addressing this legal aspect, but contests the Co-Lawyers’ submissions on the impact of this error on the legal status of each Closing Order.²⁷⁰ This is notwithstanding her and her predecessor’s consistent view that the Co-Investigating Judges may validly issue two conflicting closing orders.²⁷¹

146. On the merits, the International Co-Prosecutor submits that (i) the Pre-Trial Chamber is not required to dismiss both Closing Orders;²⁷² (ii) only the Indictment may be upheld under the ECCC’s legal framework;²⁷³ and (iii) if the Pre-Trial Chamber fails to reach a supermajority

²⁶⁵ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), para. 39.

²⁶⁶ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), para. 40.

²⁶⁷ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), para. 40.

²⁶⁸ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), paras 3, 62.

²⁶⁹ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), para. 26.

²⁷⁰ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), para. 27.

²⁷¹ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), para. 25.

²⁷² International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), paras 28-29.

²⁷³ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), paras 30-46.



decision to overturn the Indictment, that Indictment seises the Trial Chamber.²⁷⁴

147. Regarding her position that the Pre-Trial Chamber is not required to dismiss both Closing Orders,²⁷⁵ the International Co-Prosecutor asserts that (i) it remains open to the Pre-Trial Chamber to dismiss only one Closing Order, which is demonstrated by the Pre-Trial Chamber's Considerations in Case 004/2 where the Chamber's judges did not dismiss both Case 004/2 Closing Orders but considered the legality of *each* Closing Order,²⁷⁶ and (ii) contrary to the Co-Lawyers' contention that the Co-Investigating Judges were required to issue a joint closing order and not permitted to act alone, the Pre-Trial Chamber has unanimously confirmed that the Co-Investigating Judges are not required to issue joint decisions and, furthermore, that each of them can validly act alone, especially where one has retreated from continuing the investigation.²⁷⁷

148. In support of her contention that only the Indictment may be upheld, the International Co-Prosecutor reasons that only the Indictment was issued in accordance with the "fundamental and determinative" default position that the "investigation shall proceed".²⁷⁸ In particular, when one Co-Investigating Judge proposes to issue an indictment and the other disagrees, the "investigation shall proceed" means that the indictment must be issued as proposed because a dismissal order prevents the investigation from proceeding.²⁷⁹ This interpretation is supported by the Pre-Trial Chamber's unanimous holding in Case 002, affirming that the Co-Investigating Judges' indictment for national crimes despite their "procedural stalemate" was coherent with the default position.²⁸⁰ This interpretation is also supported by Supreme Court Chamber jurisprudence²⁸¹ and conforms with Cambodian and international law, including the object and purpose of the ECCC Agreement and ECCC Law.²⁸² Accordingly, the International Co-Investigating Judge's issuance of the Indictment, which progresses Case 004 to trial, "accorded fully with the fundamental and determinative default position" and his failure to refer the disagreement to the Pre-Trial Chamber "does not render

²⁷⁴ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), paras 47-58.

²⁷⁵ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), paras 28-29.

²⁷⁶ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 28.

²⁷⁷ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 29 and footnote 48.

²⁷⁸ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 30.

²⁷⁹ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 31.

²⁸⁰ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 32.

²⁸¹ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 33.

²⁸² International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 34.



the Indictment invalid.”²⁸³ Conversely, the National Co-Investigating Judge’s Dismissal was issued without legal basis because he was obliged to refer the matter before the Pre-Trial Chamber if he was unwilling to agree to a course of action coherent with the default position.²⁸⁴

149. Furthermore, the International Co-Prosecutor disputes the relevance of the presumption of innocence as raised by the Co-Lawyers, considering it remains undisturbed unless and until YIM Tith is convicted by a supermajority of Trial Chamber judges.²⁸⁵ In addition, the International Co-Prosecutor maintains that the principle of *in dubio pro reo* may not be applied to dismiss the case. First, the very existence of the default position contradicts the view that a disagreement must lead to dismissal.²⁸⁶ Second, the fact that the Co-Investigating Judges differed in their personal jurisdiction assessment does not *in itself* cast doubt on either their underlying factual findings or the personal jurisdiction discretionary determination itself.²⁸⁷ In any event, *in dubio pro reo* does not apply to factual findings at the pre-trial stage; indeed, as a corollary of the presumption of innocence, it is one aspect of the requirement that guilt must be found *at trial* beyond reasonable doubt.²⁸⁸ Lastly, in the International Co-Prosecutor’s view, in light of the Pre-Trial Chamber’s unanimous decision on the legality of the issuance of two Closing Orders and the default position, the Co-Lawyers’ arguments regarding YIM Tith’s right to legal certainty, alleged confusion regarding the basis of the charges, and alleged violation of his right to be tried expeditiously are moot and inapplicable.²⁸⁹

150. Regarding her position that the Indictment seises the Trial Chamber absent its reversal by supermajority decision, the International Co-Prosecutor submits that, after the Case 004 appeals process has been completed, the “fundamental and determinative” default position that the “investigation shall proceed” requires the case to proceed to trial, even where the Pre-Trial Chamber fails to reach a supermajority decision on the validity of the Dismissal.²⁹⁰ This is because the default position must be respected throughout ECCC proceedings, as the Pre-Trial Chamber stressed unanimously in Case 004/2.²⁹¹ Internal Rule 77(13)(b) is *lex specialis* and reflects the clear intent to implement the default position and, along with Internal Rule 79(1),

²⁸³ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), para. 36.

²⁸⁴ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), para. 37.

²⁸⁵ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), para. 39.

²⁸⁶ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), para. 41.

²⁸⁷ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), paras 42-43.

²⁸⁸ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), para. 44.

²⁸⁹ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), para. 46.

²⁹⁰ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), para. 47.

²⁹¹ International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), paras 48-49 referring to Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 112, 117.



provides that the Trial Chamber must be seised by an indictment.²⁹²

151. Accordingly, in the International Co-Prosecutor's view, the *in dubio pro reo* principle is inapplicable because there is no "doubt" to resolve.²⁹³ In any event, this principle is inapplicable to questions of procedure, because it is mainly a rule of proof and not one of legal interpretation.²⁹⁴ Moreover, even if it applies to questions of law, *in dubio pro reo* deals primarily with doubt regarding substantive criminal law, not procedure.²⁹⁵ The International Co-Prosecutor stresses that the principle's "narrow applicability to dilemmas of law is limited to doubts that remain after *interpretation* using the civil law rules of interpretation" and "the fact that a particular scenario might not be expressly covered by it does not raise 'doubt' from which a defendant will always profit".²⁹⁶ Indeed, Internal Rule 21 requires that the ECCC Law and Internal Rules be interpreted so as to always safeguard the interests not only of the accused, but also of victims as well, and to always defer to the accused on procedural matters would have "a chilling effect on the administration of justice".²⁹⁷

152. The International Co-Prosecutor also asserts that automatically terminating the proceedings in the face of any procedural uncertainty would violate Cambodian (and French) procedural law, as well as ECCC and international jurisprudence, which establishes an extremely high threshold for the termination of proceedings.²⁹⁸ Referring to the ECCC Agreement's preamble, the International Co-Prosecutor maintains that "dismissing Case 004 at this stage would violate the specific rights afforded to the civil parties within the ECCC framework" and "would also constitute an affront to the many men and women who came forward to provide evidence [...], and amount to a failure to deliver any measure of justice to tens of thousands of victims who have waited over four decades for accountability".²⁹⁹

153. Thus, the International Co-Prosecutor concludes that (i) although the Co-Investigating Judges' *issuance* of conflicting closing orders was not permitted, this does not warrant the dismissal of both Closing Orders, but rather, the Pre-Trial Chamber must now consider the

²⁹² International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 50 and footnote 111.

²⁹³ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 51.

²⁹⁴ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 52.

²⁹⁵ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 53.

²⁹⁶ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 54 (emphasis added).

²⁹⁷ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 55.

²⁹⁸ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 57.

²⁹⁹ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 58.



legal status of each Closing Order;³⁰⁰ (ii) the Indictment should be upheld, whereas the Dismissal is void and without legal effect (while also containing multiple errors of fact and law);³⁰¹ and (iii) should the Pre-Trial Chamber fail to reach a supermajority decision overturning the Indictment, that Indictment must seize the Trial Chamber following the clear terms of Internal Rules 77(13)(b) and 79(1).³⁰²

c. The Co-Lawyers for YIM Tith's Reply

154. In their Reply, the Co-Lawyers request that the Pre-Trial Chamber dismiss the International Co-Prosecutor's Response and reiterate their requests to dismiss both Closing Orders as defective and either: (i) dismiss the case against YIM Tith; *or* (ii) return the Case File to the Co-Investigating Judges with an order to jointly issue a single Closing Order; *or* (iii) assess Case File 004 itself and issue its own Closing Order either indicting YIM Tith or dismissing the case against him.³⁰³ The Co-Lawyers contend that the International Co-Prosecutor "selectively misconstrues" the Pre-Trial Chamber's unanimous finding in Case 004/2,³⁰⁴ and that the "obvious consequence" of the Pre-Trial Chamber's finding is that both unlawfully-issued Closing Orders are null and void.³⁰⁵

155. According to the Co-Lawyers, the International Co-Prosecutor's position that YIM Tith should be tried on the basis of the Indictment (which, in the Co-Lawyers' view, is unlawful and procedurally defective)³⁰⁶ demonstrates that she does not truly accept the Pre-Trial Chamber's unanimous finding, but rather that her Response seeks to subvert and challenge it.³⁰⁷ For the Co-Lawyers, the International Co-Prosecutor's "teleological" argument that there is a legitimate indictment to try YIM Tith is based not on legal foundation, but a "selective and irrational interpretation" of the Pre-Trial Chamber's finding by wrongly suggesting that the Chamber was of the view that the Co-Investigating Judges were not required to issue a joint

³⁰⁰ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 59.

³⁰¹ International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 60.

³⁰² International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 61.

³⁰³ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), para. 1 and pp. 12-13.

³⁰⁴ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), paras 1, 9-16.

³⁰⁵ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), paras 1, 9, 17-30.

³⁰⁶ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), para. 10 *referring to* International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), paras 29-38, 43.

³⁰⁷ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), para. 11. The Co-Lawyers consider that the International Co-Prosecutor's Response amounts to an unwarranted request for reconsideration of a Pre-Trial Chamber finding or an impermissible attempt to lodge an appeal prohibited by Internal Rule 77(13).



Closing Order.³⁰⁸ The International Co-Prosecutor's position relies on "irrelevant policy considerations" and "an indefatigable and relentless prosecutorial attitude" to send YIM Tith to trial at any cost, despite the lack of any validly-issued indictment.³⁰⁹ The Co-Lawyers stress that the Pre-Trial Chamber judges signed a unanimous disposition in Case 004/2 that "the Co-Investigating Judges' issuance of the Two Conflicting Closing Orders was illegal," thus finding that a Closing Order must be a *single decision*, that the ECCC legal framework makes *no allowance* for the issuance of opposing Closing Orders, and that the Co-Investigating Judges "committed a gross error of law" in doing so.³¹⁰

156. Regarding their position that the "obvious consequence" of the Pre-Trial Chamber's finding is that both Closing Orders are null and void, first, the Co-Lawyers assert that there is no legal distinction between the lawful *issuance* of a Closing Order and the lawfulness of the Closing Order itself.³¹¹ The Pre-Trial Chamber unanimously found that when the Co-Investigating Judges issue more than one Closing Order, they violate the ECCC legal framework, and so the opposing Closing Orders are consequently illegal, procedurally defective, null and void.³¹² The Co-Lawyers reason that any judicial activity is either (i) carried out in accordance with law; or (ii) not carried out in accordance with law, in which case the judge has acted arbitrarily and *ultra vires* and the procedurally defective decision is a nullity with no legal effect.³¹³ In the Co-Lawyers' view, the International Co-Prosecutor "misrepresents" and seeks to portray a simple, unanimous finding of illegality as complex, yet nothing in the unanimous Considerations suggests that the Pre-Trial Chamber was minded to dismiss only one Closing Order in these circumstances.³¹⁴ The Co-Investigating Judges were *not* permitted to exercise their independent discretion; they were required to issue a single Closing Order, which means that both Closing Orders must be null and void.³¹⁵

³⁰⁸ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), paras 12-13 *referring to* International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), para. 29 *and* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 121.

³⁰⁹ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), paras 12, 14, 16 *referring to* International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), paras 25-26, 28-38 *and* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 121, p. 61.

³¹⁰ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), para. 15 and footnotes 31-33, 37.

³¹¹ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), para. 18.

³¹² YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), para. 18.

³¹³ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), para. 18.

³¹⁴ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), para. 20 *referring to* International Co-Prosecutor's Response (Two Closing Orders) (D381/25 & D382/28), paras 27-28, 30.

³¹⁵ YIM Tith's Reply (Two Closing Orders) (D381/27 & D382/30), para. 21 *referring to* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 121.



157. Second, the Co-Lawyers assert that, in both civil law and common law jurisdictions, it is “trite law” that a judicial order with no legal basis is a nullity; in other words, illegally issued orders are null and void, with no legal effect.³¹⁶ In ECCC law, an annulled or cancelled procedurally defective act no longer exists under Internal Rule 76(5), and this annulment procedure is mirrored in Articles 280 and 281 of the Cambodian Code of Criminal Procedure and Articles 174 and 206 of the French Code of Criminal Procedure.³¹⁷ In addition, the Co-Lawyers submit that a correct interpretation of Internal Rule 67(2) mandates that the effect of the Pre-Trial Chamber’s unanimous finding in Case 004/2 is that both Closing Orders are null and void.³¹⁸

158. Third, in rebuttal to the International Co-Prosecutor’s reliance on the default position to justify the validity of the Indictment, the Co-Lawyers submit that the only interpretation of “the investigation shall proceed” consistent with the ECCC legal framework and jurisprudence and Cambodian criminal procedure is for the Pre-Trial Chamber to issue its own Closing Order.³¹⁹ In the Co-Lawyers’ view, the International Co-Prosecutor has already recognised that the remedies requested by the Defence are within the law in acknowledging that an appellate chamber “must annul” erroneous discretionary decisions and either remit or substitute its own judgment, but yet she contradictorily claims that where there are disagreements between the Co-Investigating Judges, only a decision to indict and send to trial is coherent with the default position, thus ignoring the unanimous Case 004/2 finding.³²⁰

159. Fourth, the Co-Lawyers contest the International Co-Prosecutor’s claim that the principle of *in dubio pro reo* does not apply to factual findings at the pre-trial stage, disputing her interpretation of ECCC and ICC case law.³²¹ Additionally, the Co-Lawyers assert that the International Co-Prosecutor “misrepresents and overstates the Defence position”,³²² “tramples on the most basic of fair trial rights” under Internal Rule 21 and misinterprets the Rule as if she views the calculation of the accused’s fair trial rights as a “zero-sum game”, contrary to Pre-

³¹⁶ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), paras 21-22 (citing law from the Republic of Korea, Libya, United States and United Kingdom).

³¹⁷ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), para. 22.

³¹⁸ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), para. 24.

³¹⁹ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), paras 23-24 *referring to* International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), paras 31-36, 40, 41.

³²⁰ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), para. 25 *referring to* International Co-Prosecutor’s Appeal (D381/19), para. 8 *and* International Co-Prosecutor’s Response (Two Closing Orders) (D381/25 & D382/28), paras 31-32.

³²¹ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), paras 26-27, 29.

³²² YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), para. 30.



Trial Chamber case law holding that civil party rights cannot “directly and adversely affect the position of the Accused, such as whether to prosecute or not”.³²³ In any event, for the Co-Lawyers, despite the *lacuna* in Internal Rule 67(1), there is no “doubt” that the unlawfully-issued Closing Orders in Case 004 are null and void.³²⁴

160. Thus, the Co-Lawyers conclude that (i) there is no validly issued document on which YIM Tith’s trial can proceed because he cannot be tried on a null and void indictment;³²⁵ and (ii) the only legal avenues open to the Pre-Trial Chamber are the remedies requested by the Defence. Indeed, the Co-Lawyers underscore that since the validity of the procedure in the judicial investigation cannot be raised before the Trial or Supreme Court Chambers, it is the Pre-Trial Chamber that must now provide a definitive end to these proceedings.³²⁶

2. Discussion

a. *No Violation of In Dubio Pro Reo and Right to a Fair Trial*

161. While the International Judges agree with the Co-Lawyers³²⁷ that the Co-Investigating Judges erred in law by *issuing* two separate and conflicting Closing Orders since this was impermissible under ECCC law as previously explained,³²⁸ the International Judges are not convinced that this course of action violated the principle of *in dubio pro reo* and YIM Tith’s fair trial rights.³²⁹

162. First, the International Judges specifically reject the contention that YIM Tith’s right to be presumed innocent was violated.³³⁰ The International Judges recall that the instant proceedings are in the pre-trial stage, which does not involve any determination of guilt or innocence, and also the Pre-Trial Chamber’s prior finding that the presumption of innocence is sufficiently safeguarded as, pursuant to Internal Rule 98(4), a conviction at trial requires the affirmative vote of at least four judges, and without the required majority, “the default decision

³²³ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), para. 28 *referring to* Case 002, Decision on Civil Party Appeals, 24 June 2011, D411/3/6, para. 97.

³²⁴ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), para. 29.

³²⁵ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), para. 31.

³²⁶ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), para. 32 *referring to* Internal Rule 76(7).

³²⁷ YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), paras 21-30.

³²⁸ *See supra* Section V (The Simultaneous Issuance of Two Conflicting Closing Orders).

³²⁹ *Contra* YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), paras 31-36.

³³⁰ *Contra* YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), paras 16, 34.



shall be that the Accused is acquitted.”³³¹

163. In addition, the International Judges reject the contention that the Co-Investigating Judges were bound to apply the principle of *in dubio pro reo* after they reached opposing assessments of the Court’s personal jurisdiction over YIM Tith.³³² Firstly, the Chamber has stressed that the Co-Investigating Judges were obliged to refer their disagreement to the Pre-Trial Chamber, rather than shielding the matter from its intervention if they could not agree on a course of action consistent with the default position.³³³ Secondly, the principle of *in dubio pro reo* is primarily a rule of evidentiary proof and not a rule of legal interpretation.³³⁴ The International Judges, accordingly, find no infringement of the Charged Person’s rights.

164. Furthermore, the International Judges are not persuaded by the Co-Lawyers’ argument that the “obvious consequence” of the Pre-Trial Chamber’s finding in Case 004/2 is that both unlawfully-issued Closing Orders are null and void. In Case 004/2, the Pre-Trial Chamber unanimously condemned the Co-Investigating Judges’ *agreement* to vest themselves with authority to issue split Closing Orders.³³⁵ This *illegal agreement*, which sought to tactically “shield their disagreements from the most effective dispute settlement mechanism available under the ECCC legal framework to ensure a way out of procedural stalemates”,³³⁶ was in contravention of the essential logic of the ECCC legal framework, considering the Pre-Trial Chamber’s *raison d’être*.³³⁷ But the fact that *certain actions* of the Co-Investigating Judges in

³³¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 163.

³³² *Contra* YIM Tith’s Appeal (Two Closing Orders) (D381/18 & D382/21), paras 16, 31, 34.

³³³ See, e.g., Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 117-120.

³³⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 328 referring to Case 003 Decision on MEAS Muth’s Appeal against the International Co-Investigating Judge’s Decision on MEAS Muth’s Request for Clarification concerning Crimes Against Humanity and the Nexus with Armed Conflict, 10 April 2017, D87/2/1.7/1/1/7, para. 65; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 77 (“the Chamber considers that the situation in which two independent judges issue contradictory decisions on whether to indict does not entail the application of *in dubio pro reo* principle because the principle stems from the presumption of innocence”). See also Case 002, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31 (“The Supreme Court Chamber must stress that the *in dubio pro reo* rule [...] has as its primary function to denote a default finding in the event where factual doubts are not removed by the evidence.”).

³³⁵ See also Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 110.

³³⁶ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 123.

³³⁷ See also Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 99-100 (“[T]he Pre-Trial Chamber is unable to exclude that the Co-Investigating Judges may *have willfully intended to circumvent the application of the law in this case and create the current procedural stalemate*. Indeed, it clearly appears from their above decisions that they deliberately ensured that any resolution of the matters over which they disagreed would have to be addressed only as part of appellate proceedings before the Pre-Trial Chamber *rather than through the procedure specifically intended for by the ECCC legal framework to conclusively settle disagreements between the Co-Investigating Judges*. The Co-Investigating Judges were aware of the difficulties their actions would cause. Yet, they made sure to *shield their relevant disagreements from the effective legal resolution*



producing the Closing Orders were illegal cannot “logically” lead to such a sweeping conclusion without a reasoned demonstration as to why that particular procedural illegality would result in the complete vitiation of the two Closing Orders in question.³³⁸

165. The International Judges further note that the Chamber is seised of Appeals submitted pursuant to Internal Rule 74, which are distinct from applications for annulment under Internal Rule 76. The regimes for annulment and appeals are mutually exclusive and apply to different categories of legal actions taken by the Co-Investigating Judges, involving different standards of judicial review by the Pre-Trial Chamber.³³⁹ Indeed, Internal Rule 76(4) provides that “[t]he Chamber may declare an application for annulment inadmissible” where it “relates to an order that is open to appeal”. More fundamentally, nothing in the text of Internal Rule 67(2) requires both Closing Orders to be annulled or overturned. By its terms, Internal Rule 67(2) addresses the legal consequences stemming from the absence of certain information in the *contents* of the Indictment, and not the legal consequences of agreeing to issue two separate closing orders. Accordingly, the International Judges reject the Co-Lawyers’ contention that a correct interpretation of Internal Rule 67(2) in light of Internal Rule 76(5) would mandate that the effect of the Pre-Trial Chamber’s unanimous finding in Case 004/2 is that both Closing Orders are null and void.

166. Regarding the Co-Lawyers’ assertion that it is “trite law” in both civil law and common law jurisdictions that a procedural illegality in the issuance process results in the order’s nullification,³⁴⁰ the International Judges are not convinced that it is a general principle of law³⁴¹ that a procedural illegality automatically and always results into nullity.³⁴²

mechanism prescribed by the ECCC Agreement, ECCC Law, and Internal Rules. The Pre-Trial Chamber unequivocally denounces and condemns this grave violation of the ECCC legal system” (emphasis added)).

³³⁸ See generally Case 002, Appeal Judgement, 23 November 2016, F36 (“Case 002/1 Appeal Judgment (F36)”), para. 100 (“In other words, not all procedural errors will lead to a reversal of the judgement, but only procedural errors that resulted in a ‘grossly unfair outcome in judicial proceedings’”).

³³⁹ Case 003 (PTC09), Decision on Application for Annulment Pursuant to Internal Rule 76(1), 12 November 2013, D79/1, Opinion of Judges CHUNG and DOWNING, para. 2.

³⁴⁰ YIM Tith’s Reply (Two Closing Orders) (D381/27 & D382/30), paras 21-22 (citing law from various jurisdictions, such as the Republic of Korea, Libya, the United States and the United Kingdom (footnotes omitted)).

³⁴¹ Case 004 (PTC29), Decision on YIM Tith’s Consolidated Appeal, 15 February 2017, D193/91/7, para. 32. (“Pursuant to Article 12(1) of the Agreement, Article 23new of the ECCC Law and Internal Rule 2, where the applicable law does not deal with a particular matter, guidance can be sought in the procedural rules established at the international level, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws.”).

³⁴² The cited Korean law itself stipulates that the procedure for instituting public prosecution may be void *when it is contrary to the provisions* of Korean Criminal Procedure Act. It does not relate to the situation where the provisions of the Act are silent on the issue nor does it mandatorily require nullification of a prosecution order



167. In conclusion, while the International Judges decline to overturn both conflicting Closing Orders against YIM Tith on the basis of the illegality of the issuance, the International Judges reaffirm that despite the illegal issuance of the two conflicting Closing Orders, the Indictment stands whereas the Dismissal is invalid as follows, in accordance with the default position.

b. Validity of the Two Closing Orders

i. The Meaning of “[t]he Investigation Shall Proceed” – Articles 5(4) and 7 of the ECCC Agreement and Article 23^{new} of the ECCC Law

168. The International Judges first recall that one Co-Investigating Judge may validly issue an indictment by acting alone.³⁴³ The International Judges further note Article 5(4) of the ECCC Agreement and Article 23^{new} of the ECCC Law, which provide that in the event of a disagreement between the Co-Investigating Judges, “[t]he investigation shall proceed” unless the Co-Investigating Judges or one of them refers their disagreement to the Pre-Trial Chamber.³⁴⁴

whenever there is a procedural violation in its issuance. (See, for example, Republic of Korea, *Criminal Procedure Act*, Act No. 9765 (9 June 2009), Art. 327(2), which enshrines that: “Public prosecution shall be dismissed by judgment in the following cases: [...] Where the procedure for instituting public prosecution is void by reason of its having been contrary to the provisions of Act” (*unofficial translation*). The International Judges further observe with respect to the cited *Libya Code of Criminal Procedure Act* (28 November 1953), Art. 304 (“Nullity shall occur upon non-observance of the law’s provisions *related to any substantial action*.”) (emphasis added) that this appears to suggest that the illegality must be “substantial” for nullification to occur, which appears to defeat the suggestion that an illegality automatically leads to nullity); the International Judges further conclude that the following cited jurisprudence are inapposite: the references to *Romito v. Maxwell* 227 N.E.2d, 223, 224 (Ohio 1967) (where the criminal conviction at issue had already been found void beforehand); *State v. Bezak* 868 N.E.2d 961, 963 (Ohio 2007) and *State v. Simpkins* 884 N.E.2d 568, 575 (Ohio 2008) (where, in both cases, statutory requirements existed); *R (on the application of UNISON) v Lord Chancellor (Respondent)* [2017] UKSC 51, para. 119 and *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41, para. 69 (where, in both cases, the United Kingdom Supreme Court distinguishes the nature of the illegality and its legal consequences.).³⁴³ See Internal Rule 1(2) (“[U]nless otherwise specified, a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually, whether directly or through delegation”). See, e.g., Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 105; Case 004/2, Decision on TA An’s Appeal against the Decision Rejecting his Request for Information concerning the Co-Investigating Judges’ Disagreement of 5 April 2013, 22 January 2015, D208/1/1/2, para. 11; Case 004, Decision on IM Chaem’s Urgent Request to Stay the Execution of her Summons to an Initial Appearance, 15 August 2014, A122/6.1/3, para. 14; Case 004, Decision on IM Chaem’s Appeal against the International Co-Investigating Judge’s Decision on her Motion to Reconsider and Vacate her Summons dated 29 July 2014, 9 December 2015, D236/1/1/8, para. 30. See generally Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 255.

³⁴⁴ ECCC Agreement, Art. 5(4) (“The co-investigating judges shall cooperate with a view to arriving at a common approach to investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, *the investigation shall proceed* unless the judges or one of them requests within thirty days that the



169. The International Judges observe that this principle of continuation of judicial investigation governs the issue at hand.³⁴⁵ While the settlement procedure of disagreements between the Co-Investigating Judges provided by Internal Rule 72 may not be applied to the procedures *after* the issuance of a closing order, it does not preclude application to the procedure of *issuing* the closing order before the conclusion of the investigation.³⁴⁶ As stated by the Pre-Trial Chamber in a previous decision, in case one of the Co-Investigating Judges proposes to issue an indictment and the other disagrees, either or both of them can bring the disagreement before the Pre-Trial Chamber pursuant to Internal Rule 72.³⁴⁷ The International Judges further recall the Supreme Court Chamber’s finding that “[i]f [...] the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in *proposing to issue* an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, ‘the investigation shall proceed’”.³⁴⁸

170. In the case at hand, neither of the Co-Investigating Judges referred the disagreement to the Pre-Trial Chamber within 30 days³⁴⁹ from the registration of the disagreement on 21 January 2019. In this specific situation where one of the Co-Investigating Judges proposes to issue an indictment and the other Co-Investigating Judge disagrees, “the investigation shall proceed”—being the applicable default position in case of unresolved discord between the Co-Investigating Judges—means that the indictment must be issued as proposed.³⁵⁰

171. Furthermore, in examining the meaning of “the investigation shall proceed”, the International Judges find that no one may reasonably interpret this language, in its ordinary meaning and in light of its object and purpose, to include the issuance of a dismissal order.³⁵¹ First, in its ordinary meaning, a proposal to issue a dismissal order, the very antithesis of an

difference shall be settled in accordance with Article 7”) (emphasis added); ECCC Law, Art. 23^{new} (“*The investigation shall proceed* unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions”) (emphasis added).

³⁴⁵ See Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 256.

³⁴⁶ Internal Rule 67(1) (“The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order”).

³⁴⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 94, 116.

³⁴⁸ Case 001 Appeal Judgment (F28), para. 65 (emphasis added).

³⁴⁹ See ECCC Agreement, Art. 5(4); ECCC Law, Art. 23^{new}; Internal Rule 72(2).

³⁵⁰ ECCC Agreement, Arts 5(4), 7(4); ECCC Law, Art. 23^{new}.

³⁵¹ Vienna Convention, Art. 31(1) (“[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”); see Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 258.



indictment which makes the case move forward to trial, cannot be recognised as a separate investigative act. It is nothing more than a different characterisation of the National Co-Investigating Judge's disagreement on the issuance of the indictment, which must be resolved by the Internal Rule 72 disagreement settlement procedure. Second, the purpose of the ECCC Agreement and the ECCC Law is to *bring to trial* senior leaders of DK and those who were "most responsible" for the crimes.³⁵² It is reasonably inferred from the language of Articles 5(4), 6(4) and 7 of the ECCC Agreement, Articles 20^{new} and 23^{new} of the ECCC Law and Internal Rules 13(5), 14(7), 71 and 72 that the key object of the disagreement settlement mechanism is to prevent a deadlock from derailing the proceedings from moving to trial.³⁵³

172. The International Judges, thus, find that the International Co-Investigating Judge's issuance of the Indictment, despite his erroneous agreement on the issuance of a simultaneous Dismissal by his colleague, is procedurally in conformity with the applicable law before the ECCC, whereas the National Co-Investigating Judge's issuance of the Dismissal has no legal basis.³⁵⁴

173. The International Judges reaffirm that a closing order of the Office of the Co-Investigating Judges must be a single decision.³⁵⁵ They further underline that in the present circumstances, referral of disagreements between the Co-Investigating Judges before the Pre-Trial Chamber is mandatory and that they have no other means of settling their dispute when they fail to uphold their obligation to reach a common position concerning a closing order.³⁵⁶ The International Judges consider that the issuance of the conflicting Dismissal by the National Co-Investigating Judge without referral to the Pre-Trial Chamber is a brazen attempt to entirely circumvent this essential and mandatory requirement, thwarting the ECCC founding legal texts. In particular, Articles 5 and 7 of the ECCC Agreement explicitly provide instructions on the

³⁵² ECCC Agreement, Art. 1; ECCC Law, Art. 1.

³⁵³ The ECCC's negotiating history supports this interpretation. *See, e.g.*, D. SCHEFFER, "The Extraordinary Chambers in the Courts of Cambodia" (2008), p. 231 ("In the absence of that supermajority vote, the investigation or recommendation to indict would proceed"); D. CIORCIARY & A. HEINDEL, *Hybrid Justice* (1st Edition, USA, The University of Michigan Press, 2014), D297.1, at ERN (EN) 01205794, p. 31 ("To manage the risk of disagreement and deadlock between the Co-Prosecutors and Co-Investigating Judges, U.S. officials pushed for the establishment of a special judicial panel for that purpose. [United Nations] and Cambodian officials soon agreed to create a Pre-Trial Chamber composed of three Cambodian and two international judges empowered to block investigations or indictments only by supermajority vote").

³⁵⁴ *See* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 259.

³⁵⁵ *See supra* para. 110. *See also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 260.

³⁵⁶ *See supra* paras 108-110. *See also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 260.



National Co-Investigating Judge's required conduct and the outcome of any disagreement between the Co-Investigating Judges. Therefore, the International Judges find that the issuance of the Dismissal, as an attempt to avoid the compulsory disagreement procedure, is legally flawed and shall accordingly be considered null and void.

174. Further, the International Judges hold the view that the argument of a possible *lacuna* in the ECCC legal framework in relation to the legal repercussions of issuing conflicting closing orders finds no application in the present case. Even if the Pre-Trial Chamber was to appreciate that such incongruent situation was not envisaged in the ECCC legal framework, the alleged uncertainty is removed through a fair reading of the relevant legal texts, especially Articles 5(4) and 7(4) of the ECCC Agreement and Articles 20 and 23^{new} of the ECCC Law which uphold the principle of continuation of judicial investigation and prosecution.³⁵⁷ In addition, the International Judges clarify that pursuant to Internal Rule 77(13)(b), when an indictment is not reversed, it shall stand, the proceedings must be continued and the case must be transferred to trial.

175. Accordingly, the International Judges find that the two Closing Orders in question are not identical in their conformity with the applicable law before the ECCC. The International Judges recall that for reasons stated previously, the Dismissal is void³⁵⁸ and conclude that the National Co-Investigating Judge's issuance of the Dismissal is *ultra vires* and, therefore, void, as it constitutes an attempt to defeat the default position enshrined in the ECCC legal framework. On the other hand, the International Co-Investigating Judge's Indictment stands as it remains in conformity with the said position.

ii. Finding on the Validity of the Closing Orders

176. As stated in the preceding paragraphs, the International Judges find that on account of the impermissible manner through which it was issued,³⁵⁹ the Dismissal is null and void. In essence, the International Judges conclude that, despite the simultaneous issuance of the Closing Orders, the Indictment stands as it is substantively valid and in conformity with the ECCC legal framework, including the default position applicable in case of disagreement

³⁵⁷ See *supra* Section V (The Simultaneous Issuance of Two Conflicting Closing Orders). See also Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 261.

³⁵⁸ See Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 262.

³⁵⁹ See *supra* The Co-Lawyers for YIM Tith's Appeal of the Issuance of Two Closing Orders, Section (2)(b)(i).



between the Co-Investigating Judges and which aims to bring to trial senior leaders of the DK and those “most responsible” for the crimes committed by the Khmer Rouge.³⁶⁰

177. Accordingly, the International Judges dismiss the Co-Lawyers for YIM Tith’s Appeal (Two Closing Orders) and the requests for relief outlined therein.

THE CO-LAWYERS FOR YIM TITH’S APPEAL OF THE INDICTMENT

A. Ground 2.2: Alleged Failure to Define the Legal Elements of the Crime of Genocide, Material Facts and Underlying Evidence

1. Submissions

178. The Co-Lawyers submit that the International Co-Investigating Judge erred in law by issuing a Closing Order that fails to meet the fundamental requirements of an indictment pursuant to Internal Rule 67(2).³⁶¹ While identifying the applicable law as Article 4 of the ECCC Law, the International Co-Investigating Judge failed to set out the legal elements of genocide, the factual basis of the charges and the supporting evidence with respect to: (i) the finding that the ‘Khmer Krom’ were a distinct group, and (ii) the finding that YIM Tith held the requisite special intent.³⁶²

179. First, the Co-Lawyers contend that the International Co-Investigating Judge’s use of a “hybrid, case-by-case test” to define the Khmer Krom as a distinct group is so broadly construed that it does not adequately inform YIM Tith of the nature of the charges against him.³⁶³ The Co-Lawyers aver that the common characteristics of the protected group under the Genocide Convention must be demonstrably grounded in objective reality and that reliance on a purely subjective approach is erroneous.³⁶⁴ Moreover, the International Co-Investigating Judge failed to set out additional legal requirements such as the inappropriateness of characterising a single “ethnic group” in general terms where multiple groups have been targeted,³⁶⁵ and failed to specify the factual basis and supporting evidence underlying the

³⁶⁰ See Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 284.

³⁶¹ YIM Tith’s Appeal (Indictment) (D382/22), paras 56-58, 79.

³⁶² YIM Tith’s Appeal (Indictment) (D382/22), para. 64.

³⁶³ YIM Tith’s Appeal (Indictment) (D382/22), para. 65.

³⁶⁴ YIM Tith’s Appeal (Indictment) (D382/22), para. 66.

³⁶⁵ YIM Tith’s Appeal (Indictment) (D382/22), paras 67-68 (and the legal distinction between “part of a group” and a group that is identified by reference to another group).



Khmer Krom's status as a protected group.³⁶⁶

180. Second, the Co-Lawyers submit that the International Co-Investigating Judge failed to distinguish the *mens rea* of the crime of persecution from the specific intent required for genocide (that the perpetrator must have intended to destroy the group *as such*), conflating a discriminatory intent or knowledge with the specific intent of genocide.³⁶⁷ The International Co-Investigating Judge failed to set out the requirement that genocide is only committed where the ultimate goal of the perpetrators is to destroy the group, and failed to acknowledge the special character of the "as such" element as requiring a nexus between the intent to destroy a protected group and the enumerated grounds on which the group is protected.³⁶⁸ Finally, the Co-Lawyers allege that the International Co-Investigating Judge erred in his failure to set out the material facts underlying the findings of YIM Tith's individual intent (*versus* the CPK's policies more broadly),³⁶⁹ concluding that the Indictment contains no direct evidence that YIM Tith held the specific intent to destroy the Khmer Krom in whole or in part, as such.³⁷⁰

181. In the Response, the International Co-Prosecutor submits that the Co-Lawyers fail to demonstrate any reviewable error of law in the International Co-Investigating Judge's approach to genocide or his reasoning in the Indictment, which sets out the requisite elements in accordance with Internal Rule 67(2).³⁷¹ The International Co-Investigating Judge correctly identified the Khmer Krom as a group based on their ethnicity, race, and nationality by referring to the group's particular characteristics,³⁷² and showed the relevance of the link between the targeting of the Khmer Krom and the Vietnamese.³⁷³ Moreover, the International Co-Investigating Judge set out the correct *mens rea* of genocide,³⁷⁴ referred to the material facts underpinning YIM Tith's intent and distinguished between the findings that relate to YIM Tith as opposed to the CPK in concluding that YIM Tith was likely an orchestrator of the genocide of the Khmer Krom.³⁷⁵

³⁶⁶ YIM Tith's Appeal (Indictment) (D382/22), paras 69-71.

³⁶⁷ YIM Tith's Appeal (Indictment) (D382/22), paras 72-74.

³⁶⁸ YIM Tith's Appeal (Indictment) (D382/22), paras 74-75.

³⁶⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 76.

³⁷⁰ YIM Tith's Appeal (Indictment) (D382/22), paras 76-79.

³⁷¹ International Co-Prosecutor's Response (Indictment) (D382/27), paras 45-46, 50.

³⁷² International Co-Prosecutor's Response (Indictment) (D382/27), para. 51.

³⁷³ International Co-Prosecutor's Response (Indictment) (D382/27), para. 52.

³⁷⁴ International Co-Prosecutor's Response (Indictment) (D382/27), para. 53.

³⁷⁵ International Co-Prosecutor's Response (Indictment) (D382/27), para. 54.



2. Discussion

182. The International Judges recall that in accordance with Internal Rule 67(2), the indictment shall contain a description of the material facts and their legal characterisation by the Co-Investigating Judges.³⁷⁶ The indictment must consistently set out the material facts of the case with enough detail to inform an Accused of the nature and cause of the charges against him/her to enable him/her to prepare a defence effectively and efficiently.³⁷⁷

183. The International Co-Investigating Judge indicted YIM Tith for the crime of genocide by killing members of the group in Sector 13 of the Southwest Zone and Sectors 2 and 4 of the Northwest Zone on the basis of various modes of liability, including JCE.³⁷⁸ In addition, the International Co-Investigating Judge denoted the applicable law as Article 4 of the ECCC Law³⁷⁹ and identified the legal elements of the crime of genocide as the “commission of any of the underlying acts set out in Article 4 of the ECCC Law, committed with the specific intention to destroy, in whole or in part, a national, ethnical, racial or religious group, specifically targeted as such.”³⁸⁰

184. The International Judges observe that the Co-Lawyers’ challenges pertain to two specific elements and will address in turn: (i) the identification of the protected group (Khmer Krom); and (ii) the element of specific intent.

a. *Identification of the Khmer Krom as a Protected Group*

185. Article 2 of the Genocide Convention and, correspondingly, Article 4 of the ECCC Law protect national, ethnical, racial or religious groups (“protected groups”), as such.³⁸¹ The

³⁷⁶ Internal Rule 67(2); Case 002 (PTC35), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15 (“Case 002 JCE Decision (D97/14/15)”), para. 32.

³⁷⁷ Case 002 JCE Decision (D97/14/15), para. 32; Case 002, Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011, E122, para. 18.

³⁷⁸ Indictment (D382), pp. 475-476.

³⁷⁹ Indictment (D382), para. 59.

³⁸⁰ Indictment (D382), para. 59. *See further* paras 60-72.

³⁸¹ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, entered into force 12 January 1951 (“Genocide Convention”). The ECCC has jurisdiction over the crime of genocide as defined in the Genocide Convention, Art. II (“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”). *See also* ECCC Law, Art. 4 (“The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as”). *See further Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (26 February), p.



International Judges observe that the four protected groups are not defined in the Genocide Convention or the ECCC Law, and enjoy no generally accepted definition.³⁸² In the absence of such a definition, the *ad-hoc* tribunals and the ECCC have recognised that each of the protected groups must be assessed in light of a particular political, social, historical and cultural context³⁸³ and employed a case-by-case approach, consulting both objective and subjective criteria in assessing whether a specific group enjoys protection.³⁸⁴

186. Accordingly, with respect to the International Co-Investigating Judge's alleged failure to (correctly) identify the legal elements of genocide,³⁸⁵ the International Judges find that his reference to a "case-by-case test to determine whether a victim (or targeted group) falls within one of the protected groups"³⁸⁶ is appropriate and in accordance with settled jurisprudence. However, while subjective criteria may be considered,³⁸⁷ a *purely* subjective approach to the identification of the protected group has been rejected as insufficient³⁸⁸ or not in accordance with the object and purpose of the Genocide Convention to protect relatively stable and permanent groups.³⁸⁹

43 ("Application of the Genocide Convention (*Bosnia and Herzegovina v. Serbia and Montenegro*) (ICJ)"), para. 191.

³⁸² Genocide Convention, Art. II; ECCC Law, Art. 4; ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, Trial Chamber II, 1 September 2004 ("Brđanin Trial Judgment (ICTY)"), para. 682; ICTR, *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence, Trial Chamber II, 1 December 2003 ("Kajelijeli Trial Judgment (ICTR)"), para. 811; ICTR, *Prosecutor v. Semanza*, ICTR-97-20-T, Judgement and Sentence, Trial Chamber III, 15 May 2003 ("Semanza Trial Judgment (ICTR)"), para. 317; Case 002, Case 002/2 Judgement, 16 November 2018, E465 ("Case 002/2 Trial Judgment (E465)"), para. 792.

³⁸³ ICTR, *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, Judgment, Trial Chamber II, 22 January 2004, para. 630; *Kajelijeli Trial Judgment (ICTR)*, para. 811; *Semanza Trial Judgment (ICTR)*, para. 317; ICTR, *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgment, Trial Chamber I, 7 June 2001, para. 65; ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Judgement, Trial Chamber, 02 August 2001 ("Krstić Trial Judgment (ICTY)"), para. 557; Case 002/2 Trial Judgment (E465), para. 792.

³⁸⁴ ICTY, *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Judgement, Trial Chamber I (Section A), 17 January 2005 ("Blagojević & Jokić Trial Judgment (ICTY)"), para. 667; ICTR, *Prosecutor v. Gacumbtsi*, ICTR-2001-64-T, Judgment, Trial Chamber III, 17 June 2004, para. 254; *Brđanin Trial Judgment (ICTY)*, para. 684; *Semanza Trial Judgment (ICTR)*, para. 317; *Kajelijeli Trial Judgment (ICTR)*, para. 811; Case 002/2 Trial Judgment (E465), para. 792.

³⁸⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 65.

³⁸⁶ Indictment (D382), paras 61-62.

³⁸⁷ Such as the stigmatisation of the protected group on the basis of its perceived national, ethnical, racial or religious characteristics by the perpetrators. *See, e.g., Brđanin Trial Judgment (ICTY)*, para. 683.

³⁸⁸ *See, e.g., Brđanin Trial Judgment (ICTY)*, para. 683-684 ("This is so because subjective criteria alone may not be sufficient to determine the group targeted for destruction and protected by the Genocide Convention, for the reason that the acts identified in subparagraphs (a) to of Article 4(2) must be in fact directed against 'members of the group'").

³⁸⁹ *See, e.g., Case 002/2 Trial Judgment (E465)*, para. 795 ("The Trial Chamber finds that such factors are relevant and shall be taken into account. However, it considers that the subjective element alone is insufficient to establish membership of the protected group, and finds that both objective and subjective criteria may be taken into account. An analysis which focuses on the objective criteria is consistent with the purpose of the Genocide Convention which was to protect relatively stable and permanent groups."); ICTR, *Prosecutor v. Musema*, ICTR-96-13-A,



187. In the Indictment, the International Judges observe that the International Co-Investigating Judge referred to the need to identify “the objective particulars of the relevant political, social, historical and cultural context”,³⁹⁰ and in defining the Khmer Krom as a “distinct ethnic group”,³⁹¹ pointed to factors such as their distinct accents, fair complexion, family names and traditions.³⁹² Additionally, the International Co-Investigating Judge referred to the objective social and historical context in which the Khmer Krom identity took shape, explaining, *inter alia*, that the “Khmer Krom descended from the ethnic Khmer who lived in Kampuchea Krom since the times of the Khmer Empire and whose distinct identity took shape after the area came under the growing influence and control of Vietnam.”³⁹³ This socio-historical context, including the South Vietnamese authorities’ oppressive policies against Khmer Krom forcing their assimilation into Vietnamese society, explains the objective and perceived distinctiveness of the Khmer Krom from other groups.³⁹⁴

188. Besides these objective factors, the International Co-Investigating Judge considered “the subjective perceptions of the victim and the perpetrator(s)”³⁹⁵ and accordingly relied on the Khmer Krom’s self-identification based on their lineage³⁹⁶ and the CPK’s perception of the Khmer Krom identity as a distinct and hereditary characteristic, and as racially similar or closely connected to the Vietnamese.³⁹⁷

189. Considering the above, the International Judges find that the International Co-Investigating Judge did not err in identifying the Khmer Krom as a protected group under the Genocide Convention as he relied on both objective and subjective criteria.³⁹⁸ While the

Judgement and Sentence, Trial Chamber I, 27 January 2000, para. 162; ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgement and Sentence, Trial Chamber I, 6 December 1999, para. 57.

³⁹⁰ Indictment (D382), para. 62 (footnotes omitted) *referring to, inter alia, Semanza* Trial Judgment (ICTR), para. 317 (“The various Trial Chambers of this Tribunal have found that the determination of whether a group comes within the sphere of protection created by Article 2 of the Statute ought to be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators. The Chamber finds that the determination of a protected group is to be made on a case-by-case basis, consulting both objective and subjective criteria”) (footnotes omitted); *Krstić* Trial Judgment (ICTY), para. 557.

³⁹¹ Indictment (D382), paras 187, 1008-1009 (referring to the Khmer Krom as an “ethnic minority” a “distinct ethnic group” and specifying that the “Khmer Krom were targeted because of their ethnic status [...] and that their ethnicity triggered an irrebuttable presumption of being enemies” (emphasis added)).

³⁹² Indictment (D382), paras 187, 196, 267.

³⁹³ Indictment (D382), paras 187, 189-195.

³⁹⁴ Indictment (D382), paras 189-191.

³⁹⁵ Indictment (D382), para. 62.

³⁹⁶ Indictment (D382), para. 188.

³⁹⁷ Indictment (D382), para. 196.

³⁹⁸ The International Judges observe that besides “ethnic traits”, the International Co-Investigating Judge also referred to what could be considered as “national” and “racial” characteristics but find that it is not required to specifically delineate the various protected groups. See *Brđanin* Trial Judgment (ICTY), para. 682 *referring to*



International Co-Investigating Judge relied heavily on subjective criteria, such as the CPK's perception of the Khmer Krom,³⁹⁹ the International Judges consider that this accords with the recognised case-by-case approach.

190. Allegations that the International Co-Investigating Judge failed to set out other legal requirements, *inter alia*, "that it is inappropriate to legally characterize a single ethnic group in general terms" where multiple national and ethnic groups have been targeted (*i.e.*, negatively),⁴⁰⁰ are without merit. The International Co-Investigating Judge found that the targeted group cannot be defined negatively and that where more than one group is targeted, the elements of genocide must be satisfied in relation to each group.⁴⁰¹

191. Finally, with respect to the International Co-Investigating Judge's alleged failure to identify the material facts and underlying evidence of the Khmer Krom's status as a protected group,⁴⁰² the International Judges first observe that the International Co-Investigating Judge relied on witness and documentary evidence in his findings on the Khmer Krom identity, history and CPK policy on the Khmer Krom⁴⁰³ and that the "legal findings" on the genocide of the Khmer Krom are based on the factual findings throughout the Indictment.⁴⁰⁴ Second, as indicated, the International Co-Investigating Judge positively identified the Khmer Krom by their distinct traits and perception of racial similarity to the Vietnamese, rather than relying on a negative definition (such as non-Khmer).

Krstić Trial Judgment (ICTY), para. 556 ("[t]he preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as "national minorities", rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.").

³⁹⁹ Indictment (D382), paras 196-200 ("the CPK generally viewed the Khmer Krom identity as a distinct hereditary characteristic that could be passed on from parents to child [...] the CPK tended to consider them to be Vietnamese, or at least to be a distinct group that was racially similar or otherwise closely connected to the Vietnamese. [...] The CPK considered the Khmer Krom to have a Vietnamese mindset, evidence by the common usage of terms including "*Khmer body with Yuon head*", "*Yuon brains*" [...]. Because they were viewed as equivalent or similar to the Vietnamese, the Khmer Krom were subject to the CPK's anti-Vietnamese policies").

⁴⁰⁰ YIM Tith's Appeal (Indictment) (D382/22), paras 67-68 and footnote 159 referring to ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Judgement, Trial Chamber II, 31 July 2003, para. 512; ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, Appeals Chamber, 22 March 2006 ("*Stakić* Appeal Judgment (ICTY)"), para. 19 ("where more than one group is targeted [...], it is not appropriate to define the group in general terms as, for example, 'non-Serbs'").

⁴⁰¹ Indictment (D382), para. 63.

⁴⁰² YIM Tith's Appeal (Indictment) (D382/22), paras 69-71.

⁴⁰³ Indictment (D382), paras 186-203 (referring to Written Record of Interviews and testimony of witnesses and Civil Parties, non-governmental organisation reports, books, CPK directives and documents and DK publications).

⁴⁰⁴ Indictment (D382), paras 1008-1012.



b. Specific Intent

192. The *mens rea* of the crime of genocide is “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.⁴⁰⁵ Referred to as specific intent or *dolus specialis*, the underlying acts listed in Article II of the Genocide Convention and Article 4 of the ECCC Law must be committed with the specific intent to destroy the protected group in whole or in part, as such.⁴⁰⁶ The wording “as such” indicates that the targeting of the victim on account of membership of the group alone (discriminatory intent) does not suffice.⁴⁰⁷ Rather, there must be intent to destroy the protected group as a separate and distinct entity.⁴⁰⁸

193. First, regarding the legal elements, the International Judges observe that the International Co-Investigating Judge defined genocide as “the commission of any of the underlying acts set out in Article 4 of the ECCC Law, committed with the *specific intention* to destroy, in whole or in part, a national, ethnical, racial or religious group, specifically targeted as such”⁴⁰⁹ and that “in addition to possessing the *mens rea* required in relation to the relevant underlying act, [...] a perpetrator must possess the *specific intent to destroy*, in whole or in part, *the relevant protected group, as such*”.⁴¹⁰

194. As regards the meaning of “as such”, the International Co-Investigating Judge indicated that this wording signifies that the ultimate victim of the crime of genocide is the group and that the underlying acts must therefore be committed with the intention of destroying the group as a separate and distinct entity from the individual victims.⁴¹¹ Since the “[individual] victims must be targeted because they are a member of the group [...] knowledge of such membership

⁴⁰⁵ Genocide Convention, Art. II; ECCC Law, Art. 4.

⁴⁰⁶ Genocide Convention, Art. II; ECCC Law, Art. 4; *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* (ICJ), para. 187; *Application of the Convention in the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015 (3 February), p.3, para. 132; ICTR, *Prosecutor v. Akayesu*, ICTR- 96-4-T, Judgement, Trial Chamber I, 2 September 1998 (“*Akayesu* Trial Judgment (ICTR)”), paras 497-498; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Public Redacted Version of the Judgement Issued on 24 March 2016, Trial Chamber, 24 March 2016 (“*Karadžić* Trial Judgment (ICTY)”), para. 549; Case 002/2 Trial Judgment (E465), para. 797.

⁴⁰⁷ *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* (ICJ), para. 187; Case 002/2 Trial Judgment (E465), paras 797-798; *Stakić* Appeal Judgment (ICTY), para. 19.

⁴⁰⁸ *Blagojević & Jokić* Trial Judgment (ICTY), paras 669-670; ICTY, *Prosecutor v. Krajišnik*, IT-00-39-T, Judgement, Trial Chamber I, 27 September 2006, para. 856; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Judgement, Trial Chamber II, 12 December 2012, para. 747; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Judgement, Trial Chamber II, 10 June 2010 (“*Popović et al.* Trial Judgment (ICTY)”), para. 821; *Akayesu* Trial Judgment (ICTR), para 521; ICTR, *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Judgement, Appeals Chamber, 9 July 2004, para. 53.

⁴⁰⁹ Indictment (D382), para. 59 (emphasis added).

⁴¹⁰ Indictment (D382), para. 68 (emphasis added).

⁴¹¹ Indictment (D382), para. 72.



alone is insufficient”.⁴¹² Accordingly, the Co-Lawyers’ allegation that the International Co-Investigating Judge failed to distinguish the *mens rea* of persecution from the specific intent required for genocide or failed to set out the “as such” requirement, is without merit.⁴¹³

195. Second, concerning the alleged failure to identify the material facts and underlying evidence by failing to distinguish between the facts that relate to YIM Tith and those that relate to the CPK’s policies,⁴¹⁴ the International Judges observe that the Indictment refers to a nationwide plan to “eliminate a distinct ethnic group, the Khmer Krom, or at least a substantial part of them because of their ethnicity.”⁴¹⁵ This statement is supported, *inter alia*, by the evidentiary findings in the section of the Indictment entitled “CPK policy on the Khmer Krom”⁴¹⁶, including the common use of derogatory terms by the CPK such as “*Khmer body with Yuon head*”⁴¹⁷ and that the CPK viewed the Khmer Krom, as a group, to be highly suspect to be potential spies for the Vietnamese, and prone to rebel.⁴¹⁸

196. In a separate section of the Indictment called “Y[IM] Tith’s conduct and contributions to the JCE seeking to eliminate the Khmer Krom”⁴¹⁹, the International Co-Investigating Judge clearly distinguished between the facts relating to the CPK policies in general and the findings that relate to YIM Tith’s acts and conduct. Specifically, the International Co-Investigating Judge found that “YIM Tith’s words reveal a strong hatred towards the Vietnamese, extending to anyone of Vietnamese origin or with possible ties to Vietnam, such as the Khmer Krom.”⁴²⁰ The International Co-Investigating Judge referred to statements made by YIM Tith during meetings⁴²¹ including references to “*Yuon Khmer*”,⁴²² “*fighting the Yuon*”, “internal enemies”⁴²³ and the need to execute anyone connected to the Vietnamese.⁴²⁴

197. Moreover, it is widely accepted that in assessing evidence of genocidal intent, a Chamber should consider whether “all of the evidence, taken together, demonstrates a

⁴¹² Indictment (D382), para. 72.

⁴¹³ YIM Tith’s Appeal (Indictment) (D382/22), paras 72-75.

⁴¹⁴ YIM Tith’s Appeal (Indictment) (D382/22), paras 76-78.

⁴¹⁵ Indictment (D382), para. 1008.

⁴¹⁶ Indictment (D382), pp. 80-85.

⁴¹⁷ Indictment (D382), para. 196 and footnote 457 referring to VOERN Dara’s evidence.

⁴¹⁸ Indictment (D382), para. 198 referring to, *inter alia*, RIEL Son, PHAN Saray, RIEM DY’s evidence.

⁴¹⁹ Indictment (D382), pp. 192-194.

⁴²⁰ Indictment (D382), para. 387.

⁴²¹ Indictment (D382), paras 388-397.

⁴²² Indictment (D382), para. 390 referring to YOU Phom’s evidence.

⁴²³ Indictment (D382), para. 394 referring to VY Phann’s evidence.

⁴²⁴ Indictment (D382), para. 397 referring to CHHOENG Chhoeurt’s evidence.



genocidal mental state.”⁴²⁵ In the absence of direct evidence, genocidal intent may be inferred from the facts and circumstances of the crimes, such as the general context, the scale of the atrocities, the perpetration of other culpable acts systematically directed against the same group, the systematic targeting of victims on account of their membership of a particular group, the repetition of destructive and discriminatory acts, the existence of a plan or policy or the display of intent through public speeches or in meetings.⁴²⁶ This defeats the Co-Lawyers’ claim that the International Co-Investigating Judge erred by failing to set out “any direct evidence that YIM Tith held the specific intent.”⁴²⁷

198. Beyond the evidence of YIM Tith’s derogatory speeches, the International Co-Investigating Judge found that YIM Tith’s statements coincided temporally and geographically with the mass killing of hundreds of Khmer Krom in Kouk Preh Commune between late 1977 and early 1978 and referred to YIM Tith’s visits to Wat Pratheat Security Centre, where Khmer Krom were detained and subsequently killed and where he questioned and identified prisoners as enemies.⁴²⁸ He found that YIM Tith was aware of all CPK activities in his areas of control through meetings and a system of communication and reporting, and was one of the primary persons responsible for implementing the CPK policies in his areas of responsibility.⁴²⁹ Moreover, the systematic targeting of Khmer Krom in areas under YIM Tith’s control,⁴³⁰ the compilation of records identifying Khmer Krom,⁴³¹ the large scale killings of Khmer Krom,⁴³² the forced transfer of Khmer Krom⁴³³ and CPK policy targeting Khmer Krom (including in areas under YIM Tith’s control)⁴³⁴ are all facts and circumstances that support the International Co-Investigating Judge’s ultimate conclusion that YIM Tith shared the specific intent to

⁴²⁵ *Karadžić* Trial Judgment (ICTY), para. 550; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgement, Appeals Chamber, 8 April 2015 (“*Tolimir* Appeal Judgment (ICTY)”), para. 247; *Popović et al.* Trial Judgment (ICTY), para. 820.

⁴²⁶ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, Appeals Chamber, 30 January 2015, para. 468; *Karadžić* Trial Judgment (ICTY), para. 550; *Tolimir* Appeal Judgment (ICTY), para. 246; ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, Appeals Chamber, 5 July 2001, para. 47; ICTR, *Prosecutor v. Munyakazi*, ICTR-97-36A-A, Judgement, Appeals Chamber, 28 September 2011, para. 142; *Akayesu* Trial Judgment (ICTR), para. 523. See also *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* (ICJ), para. 242.

⁴²⁷ YIM Tith’s Appeal (Indictment) (D382/22), para. 78.

⁴²⁸ Indictment (D382), para. 392.

⁴²⁹ Indictment (D382), para. 1019.

⁴³⁰ See, e.g., Indictment (D382), paras 210, 243, 246, 258-265.

⁴³¹ See, e.g., Indictment (D382), paras 210, 247-248, 267.

⁴³² See, e.g., Indictment (D382), paras 212, 250-256, 258-260.

⁴³³ See, e.g., Indictment (D382), paras 222-234, 244-245, 249.

⁴³⁴ See, e.g., Indictment (D382), para. 213.



destroy the Khmer Krom.⁴³⁵

199. In conclusion, the International Judges find that the International Co-Investigating Judge did not err in setting out the legal elements of genocide, the material facts and underlying evidence. Accordingly, Ground 2.2 is dismissed.

B. Ground 3: Alleged Exceeding of the Factual Scope of the Investigation

1. Submissions

200. The Co-Lawyers submit that the International Co-Investigating Judge erred in law by exceeding the factual scope of the judicial investigation.⁴³⁶ First, they argue that Internal Rule 55(2) limits the investigation to the seised facts as alleged in the Introductory and Supplementary Submissions.⁴³⁷ Thus, the Co-Investigating Judges have no jurisdiction to indict on facts outside the judicial investigation, with the exception of aggravating circumstances under Internal Rule 55(3).⁴³⁸ Second, the Co-Lawyers aver that as per Internal Rule 67(1), only facts which have been charged beforehand can be considered for indictment.⁴³⁹ Accordingly, while the indictment must be based on prior charging, the scope of indictable facts continues to be restricted by the Introductory and Supplementary Submissions.⁴⁴⁰

201. On the basis of these Internal Rules, the Co-Lawyers argue that the International Co-Investigating Judge's Closing Order exceeds the permissible scope of the indictment. They assert that the Introductory and Supplementary Submissions limited the temporal and geographical scope of the investigation to: (i) allegations in the Southwest Zone from 1976 until early 1978; and (ii) allegations in the Northwest Zone from mid-1977 to January 1979.⁴⁴¹ The International Co-Investigating Judge incorrectly interpreted Internal Rule 55(2) and erred by indicting YIM Tith for crimes occurring outside of these parameters, namely on the basis of his responsibility as a member of: (i) JCE B and JCE C *after* early 1978 in the Southwest Zone;

⁴³⁵ Indictment (D382), paras 1008-1023.

⁴³⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 95.

⁴³⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 95.

⁴³⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 95.

⁴³⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 96.

⁴⁴⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 96.

⁴⁴¹ YIM Tith's Appeal (Indictment) (D382/22), paras 97-98 *referring to* Third Introductory Submission (D1), paras 93-94; First Supplementary Submission (D65), para. 13; Second Supplementary Submission (D191), para. 8.



- (ii) JCE C *prior* to the end of 1975 at Wat Pratheat Security Centre in the Southwest Zone; and
- (iii) JCE A *prior* to mid-1977 in the Northwest Zone.⁴⁴²

202. The Co-Lawyers conclude that this error of law was “so unfair and unreasonable as to constitute an abuse of discretion” and request the Pre-Trial Chamber to invalidate all of the charges that are based on crimes committed outside of the scope of the investigation.⁴⁴³

203. In response, the International Co-Prosecutor submits that the Co-Lawyers’ argument is based on a misunderstanding of the factual parameters of an investigation and fails to demonstrate any reviewable error of law or abuse.⁴⁴⁴ The International Co-Prosecutor submits that it is clear from Pre-Trial Chamber holdings that the “facts” of which the Co-Investigating Judges were seised relate to criminal conduct and that “[t]he circumstances in which the alleged crime was committed and that contribute to the determination of its legal characterisation are not considered as being new facts and are thus part of the investigation”.⁴⁴⁵

204. As such, the International Co-Prosecutor submits that the critical question is whether the crimes alleged in the Introductory or Supplementary Submissions were temporally limited. She asserts that no such temporal limitation existed in relation to the crimes in the Southwest and Northwest Zones.⁴⁴⁶ Accordingly, in her view, the International Co-Investigating Judge properly indicted YIM Tith for crimes committed in the Southwest Zone throughout the DK regime and for crimes in the Northwest Zone from at least early 1977 until January 1979.⁴⁴⁷

205. Moreover, the International Co-Prosecutor asserts that the Co-Lawyers improperly conflate “facts” with modes of liability by referring to the JCEs for which YIM Tith is indicted.⁴⁴⁸ Finally, she argues that the Co-Lawyers’ allegations are untimely and unfounded as the temporal scope of the three JCEs in the Indictment is the same, if not narrower, than alleged in the Written Record of Initial Appearance of YIM Tith and this could have been challenged before the Co-Lawyers raised this argument in their response to the Final

⁴⁴² YIM Tith’s Appeal (Indictment) (D382/22), paras 99-103.

⁴⁴³ YIM Tith’s Appeal (Indictment) (D382/22), para. 103.

⁴⁴⁴ International Co-Prosecutor’s Response (Indictment) (D382/27), paras 57-58.

⁴⁴⁵ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 58 *referring to* Case 001 Decision on Closing Order Appeal (D99/3/42), para. 35; Internal Rule 67(3).

⁴⁴⁶ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 59.

⁴⁴⁷ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 59.

⁴⁴⁸ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 60.



Submissions.⁴⁴⁹

2. Discussion

206. Under Ground 3, the Co-Lawyers assert that the Introductory and Supplementary Submissions delimited the temporal scope of the judicial investigation against YIM Tith as follows:⁴⁵⁰

- (i) For the Southwest Zone: from 1976 until early 1978; and
- (ii) For the Northwest Zone: from mid-1977 to 6 January 1979.

207. The Indictment charged YIM Tith with various international crimes through, *inter alia*, JCE liability, pursuant to which the International Co-Investigating Judge held YIM Tith responsible for certain crimes in the Southwest Zone as a JCE member from “at least September-October 1975 until 6 January 1979”⁴⁵¹ and for other crimes in the Northwest Zone as a JCE member from “early 1977 until at least 6 January 1979”.⁴⁵²

208. As the Pre-Trial Chamber has previously noted, the scope of the judicial investigation is controlled by the allegations as set out in the Introductory and Supplementary Submissions.⁴⁵³ In order to determine whether the criminal charges in the Indictment exceed the scope of the investigation, the International Judges will first need to determine the facts included in the seisin, which necessitates a careful reading of the Third Introductory Submission and the various Supplementary Submissions filed in Case 004. The International Judges first examine the allegations relevant to the Southwest Zone crimes. Second, the International Judges will assess the temporal scope of the allegations concerning Northwest Zone crimes.

a. Southwest Zone Crimes

⁴⁴⁹ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 60 *referring to* Written Record of Initial Appearance of YIM Tith (D281), at ERN (EN) 01205500-01205501.

⁴⁵⁰ YIM Tith’s Appeal (Indictment) (D382/22), para. 97.

⁴⁵¹ Indictment (D382), paras 1016, 1017. *See, e.g.*, Indictment (D382), paras 440-442 (describing formation of cooperatives and arrests in Kirivong District “from 1975 to 1976”), para. 462 (calculating killings at Wat Pratheat Security Centre “since 1975”).

⁴⁵² Indictment (D382), paras 1016, 1017. *See, e.g.*, Indictment (D382), para. 718 (discussing evidence of YIM Tith visiting Banan Security Centre prison “probably in 1977”, about two months before the arrival of the Southwest Zone cadres”).

⁴⁵³ Case 004/I Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 128; Case 001 Decision on Closing Order Appeal (D99/3/42), paras 35-37.



209. On a holistic reading of the Third Introductory Submission against YIM Tith, the International Judges find that the International Co-Prosecutor's allegations regarding Southwest Zone crimes extends from 17 April 1975 to 6 January 1979. The introductory paragraphs of the Third Introductory Submission, together with the criminal allegations set out in paragraphs 80 to 81 thereof and, in particular paragraph 109, lead the International Judges to this conclusion.⁴⁵⁴ As a consequence, since the criminal allegations concerning Wat Pratheat Security Centre are not restrictively limited in time, they relate to the general framework set forth in paragraph 109.⁴⁵⁵

210. The International Co-Investigating Judge charged YIM Tith for crimes committed at Wat Pratheat Security Centre through participation in a JCE existing from "at least 17 April 1975 until 6 January 1979".⁴⁵⁶

211. The International Judges conclude that, in respect of Southwest Zone crimes, the temporal scope of the judicial investigation against YIM Tith is: from 17 April 1975 until 6 January 1979. Consequently, the International Judges find that the Co-Lawyers' request for the invalidation of criminal charges in the Indictment for Southwest Zone crimes that are (i) after "early 1978" and (ii) prior to January "1976" should be rejected.

b. Northwest Zone Crimes

212. With respect to Northwest Zone crimes, the International Judges find that, on a holistic reading, the Introductory and Supplementary Submissions may fairly be regarded as encompassing criminal allegations also in early 1977 (and not just mid-1977 as alleged). Consequently, the International Co-Investigating Judge acted within the scope of the investigation.

213. Indeed, in the opening paragraphs of the Third Introductory Submission, YIM Tith's participation in the purge of existing cadre in the Northwest Zone is alleged to take place "[i]n 1977 and 1978".⁴⁵⁷ While the International Judges observe that many allegations about the purge relate to "mid-1977" onwards, the purge is not the only criminal act alleged in the

⁴⁵⁴ See Third Introductory Submission (D1), paras 5(2), 15 ("a nation-wide radio network established in October 1975"), 80, 81, 93, 109 ("TA Tith planned, instigated, ordered, aided and abetted or committed the offenses described in paragraphs 54 to 81 [...], all of which occurred in Cambodia during the period from 17 April 1975 to 6 January 1979...").

⁴⁵⁵ See Third Introductory Submission (D1), paras 80, 81.

⁴⁵⁶ See Written Record of Initial Appearance of YIM Tith (D281), at ERN (EN) 01205500-01205501.

⁴⁵⁷ Third Introductory Submission (D1), para. 3 (emphasis added).



Northwest Zone. Criminal acts occurring at crime sites Banteay O Ta Krey (1977 to early 1979),⁴⁵⁸ Banteay Treng (1977 to 1978),⁴⁵⁹ Wat Samdech (1977 to 1978),⁴⁶⁰ and Phnom Trayoung (between 1977 and 1979)⁴⁶¹ contain express references to “1977”. This is further reinforced by the Supplementary Submissions; for example, in the Second Supplementary Submission, an allegation of crimes in Preah Net Preah District in the Northwest Zone is alleged to take place “in 1977”.⁴⁶²

214. In conclusion, the International Co-Investigating Judge did not err in indicting YIM Tith for Northwest Zone crimes from “at least early 1977 until at least 6 January 1979”,⁴⁶³ because this fell within the temporal seisin of the case. The Co-Lawyers’ request in respect of Northwest Zone crimes must therefore be dismissed.

c. Conclusion

215. In summary, the International Judges uphold the International Co-Investigating Judge’s Indictment of YIM Tith to the extent that it seeks to commit YIM Tith for trial for crimes committed in the Southwest Zone prior to 1976 and those after early 1978. The International Judges also uphold the Indictment for Southwest Zone crimes occurring in the intervening period. In addition, the Indictment for crimes committed in the Northwest Zone is upheld.

216. Accordingly, the International Judges reject Ground 3.

C. Ground 4: Alleged Error in Using JCE to Establish Personal Jurisdiction

1. Submissions

217. The Co-Lawyers submit that the International Co-Investigating Judge erred in law by using JCE liability as a relevant consideration to assess personal jurisdiction,⁴⁶⁴ causing irreparable harm to YIM Tith’s fair trial rights and constituting an abuse of discretion remedied only by dismissal of the Indictment.⁴⁶⁵ First, the International Co-Investigating Judge failed to

⁴⁵⁸ Third Introductory Submission (D1), para. 61.

⁴⁵⁹ Third Introductory Submission (D1), para. 62.

⁴⁶⁰ Third Introductory Submission (D1), para. 67.

⁴⁶¹ Third Introductory Submission (D1), para. 74.

⁴⁶² Second Supplementary Submission (D191), para. 9.

⁴⁶³ Indictment (D382), paras 1016(i), 1017(i).

⁴⁶⁴ YIM Tith’s Appeal (Indictment) (D382/22), paras 104, 108.

⁴⁶⁵ YIM Tith’s Appeal (Indictment) (D382/22), paras 107, 120.



assess personal jurisdiction over YIM Tith in an equal manner to the Accused in Case 004/1,⁴⁶⁶ where the Co-Investigating Judges set out the relevant criteria for the exercise of their discretion and relied on considerations analogous to those used for sentencing purposes as relevant to their determination of personal jurisdiction, including: (i) the person's formal position in the hierarchy; (ii) the degree to which the accused was able to contribute to or even determine policies and/or their implementation; and (iii) the relative gravity of the person's own actions and their effects.⁴⁶⁷

218. While the National Co-Investigating Judge stayed faithful to the joint analysis presented in Case 004/1 and consequently found that the ECCC had no personal jurisdiction over YIM Tith, dismissing the charges against him;⁴⁶⁸ the International Co-Investigating Judge instead utilised the "fundamentally flawed" JCE doctrine, which does not discriminate degrees of responsibility or requires the accused to have performed any part of the *actus reus*.⁴⁶⁹ The Co-Lawyers aver that JCE is especially ill-suited to assess personal jurisdiction in cases where the JCE is broadly construed to cover vast ranges of the DK hierarchy (as in Case 004) and that the drafters of the ECCC Law did not envisage personal jurisdiction to cover a massive category of perpetrators.⁴⁷⁰

219. In response, the International Co-Prosecutor submits that the Co-Lawyers fail to demonstrate any reviewable error in the International Co-Investigating Judge's purported reliance on JCE.⁴⁷¹ First, the Co-Lawyers merely suggest that the International Co-Investigating Judge relied on JCE in assessing personal jurisdiction and erroneously assert that personal jurisdiction can only consider acts and conduct that are either geographically proximate or amount to physical perpetration.⁴⁷² Second, the Co-Lawyers fail to demonstrate any error, in

⁴⁶⁶ YIM Tith's Appeal (Indictment) (D382/22), paras 108, 119 *referring to* Case 004/1, Closing Order (Reasons), 10 July 2017, D308/3 ("Case 004/1 Closing Order (Reasons) (D308/3)") (and failed to provide reasons for his divergence from the Case 004/1 approach).

⁴⁶⁷ YIM Tith's Appeal (Indictment) (D382/22), paras 109-113, 119 (the Co-Lawyers point to additional "general facts" borne in mind by the Co-Investigating Judges in Case 004/1, such as that: (i) the decision making in the DK was not a formal democratic process; decisions were made at the top and implemented by lower levels; (ii) a person's own initiative in these circumstances is not in and of itself a criterion that would elevate them into the category of those "most responsible"; (iii) vertical lines of communications in the chain of command and secrecy did not permit horizontal exchange of tactical and operational information below top leadership; openly discussing instructions from *Angkar* would have resulted in adverse effects for the individuals involved).

⁴⁶⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 114.

⁴⁶⁹ YIM Tith's Appeal (Indictment) (D382/22), paras 115-118 *referring to* ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, Appeals Chamber, 3 April 2007 ("*Brđanin* Appeal Judgment (ICTY)"), paras 426-427, 431-432.

⁴⁷⁰ YIM Tith's Appeal (Indictment) (D382/22), paras 118-119.

⁴⁷¹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 61 (heading).

⁴⁷² International Co-Prosecutor's Response (Indictment) (D382/27), para. 62.



the event that the International Co-Investigating Judge did rely on JCE, as the applicability of this mode of liability at the ECCC has long been settled. The Co-Lawyers selectively rely on *Brđanin* (ICTY) and fail to acknowledge that the International Co-Investigating Judge expressly relied on JCE liability when determining personal jurisdiction in Case 004/1.⁴⁷³

220. Finally, the International Co-Prosecutor avers that YIM Tith was found to be among those “most responsible” for the major role he played in all of the atrocities, including the orchestration of genocide, victimisation of civilians and former CPK cadres and forced marriages, as supported by myriad factual findings on YIM Tith’s involvement in the commission of crimes.⁴⁷⁴

2. Discussion

221. The International Judges will address, in turn, the Co-Lawyers’ two-fold allegation that the International Co-Investigating Judge (i) failed to assess personal jurisdiction over YIM Tith in an equal manner to the Accused in Case 004/1, and instead (ii) inappropriately relied on YIM Tith’s alleged responsibility as a JCE member as a relevant consideration to find that YIM Tith was “most responsible”.

222. First, as to the International Co-Investigating Judge’s alleged failure to assess personal jurisdiction over YIM Tith in an equal manner to the Accused in Case 004/1,⁴⁷⁵ the International Judges uphold that, for the purpose of determining the ECCC’s personal jurisdiction, the identification of “those most responsible” entails a quantitative and qualitative assessment of (i) the gravity of the crimes alleged or charged and (ii) the level of responsibility of the suspect.⁴⁷⁶ In assessing the gravity of the crimes, factors such as the number of victims, the geographic and temporal scope of the crimes, the manner in which the crimes were allegedly committed and the number of separate incidents may be considered.⁴⁷⁷ In determining the level

⁴⁷³ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 63.

⁴⁷⁴ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 64.

⁴⁷⁵ YIM Tith’s Appeal (Indictment) (D382/22), paras 109-113, 119.

⁴⁷⁶ See, e.g., Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para 286; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 352; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321; Case 001 Trial Judgment (E188), para. 22 and accompanying footnotes; Case 003 Decision on Personal Jurisdiction (D48), para. 15 and footnote 25.

⁴⁷⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para 352; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of



of responsibility of a suspect, considerations such as his or her level of participation in the crimes may be relied on, along with other factors as his or her hierarchical rank or position, including the number of subordinates and hierarchical echelons above, the permanence of his or her position and his or her *de facto* roles and responsibilities.⁴⁷⁸

223. Whereas the considerations referred to in Case 004/1, such as the person's formal position in the hierarchy, the relative gravity of the person's own actions and the degree to which the suspect was able to contribute to policies and/or their implementation,⁴⁷⁹ may be part of this assessment, the International Judges reiterate that there is no exhaustive list of factors to be considered; nor is there a mathematical threshold for casualties,⁴⁸⁰ or a filtering standard in terms of positions in the hierarchy.⁴⁸¹ Rather, the determination of personal jurisdiction requires a case-by-case assessment, taking into account the general context and the personal circumstances of the suspect.⁴⁸² Accordingly, the alleged deviation from the considerations listed in Case 004/1 or from other cases, does not amount to an error in law as the determination of personal jurisdiction is case-specific and the criteria non-exhaustive. Moreover, the International Co-Investigating Judge, in fact, took into consideration the criteria listed in Case 004/1 as part of a broader assessment in determining personal jurisdiction over YIM Tith.⁴⁸³

224. Second, upon examining the Indictment, the International Judges are unpersuaded that

Judges BAIK and BEAUVALLET, para. 321; Case 001 Trial Judgment (E188), para. 22 and accompanying footnotes.

⁴⁷⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para 353; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321; Case 001 Trial Judgment (E188), para. 22 and accompanying footnotes.

⁴⁷⁹ YIM Tith's Appeal (Indictment) (D382/22), paras 109-112 referring to Case 004/1 Closing Order (Reasons), (D308/3), paras 38-42.

⁴⁸⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 352, 555; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321.

⁴⁸¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 352; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321.

⁴⁸² Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para 286; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 352. *See also* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321. *See also* SCSL, *Prosecutor v. Fofana*, SCSL-04-14-PT, 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, *Situation in the Democratic Republic of the Congo*, ICC-01/04-169, Judgment on Prosecutor's Appeal against the Decision of the Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", Appeals Chamber, 13 July 2006, para. 76.

⁴⁸³ *See* Indictment (D382), paras 33-34, footnotes 72-73 (The International Co-Investigating Judge's reference to the Case 004/1 Closing Order (Reasons) (D308/3) "[f]or the details regarding the exercise of this discretion").



the International Co-Investigating Judge inappropriately relied on YIM Tith's alleged responsibility as a JCE member in establishing personal jurisdiction.⁴⁸⁴ In finding that "YIM Tith falls under the ECCC's personal jurisdiction as one of the *"persons most responsible"*",⁴⁸⁵ the International Co-Investigating Judge carried out a case-specific assessment and relied on the above recognised criteria, such as YIM Tith's official rank and positions in the Northwest and Southwest Zones as well as his *de facto* authority,⁴⁸⁶ the gravity of his conduct, including the number of crime sites⁴⁸⁷ and his "major role" in the atrocities and implementation of the CPK policies in the areas under his responsibility.⁴⁸⁸

225. Notably, with respect to YIM Tith's official rank, the International Co-Investigating Judge considered his rise from the position of (Deputy) Secretary of Kirivong District in the Southwest Zone,⁴⁸⁹ to that of Deputy Zone Secretary and "possibly even full zone secretary" in the Northwest Zone,⁴⁹⁰ as well as his responsibilities for a number of sectors.⁴⁹¹ On this basis (and not his membership of the JCEs),⁴⁹² the International Co-Investigating Judge concluded that YIM Tith's authority under CPK law "stretched very far, both geographically and hierarchically".⁴⁹³ Moreover, as one of several considerations, the International Co-Investigating Judge held that through his close familial ties and working relationship as *de facto* second-in-command to *Ta Mok*, YIM Tith's factual authority extended beyond the authority he enjoyed through his official positions.⁴⁹⁴

226. In assessing the gravity of the crimes and YIM Tith's responsibility for them, the International Co-Investigating Judge considered crimes at over 20 sites,⁴⁹⁵ including allegations

⁴⁸⁴ YIM Tith's Appeal (Indictment) (D382/22), paras 108, 116-120.

⁴⁸⁵ Indictment (D382), para. 992 (emphasis added).

⁴⁸⁶ Indictment (D382), paras 993-994.

⁴⁸⁷ Indictment (D382), para. 995.

⁴⁸⁸ Indictment (D382), paras 996-999.

⁴⁸⁹ Indictment (D382), paras 993, 327-342.

⁴⁹⁰ Indictment (D382), paras 993, 380-385.

⁴⁹¹ Indictment (D382), para. 993 (referring to his position as Sector Secretary in Sectors 1, 3 and 4 in the Northwest Zone, in addition to Sector 13 in the Southwest Zone (*see* paras 343-352, 357-378)).

⁴⁹² YIM Tith's Appeal (Indictment) (D382/22), para. 104 and footnote 254.

⁴⁹³ Indictment (D382), para. 993.

⁴⁹⁴ Indictment (D382), paras 327, 994.

⁴⁹⁵ Indictment (D382), paras 433-469 (Wat Pratheat Security Centre), 470-526 (Kraing Ta Chan Security Centre), 527-546 (Preil Village Execution Site), 547-554 (Wat Angkun Execution Site), 555-565 (Slaeng Village Forest Execution Site), 566-585 (Prey Sokhon Execution Site and Wat Ang Serei Muny), 586-595 (Koas Krala Security Centre), 596-651 (Thipakdei Cooperative – Wat Thipakdei Security Centre and Tuol Mtes Security Centre and Worksite), 652-700 (Kang Hort Dam Worksite), 701-719 (Banan Security Centre), 720-737 (Khnamg Kou Security Centre), 738-746 (Kampong Kol Sugar Factory Worksite), 747-771 (Phum Veal Security Centre), 772-796 (Svay Chrum Security Centre), 797-810 (Tuol Seh Nhauv Execution Site), 811-826 (Prey Krabau Execution Site), 829-849 (Wat Kirirum Security Centre), 850-869 (Wat Samdech Security Centre), 870-910, 918-920, 967-979, (Kampong Prieng Commune-Wat Po Laingka/Kach Roteh Security Centre, Kach Roteh, Thmei and Sala



of genocide, crimes against humanity, war crimes and homicide under domestic law⁴⁹⁶ through several modes of liability, including JCE, planning, ordering, instigating, superior responsibility and direct perpetration for the international crimes and co-perpetration, planning and ordering for the domestic crimes.⁴⁹⁷ Although the evidence on victim numbers at several crime sites was unclear or “not sufficiently specific to form a proper basis for calculation”,⁴⁹⁸ the International Co-Investigating Judge provided a conservative estimate of thousands of Khmer Krom victims (killings)⁴⁹⁹ and found that tens of thousands of other civilians and former CPK cadres were otherwise victimised.⁵⁰⁰

227. While the International Co-Investigating Judge referred to the various CPK policies in his Legal Findings on Personal Jurisdiction,⁵⁰¹ it is apparent from the Indictment that he assessed the gravity of YIM Tith’s conduct through his individual actions and contributions to the policies and crimes. For example, the International Co-Investigating Judge assessed YIM Tith’s “**participation** in, and **orchestration** of, the genocide of the Khmer Krom in his areas of responsibility,”⁵⁰² and found that YIM Tith’s conduct and contributions consisted of, *inter alia*, “consistently speaking out against the Vietnamese and anyone linked to Vietnam, and by calling on all sectors of society, including subordinate CPK cadres, to monitor and report anyone suspected of such links so they could be killed”,⁵⁰³ as well as finding that YIM Tith visited, questioned and identified prisoners as enemies at Wat Pratheat Security Centre, where Khmer Krom were detained and subsequently killed.⁵⁰⁴

228. Similarly, the International Co-Investigating Judge considered the victimisation of

Trav Villages), 894, 911-920, 950-966 (Reang Kerei Commune), 921-939 (Prison No. 8), 940-948 (Veal Bak Chunching Execution Site), 980-991 (Samlaut District (forced marriage)), 1012-1015.

⁴⁹⁶ Indictment (D382), paras 995, 1012-1015.

⁴⁹⁷ Indictment (D382), paras 1016-1039.

⁴⁹⁸ See, e.g., Indictment (D382), paras 564 (Slaeng Village Forest Execution Site), 594 (Koas Krala Security Centre).

⁴⁹⁹ Indictment (D382), para. 996.

⁵⁰⁰ Indictment (D382), para. 997. See further e.g., paras 462 (Wat Pratheat: 640 victims, 140 Khmer Krom (conservative estimate)), 525 (Kraing Ta Chan: 646 victims, including 203 Khmer Krom (very conservative estimate)), 545 (Preil Village Execution Site: 16 victims, 10 Khmer Krom), 553 (Wat Angkun Execution Site: 4 victims, all Khmer Krom (very likely more victims)), 583 (Prey Sokhon Execution Site and Wat Ang Serei Muny: 90 victims, unknown number of Khmer Krom (conservative estimate), 594 (Koas Krala Security Centre: the evidence on victim numbers is unclear but it can be assumed that a large number of persons were killed), 649 (Thipakdei Cooperative – Wat Thipakdei Security Centre and Tuol Mtes Security Centre and Worksite: 375 victims (minimum number of deaths)).

⁵⁰¹ Indictment (D382), paras 996-998 (referring to the genocidal targeting of the Khmer Krom, the targeting of civilians former CPK cadres based on the CPK’s delusional political vision and the policy on forced marriages.). See also YIM Tith’s Appeal (Indictment) (D382/22), para. 104 and footnote 254.

⁵⁰² Indictment (D382), para. 996 (emphasis added).

⁵⁰³ Indictment (D382), paras 386-397, 1022.

⁵⁰⁴ Indictment (D382), paras 392, 101.



“other civilians and former CPK cadres [...] **under and by YIM Tith**”,⁵⁰⁵ and found that *Ta Mok* and YIM Tith **orchestrated** the purge of the Northwest Zone.⁵⁰⁶ YIM Tith presided over and participated in meetings (focused on the search for Vietnamese and CIA agents), identified and denounced traitors and enemies, ordered arrests and killings, and coordinated a network of Security Centres and killing sites, amongst other contributions.⁵⁰⁷ Finally, the International Co-Investigating Judge found that “YIM Tith and *Ta Mok* **played a central role**”⁵⁰⁸ in implementing the CPK’s policies on the establishment and operation of worksites and cooperatives,⁵⁰⁹ and that YIM Tith contributed to the CPK policy on the regulation of marriage by attending at least the preparatory stages of a marriage ceremony in Sector 1 and by giving instructions to the “*newlyweds*” a few days after the ceremony “*to live together happily*”.⁵¹⁰

229. Thus, even though a JCE may be “broadly construed”⁵¹¹ and include multiple people, such as “other trusted Southwest Cadre”,⁵¹² this would not automatically lead to a finding of personal jurisdiction over all of them, as the assessment of “those most responsible” is based on the myriad of factors described above and would moreover depend on the type and severity of the contribution to the crimes. An evaluation of these different factors, that included but was not limited to YIM Tith’s liability under JCE (in terms of his individual contribution), considered in the context of the DK regime,⁵¹³ led the International Co-Investigating Judge to conclude that there is “no doubt that YIM Tith is subject to the Court’s jurisdiction”.⁵¹⁴ Accordingly, Ground 4 is dismissed.

D. Ground 5: Alleged Error in Finding that YIM Tith was “Most Responsible”

Introduction

230. Ground 5 of the Co-Lawyers’ Appeal against the Indictment challenges the International Co-Investigating Judge’s conclusion that YIM Tith was “most responsible” and thus falls within the ECCC’s personal jurisdiction. In essence, the Co-Lawyers raise errors of

⁵⁰⁵ Indictment (D382), para. 997 (emphasis added).

⁵⁰⁶ Indictment (D382), para. 412.

⁵⁰⁷ Indictment (D382), paras 413-426, 997, 1022.

⁵⁰⁸ Indictment (D382), para. 398 (emphasis added).

⁵⁰⁹ Indictment (D382), paras 398-411, 997, 1016.

⁵¹⁰ Indictment (D382), paras 427, 998, 1024.

⁵¹¹ YIM Tith’s Appeal (Indictment) (D382/22), para. 118.

⁵¹² See, e.g., Indictment (D382), para. 1016(i)(ii).

⁵¹³ See Indictment (D382), paras 33-34, footnotes 72-73 (where he considers the specifics of the DK regime).

⁵¹⁴ Indictment (D382), para. 999.



law and fact mostly pertaining to the evaluation of evidence regarding YIM Tith's *de jure* positions in the CPK hierarchy and *de facto* responsibilities in the Southwest and Northwest Zones of DK, as well as YIM Tith's membership of and contribution to three JCEs identified by the International Co-Investigating Judge.

231. Under Ground 5,⁵¹⁵ the Co-Lawyers develop ten interrelated sub-grounds of appeal, namely that the International Co-Investigating Judge erred in finding that: (i) YIM Tith's family relationship with *Ta Mok* "amounted to a finding of *de facto* authority" (Ground 5.1); (ii) YIM Tith was "leader" of Kirivong District (Ground 5.2(i)); (iii) he held "major factual authority" in Sector 13 (Ground 5.2(ii)); (iv) he was Secretary of Sector 1 (Ground 5.2(iii)); (v) he was Secretary of Sector 3 (Ground 5.2(iv)); (vi) he was Secretary of Sector 4 (Ground 5.2(v)); and (vii) he was a member of the Northwest Zone Committee (Ground 5.2(vi)). The Co-Lawyers also contest the International Co-Investigating Judge's findings that (viii) YIM Tith contributed to JCE A concerning cooperatives, worksites, targeting of "enemies" and specific groups, and regulation of marriage in the Northwest Zone (Ground 5.3(i)); (ix) he contributed to JCE B concerning genocidal elimination of the Khmer Krom (Ground 5.3(ii)); and (x) he contributed to JCE C at Wat Pratheat Security Centre (Ground 5.3(iii)). Each of these sub-grounds will be assessed in turn.

Evidentiary Considerations

232. The ten sub-grounds of appeal lodged under Ground 5, as recounted above, primarily challenge the International Co-Investigating Judge's treatment of and reliance on the evidence relating to personal jurisdiction issues. The International Judges will therefore set out the applicable standard of review and evidentiary considerations to be applied in assessing the Co-Lawyers' sub-grounds of appeal under Ground 5.

233. The International Judges recall that "while alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct, alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue."⁵¹⁶ In the latter case, "the burden is on the appellant to show

⁵¹⁵ YIM Tith's Appeal (Indictment) (D382/22), pp. 45-98.

⁵¹⁶ Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 113; Case 002/1 Appeal Judgment (F36), paras 89-90; *see also* ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003 ("*Rutaganda* Appeal Judgment (ICTR)"), para. 353 ("Indeed, to the extent that the Trial Chamber was best placed to observe the witnesses first-hand, the Appeals Chamber will only intervene in cases



that no reasonable trier of fact could have found and relied on the challenged evidence in the fact-finding.”⁵¹⁷

234. It must be recalled that conclusory allegations which merely express disagreement with the factual conclusions reached or which vaguely assert an error in an unsubstantiated manner may be summarily dismissed by the Chamber,⁵¹⁸ since such allegations do not discharge the burden of demonstrating specific errors of fact or law on appeal.⁵¹⁹ Specifically as to witness evidence, the presence of inconsistencies does not *per se* require a reasonable trier of fact to reject the testimony as unreliable,⁵²⁰ as a fact-trier can “reasonably accept certain parts of a witness’s testimony and reject others” after having considered the whole of the testimony.⁵²¹

235. As the Pre-Trial Chamber has repeatedly stressed, “[a]ll evidence is admissible and generally enjoys the same legal presumption of reliability” and that 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

where the Appellant has demonstrated that evidence relied upon could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous.”); ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgment (Reasons), Appeals Chamber, 1 June 2001, para. 129; SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, Appeals Chamber, 22 February 2008 (“*Brima et al.* Appeal Judgment (SCSL)”), para. 120 (“The Appeals Chamber will normally uphold a Trial Chamber’s findings on issues of credibility, including its resolution of inconsistent evidence and will only find that an error of fact occurred when it determines that no reasonable tribunal could have made the impugned finding.”). See also Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, paras 259, 263, 282 (applying standard in assessing mixed errors of law and fact); Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 381.

⁵¹⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 381; see also *Rutaganda* Appeal Judgment (ICTR), para. 442; ICTR, *Prosecutor v. Setako*, ICTR-04-81-A, Judgement, Appeals Chamber, 28 September 2011, para. 31; *Popović et al.* Appeal Judgment (ICTY), para. 1228.

⁵¹⁸ See Case 002/1 Appeal Judgment (F36), paras 101-102 (holding that “arguments that merely claim that a given decision or finding of the Trial Chamber was erroneous, without actually substantiating why the decision or finding was in error” will not be considered).

⁵¹⁹ For example, mere assertions that contradictory or exculpatory evidence was disregarded, without particular citation or meaningful explanation of how an error was committed, are subject to summary dismissal. Similarly, the repeated use of generic boilerplate language—e.g., “drawing patently incorrect conclusions”, “resulting in miscarriage of justice”, or “unfairly and unreasonably abused his discretion”—does not demonstrate error at the appellate level.

⁵²⁰ *Kupreškić* Appeal Judgment (ICTY), para. 31. See also *Rutaganda* Appeal Judgment (ICTR), para. 353 (“It should also be stressed that with regard to the assessment of the credibility of a witness and the reliability of testimony, the Trial Chamber may accept a witness’s testimony despite the existence of contradictory statements”).

⁵²¹ *Popović et al.* Appeal Judgment (ICTY), para. 132. See also Case 002/1 Appeal Judgment (F36), para. 357 (“The Supreme Court Chamber considers that, depending on the circumstances of the case, it is not generally unreasonable for a trial chamber to accept certain parts of a person’s testimony while rejecting others”); ICTR, *Prosecutor v. Muvunyi*, ICTR-2000-55A-A, Judgement, Appeals Chamber, 1 April 2011, para. 26.



charges.”⁵²² It is well-settled that hearsay evidence is admissible before the ECCC and may be relied on.⁵²³ As previously affirmed, the International Co-Investigating Judge has “broad discretion” to rely on hearsay evidence.⁵²⁴ The probative value of hearsay, as with all forms of evidence, varies based on its nature and substance and will ultimately “depend upon the infinitely variable circumstances which surround hearsay evidence.”⁵²⁵ Moreover, there is no legal requirement that a witness’ evidence on material facts needs to be corroborated by evidence from other sources at the pre-trial stage.⁵²⁶

236. The International Judges further 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.”⁵²⁷ In evaluating the Co-Lawyers’ allegations concerning failure to provide reasoned findings or on evidentiary matters such as whether particular witnesses are generally credible and reasonably may be relied on, the International Judges will apply this consistent approach.

⁵²² Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 51-52; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 76-77; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 155.

⁵²³ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 44; Case 002/1 Appeal Judgment (F36), para. 302; *see also* ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Appeals Chamber, 16 February 1999 (“*Aleksovski* Decision on Admissibility of Evidence Appeal (ICTY)”), para. 15; *Rutaganda* Appeal Judgment (ICTR), paras 34, 148; ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Mathieu Ngudjolo*, ICC-01/04-02/12-3-tENG, Judgment pursuant to Article 74 of the Statute, Trial Chamber II, 18 December 2012, para. 56.

⁵²⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 433; Case 002/1 Appeal Judgment (F36), para. 302. *See also* *Popović et al.* Appeal Judgment (ICTY), para. 1307; *Rutaganda* Appeal Judgment (ICTR), para. 34; ICTR, *Prosecutor v. Karera*, ICTR-01-74-A, Judgement, Appeals Chamber, 2 February 2009 (“*Karera* Appeal Judgment (ICTR)”), para. 39.

⁵²⁵ Case 002/1 Appeal Judgment (F36), para. 302; *Aleksovski* Decision on Admissibility of Evidence Appeal (ICTY), para. 15; *Popović et al.* Appeal Judgment (ICTY), para. 1307; *Karera* Appeal Judgment (ICTR), para. 39; ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to Article 74 of the Statute, Trial Chamber II, 7 March 2014 (“*Katanga* Trial Judgment (ICC)”), para. 89.

⁵²⁶ Internal Rule 67 does not require corroboration of evidence in issuing an indictment. *See* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 426. *See also* Case 002/1 Appeal Judgment (F36), para. 424 (“There is no general rule that a finding beyond reasonable doubt cannot be reasonably entered unless there is more than one item of evidence to support it”); SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgement, Appeals Chamber, 26 September 2013, para. 75; ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, Appeals Chamber, 28 November 2007 (“*Nahimana et al.* Appeal Judgment (ICTR)”), footnote 1312 (collecting ICTR and ICTY cases holding the same).

⁵²⁷ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 306; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 468. *See also* ICTR, *Prosecutor v. Zigiranyirazo*, ICTR-01-73-A, Judgement, Appeals Chamber, 16 November 2009, para. 45; ICTY, *Prosecutor v. Perišić*, IT-04-81-A, Judgement, Appeals Chamber, 28 February 2013, para. 92.



237. Finally, the International Judges observe that the Co-Lawyers appear to confuse the standard of proof applicable at the pre-trial stage, incorrectly mixing language normally used at the trial stage to describe the evidentiary standard binding the Co-Investigating Judges in issuing closing orders. In the course of its Ground 5 submissions asserting that an incorrect legal standard was applied, the Co-Lawyers have variously claimed that:

- “The [International Co-Investigating Judge] failed to give a reasoned opinion as to why he found that evidence was such that *no reasonable trier of fact could not reach any other conclusion* in applying a ‘probability’ standard.”⁵²⁸
- “The [International Co-Investigating Judge] failed to [...] provide reasoning as to why he found the evidence he relied on so *persuasive* that *no reasonable trier of fact could have reached any other conclusion*, thereby erring in law by failing to apply the standard of ‘probability’.”⁵²⁹

238. The International Judges recall that the nature of the decision and the stage of the proceedings affect the standard of evidence.⁵³⁰ Internal Rule 67, which governs the applicable standard of proof at the pre-trial stage, dictates that the test for the Co-Investigating Judges’ issuance of closing orders is the existence of “sufficient evidence [...] of the charges”. While this standard is difficult to precisely quantify, the Pre-Trial Chamber has consistently observed that “the legal standards required for a decision progress incrementally throughout the judicial proceedings 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.”⁵³¹

239. The Co-Lawyers’ submissions appear to require a Co-Investigating Judge to show that it is beyond reasonable doubt that the evidence inescapably reaches the level of probability, in effect combining aspects of the standard of proof applicable at the trial/appellate stage of proceedings with that applicable at the pre-trial stage, thus creating a sort of standard of proof chimera. The “only relevant criterion”, as recalled above, is the “personal conviction of the Co-

⁵²⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 140 (emphasis added).

⁵²⁹ YIM Tith’s Appeal (Indictment) (D382/22), para. 188 (emphasis added); *see also* paras 197 and 202 for similarly formulated allegations.

⁵³⁰ *See* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 84; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 61; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion BEAUVALLET and BAIK, para. 163.

⁵³¹ *See* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 85; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 62; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion BEAUVALLET and BAIK, para. 165.



Investigating Judges regarding whether there is sufficient evidence for the charges.”⁵³² Accordingly, the Co-Lawyers’ submissions in this regard must be rejected.⁵³³

240. The International Judges will now turn to evaluate the various sub-grounds of appeal categorised under Ground 5, consistent with the appropriate evidentiary principles and standards of review as outlined above.

Ground 5.1: Alleged Error in Finding that YIM Tith’s Family Relationship with Ta Mok Amounted to *De Facto* Authority in the Southwest and Northwest Zones

1. Submissions

241. Under Ground 5.1, the Co-Lawyers submit that the International Co-Investigating Judge erred in finding that YIM Tith’s family relationship with Ta Mok amounted to his *de facto* authority in the Southwest and Northwest Zones and that he was amongst those “most responsible”.⁵³⁴

242. First, the Co-Lawyers argue that the International Co-Investigating Judge gave “excessive prominence” to YIM Tith’s family relationship with Ta Mok to conclude that YIM Tith held *de facto* authority in Sector 13 of the Southwest Zone.⁵³⁵ The Co-Lawyers contend that the International Co-Investigating Judge’s reliance on witness evidence to demonstrate YIM Tith and Ta Mok’s close relationship is “irrelevant” for the assessment of *de facto* authority and his effective command and control.⁵³⁶ In addition, the International Co-Investigating Judge abused his discretion by unfairly and unreasonably relying upon certain evidence while disregarding other contradictory evidence, as shown by the “telling examples” of RIEL Son, SANN Lorn and NOP Ngim.⁵³⁷

⁵³² Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 51-52; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 76-77; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion BEAUVALLET and BAIK, para. 155.

⁵³³ The International Judges observe that the International Co-Investigating Judge applied the standard of proof of “probability” in his Closing Order. See Indictment (D382), para. 25.

⁵³⁴ YIM Tith’s Appeal (Indictment) (D382/22), paras 124-141.

⁵³⁵ YIM Tith’s Appeal (Indictment) (D382/22), para. 124.

⁵³⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 125.

⁵³⁷ YIM Tith’s Appeal (Indictment) (D382/22), para. 126 referring to evidence allegedly contradicting the International Co-Investigating Judge’s finding of “close ties” between Ta Mok and YIM Tith from RIEL Son (who stated that he had no contact with YIM Tith but he believed YIM Tith worked in an office with POL Pot and that YIM Tith was not very active), SANN Lorn (who repeated that he did not know anything about Ta Mok and YIM Tith’s relationship), and NOP Ngim (who did not know YIM Tith’s position in the Southwest Zone).



243. The Co-Lawyers contend that the International Co-Investigating Judge failed to properly consider CHAN Vicheth's witness evidence concerning YIM Tith's responsibilities in Takeo Province, and especially testimony which the Co-Lawyers argue is temporally contradictory to SAO Chobb's evidence.⁵³⁸ In particular, according to the Co-Lawyers, CHAN Vicheth saw YIM Tith almost every day from April to July 1977 in Takeo Province, which is exactly the same period when SAO Chobb allegedly saw YIM Tith travelling all over the Northwest Zone with *Ta Mok*.⁵³⁹ Furthermore, the International Co-Investigating Judge failed to consider CHAN Vicheth's contradictory evidence and clarifying statements relevant to YIM Tith's status as "most responsible".⁵⁴⁰ In addition, the International Co-Investigating Judge misinterpreted CHAN Vicheth's evidence and failed to take into account exculpatory evidence for his finding that YIM Tith attended a meeting with district representatives at the Southwest Zone Office and that YIM Tith ordered people to carry out tasks and inspect worksites throughout the Zone.⁵⁴¹

244. The Co-Lawyers also challenge reliance on MOENG Vet's observations that YIM Tith was more powerful than *Ta Phen* (the alleged Deputy Sector 13 Secretary) because of his age and family connection with *Ta Mok*, as part of the finding that YIM Tith held *de facto* authority in Sector 13.⁵⁴² Finally, the Co-Lawyers argue that none of the witnesses relied on by the International Co-Investigating Judge gave evidence of YIM Tith's concurrent *de jure* and *de facto* authority in both the Southwest and Northwest Zones *after* June 1978.⁵⁴³

245. In conclusion, the Co-Lawyers reiterate that the International Co-Investigating Judge failed to show that YIM Tith's family relationship with *Ta Mok* amounted to his *de facto* authority in Sector 13 or that he was *Ta Mok*'s second-in-command in both Zones. The Co-Lawyers contend that neither ECCC jurisprudence nor that of other international tribunals

⁵³⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 127.

⁵³⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 129.

⁵⁴⁰ YIM Tith's Appeal (Indictment) (D382/22), paras 130-131 (The Co-Lawyers point to CHAN Vicheth's evidence that: (i) he did not know that YIM Tith and *Ta Mok* were relatives or what kind of relationship they had; (ii) YIM Tith became *Ta Mok*'s representative in military matters only after the war ended; (iii) YIM Tith's responsibilities were not fixed; (iv) YIM Tith was not District Secretary but *Ta Mok*'s representative for particular tasks for a short period; (v) YIM Tith had no official position and; (vi) YIM Tith did not work for the military but was with the "base". The Co-Lawyers further allege that this evidence is corroborated by VANN Kosal who stated that he heard that YIM Tith worked "at the base.").

⁵⁴¹ YIM Tith's Appeal (Indictment) (D382/22), paras 132-133.

⁵⁴² YIM Tith's Appeal (Indictment) (D382/22), para. 134.

⁵⁴³ YIM Tith's Appeal (Indictment) (D382/22), paras 135-136 (emphasis added) (challenging the evidence of SANN Lorn, PECH Chim, SOEUM Chhoeun, PANN Sarou and HUY Krim).



suggest that family relationships are indicative of effective command and control.⁵⁴⁴ The Co-Lawyers aver that the critical criterion of effective control is the actual possession of powers of control over subordinates, and assert that the International Co-Investigating Judge failed to show YIM Tith had “control over the actions of even one single person”.⁵⁴⁵ The Co-Lawyers conclude that the International Co-Investigating Judge’s “preoccupation” with YIM Tith’s family relationship with *Ta Mok* resulted in his failure to consider contradictory evidence, legally relevant considerations and exculpatory evidence, among other evidentiary errors.⁵⁴⁶

246. In response, the International Co-Prosecutor submits that Ground 5.1 fails to demonstrate any reviewable error of law or fact in the International Co-Investigating Judge’s finding that YIM Tith had *de facto* authority in the Southwest and Northwest Zones and that he was among those “most responsible”.⁵⁴⁷ She argues that the International Co-Investigating Judge did *not* find that YIM Tith had *de facto* authority in the two Zones based only on his family relationship with *Ta Mok*.⁵⁴⁸

247. The International Co-Prosecutor presents detailed rebuttals to the Co-Lawyers’ challenges of witness testimony, submitting that (i) RIEL Son saw YIM Tith at the Sector Commerce Office and also travelling with *Ta Mok*;⁵⁴⁹ (ii) SANN Lorn was related to YIM Tith and recounted YIM Tith’s role as Sector 13 Secretary and his close working relationship with *Ta Mok*;⁵⁵⁰ and (iii) NOP Ngim recounted that YIM Tith was one of the leaders in the Southwest Zone, *Ta Mok* was senior to YIM Tith, and that YIM Tith and *Ta Mok* attended her forced wedding ceremony and various meetings together.⁵⁵¹ In addition, the Co-Lawyers fail to demonstrate any error in relying on the testimony of CHAN Vicheth,⁵⁵² by (i) wrongly claiming that his evidence regarding YIM Tith in the Southwest Zone related to the period April to July 1977, when it concerned a four-month period in 1975;⁵⁵³ (ii) erroneously characterising CHAN Vicheth’s evidence as exculpatory;⁵⁵⁴ and (iii) failing to demonstrate that

⁵⁴⁴ YIM Tith’s Appeal (Indictment) (D382/22), para. 137.

⁵⁴⁵ YIM Tith’s Appeal (Indictment) (D382/22), paras 138-139.

⁵⁴⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 140.

⁵⁴⁷ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 66.

⁵⁴⁸ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 67.

⁵⁴⁹ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 68.

⁵⁵⁰ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 69.

⁵⁵¹ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 70.

⁵⁵² While the International Co-Prosecutor makes these submissions in other sections of her Response, it is convenient to address them here as part of Ground 5.1.

⁵⁵³ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 97.

⁵⁵⁴ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 98.



CHAN Vicheth's evidence was disregarded or was contradictory.⁵⁵⁵ For the International Co-Prosecutor, CHAN Vicheth's statements regarding YIM Tith's role and authority in the Southwest Zone are clear and consistent, strongly supporting significant *de facto* authority.⁵⁵⁶

248. According to the International Co-Prosecutor, the International Co-Investigating Judge did not merely impute acts of *Ta Mok* to YIM Tith. Instead, YIM Tith's presence next to *Ta Mok* at meetings in Sector 1 demonstrates his "involvement with and endorsement of the policies discussed and implemented".⁵⁵⁷ Moreover, YIM Tith's family relationship with *Ta Mok* was not even referenced in the finding that he was Sector 3 Secretary.⁵⁵⁸

249. Concerning the finding that YIM Tith had concurrent authority in the Southwest and Northwest Zones similar to *Ta Mok*,⁵⁵⁹ the International Co-Prosecutor observes that (i) SANN Lorn knew about YIM Tith moving between zones because he was directly told by *Ta Mok*,⁵⁶⁰ (ii) PECH Chim did not "change his evidence" about hearing a broadcast about YIM Tith receiving guests at the Sector 13 Office;⁵⁶¹ (iii) PANN Sarou did not "change his testimony" about YIM Tith's position in Kirivong District and his promotion to the National Assembly;⁵⁶² (iv) SOEUM Chhoeun clarified that he knew that YIM Tith administered Kirivong District until the end of the Khmer Rouge regime;⁵⁶³ and (v) HUY Krim's evidence is not temporally irrelevant or limited to 1976 or 1977.⁵⁶⁴

250. In conclusion, the International Co-Prosecutor reiterates that the International Co-Investigating Judge did not find that YIM Tith's *de facto* authority was demonstrated solely by his family tie to *Ta Mok*. Rather, YIM Tith's acts and conduct are the foundation of the Indictment,⁵⁶⁵ which relies on sufficient evidence of YIM Tith exercising control over his subordinates in both the Northwest and Southwest Zones.⁵⁶⁶

⁵⁵⁵ International Co-Prosecutor's Response (Indictment) (D382/27), para. 163.

⁵⁵⁶ International Co-Prosecutor's Response (Indictment) (D382/27), paras 163-165.

⁵⁵⁷ International Co-Prosecutor's Response (Indictment) (D382/27), para. 71.

⁵⁵⁸ International Co-Prosecutor's Response (Indictment) (D382/27), para. 71.

⁵⁵⁹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 72.

⁵⁶⁰ International Co-Prosecutor's Response (Indictment) (D382/27), para. 73.

⁵⁶¹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 74.

⁵⁶² International Co-Prosecutor's Response (Indictment) (D382/27), para. 75.

⁵⁶³ International Co-Prosecutor's Response (Indictment) (D382/27), para. 76.

⁵⁶⁴ International Co-Prosecutor's Response (Indictment) (D382/27), para. 77.

⁵⁶⁵ International Co-Prosecutor's Response (Indictment) (D382/27), para. 79.

⁵⁶⁶ International Co-Prosecutor's Response (Indictment) (D382/27), para. 78.



2. Discussion

251. Ground 5.1 raises various interconnected arguments relating to YIM Tith's family relationship with *Ta Mok*, some legal and some factual in nature, and mostly concerning Sector 13 of the Southwest Zone. The International Judges deem it convenient to first address the legal issues underlying this appeal ground. Afterwards, the International Judges will examine the Co-Lawyers' factual evidentiary challenges against specific witnesses attesting to YIM Tith's (i) *de facto* authority in Sector 13 and (ii) concurrent authority and responsibility in both the Southwest and Northwest Zones.

252. At the outset, the International Judges note that the Co-Lawyers do not challenge the existence of a family relationship in fact between YIM Tith and *Ta Mok*. Instead, they challenge what they consider the excessive weight given by the International Co-Investigating Judge to this family relationship by allegedly treating this association as amounting to a finding of *de facto* authority in the Southwest and Northwest Zones.⁵⁶⁷ In this connection, the International Judges observe the International Co-Investigating Judge's finding that (i) *Ta Mok* "held several senior positions in DK including member of the Standing Committee [of the CPK] as well as Secretary of the Southwest Zone, Secretary of the Northwest Zone, and Secretary of the West Zone"⁵⁶⁸ and that (ii) prior to the beginning of the DK period, YIM Tith married the younger sister of *Ta Mok*.⁵⁶⁹ The International Judges see no reason to question these findings, nor do the Parties dispute them; accordingly, the International Judges take these facts as established.

253. The International Judges hold that, as a matter of law, a reasonable trier of fact could find that a close personal relationship serves as corroborative context supporting other evidence demonstrating an individual's exercise of authority. For the purpose of assessing the ECCC's personal jurisdiction, the relevant inquiry is whether the individual is among those "most responsible", which "requires a case-by-case assessment, taking into account the general context and the personal circumstances of the suspect."⁵⁷⁰ The International Judges consider

⁵⁶⁷ See YIM Tith's Appeal (Indictment) (D382/22), paras 124,137, 141.

⁵⁶⁸ Indictment (D382), para. 158 and footnote 335 (citing supporting evidence).

⁵⁶⁹ Indictment (D382), para. 325 and footnotes 857-858 (citing supporting evidence).

⁵⁷⁰ See Case 004/I Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321 (holding that the identification of persons falling into those "most responsible" involves a quantitative and qualitative assessment of (i) the gravity of the crimes alleged or charged and (ii) the level of responsibility of the suspect and that there is no exhaustive list of factors to be considered in undertaking this review nor is there a filtering standard in terms of positions in the hierarchy); *see also* paras 327-338.



that this can be demonstrated by evidence that a family relationship, as a matter of fact, augmented or facilitated the exercise of responsibility by the suspect in question.⁵⁷¹ Accordingly, the International Judges reject the Co-Lawyers' argument that evidence, *inter alia*, of *Ta Mok* and *YIM Tith* travelling together throughout the Southwest Zone inspecting worksites and were seen attending meetings together constitute "irrelevant factors",⁵⁷² considering such evidence goes directly to an assessment of whether *YIM Tith* himself exercised authority and control, in actual practice, in the areas concerned.⁵⁷³

a. YIM Tith's De Facto Authority in Sector 13

254. Turning to the Co-Lawyers' claim concerning Sector 13 of the Southwest Zone, the International Judges are not persuaded that the International Co-Investigating Judge reached a conclusion regarding *YIM Tith's de facto* authority in that Sector based exclusively upon the mere fact of the two men's family association. Instead, the International Co-Investigating Judge expressly highlighted that "*YIM Tith's close familial ties to Ta Mok and the close working relationship they both shared in the Southwest Zone [...] gave him major additional factual authority in the Southwest Zone that extended the authority he enjoyed by means of holding certain official positions.*"⁵⁷⁴ Of particular relevance, the International Co-Investigating Judge cited evidence that the two men worked and attended meetings together, that their offices were located in close proximity and that they lived together in a large compound, which was also used to receive guests and hold meetings.⁵⁷⁵ The International Judges see no error in the International Co-Investigating Judge's simultaneous focus on *YIM Tith's* family ties with *Ta Mok* combined with evidence that the two worked very closely in the fulfilment of sector work responsibilities.

255. In addition, the International Judges are not convinced by the Co-Lawyers' specific

⁵⁷¹ See Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 337.

⁵⁷² *Contra YIM Tith's Appeal* (Indictment) (D382/22), paras 125, 126.

⁵⁷³ The International Judges summarily reject the Co-Lawyers' arguments regarding the law on command responsibility and the indicators of effective control, which have already been held inadmissible under Ground 2.3. *Contra YIM Tith's Appeal* (Indictment) (D382/22), para. 138. Furthermore, the International Judges summarily dismiss the conclusory allegations laid out in paragraphs 139-140 of the Appeal. See Case 002/1 Appeal Judgment (F36), paras 101-102 (holding that "arguments that merely claim that a given decision or finding of the Trial Chamber was erroneous, without actually substantiating why the decision or finding was in error" will not be considered).

⁵⁷⁴ Indictment (D382), para. 327 (emphasis added).

⁵⁷⁵ Indictment (D382), para. 349.



examples where contradictory evidence was supposedly disregarded.⁵⁷⁶ First, regarding RIEL Son (a District Level cadre), while he had no “personal contact” with YIM Tith during the DK regime, the witness explained that he “saw” YIM Tith when he went to get supplies at the Sector Commerce Office in Takeo Province (even if they “never talked”).⁵⁷⁷ Furthermore, RIEL Son saw YIM Tith and *Ta* Mok travel together “once in a while”.⁵⁷⁸ Second, although SANN Lorn (a former CPK cadre) initially denied knowing anything about YIM Tith, it was not unfair or unreasonable to rely on SANN Lorn’s evidence about the two men’s close working relationship,⁵⁷⁹ in light of SANN Lorn’s admission that he was actually related to YIM Tith and *Ta* Mok through *Ta* Mok’s wife, who was the witness’ older sister.⁵⁸⁰ Third, regarding NOP Ngim (Deputy Secretary of Samlaut District), even if she could not recall YIM Tith’s exact position or the details of the Southwest Zone structure (though the International Judges note that she *was* able to affirm that YIM Tith was “one of the leaders in the Southwest Zone”),⁵⁸¹ this does not negate her testimony of the two men’s work-related interactions, including them inspecting the Kep Salt Fields together “every month” in mid-1977, and also mutual presence at meetings with representatives from the districts and sectors.⁵⁸² The International Judges see no error in the International Co-Investigating Judge’s reliance on the evidence of each of these impugned witnesses.

256. The International Judges find that the Co-Lawyers’ extensive challenges relating to the evidence of CHAN Vicheth (a former messenger based in Sector 13 for part of the DK period) are unavailing. First, the Co-Lawyers’ efforts to find a temporal contradiction between CHAN Vicheth’s and SAO Chobb’s testimonies fail. After recounting that YIM Tith had an office in Takeo Province in 1975, CHAN Vicheth told investigators that he stayed in Takeo provincial town for a short time, “about four months”, during which he saw YIM Tith “almost every

⁵⁷⁶ *Contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 126.

⁵⁷⁷ Written Record of Interview of RIEL Son, 18 February 2014, D118/181, at ERN (EN) 00982644 (A72, A77-A80).

⁵⁷⁸ Written Record of Interview of RIEL Son, 18 February 2014, D118/181, at ERN (EN) 00982645 (A89).

⁵⁷⁹ Written Record of Interview of SANN Lorn, 29 September 2014, D219/19, at ERN (EN) 01050428 (A774), 01050436 (A821), 01050457 (A983) (stating that YIM Tith and *Ta* Mok “always reported to each other, sharing information mutually”).

⁵⁸⁰ Written Record of Interview of SANN Lorn, 29 September 2014, D219/19, at ERN (EN) 01050420 (A711), ERN (EN) 01050437 (A827-A828); *compare with* ERN (EN) 01050355 (A166).

⁵⁸¹ Written Record of Interview of NOP Ngim, 12 August 2014, D118/285, at ERN (EN) 01044675 (A9), 01044676 (A18).

⁵⁸² Written Record of Interview of NOP Ngim, 12 August 2014, D118/285, at ERN (EN) 01044674 (A7), 01044675 (A8-A9, A12), 01044676 (A17), 01044683-01044684 (A55-A56), 01044686 (A73).



day”.⁵⁸³ The witness further specified that “[a]fter staying there [*i.e.* Takeo provincial town] for four months, [he] went to live in Anlong Tean.”⁵⁸⁴ Read in context, this testimony does not support the Co-Lawyers’ suggestion⁵⁸⁵ that CHAN Vicheth saw YIM Tith from April to July 1977 (a period when the witness was instead at Anlong Tean, Koh Andeat District with a unit defending the border against Vietnam).⁵⁸⁶ In any event, the witness clarified that his usage of “almost every day” meant that “[s]ometimes, I did not see him. Sometimes, he went here and there and I did not see him.”⁵⁸⁷ Thus, CHAN Vicheth’s testimony of seeing YIM Tith in Takeo would not necessarily preclude visits by YIM Tith to the Northwest Zone in the same time period, such as SAO Chobb meeting YIM Tith, accompanying *Ta Mok*, at a “study session” at Kang Hort Dam worksite in 1976.⁵⁸⁸

257. Second, the Co-Lawyers cite VANN Kosal (a military platoon commander) as a corroborating witness to suggest that YIM Tith had little to no responsibility over military matters.⁵⁸⁹ VANN Kosal, however, repeatedly stressed that he did not know YIM Tith, explaining that YIM Tith “was not a soldier like the men in my team” and that “I worked at the frontline and he worked at the rear, so we did not have any communication.”⁵⁹⁰ The International Judges do not consider this evidence to be very probative, except to suggest that YIM Tith was not a frontline soldier at the relevant time. Conversely, reviewing CHAN Vicheth’s evidence as a whole, the International Judges are satisfied that a reasonable trier of

⁵⁸³ Written Record of Interview of CHAN Vicheth, 25 October 2016, D219/853, at ERN (EN) 01375337-01375338 (A16-A21).

⁵⁸⁴ Written Record of Interview of CHAN Vicheth, 25 October 2016, D219/853, at ERN (EN) 01375337 (A18). The International Judges note CHAN Vicheth’s testimony that he was a military messenger with Battalion 310 and the particular military unit he worked for was stationed at Wat Trakeath Pagoda at Tuol Krei near Phnom Penh in 1975. After staying there for a year, some soldiers stayed at Tuol Krei, while others went to construct a railway in Takeo Province. According to CHAN Vicheth, he went to Takeo Province although his military base remained at Tuol Krei and during that time, he “worked closely with *Ta Phea*”, the Commander of Battalion 310. It is probable that CHAN Vicheth stayed at Takeo provincial town for the four-month period earlier than early 1977, since he specified that he went to live in Anlong Tean “from the rail road place”, suggesting that he had resumed duties with the military unit after his time in Takeo provincial town or at least had an intermediate stop between the provincial town and Anlong Tean. *See* DC-Cam Interview of CHAN Vicheth, 23 December 2015, D219/815.1, at ERN (EN) 01344871-01344872; Written Record of Interview of CHAN Vicheth, 25 October 2016, D219/853, at ERN (EN) 01375338 (A21-A24).

⁵⁸⁵ YIM Tith’s Appeal (Indictment) (D382/22), para. 129.

⁵⁸⁶ Written Record of Interview of CHAN Vicheth, 25 October 2016, D219/853, at ERN (EN) 01375337 (A11); DC-Cam Interview of CHAN Vicheth, 23 December 2015, D219/815.1, at ERN (EN) 01344874, 01344884-01344885.

⁵⁸⁷ Written Record of Interview of CHAN Vicheth, 25 October 2016, D219/853, at ERN (EN) 01375338 (A30).

⁵⁸⁸ Written Record of Interview of SAO Chobb, 21 March 2017, D219/956, at ERN (EN) 01456265 (A13-A18), 01456266 (A22).

⁵⁸⁹ YIM Tith’s Appeal (Indictment) (D382/22), paras 130, 131.

⁵⁹⁰ Written Record of Interview of VANN Kosal, 24 January 2017, D219/901, at ERN (EN) 01517487-01517488 (A35-A39).



fact could conclude that *Ta Mok* gave YIM Tith some responsibility for certain military and internal security matters in Takeo Province.⁵⁹¹

258. Third, the International Judges also find no error in the finding that YIM Tith attended a meeting with district committee representatives at the Zone Office, considering the International Co-Investigating Judge specifically cited the passages that the Co-Lawyers claim were not taken into account.⁵⁹² Furthermore, the testimony that YIM Tith also received his relatives for overnight visits many times in the same compound does not contradict CHAN Vicheth's evidence that district representatives with bicycles once arrived to hold a meeting with YIM Tith.⁵⁹³ The International Judges similarly find no error in the Indictment's reliance on CHAN Vicheth's testimony that YIM Tith ordered people to carry out tasks throughout the Zone.⁵⁹⁴

259. More fundamentally, the International Judges are satisfied that a reasonable trier of fact could find sufficient evidence that YIM Tith and *Ta Mok*'s close personal relationship gave YIM Tith *de facto* authority beyond his formal role, with CHAN Vicheth succinctly affirming that: "The biggest leaders in Takeo Sector were *Ta Mok* and *Ta Tith*. They supervised the whole Takeo Province and the entire zone."⁵⁹⁵

⁵⁹¹ See, e.g., Written Record of Interview of CHAN Vicheth, 25 October 2016, D219/853, at ERN (EN) 01375340 (A51-A52) ("It [*i.e.* internal security] was under *Ta Mok*. However, if *Ta Mok* was not present, there could be a meeting to grant *Ta Tith* that role."), ERN (EN) 01375341 (A59) ("*Ta Tith* became the representative only after the war ended. During the war time, he was not."), (A60) ("I saw that [*i.e.* YIM Tith giving directions for military attacks] when he was a military representative. The fighting was around Kiri Vong District and Thnal Dach. *Ta Tith* was responsible only in Kiri Vong District. [...] He was in charge once in a while.").

⁵⁹² See Indictment (D382), footnotes 914, 919.

⁵⁹³ Written Record of Interview of CHAN Vicheth, 25 October 2016, D219/853, at ERN (EN) 01375339 (A32-A38), ERN (EN) 01375346 (A109-A112), ERN (EN) 01375351 (A152); see also Annex A: Sketch of Places, 26 October 2016, D219/853.1, ERN (KH) 01340661.

⁵⁹⁴ For example, the evidence provides that people under YIM Tith's order from Angkor Borei District, Koh Andeth District, and Prey Kakbas District were asked to produce fish traps, with YIM Tith determining the distribution of the dry salty fish. Written Record of Interview of CHAN Vicheth, 25 October 2016, D219/853, at ERN (EN) 01375352 (A158). See also ERN (EN) 01375342 (A67-A69), ERN (EN) 01375344 (A82-A83) ("The zone messengers were under *Ta Tith* [...]"), ERN (EN) 01375351 (A154) ("*Ta Tith* was the one who held the walkie-talkie and he ordered to bring the heads of the dry salty fish to the people who cut bamboos on the mountain. He also ordered the truck to deliver the bamboos somewhere. It was like part of the economics section.").

⁵⁹⁵ Written Record of Interview of CHAN Vicheth, 25 October 2016, D219/853, at ERN (EN) 01375345 (A101); see also ERN (EN) 01375342 (A64) ("*Ta Tith* was probably higher than the sector level because he was *Ta Mok*'s representative."), (A66) ("[YIM Tith] was responsible for the entire western part of Takeo Province."), ERN (EN) 01375348 (A131) ("According to my conclusion, *Ta Tith* was higher than the sector."), ERN (EN) 01375353 (A171) ("I agree to additionally describe the structure of the Southwest Zone leadership (*Ta Mok* and *Ta Tith*). *Ta Tith*'s structure was a branch of *Ta Mok*. In the structure, he was an acting head. He was not *Ta Mok*'s full rights member. He was under *Ta Mok*'s instruction. He used to do different work, without having a letter of appointment.").



260. Lastly, the Co-Lawyers' challenge to MOENG Vet's testimony also fails. According to the witness (a messenger based in Sector 13), during a ten-day meeting of Sector 13 cadre in late 1976, YIM Tith sat at the right-hand side of *Ta Saom*, the then-Sector 13 Secretary, on the stage facing the rest of the attendees.⁵⁹⁶ Even if YIM Tith did not give a speech, as MOENG Vet explains, although YIM Tith's official position was at the district level, YIM Tith "always went to sit on stage with *Ta Saom*" during the whole ten days, and this seating arrangement meant that YIM Tith was "about to be promoted" to Sector Secretary; indeed, when *Ta Saom* was later removed, YIM Tith replaced *Ta Saom*.⁵⁹⁷ The International Co-Investigating Judge did not err in relying on MOENG Vet's testimony, especially given MOENG Vet's explanation that *Ta Mok* "usually selected his relatives to control the district and other sectors" and sent YIM Tith to Kirivong District to investigate suspected cadre because YIM Tith "was *Ta Mok*'s younger brother-in-law".⁵⁹⁸

b. Concurrent Authority and Responsibility in Both the Southwest and Northwest Zones

261. In addition to Sector 13 findings, the Co-Lawyers also specifically contest that witnesses gave evidence about YIM Tith's *concurrent* authority in *both* the Southwest and Northwest Zones after June 1978 (when YIM Tith was appointed to positions in the Northwest Zone, according to the Indictment).⁵⁹⁹ The Co-Lawyers challenge the evidence of SANN Lorn, PECH Chim, SOEUM Chhoeun, PANN Sarou and HUUY Krim. The International Judges first discuss the challenges with merit.

262. First, the Co-Lawyers correctly note that SOEUM Chhoeun (a District-Level Military and Commerce cadre in Kirivong District) said he believed that, during the last few months of the DK regime, YIM Tith "still administered Kiri Vong District because [the witness] never heard that [YIM Tith] moved away from Kiri Vong District".⁶⁰⁰ This evidence relied on by the

⁵⁹⁶ Written Record of Interview of MOENG Vet, 1 September 2015, D219/488, at ERN (EN) 01170589 (A57-A58).

⁵⁹⁷ Written Record of Interview of MOENG Vet, 1 September 2015, D219/488, at ERN (EN) 01170587 (A37-A42), ERN (EN) 01170588 (A50-A51), ERN (EN) 01170589 (A62-A63); ERN (EN) 01170592-01170593 (A90-A95); Case 002 Transcript of 26 July 2016 (MOENG Vet), D219/899.1.4, at ERN (EN) 01346502-01346503, p. 38, lines 20-25, p. 39, lines 1-14.

⁵⁹⁸ Written Record of Interview of MOENG Vet, 1 September 2015, D219/488, at ERN (EN) 01170592 (A88, A90, A91).

⁵⁹⁹ YIM Tith's Appeal (Indictment) (D382/22), paras 135-136; *see also* Indictment (D382), para. 352, footnote 923.

⁶⁰⁰ Written Record of Interview of SOEUM Chhoeun, 17 February 2015, D219/189, at ERN (EN) 01079819 (A27).



International Co-Investigating Judge does not appear to support YIM Tith's *concurrent* authority in both Northwest and Southwest Zones, but rather that he never left the Southwest Zone.⁶⁰¹

263. The Co-Lawyers also raise a valid challenge regarding HUY Krim's testimony. Reading the cited evidence in context, HUY Krim stated that he knew that YIM Tith "travelled up and down between the Southwest and Northwest zones" as part of the witness' discussion about seeing YIM Tith depicted in a DK magazine in 1976 and 1977 (before the arrival of the Southwest Zone cadre) and also in a movie shown at the end of 1976.⁶⁰² It is unclear whether this statement relates specifically to the post-June 1978 period after YIM Tith's formal appointment in the Northwest Zone, but the context would suggest otherwise.⁶⁰³

264. PECH Chim (former District Secretary of Tram Kak District, later transferred to the Central Zone) did not change his evidence as alleged by the Co-Lawyers. Instead, PECH Chim confirmed his statement that, in late 1978, he heard a radio broadcast that YIM Tith was receiving guests at the Sector 13 Office in Takeo, adding that "[l]ater on, [his] messenger told [him] about this matter."⁶⁰⁴ The International Judges note, however, there is some ambiguity as to the timeframe, as PECH Chim relates a few answers earlier that he had heard from his messenger "[p]erhaps in late 1977" that YIM Tith was stationed at the Sector Office in the provincial town of Takeo.⁶⁰⁵

265. In contrast, the International Judges find the remaining challenges unconvincing. SANN Lorn, as noted above, is related to YIM Tith through *Ta Mok's* wife.⁶⁰⁶ Moreover, SANN Lorn states that both *Ta Mok* and YIM Tith travelled back and forth between the Northwest and Southwest Zones, in particular explaining that YIM Tith "traveled to Takeo from time to time" and recounting learning about this from *Ta Mok* when the witness visited

⁶⁰¹ See Indictment (D382), para. 352, footnote 924.

⁶⁰² Written Record of Interview of HUY Krim, 20 June 2013, D118/75, at ERN (EN) 00976618-19 (A27-A34).

⁶⁰³ The International Co-Investigating Judge's use of the notation "*see also*" in the Indictment in citing HUY Krim's testimony suggests that he recognised this evidence only provides indirect support to the proposition concerned. See Indictment (D382), footnote 924.

⁶⁰⁴ Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000683 (A135-A137); Written Record of Interview of PECH Chim, 26 June 2013, D118/79, at ERN (EN) 00947190 (A17-A18, A20).

⁶⁰⁵ Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000683 (A131-A133); *see also* ERN (EN) 01000682 (A128-A129) ("*Ta Tith* remained as the Secretary of Kiri Vong District until he left for Battambang, but I do not recall the date.").

⁶⁰⁶ Written Record of Interview of SANN Lorn, 29 September 2014, D219/19, at ERN (EN) 01050437 (A827-A828).



Ta Mok's office in Battambang in the later DK period.⁶⁰⁷ Nor did PANN Sarou (a soldier stationed in Kirivong District) change his testimony as claimed. YIM Tith worked in Kirivong District "for a long time" and then he was promoted, according to the witness, "probably in the late period of the Khmer Rouge regime."⁶⁰⁸ This is consistent with the witness' statement that YIM Tith was on the Kirivong District Committee "until *nearly* the end of the Khmer Rouge regime."⁶⁰⁹

266. From the evidence discussed above, the International Judges consider that there is some corroboration for the proposition that YIM Tith may have continued to exercise administrative authority in the Southwest Zone in the later part of the DK period, though whether this encompasses the post-June 1978 period is unclear. The International Judges, however, consider it unnecessary to make a ruling whether the International Co-Investigating Judge erred in this regard, finding that, even without considering YIM Tith's post-June 1978 authority in the Southwest Zone, in light of the personal jurisdiction findings upheld in Grounds 5.2 and 5.3 below,⁶¹⁰ this has no fundamentally determinative impact on the International Co-Investigating Judge's discretionary decision that YIM Tith was amongst the persons "most responsible" and, thus, within the ECCC's personal jurisdiction.⁶¹¹

267. In sum, the International Judges find that the International Co-Investigating Judge did not improperly use YIM Tith's family relationship with *Ta Mok* as a basis or shortcut to impute *de facto* or *de jure* authority; rather, the Indictment relied upon various witnesses, discussed above, who gave testimony to the role and responsibilities of YIM Tith personally. Consequently, the International Judges dismiss Ground 5.1.

⁶⁰⁷ Written Record of Interview of SANN Lorn, 29 September 2014, D219/19, at ERN (EN) 01050429 (A776-A781) ("Q: When did you go to *Ta Mok*'s place and asked him about *Ta Tith*? A779: In the 1970s. It was probably between 1975 and 1979. [...] A780: It was closer to 1979. [...] A781: And when I asked him about *Ta Tith*, he told me that *Ta Tith* went to Takeo").

⁶⁰⁸ Written Record of Interview of PANN Sarou, 2 September 2014, D118/302, at ERN (EN) 01045476 (A46-A52).

⁶⁰⁹ Written Record of Interview of PANN Sarou, 2 September 2014, D118/302, at ERN (EN) 01045473 (A26) (emphasis added).

⁶¹⁰ This includes the findings regarding YIM Tith's significant level of responsibility in the Northwest Zone post-June 1978.

⁶¹¹ See Indictment (D382), paras 992-999. See generally *supra* Standard of Review.



Ground 5.2(i): Alleged Error in Finding that YIM Tith was the Leader of Kirivong District

1. Submissions

268. The Co-Lawyers submit that the International Co-Investigating Judge erred in finding that YIM Tith was the “leader of Kirivong District” during the DK regime.⁶¹² The errors invalidate the findings in the Indictment pertaining to Kirivong District and necessitate reversal to prevent a miscarriage of justice.⁶¹³

269. With regard to YIM Tith’s alleged *de jure* positions, the International Co-Investigating Judge failed to make findings on the date or time-period of his alleged appointment to the Kirivong District Committee⁶¹⁴ and his appointment as District Secretary.⁶¹⁵ He failed to account for contradictory evidence of TOP Phan and MOENG Vet⁶¹⁶ and erroneously relied on witness testimony of YIM Tith’s mere presence in Kirivong District during 1972-1974 as evidence that he held a *de jure* position.⁶¹⁷ On the basis of this “inadequate” evidence, no reasonable trier of fact could have concluded that YIM Tith held leadership positions in Kirivong District, as is further supported by the National Co-Investigating Judge’s inability to reach a firm conclusion on YIM Tith’s positions in the District.⁶¹⁸

270. As regards YIM Tith’s alleged *de facto* authority in Kirivong District, the Co-Lawyers submit that the International Co-Investigating Judge misinterpreted witness evidence and failed to account for contradictory and exculpatory evidence of TIM Phuon, NGET Ngay and MOENG Vet.⁶¹⁹ In addition to the lack of clarity as to when YIM Tith exercised control in Kirivong District, the Co-Lawyers submit that there is insufficient evidence that he effectively

⁶¹² YIM Tith’s Appeal (Indictment) (D382/22), para. 142 *referring to* Indictment (D382), paras 328-342, 463-469.

⁶¹³ YIM Tith’s Appeal (Indictment) (D382/22), paras 151-152 (asserting that no reasonable trier of fact could have made the findings based on weak and unreliable evidence, without specifying a timeframe and further alleging that the International Co-Investigating Judge failed to take into account contradictions and uncertainties in the Case File and failed to provide reasoning).

⁶¹⁴ YIM Tith’s Appeal (Indictment) (D382/22), para. 143.

⁶¹⁵ YIM Tith’s Appeal (Indictment) (D382/22), para. 144.

⁶¹⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 144 (The Co-Lawyers allege that “TOP Phan ‘did not know Mr. YIM Tith’s position’” and “MOENG Vet stated that ‘Ta Tith did not do the district work directly.’”).

⁶¹⁷ YIM Tith’s Appeal (Indictment) (D382/22), para. 145.

⁶¹⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 146.

⁶¹⁹ YIM Tith’s Appeal (Indictment) (D382/22), paras 147-150 (the Co-Lawyers refer to evidence of (i) TIM Phuon who stated that he did not know that YIM Tith was on the District Committee and did not know his role; (ii) NGET Ngay who allegedly did not know anything about YIM Tith from his own experience, and; (iii) MOENG Vet whose evidence concerned a short period and whose source of information was his mother).



performed his duties and responsibilities.⁶²⁰

271. In response, with regard to his *de jure* position in Kirivong District, the International Co-Prosecutor submits that the Co-Lawyers have not presented an accurate picture of the witness statements alleged to be contradictory, pointing to omissions of statements referring to YIM Tith's position and his duties on the Kirivong District Committee in 1975.⁶²¹ She asserts that YIM Tith's presence in the District was cited as evidence simply to demonstrate his prominence in the area, even before the indictment period.⁶²² The International Co-Prosecutor also highlights the Dismissal's references to YIM Tith as Kirivong District Secretary, including Deputy Secretary in 1975, contrary to the Co-Lawyers' assertions.⁶²³ In respect of the finding that YIM Tith held *de facto* authority in Kirivong District, the International Co-Prosecutor criticises the Co-Lawyers' "selective" review of the evidence.⁶²⁴ In particular, the International Co-Prosecutor points out certain omissions of TIM Phuon's evidence (affirming YIM Tith had a "top role" and was "among the leaders"),⁶²⁵ NGET Ngay's evidence (physically seeing YIM Tith and offering a clear timeframe for when he was District Secretary),⁶²⁶ and MOENG Vet's evidence (supported by his prolonged role in the area personally delivering messages to YIM Tith's office).⁶²⁷

2. Discussion

272. The International Judges find that the Co-Lawyers have not satisfied their burden of demonstrating that no reasonable trier of fact could have made the challenged findings.

273. First, the Co-Lawyers' challenges fail in light of the many witnesses who attest to YIM Tith's *de jure* positions in Kirivong District.⁶²⁸ While the International Co-Investigating Judge acknowledges that it "is unclear when YIM Tith was appointed to the Kirivong District

⁶²⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 151.

⁶²¹ International Co-Prosecutor's Response (Indictment) (D382/27), paras 81-82.

⁶²² International Co-Prosecutor's Response (Indictment) (D382/27), para. 83.

⁶²³ International Co-Prosecutor's Response (Indictment) (D382/27), paras 84-86.

⁶²⁴ International Co-Prosecutor's Response (Indictment) (D382/27), para. 87.

⁶²⁵ International Co-Prosecutor's Response (Indictment) (D382/27), para. 88.

⁶²⁶ International Co-Prosecutor's Response (Indictment) (D382/27), para. 89 *referring to* Indictment (D382), footnote 869.

⁶²⁷ International Co-Prosecutor's Response (Indictment) (D382/27), para. 90.

⁶²⁸ The International Judges discuss the Co-Lawyers' challenges to the evidence of specific witnesses in detail below but, in any case, find that these challenges fail to undermine the International Co-Investigating Judge's findings of YIM Tith's *de jure* positions and/or *de facto* authority in Kirivong District.



Committee”⁶²⁹ and does not provide a specific date of appointment for his role as District Secretary,⁶³⁰ the International Judges observe that the International Co-Investigating Judge relied on the evidence of multiple witnesses who attest that YIM Tith was on the District Committee⁶³¹ no later than 1975,⁶³² initially serving as the Deputy Secretary⁶³³ and that he took over the role of District Secretary⁶³⁴ after *Ta Tom*’s removal between late 1976 and September 1977.⁶³⁵ Accordingly, the allegation that the “International Co-Investigating Judge relied on witness testimony of YIM Tith’s “mere presence in Kirivong District during 1972, 1973 and 1974” as evidence that he held a *de jure* position is unfounded.⁶³⁶

274. With regard to YIM Tith’s alleged brief tenure on the Committee and purported contradictions as to the date of his departure from the District,⁶³⁷ the International Judges hold that the finding that YIM Tith left the District in 1976 or 1977,⁶³⁸ cannot faithfully be understood to mean *January 1976*,⁶³⁹ when read in conjunction with the finding that *Ta Tom* was removed “at some point between late 1976 and September 1977”⁶⁴⁰ and the evidence

⁶²⁹ Indictment (D382), para. 328.

⁶³⁰ Indictment (D382), para. 330-331.

⁶³¹ Indictment (D382), paras 328-331 *referring to, inter alia*, Written Record of Interview of YOU Phnom, 1 December 2014, D219/108, at ERN (EN) 01076892 (A6) (“I know of the following people on the Kiri Vong District Committee: *Ta Tom* [...], District Committee or District Secretary; [...] *Ta Tith* [...] I do not know their roles”); Written Record of Interview of PANN Sarou, 2 September 2014, D118/302, at ERN (EN) 01045473 (A25) (“The Kiri Vong District Committee was composed of *Ta Tom* [...], *Ta Tith* [...], and *Yeay Bau*”); Written Record of Interview of LACH Sambath, 5 December 2013, D118/165, at ERN (EN) 00980255 (A12) (“I knew *Ta tit*. He was on the District 109 Committee”).

⁶³² Indictment (D382), paras 328-331 *referring to, inter alia*, Written Record of Interview of LUON Mol, 8 June 2015, D219/358, at ERN (EN) 01116344 (A10, A13) (“In 1975, KHIEV Tom [...] was a district secretary, *Ta Tith* [...] was the deputy [...] *Ta Tith* became the deputy district secretary in 1974”); Written Record of Interview of MOENG Vet, 12 February 2014, D119/85, at ERN (EN) 00982715 (A21-A22) (“In September, 1975, when I arrived in Kirivong District, he [YIM Tith] was already there.”); Written Record of Interview of TUN Socun, 6 May 2011, D13, at ERN (EN) 00698809 (“Can you tell us whether *Ta Tith* was actually the District Committee? A: Yes, he was. In around late 1975 and early 1976”).

⁶³³ Indictment (D382), paras 328-331 *referring to, inter alia*, Written Record of Interview of KHOEM Sorn, 1 September 2014, D118/301, at ERN (EN) 01045454 (A27-A28) (“*Ta Tom* [...] was Kiri Vong District Chairman, *Ta Tith* was the Deputy Chairman, and *Year Baur* was subordinate to *Ta Tith*. Q: How did you know this? A28: After 1975, they made an announcement in a meeting about their entire composition”).

⁶³⁴ Indictment (D382), para. 331, footnote 868 *referring to, inter alia*, Written Record of Interview of DOK Chann, 20 November 2014, D219/86, at ERN (EN) 01056874 (A7) (“After *Ta Tam* and *Yeay Beau* transferred away, *Ta Tith* [...] became District Committee and *Yeay Khoeun* [...] was his deputy”); Written Record of Interview of HEM Chhoun, 23 April 2013, D118/45, at ERN (EN) (A7) (“*Ta Tit* [...] was the chief of Kiri Vong district alias District 109”); Written Record of Interview of KHIEU Neou, 23 November 2013, D118/151, at ERN (EN) (A17) (“What was *Ta Tit*’s actual position? A: I heard that he was first the Secretary of Kiri Vong [...] District”).

⁶³⁵ Indictment (D382), para. 330.

⁶³⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 145.

⁶³⁷ YIM Tith’s Appeal (Indictment) (D382/22), para. 143.

⁶³⁸ Indictment (D382), para. 342.

⁶³⁹ YIM Tith’s Appeal (Indictment) (D382/22), para. 143 (The Co-Lawyers allege that YIM Tith “left Kirivong District as early as January 1976”).

⁶⁴⁰ Indictment (D382), para. 330.



supporting that YIM Tith became Secretary of Kirivong District after *Ta Tom*'s removal.⁶⁴¹

275. The Co-Lawyers point to the National Co-Investigating Judge's alleged inability to "reach a firm conclusion" that YIM Tith held *de jure* positions in Kirivong District.⁶⁴² However, the International Judges observe that the National Co-Investigating Judge found that YIM Tith was the Deputy Secretary in Kirivong District in 1975⁶⁴³ and made findings on YIM Tith's position as District Secretary in 1976 and 1977.⁶⁴⁴ In any case, the International Judges hold that an error cannot be established by merely pointing to the National Co-Investigating Judge's findings.⁶⁴⁵

276. Second, the Co-Lawyers challenge the International Co-Investigating Judge's reliance on alleged contradictory evidence and his failure to account for exculpatory evidence of MOENG Vet, NGET Ngay, TOP Phan and TIM Phuon in finding that YIM Tith held *de jure* positions or *de facto* authority in Kirivong District.⁶⁴⁶ In respect of those witnesses, the International Judges find that the challenged evidence is either not contradictory, meriting no specific consideration, or the conflicting evidence has already been demonstrably considered by the International Co-Investigating Judge.

277. As regards TOP Phan's evidence, the International Judges consider that the statement that he did not know YIM Tith's exact position, neither contradicts the evidence that "*Ta Tith*, Yeay Beau and *Ta Tom* [...] were colleagues", nor his statement "I think *Ta Tith* held a senior

⁶⁴¹ Indictment (D382), para. 331, footnote 868 *referring to, inter alia*, Written Record of Interview of DOK Chann, 20 November 2014, D219/86, at ERN (EN) 01056874 (A7) ("After *Ta Tam* and *Yeay Beau* transferred away, *Ta Tith* [...] became District Committee and *Yeay Khoeun* [...] was his [D]eputy"); Written Record of Interview of HÈM Chhuon, 23 April 2013, D118/45, at ERN (EN) (A7) ("*Ta Tit* [...] was the chief of Kiri Vong district alias District 109").

⁶⁴² YIM Tith's Appeal (Indictment) (D382/22), para. 146 (alleging that the National Co-Investigating Judge was unable to reach a firm conclusion as to whether YIM Tith had been District Secretary from June 1976 to 1977 and that he did not find that YIM Tith may have been on the Committee prior to January 1976).

⁶⁴³ Dismissal (D381), para. 185.

⁶⁴⁴ Dismissal (D381), paras 185, 187, 680 (finding that "*Ta Tith* was the district Secretary in 1976" and that "*Ta Tith* was the Kirivong district Secretary between 1976 and 1977; later he was transferred to Battambang, perhaps in mid-1977" and "*YIM Tith* became the Kirivong district Secretary and Sector 13 Secretary between 1976 and mid-1977").

⁶⁴⁵ ICTY, *Prosecutor v. Lukić & Lukić*, IT-98-32/1-A, Judgement, Appeals Chamber, 4 December 2012, para. 396 ("The Appeals Chamber recalls that two reasonable triers of facts may reach different but equally reasonable conclusions when assessing the reliability of a witness and determining the probative value of the evidence presented at trial. An error cannot be established by simply demonstrating that other trial chambers have exercised their discretion in a different way"); ICTR, *Prosecutor v. Karemera & Ngirumpatse*, ICTR-98-44-A, Judgement, Appeals Chamber, 29 September 2014, para. 52 ("A trial chamber must make its own final assessment on the evidence on the basis of the totality of the evidence presented in the case before it. Consequently, two reasonable triers of facts may reach different but equally reasonable conclusions when determining the probative value of the evidence presented at trial.") (footnotes omitted).

⁶⁴⁶ YIM Tith's Appeal (Indictment) (D382/22), paras 144, 147-150.



position”.⁶⁴⁷ MOENG Vet’s evidence that YIM Tith “did not do the district work directly”⁶⁴⁸ merely supports the findings that YIM Tith also acted in a supervisory role over *Ta Tom* and was in fact “the leader of the district even throughout the period when both YIM Tith and *Ta Tom* still sat together on the District Committee.”⁶⁴⁹

278. Moreover, the allegation that MOENG Vet’s evidence concerns a “short period of time from ‘maybe in late 1976’ until at the latest, January 1977” is unfounded.⁶⁵⁰ MOENG Vet arrived in Kirivong in September 1975 and moved to Kratie in March 1977.⁶⁵¹ Upon his arrival in Kirivong, “Y[IM] Tith was already on the District Committee”⁶⁵² and he started delivering letters directly to YIM Tith’s office “between early 1976 and late 1976”.⁶⁵³ Regarding the source of MOENG Vet’s knowledge, his observation that YIM Tith held superiority over *Ta Tom* is based on his own observations of where YIM Tith was seated during meetings⁶⁵⁴ and on information obtained from his mother who, notably, was *Ta Tom*’s cousin.⁶⁵⁵

279. As regards TIM Phuon’s allegedly conflicting and exculpatory evidence,⁶⁵⁶ the Co-Lawyers fail to fully and accurately represent TIM Phuon’s statements. While this witness explains that he “did not know” YIM Tith’s role⁶⁵⁷ and “did not know what position [YIM Tith]

⁶⁴⁷ Written Record of Interview of TOP Phan, 6 September 2014, D118/305, at ERN (EN) 01045521 (A27-A29).

⁶⁴⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 144 *referring to* Written Record of Interview of MOENG Vet, 18 April 2014, D119/85, at ERN (EN) 00982715-00982716 (A23-A24).

⁶⁴⁹ Indictment (D382), para. 332.

⁶⁵⁰ YIM Tith’s Appeal (Indictment) (D382/22), para. 150.

⁶⁵¹ Written Record of Interview of MOENG Vet, 18 April 2014, D119/85, at ERN (EN) 00982717 (A32).

⁶⁵² Written Record of Interview of MOENG Vet, 18 April 2014, D119/85, at ERN (EN) 00982717 (A32).

⁶⁵³ Written Record of Interview of Witness MOENG Vet, 16 November 2015, D219/488, at ERN (EN) 01170584 (A7).

⁶⁵⁴ Case 002, Transcript of 26 July 2016 (MOENG Vet), D219/899.1.4, at ERN (EN) 01346502-01346503, pp. 38-39, lines 18-25, 1-14 (“What did *Ta Tom* do in Kiri Vong district, and what function did *Ta Tith* have in Kiri Vong district? A. “To my understanding, although *Ta Tith* was <chief of Kiri Vong district>, he also linked to the sector levels since he was more senior. He could be part of the sector standing committee, as he attended the meetings at the district and he sat to the right side of *Ta Saom*. <I saw that and found out when I was in Angkor Chey.> Q. And *Ta Tom*, what was his position in the district, Kiri Vong? A. *Ta Tom* was [S]ecretary of Kiri Vong district. [...] Q. Yet you said that *Ta Tith* was senior to *Ta Tom* because he worked at the sector; is that correct? A. Yes, that is correct. And according to my understanding, <based on what I had seen when I went to the office as a messenger>, usually the arrangement in the meetings <was that> *Ta Tith* could sit <in> the front row with *Ta Saom* and <at> the district level <he> would sit <in> the <back> row. And *Ta Tith* was the one who organized such meetings, and <he was *Ta 15*’s younger brother-in-law>”) (emphasis added).

⁶⁵⁵ Written Record of Interview of MOENG Vet, 18 April 2014, D119/85, at ERN (EN) 00982716, (A24-A25) (“*Ta Tith* was from the Sector, so he was more senior [...] Q: How did you know this information? A25: I learned this from my mother, because **she was *Ta Tom*’s cousin**. Before I left to Kratie, she told me about *Ta Tom*, and said that there was going to be trouble”) (emphasis added).

⁶⁵⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 148.

⁶⁵⁷ Written Record of Interview of TOEM Phuon [TIM Phuon], 19 February 2013, D118/20, at ERN (EN) 00911425 (A7); Written Record of Interview of TOEM Phuon [TIM Phuon], 17 August 2015, D219/466, at ERN (EN) 01152281 (A103); Written Record of Interview of Witness TIM Phuon [TOEM Phuon], 6 May 2011, D11, ERN (EN) 00698806.



was in”,⁶⁵⁸ he further elaborates that he was sent to live and work in Kirivong District, “the location under [YIM] Tith’s control”,⁶⁵⁹ and learned that YIM Tith had “a top role”, “probably at the district level, Kirivong District”.⁶⁶⁰ Moreover, the International Co-Investigating Judge explicitly considered TIM Phuon’s conflicting evidence in reaching the conclusion that YIM Tith held a “top role” in Kirivong District.⁶⁶¹

280. As regards NGET Ngay, who allegedly “knew nothing about Mr YIM Tith from his own direct experience”,⁶⁶² the International Judges observe that NGET Ngay saw YIM Tith often and talked to him once.⁶⁶³ While he learned from “Chhorn and Nen [...] who were commune chiefs” that YIM Tith and *Ta Tom* were Chiefs of Kirivong District⁶⁶⁴ and that YIM Tith held a more superior position than *Ta Tom*,⁶⁶⁵ the International Judges recall that it is well-settled that hearsay evidence is admissible and find no error in the International Co-Investigating Judge’s reliance on this evidence in support of his finding.⁶⁶⁶

281. Finally, the Co-Lawyers fail to support the claim that there is insufficient evidence that YIM Tith “carried out or effectively performed his duties and responsibilities” or what his duties and responsibilities were.⁶⁶⁷ The Indictment specifies that “YIM Tith travelled throughout Kirivong District to inspect worksites, receive reports, and preside over meetings regarding production targets”.⁶⁶⁸ He visited Wat Pratheat Security Centre on multiple occasions where he questioned witnesses and identified them as enemies.⁶⁶⁹ Several witnesses report that YIM Tith was responsible for “*propaganda*” and “*reinforcing the political section*” or economics and logistics.⁶⁷⁰ The International Judges observe that these findings are sufficiently

⁶⁵⁸ Written Record of Interview of TOEM Phuon [TIM Phuon], 19 February 2013, D118/20, at ERN (EN) 00911425 (A10); Written Record of Interview of TOEM Phuon [TIM Phuon], D219/466, at ERN (EN) 01152281 (A103).

⁶⁵⁹ Written Record of Interview of TOEM Phuon [TIM Phuon], 19 February 2013, D118/20, at ERN (EN) 00911424-00911425 (A4-A6) (“In late 1975, they sent me to live in Pech Sar [...] adjacent to Tomloab [...] in Kirivong District [...] At the location under *Ta Tit*’s control.”).

⁶⁶⁰ Written Record of Interview of TOEM Phuon [TIM Phuon], 19 February 2013, D118/20, at ERN (EN) 00911425 (A10); Written Record of Interview of TOEM Phuon [TIM Phuon], D219/466, at ERN (EN) 01152298 (A244-A247).

⁶⁶¹ Indictment (D382), para. 332, footnote 871 (The International Co-Investigating Judge considered TIM Phuon’s DC-Cam statement (where TIM Phuon held that YIM Tith “was the [S]ecretary of Kirivong district”) and later statements (where TIM Phuon alleges that he did not know that YIM Tith “was the District Committee”).

⁶⁶² YIM Tith’s Appeal (Indictment) (D382/22), para. 149.

⁶⁶³ Written Record of Interview of NGET Ngay, 23 April 2013, D118/44, at ERN (EN) 00920580 (A12-A14).

⁶⁶⁴ Written Record of Interview of NGET Ngay, 23 April 2013, D118/44, at ERN (EN) 00920580 (A9).

⁶⁶⁵ Written Record of Interview of NGET Ngay, 23 April 2013, D118/44, at ERN (EN) 00920580 (A5).

⁶⁶⁶ See *supra* Ground 5 Evidentiary Considerations.

⁶⁶⁷ YIM Tith’s Appeal (Indictment) (D382/22), para. 151.

⁶⁶⁸ Indictment (D382), para. 334.

⁶⁶⁹ Indictment (D382), paras 336, 392, 439, 463-469.

⁶⁷⁰ Indictment (D382), para. 336.



supported by witness evidence⁶⁷¹ and, as the Co-Lawyers do not raise specific challenges to the evidence supporting these findings or indicate why the cited evidence is insufficient, the International Judges must dismiss the allegation.⁶⁷²

282. Accordingly, Ground 5.2(i) is dismissed.

Ground 5.2(ii): Alleged Error in Finding that YIM Tith Held “Major Factual Authority” in Sector 13

1. Submissions

283. The Co-Lawyers challenge the International Co-Investigating Judge’s findings on both YIM Tith’s alleged *de facto* authority and *de jure* positions in Sector 13. First, regarding the *de jure* findings, the Co-Lawyers submit that they are unclear or based on insufficient evidence. Regarding YIM Tith’s alleged *de jure* appointment to the Sector 13 Committee, the Co-Lawyers point out that the findings do not specify YIM Tith’s specific position on the Committee, his specific responsibilities or the specific time period of his alleged tenure.⁶⁷³ For the Co-Lawyers, the International Co-Investigating Judge himself also found insufficient evidence of YIM Tith’s appointment as Sector 13 Secretary.⁶⁷⁴

284. Second, regarding *de facto* authority, the Co-Lawyers aver that the International Co-Investigating Judge erred by: (i) relying on erroneous findings about the relationship between YIM Tith and Ta Mok to “compensate” for lack of evidence of YIM Tith’s own acts and conduct;⁶⁷⁵ (ii) concluding that YIM Tith held meetings and received guests at the Sector 13 Office *on a regular basis*, based on PECH Chim’s unsupported evidence;⁶⁷⁶ and (iii) relying on uncorroborated and contradictory opinions and hearsay evidence of the “low-level cadre” MOENG Vet.⁶⁷⁷

⁶⁷¹ See, e.g., Indictment (D382), para. 336, footnotes 877-878.

⁶⁷² The International Judges recall that the burden is on the appellant to show that no reasonable trier of fact could have found and relied on the challenged evidence in the fact-finding. See, e.g., ICTY, *Prosecutor v. Stanišić & Župljanin*, IT-08-91-A, Judgement, Appeals Chamber, 30 June 2016, para. 24; ICTY, *Prosecutor v. Gotovina & Markač*, IT-06-90-A, Judgement, Appeals Chamber, 16 November 2012, para. 14.

⁶⁷³ YIM Tith’s Appeal (Indictment) (D382/22), para. 154.

⁶⁷⁴ YIM Tith’s Appeal (Indictment) (D382/22), para. 155.

⁶⁷⁵ YIM Tith’s Appeal (Indictment) (D382/22), para. 156.

⁶⁷⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 157.

⁶⁷⁷ YIM Tith’s Appeal (Indictment) (D382/22), para. 158.



285. Moreover, the Co-Lawyers submit that the International Co-Investigating Judge failed to make findings about the *de facto* authority of other individuals, such as RANH Bith, alleged to have been on the Sector 13 Committee, and also failed to provide reasons for finding that YIM Tith's *de facto* authority was greater than others.⁶⁷⁸ According to the Co-Lawyers, the International Co-Investigating Judge ignored the evidence of 36 witnesses who lived and worked in Sector 13 during the DK period and who stated that they had never heard of YIM Tith, which "severely undermines" the findings on YIM Tith's major authority in Sector 13.⁶⁷⁹

286. The Co-Lawyers conclude that the International Co-Investigating Judge erred in law by applying an incorrect legal standard and failing to provide reasons.⁶⁸⁰ In addition, the International Co-Investigating Judge erred in fact by drawing patently incorrect conclusions about YIM Tith's alleged *de facto* authority in Sector 13, resulting in a miscarriage of justice requiring reversal.⁶⁸¹

287. The International Co-Prosecutor responds that the Co-Lawyers' "selective" and "errant analysis" of the evidence fails to demonstrate any reviewable error of law or fact.⁶⁸² First, regarding YIM Tith's *de jure* position on the Sector 13 Committee, she notes the Indictment's reliance on insider witnesses attesting to his holding of the Sector 13 Secretary position in 1975, 1976, 1977 or 1978, thus highlighting YIM Tith's "prominence" throughout the relevant period.⁶⁸³ She also notes the Dismissal's finding that YIM Tith held the position of Sector 13 Secretary between 1976 and mid-1977.⁶⁸⁴

288. Second, regarding his *de facto* authority in Sector 13, the International Co-Prosecutor disputes the notion that evidence of YIM Tith inspecting worksites, attending meetings and working in the Southwest Zone Office constitute "irrelevant factors".⁶⁸⁵ Moreover, she observes that the Co-Lawyers failed to reference key witnesses and incorrectly or selectively

⁶⁷⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 159 *referring to* Article by Timothy CARNEY, "The Organization of Power", DL3.15.2, ERN (EN) 00105142-00105143.

⁶⁷⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 160; Case 004, Annex A to YIM Tith's Appeal (Indictment): Witnesses Who Had Never Heard of YIM Tith, 4 December 2019, D382/22.2.

⁶⁸⁰ YIM Tith's Appeal (Indictment) (D382/22), paras 161-163.

⁶⁸¹ YIM Tith's Appeal (Indictment) (D382/22), paras 161-163.

⁶⁸² International Co-Prosecutor's Response (Indictment) (D382/27), para. 91.

⁶⁸³ International Co-Prosecutor's Response (Indictment) (D382/27), para. 92 *referring to* Indictment (D382), para. 346.

⁶⁸⁴ International Co-Prosecutor's Response (Indictment) (D382/27), para. 92 *referring to* Dismissal (D381), paras 668, 680.

⁶⁸⁵ International Co-Prosecutor's Response (Indictment) (D382/27), para. 93 *referring to* Indictment (D382), paras 348-351.



presented evidence, including the testimony of PECH Chim meeting YIM Tith “so many times” at the Sector 13 Office.⁶⁸⁶ She also criticises the Co-Lawyers’ presentation of MOENG Vet’s evidence, finding no contradictions.⁶⁸⁷ Further, the International Co-Prosecutor counters that findings about the *de facto* authority of other individuals on the Sector 13 Committee are irrelevant because, among other reasons, the International Co-Investigating Judge is to only investigate the acts and conduct of YIM Tith, not that of others.⁶⁸⁸ In any event, the example of RANH Bith is misleading or unsupported.⁶⁸⁹ Consequently, the Co-Lawyers’ claim that an incorrect legal standard was applied is without foundation, amounting to a disagreement with the conclusions reached rather than a legal or factual error.⁶⁹⁰

2. Discussion

289. The International Judges will first consider the Co-Lawyers’ challenges regarding YIM Tith’s *de facto* authority in Sector 13, before proceeding to resolve the challenges concerning his *de jure* positions.

290. As already held as part of the discussion of Ground 5.1, the International Judges found no error in the International Co-Investigating Judge’s use of evidence of YIM Tith’s close family and working relationship with *Ta Mok* and, upon review of the impugned testimony, found sufficient evidence for a reasonable fact finder to conclude that this relationship gave YIM Tith *de facto* authority beyond his formal positions in Sector 13 of the Southwest Zone.⁶⁹¹ The International Judges reaffirm these rulings regarding YIM Tith’s level of *de facto* responsibility in Sector 13 and thereby reject the Co-Lawyers’ argument that this constituted an improper deduction of YIM Tith’s guilt by simple association with *Ta Mok*.⁶⁹²

291. In this connection, the International Judges have carefully reviewed the additional factual challenges to witness testimony advanced by the Co-Lawyers under this sub-ground of appeal, but are not convinced that these are capable of undermining the International Co-

⁶⁸⁶ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 94.

⁶⁸⁷ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 95.

⁶⁸⁸ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 96 *referring to* Internal Rules 55(2), 55(4).

⁶⁸⁹ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 96 *referring to* Case 002/2 Trial Judgment (E465), paras 910-917.

⁶⁹⁰ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 99.

⁶⁹¹ *See supra* Ground 5.1.

⁶⁹² *Contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 156.



Investigating Judge's findings on YIM Tith's *de facto* roles and responsibilities in Sector 13.⁶⁹³ Moreover, the observation that 36 witnesses who lived in this Sector during the DK period stated that they had never heard of YIM Tith does not, in and of itself, discharge the Co-Lawyers' burden to establish that no reasonable trier of fact could have reached the findings regarding YIM Tith's *de facto* authority at issue.⁶⁹⁴ This is particularly in light of the "almost total secrecy" which shrouded the CPK leadership structure from the knowledge of ordinary Cambodians during the DK period.⁶⁹⁵

292. Finally, the suggestion that the International Co-Investigating Judge was obliged to make findings about the authority or responsibility of other individuals potentially on the Sector 13 Committee must be rejected. There is no such requirement under Internal Rule 67 in issuing a closing order indicting YIM Tith, the Charged Person in this case.⁶⁹⁶ As previously held, while the assessment of whether a suspect was amongst the "most responsible" may include comparison to other Khmer Rouge officials, comparisons to every known Khmer Rouge official are not required or necessary.⁶⁹⁷

⁶⁹³ In regards of PECH Chim, the International Judges agree with the Co-Lawyers that the cited evidence does not specifically support the proposition that YIM Tith held meetings and received guests at the Sector 13 Office *on a regular basis*. Contrary to the International Co-Prosecutor's suggestion, PECH Chim's statement about seeing YIM Tith "so many times" relates to a period when YIM Tith served as Kirivong District Secretary. Written Record of Interview of PECH Chim, 26 June 2013, D118/79, at ERN (EN) 00947191 (A31-A33). The witness' use of the words "attended" and "participated" suggests that YIM Tith attended meetings along with other District-Level members in a District-Level capacity, and not necessarily hosting them in the capacity of a *de facto* Sector 13 leader. See Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000670-01000671 (A36, A38). Nevertheless, this error does not result in overturning of the overall conclusion on YIM Tith's exercise of significant *de facto* authority in Sector 13. In regards of MOENG Vet, this witness was a leader of the messenger unit in Kirivong District of Sector 13 and was well placed to give evidence about his personal observations of YIM Tith's seating placement during a ten-day sector-level meeting in late 1976. Case 002 Transcript of 26 July 2016 (MOENG Vet), D219/899.1.4, at ERN (EN) 01346502-01346503, p. 38, lines 5-11, 22-25, p. 39, lines 1-14; Written Record of Interview of MOENG Vet, 1 September 2015, D219/488, at ERN (EN) 01170589 (A57-A58). Another witness corroborates seeing YIM Tith at this late 1976 sector-level meeting. See Written Record of Interview of BUN Thoeun, 10 July 2014, D118/274, at ERN (EN) 01031981 (A66, A68).

⁶⁹⁴ Furthermore, the International Judges note that several of the cited witnesses also stated that they lacked knowledge about the Sector 13 political structure or even the Khmer Rouge in general. See, e.g., Written Record of Interview of CHEAV Rann, 9 March 2016, D219/724, at ERN (EN) 01218617 (A73); Written Record of Interview of SAM Touch, 18 November 2015, D219/604, at ERN (EN) 01184878 (A103) ("Q. During the Khmer Rouge era, who was the Sector Secretary? A103: I do not know. The reason is that I only worked. It is only now that I know what *Angkar* is.").

⁶⁹⁵ Case 001 Trial Judgment (E188), paras 97-98; Case 002, Case 002/01 Judgement, 7 August 2014, E313 ("Case 002/1 Trial Judgment (E313)", para. 199).

⁶⁹⁶ See also Internal Rule 55(4).

⁶⁹⁷ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 358. See also Case 001 Trial Judgment (E188), para. 24 ("Due to the scale of crimes committed during the DK period, the ECCC Agreement and ECCC Law impose no obligation to try all potential perpetrators of crimes falling within its jurisdiction. [...] The fact that other individuals within DK during the indictment period may have shared these attributes does therefore not preclude the Accused from also being considered as one of those most responsible.") (footnote omitted).



293. The International Judges accordingly reject the Co-Lawyers' arguments disputing the findings of YIM Tith's *de facto* authority. The International Judges thus now turn to the remaining arguments challenging the alleged imprecision or insufficiency of evidence supporting the findings on YIM Tith's *de jure* positions in Sector 13.⁶⁹⁸

294. The International Judges recall that, for the purposes of the review of the present Appeal, the relevant overarching jurisdictional question is whether YIM Tith falls within the category of "most responsible" and, as part of this assessment, in addition to assessing the gravity of the crimes, the suspect's level of responsibility shall be considered.⁶⁹⁹ The latter inquiry is informed by considerations including, *inter alia*, YIM Tith's hierarchical rank or position and the permanence of his positions, though it must be recalled and stressed that there is no filtering standard in terms of positions in the hierarchy.⁷⁰⁰

295. Bearing in mind the above legal considerations, if the evidence in the Case File allowed the Co-Investigating Judges to sufficiently conclude that a Charged Person held a specific *de jure* position at a specific time with specifically identified duties, as the Co-Lawyers urge,⁷⁰¹ making such findings would achieve welcome clarity in conducting the "most responsible" analysis. This level of precision, however, is not necessarily required.

296. In the Indictment, the International Co-Investigating Judge found that he was unable to reach a determination on "the exact dates or duration" of YIM Tith's tenure, although he could conclude that YIM Tith "served as Sector 13 Secretary at some point during DK".⁷⁰² The International Judges can discern no error in the International Co-Investigating Judge's frank acknowledgement that the Case File evidence on the dates of tenure were "conflicting"; on the contrary, by laying out the inconsistent dates proffered by witnesses UL Hoeun, NUT Nov, MOENG Vet, SANN Lorn, PECH Chim, VANN Yann and NOP Nan, the International Co-Investigating Judge demonstrated that he took due account of the inconsistent evidence. Importantly, notwithstanding these divergences on the dates, these witness accounts converged

⁶⁹⁸ The International Judges summarily dismiss the conclusory allegations laid out in paragraphs 162-163 of the Appeal.

⁶⁹⁹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 141; *see also* Opinion of Judges BAIK and BEAUVALLET, para. 352; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321.

⁷⁰⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 141; *see also* Opinion of Judges BAIK and BEAUVALLET, paras 352-353; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321.

⁷⁰¹ *See* YIM Tith's Appeal (Indictment) (D382/22), para. 155.

⁷⁰² Indictment (D382), para. 346.



on the point that YIM Tith served as Sector 13 Secretary, permitting a finding that the applicable threshold of “sufficient evidence” was satisfied. Upon review, the International Judges are similarly satisfied that there was sufficient evidence to find that YIM Tith served on the Sector 13 Committee.⁷⁰³

297. The International Co-Investigating Judge’s inability to make exact findings as to the dates and duration of YIM Tith’s *de jure* positions would, in any event, only implicate one of multiple factors in the holistic assessment of his level of responsibility. The International Judges find that, in this instance, these factors are not fundamentally determinative.

298. The International Judges thus conclude that Ground 5.2(ii) must be dismissed.

Ground 5.2(iii): Alleged Error in Finding that YIM Tith was the Secretary of Sector 1

1. Submissions

299. The Co-Lawyers challenge the International Co-Investigating Judge’s findings that YIM Tith was *de jure* and/or *de facto* Secretary of Sector 1. First, they submit that the International Co-Investigating Judge erred in finding that YIM Tith was appointed Secretary of Sector 1 in June 1978 and exercised authority through to the end of the regime.⁷⁰⁴ The Co-Lawyers allege that the finding that YIM Tith replaced *Ta Paet* after his demotion is erroneous and unsupported⁷⁰⁵ because none of the multiple witnesses gave “direct evidence” of YIM Tith’s alleged appointment.⁷⁰⁶ The Co-Lawyers submit specific argument as to the International Co-Investigating Judge’s failings in his consideration of certain witness evidence, including, *inter alia*, issues such as: not knowing or having limited contact with YIM Tith; erroneous or inconsistent references to dates, people or events; the failure to identify YIM Tith; and lack of corroboration as to certain accounts.⁷⁰⁷ The International Co-Investigating Judge

⁷⁰³ Several different witnesses testify that YIM Tith was “on the Sector 13 Committee”, “promoted to the Sector Committee” and “Secretary of Sector 13”. See, e.g., Written Record of Interview of KHOEM Vai, 21 December 2015, D219/636, at ERN (EN) 01207672 (A38); Written Record of Interview of MOENG Vet, 1 September 2015, D219/488, at ERN (EN) 01170586 (A31); Written Record of Interview of NUT Nov, 17 March 2015, D219/228, at ERN (EN) 01087488 (A25); Written Record of Interview of LOR Thon, 22 March 2017, D219/951, at ERN (EN) 01496606 (A119); Written Record of Interview of DOK Chann, 20 November 2014, D219/86, at ERN (EN) 01056874 (A7).

⁷⁰⁴ YIM Tith’s Appeal (D382/22), para. 164.

⁷⁰⁵ YIM Tith’s Appeal (D382/22), para. 164.

⁷⁰⁶ YIM Tith’s Appeal (D382/22), para. 165.

⁷⁰⁷ YIM Tith’s Appeal (D382/22), para. 165 referring to TOP Seung, LEK Phiv, CHHAM Luy, CHUON Than, VY Phan, NOP Ngim, NANG Ny, LIES Kung, NUON Muon and CHHOEUNG Bean.



further erred by relying on the uncorroborated evidence of CHHEAN Hea (including about the purported arrest of *Ta Paet*) while disregarding contradictory and exculpatory evidence provided by the same witness, other witnesses and/or documentary evidence.⁷⁰⁸

300. Second, the Co-Lawyers submit that the International Co-Investigating Judge erred in finding that YIM Tith exercised authority in Sector 1 as the *de facto* Secretary.⁷⁰⁹ In finding that YIM Tith had authority and direct control over the military in Sector 1, the International Co-Investigating Judge relied upon the uncorroborated evidence of one witness, SOEUN Mat, while failing to consider that this witness did not know who was in charge of Sector 1 at the time, overheard that YIM Tith was a military commander and provided no timeframe.⁷¹⁰ In addition, the International Co-Investigating Judge: (i) failed to explain the notion of “personal matters” when finding that YIM Tith had authority over “personal matters within the sector” without sufficient evidence;⁷¹¹ (ii) failed to account for contradictory evidence of several witnesses⁷¹² and other relevant considerations when finding that YIM Tith had authority over his subordinates in matters of security, including his ability to instruct others, to report on enemy activity, chair meetings and give instructions to ‘re-educate’ or ‘smash’;⁷¹³ (iii) misstated the evidence of PHAR Pet who did not know YIM Tith’s position, when concluding that YIM Tith had the power to shield individuals from arrest and execution;⁷¹⁴ and (iv) erroneously relied on the unsupported testimony of CHHOEUNG Bean in finding that YIM Tith spared a Northwest Zone cadre (*Ta Saman*) while failing to explain why he did not consider other possible reasons for *Ta Saman*’s survival after 1979.⁷¹⁵

301. As to the finding that YIM Tith was in charge of economics in Sector 1, the Co-Lawyers submit that the International Co-Investigating Judge failed to explain what ‘in charge’ means in terms of a person’s criminal responsibility and based himself on unreliable evidence of YIM

⁷⁰⁸ YIM Tith’s Appeal (D382/22), paras 166-169 (The Co-Lawyers allege that CHHEAN Hea did not see *Ta Paet*’s alleged arrest as he fled to the jungle. In addition, VY Phann stated that YIM Tith arrived around November 1978 and that *Ta Paet* announced that *Ta Tith* had come to help govern Sector 1; moreover, HAN Thy attended a meeting in late 1978 where *Ta Paet* was present. *Ta Paet* was a Member of the Standing Committee and the Central Committee in August 1978 according to the document ‘The Organization of Power’.)

⁷⁰⁹ YIM Tith’s Appeal (D382/22), para. 170.

⁷¹⁰ YIM Tith’s Appeal (D382/22), para. 171.

⁷¹¹ YIM Tith’s Appeal (D382/22), paras 172-173 referring to evidence in connection to VY Phann, CHUON Than.

⁷¹² YIM Tith’s Appeal (D382/22), para. 174 referring to evidence in connection to VY Phann, CHUON Than, NOP Ngim, CHHOEUNG Ban, CHHOENG Chhoeuth and NANG Ny.

⁷¹³ YIM Tith’s Appeal (D382/22), paras 174-175.

⁷¹⁴ YIM Tith’s Appeal (D382/22), paras 176-178 referring to Written Record of Interview of PHAR Pet, 23 May 2014, D118/244, at ERN (EN) 01029410 (A5), 01029410 (A9).

⁷¹⁵ YIM Tith’s Appeal (D382/22), para. 179.



Tith's alleged speeches on irrigation and agricultural production as well as his frequent visits to Kang Hort Dam.⁷¹⁶ The International Co-Investigating Judge failed to provide reasons as to how he could make this finding without evidence of direct orders from or reports sent to YIM Tith.⁷¹⁷ Moreover, the International Co-Investigating Judge's finding that YIM Tith had *de jure* authority over the district and commune level cadres in Sector 1 is unreasonable as he failed to establish YIM Tith's *de jure* position as Sector 1 Secretary; moreover, he failed to provide any reasoning on why the evidence cited in the Indictment not referring to YIM Tith's appointment as Secretary of Sector 1 is relevant to establishing YIM Tith's *de jure* authority.⁷¹⁸

302. Finally, the Co-Lawyers assert that the International Co-Investigating Judge failed to differentiate between the roles and actions of YIM Tith and *Ta Mok* at alleged Zone level meetings in Battambang, where they purportedly gave instructions and addressed production targets and birth rates.⁷¹⁹ In making the above finding, the International Co-Investigating Judge relied on one witness, NOP Ngim, who later revoked part of her evidence and stated that she had only attended one meeting (at YIM Tith's house where there were no other attendees),⁷²⁰ which could only have happened after September 1978 when she was assigned to be the Deputy Secretary of Samlaut District.⁷²¹ The Co-Lawyers assert that the International Co-Investigating Judge unreasonably concluded that NOP Ngim's revocation lacked credibility as she had been granted a Letter of Assurance (safeguarding NOP Ngim from her statements being used against her) and, thus, did not need to protect her position.⁷²² In addition, as to the evidence of her husband, PREAP Kap, the International Co-Investigating Judge failed to consider: that PREAP Kap was blind, making him unfit to be a messenger; that NOP Ngim never allowed PREAP Kap to be involved in her work and knew nothing about her work; and that NOP Ngim did not confirm in any of her statements that PREAP Kap ever accompanied her to any meetings or talked to him about being Deputy District Secretary.⁷²³ The Co-Lawyers aver that the International Co-Investigating Judge misrepresented NOP Ngim's evidence: erroneously holding that NOP Ngim, the Deputy Secretary of Samlaut District, recalled receiving handwritten instructions by YIM Tith from the Sector; whereas, NOP Ngim never specifically

⁷¹⁶ YIM Tith's Appeal (D382/22), para. 180.

⁷¹⁷ YIM Tith's Appeal (D382/22), para. 180.

⁷¹⁸ YIM Tith's Appeal (D382/22), para. 181.

⁷¹⁹ YIM Tith's Appeal (D382/22), para. 182.

⁷²⁰ YIM Tith's Appeal (D382/22), paras 182-183.

⁷²¹ YIM Tith's Appeal (D382/22), para. 185.

⁷²² YIM Tith's Appeal (D382/22), para. 184 referring to [International Co-Investigating Judge's] Letter of Assurance to NOP Ngim, 21 April 2014, D118/285/1.

⁷²³ YIM Tith's Appeal (D382/22), para. 184.



stated that the instructions were written by YIM Tith himself and NOP Ngim's illiteracy would have rendered her unable to read or recognise handwriting.⁷²⁴

303. In conclusion, the Co-Lawyers assert that the International Co-Investigating Judge erred in law and fact in finding that YIM Tith was the *de jure* and/or *de facto* Secretary of Sector 1.⁷²⁵ YIM Tith's 'mere presence at a few meetings' and YIM Tith's family relationship with *Ta Mok* cannot amount to a finding of *de facto* authority as Sector 1 Secretary.⁷²⁶ The International Co-Investigating Judge failed to accurately assess witness statements, provide reasoning, consider contradictory and exculpatory evidence, apply the standard of probability and apply the principle of *in dubio pro reo*⁷²⁷ and disregarded contradictory evidence.⁷²⁸

304. In the Response, the International Co-Prosecutor submits that, on a balance of probabilities, there was sufficient evidence that YIM Tith was Sector 1 Secretary from June 1978 until the end of the DK regime and that the Co-Lawyers failed to demonstrate any reviewable error of law or fact.⁷²⁹ She refutes the suggestion that direct evidence of appointment is necessary and highlights the evidence of witnesses who learned about YIM Tith's position from his actions, through other people who directly interacted with him, or through common knowledge of those in Sector 1.⁷³⁰ The International Co-Prosecutor considers the Co-Lawyers' attempts to discredit important witnesses to be unpersuasive or meritless, exemplifying a failure to view the evidence holistically, including the evidence of LEK Phiv, VY Phann, NOP Ngim, NANG Ny, LIES Kung and others.⁷³¹

305. Concerning YIM Tith's authority as Sector 1 Secretary, the International Co-Prosecutor similarly submits that sufficient evidence demonstrates YIM Tith's authority over subordinates, including in security and economic matters, through meetings, reports, letters and site inspections and submits that no reviewable error has been shown by the Co-Lawyers.⁷³² In particular, the Co-Lawyers disregard evidence relating to YIM Tith's effective control over subordinates, his power to shield cadres from arrest and execution, his authority in economics

⁷²⁴ YIM Tith's Appeal (D382/22), para. 186.

⁷²⁵ YIM Tith's Appeal (D382/22), para. 187.

⁷²⁶ YIM Tith's Appeal (D382/22), para. 187.

⁷²⁷ YIM Tith's Appeal (D382/22), para. 188.

⁷²⁸ YIM Tith's Appeal (D382/22), para. 188.

⁷²⁹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 100.

⁷³⁰ International Co-Prosecutor's Response (Indictment) (D382/27), para. 101.

⁷³¹ International Co-Prosecutor's Response (Indictment) (D382/27), paras 102-104.

⁷³² International Co-Prosecutor's Response (Indictment) (D382/27), para. 105.



and his ability to issue handwritten instructions and orders.⁷³³ Moreover, the CPK Statute is relevant for establishing YIM Tith's *de jure* control over subordinates and his duties and powers.⁷³⁴

306. The International Co-Prosecutor further argues that the Co-Lawyers overlook supporting evidence⁷³⁵ and that their attempts to discredit the witnesses attesting to YIM Tith's authority over security and personnel matters are unsuccessful, as the Co-Lawyers neglected to explain the relevance of their challenges to certain witness evidence.⁷³⁶ For the International Co-Prosecutor, the Co-Lawyers' piecemeal assessment of the evidence obscures, for example, YIM Tith's power to shield individuals from arrest and execution.⁷³⁷ Lastly, she emphasises that the Co-Lawyers' attempts to discredit the International Co-Investigating Judge's treatment of NOP Ngim's evidence regarding YIM Tith's regular meetings that NOP Ngim attended are unpersuasive.⁷³⁸

2. Discussion

307. Given the tapestry of evidence assessed by the International Co-Investigating Judge and the failure of the Co-Lawyers to demonstrate any error, the International Judges find that a reasonable trier of fact could have concluded that (i) YIM Tith was appointed as the Secretary of Sector 1 from around June 1978 to the end of the regime; and (ii) YIM Tith exercised *de facto* authority in the region at the relevant time.⁷³⁹

308. The Co-Lawyers elucidate a myriad of 'errors' centred on the International Co-Investigating Judge's appraisal of certain evidence that involves, *inter alia*: the lack of direct evidence or corroboration; flawed assessment of the details provided by witnesses; and a failure to consider pivotal facts, deficiencies or inconsistencies within the findings. These arguments are unavailing. The position of the Co-Lawyers is commonly advanced by: (i) narrowly excising one detail from the landscape of evidence; (ii) presenting an unfounded allegation;

⁷³³ International Co-Prosecutor's Response (Indictment) (D382/27), para. 106.

⁷³⁴ International Co-Prosecutor's Response (Indictment) (D382/27), para. 107.

⁷³⁵ International Co-Prosecutor's Response (Indictment) (D382/27), para. 108. *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 171.

⁷³⁶ International Co-Prosecutor's Response (Indictment) (D382/27), para. 109 referring to VY Phann, NOP Ngim, CHHOEUN Bean, CHHOENG Chhoeuth and NANG Ny.

⁷³⁷ International Co-Prosecutor's Response (Indictment) (D382/27), para. 110 referring to PHAR Phat and CHHOEUN Bean.

⁷³⁸ International Co-Prosecutor's Response (Indictment) (D382/27), para. 111.

⁷³⁹ YIM Tith's Appeal (Indictment) (D382/22), paras 164-188.



and/or (iii) assembling numerous unreasoned or irrelevant claims.⁷⁴⁰

a. *YIM Tith's Appointment as Secretary of Sector 1 around June 1978*

309. Turning to the first issue of whether the International Co-Investigating Judge erred in finding that YIM Tith replaced *Ta Paet* as the Secretary of Sector 1 in June 1978,⁷⁴¹ the International Judges will consider the Co-Lawyers' allegations as to each witness or piece of evidence in turn below: TOP Seung, LEK Phiv, CHHAM Luy, CHUON Than, VY Phann, NOP Ngim, NANG Ny, LIES Kung, NUON Muon, CHHOEUNG Bean, CHHEAN Hea, HAN Thy and an academic article called, "The Organization of Power".⁷⁴²

310. With regard to the assertion that TOP Seung (who led a mobile unit around Kang Hort Dam Worksite in 1978)⁷⁴³ "did not know" YIM Tith or that YIM Tith's identity was learned "from her unit chairperson",⁷⁴⁴ the International Judges find that these arguments and the remaining extraneous contentions fail. TOP Seung personally saw YIM Tith "many times"⁷⁴⁵ when he showed up to inspect Kang Hort Dam "approximately twice a month" during 1978⁷⁴⁶—a responsibility identical to that of his predecessor, *Ta Paet*, before YIM Tith arrived.⁷⁴⁷ Moreover, the International Judges are not persuaded that the absence of a positive identification demonstrates any error⁷⁴⁸ since the International Co-

⁷⁴⁰ YIM Tith's Appeal (Indictment) (D382/22), paras 164-188. The International Judges note the argument of the Co-Lawyers in this Ground 5.2(iii) summoning complaints regarding the use of YIM Tith and *Ta Mok*'s relationship (YIM Tith's Appeal (Indictment) (D382/22), para. 187, alleging that the International Co-Investigating Judge erred "in fact and in law in finding that [YIM Tith] was *de jure* and/or *de facto* Secretary of Sector 1 of the Northwest Zone at any point in time during the DK regime" and their support of this by alluding to their earlier argument that YIM Tith's "family relationship" with *Ta Mok* "cannot amount to a finding that [YIM Tith] held *de facto* authority as Sector 1 Secretary"). The International Judges recall their earlier finding in these Considerations that "the International Co-Investigating Judge did not improperly use YIM Tith's family relationship with *Ta Mok* as a basis or shortcut to impute *de facto* or *de jure* authority; rather, the Indictment relied upon various witnesses [...] who gave testimony to the role and responsibilities of YIM Tith personally." (See *supra* Ground 5.1). Thus, YIM Tith's relationship with *Ta Mok* will not be addressed further here.

⁷⁴¹ Indictment (D382), paras 360-362.

⁷⁴² YIM Tith's Appeal (Indictment) (D382/22), paras 165-169.

⁷⁴³ Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067700-01067705 (A15-A19, A49).

⁷⁴⁴ YIM Tith's Appeal (Indictment) (D382/22), para. 165.

⁷⁴⁵ Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067711 (A91).

⁷⁴⁶ Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067708 (A69-A75).

⁷⁴⁷ Indictment (D382), para. 381, footnote 1007 citing Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067706 (A58-A60), (A60: stating "While I was building the dam, I saw *Ta Paet* come by car to inspect the dam work site, and I heard that *Ta Paet* was Sector 1 Committee and Staff Assistant to the Northwest Zone.").

⁷⁴⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 165; While identifications of the Accused during investigations may be a valuable tool used in criminal matters, the International Judges remark that these extremely complex cases (involving, *inter alia*, war crimes and/or genocide) transpired decades earlier within conflict zones and, thus, may diminish the feasibility, value or even accuracy of such an investigative tool. The



Investigating Judge considered that TOP Seung's testimony was based not only on what she learned at the time but, correspondingly, on her sightings of YIM Tith,⁷⁴⁹ with TOP Seung concluding that YIM Tith was "the highest leader at my workplace [Kang Hort Dam within Sector 1]".⁷⁵⁰

311. The Co-Lawyers contend that LEK Phiv was "not certain of the roles of *Ta* [Paet] and *Ta* Tith"⁷⁵¹ by extracting this single phrase from between two sentences where LEK Phiv stated on the one side that YIM Tith "was on the committee of Sector 1" and on the other side that LEK Phiv personally saw the Accused and described that when "*Ta* Tith talked during meetings, [LEK Phiv] listened to him."⁷⁵² Regarding the lack of a positive identification,⁷⁵³ the International Judges are not convinced of any error given the evidence and that the witness saw the Accused at Kang Hort Dam and at meetings.⁷⁵⁴

312. As to CHHAM Luy (a Khmer Rouge soldier in Sector 1 around 1978)⁷⁵⁵ who "never met" YIM Tith,⁷⁵⁶ the International Judges find that the International Co-Investigating Judge did not err in considering that this witness learned of YIM Tith's position from the people in

want of such an identification may be considered by a reasonable trier of fact within the totality of the case evidence but the absence of an identification does not *per se* invalidate evidence or testimony.

⁷⁴⁹ See Indictment (D382), para. 356 *citing* Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067708-01067709 (A71-A76), 01067710 (A90), 01067718-01067719 (A143-A146) (Q144: "Did you ever meet and speak to *Ta* Tith?" A144: "When he met me, he said hello to me and asked me how my work was"); *see also* Indictment (D382), para. 400, footnote 1057 *citing, inter alia*, Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067706-01067710 (A58-A61, A67-A68, A78-A79, A85, A87-A90), 01067718 (A143-A145), 01067723 (A181). *See* Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067706 (A60) (stating "While I was building the dam, I saw *Ta* Paet come by car to inspect the dam work site, and I heard that *Ta* Paet was Sector 1 Committee and Staff Assistant to the Northwest Zone."); Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067707 (A67-A68) (TOP Seung specifying that "[a] Southwest Cadre called *Ta* Tith came to replace *Ta* Paet [...] [a]round mid-1978").

⁷⁵⁰ Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067710 (A87-A88).

⁷⁵¹ YIM Tith's Appeal (Indictment) (D382/22), para. 165 *citing* Written Record of Interview of LEV Phiv, 20 March 2015, D219/236, at ERN (EN) 01092932 (A18).

⁷⁵² YIM Tith's Appeal (Indictment) (D382/22), para. 165; Written Record of Interview of LEV Phiv, 20 March 2015, D219/236, at ERN (EN) 01092932 (A16-A18).

⁷⁵³ YIM Tith's Appeal (Indictment) (D382/22), para. 165.

⁷⁵⁴ Indictment (D382), para. 354, footnote 928 *citing, inter alia*, Written Record of Interview of LEV Phiv, 20 March 2015, D219/236, at ERN (EN) 01092932 (A17) ("Q: Did you ever see *Ta* Tith [...] or YIM Tith [...] at Kang [Hort] Dam's worksite? A17: Yes, I did. I sometimes saw him during meetings. He attended the meetings, but he did not stay at the Kang [Hort] Dam Worksite. Sometimes, the meetings took place at the Kang [Hort] Dam Worksite, and sometimes they were held at Prey Tauch [...]. The meeting took place every ten days.").

⁷⁵⁴ Written Record of Interview of CHHAM Luy, 22 May 2014, D118/243, at ERN (EN) 01029401 (A10).

⁷⁵⁵ Written Record of Interview of CHHAM Luy, 22 May 2014, D118/243, at ERN (EN) 01029399-01029401 (A2-A10).

⁷⁵⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 165 *citing* Written Record of Interview of CHHAM Luy, 22 May 2014, D118/243, at ERN (EN) 01029401 (A13).



the village.⁷⁵⁷ Whether CHHAM Luy realised YIM Tith's role later than contemporaneous to the appointment in June 1978 does not, in the view of the International Judges, demonstrate any error.⁷⁵⁸

313. Contrary to the Co-Lawyers' allegation that CHUON Than⁷⁵⁹ erroneously referred to "[Ta] Tith" as the person who replaced *Ta Vanh* in June 1977⁷⁶⁰ (and, thus, failed to describe *Ta Paet*'s actual replacement of *Ta Vanh* in June 1977 and *Ta Paet*'s arrest around August 1978 after YIM Tith's appointment as a Secretary of Sector 1⁷⁶¹), the witness, without referencing any specific date for replacement, merely stated that "[a]fter *Ta Nop* and *Ta Vanh* [who were in charge of Sector 1] had disappeared, *Ta Tith* arrived."⁷⁶² This is commensurate with the chronology of the International Co-Investigating Judge's findings.⁷⁶³

314. Moreover, recalling that there is no legal requirement that a witness' evidence on material facts needs to be corroborated by evidence from other sources at the pre-trial stage,⁷⁶⁴ the International Judges are unpersuaded by the Co-Lawyers' contention that CHUON Than's inability to provide some circumstantial details⁷⁶⁵ undermines the reliability of his first-hand account of participating in a meeting, presided over by YIM Tith, with over 100 participants in

⁷⁵⁷ Written Record of Interview of CHHAM Luy, 22 May 2014, D118/243, at ERN (EN) 01029401 (A10-A11). (CHHAM Luy learned that "*Ta Tith* from the Southwest controlled Sector 1" from the people of the village who saw the Accused at meetings and knew that *Ta Tith* was the "strong man" who came to "chair meetings at the cooperatives and introduced himself as the chairman of Sector 1.") Moreover, the International Judges recall, as upheld in Evidentiary Considerations for Ground 5 *supra*, that all evidence is admissible and generally enjoys the same legal presumption of reliability; moreover, the International Judges uphold that it is well-settled that hearsay evidence is admissible before the ECCC and may be considered and that the International Co-Investigating Judge has broad discretion to rely on hearsay evidence.

⁷⁵⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 165 citing Written Record of Interview of CHHAM Luy, 22 May 2014, D118/243, at ERN (EN) 01029401 (A10-A11).

⁷⁵⁹ CHUYON Than being a rice farmer responsible for a mobile unit situated east of Kang Hort Dam around early 1978; Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029378 (A4).

⁷⁶⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 165.

⁷⁶¹ Indictment (D382), paras 361-363.

⁷⁶² Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029379 (A5).

⁷⁶³ See Indictment (D382), para. 353, "*Ta Vanh* had served as Sector 1 Secretary before being replaced by [Ta] Paet."; paras 361-362 "After the purge of its former secretary *Ta Vahn*, in June 1977, [...] *Ta Paet* became secretary of Sector 1. [...] After *Ta Paet* was demoted from his role, YIM T[i]th replaced him [...] *Ta Paet* was arrested after the arrival of YIM Tith [...] around August 1978."

⁷⁶⁴ See *supra* Ground 5 Evidentiary Considerations (holding that "there is no legal requirement that a witness' evidence on material facts needs to be corroborated by evidence from other sources at the pre-trial stage.", detailing that Internal Rule 67 does not require corroboration of evidence in issuing an indictment. See ICTY, *Prosecutor v. Haradinaj et. al.*, IT-04-84-A, Appeal Judgement, Appeals Chamber, 19 July 2010, para. 219 ("The testimony of a single witness may be accepted without the need for corroboration, even if it relates to a material fact.").

⁷⁶⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 165 (purporting that CHUON Than saw *Ta Tith* "only once", "sometime in 1978" and CHUON Than did not "remember the name of the person who introduced" *Ta Tith* or CHUON Than cannot "remember a single name of any of the other 100 participants present at this meeting" or CHUON Than was "not familiar with the administrative structures of Sector 1 or Sector 3" or "never saw anyone from the Zone committee" or "never attended any meetings conducted by the Section cadres").



Phnom Sampeou.⁷⁶⁶

315. Likewise, concerning VY Phann (the Deputy Chairman of Kampang Village who worked alongside Southwest cadres, including YIM Tith around 1978),⁷⁶⁷ he saw ‘Ta Paet’ and ‘Ta Tith’ at a meeting in Kang Hort Dam, during which ‘Ta Paet’ announced that ‘Ta Tith’ had come to help govern Sector 1; the International Judges are unconvinced that VY Phann’s other assertion alone, describing that “‘Ta Tith’ arrived this area at around this time [November],” makes this witness unreliable.⁷⁶⁸ The International Co-Investigating Judge scrutinised this exact date discrepancy and reasonably articulated that: “[a]lthough the witness [VY Phann] claims that this meeting [took place in late 1978, the presence of [Ta] Paet, who was arrested around August 1978, shows that the meeting must have taken place] prior to this date, and the witness is mistaken about the [November] date.”⁷⁶⁹

316. The contention that NOP Ngim (the Samlaut District Deputy Secretary until the end of the Khmer Rouge regime)⁷⁷⁰ only “assumed” that YIM Tith was Sector 1 Committee in 1978 is baseless.⁷⁷¹ The International Co-Investigating Judge reasonably considered that NOP Ngim saw YIM Tith leading meetings while disseminating instructions to the cadres⁷⁷² and knew of

⁷⁶⁶ While the Co-Lawyers are silent on the International Co-Investigating Judge recognising “Phnom Sampov” as a transliteration of “Phnom Sampeou”, (see Indictment (D382), para. 829, footnote 2255), the International Judges find that he reasonably considered a constellation of circumstantial evidence on the activities of the Khmer Rouge regime in and around Phnom Sampov/Phnom Sampeou (including, *inter alia*, evidence concerning the Wat Kirirum Security Centre and three caves used as mass graves) at the approximate time of the meeting, which CHUON Than attested was led by YIM Tith in 1978. See also Indictment (D382), para. 420 (ii), footnote 1109.

⁷⁶⁷ Written Record of Interview of VY Phann, 18 November 2014, D219/85, at ERN (EN) 01061167-01061168 (A2).

⁷⁶⁸ Moreover, the International Judges note that the Co-Lawyers’ remaining submissions on VY Phann (that Ta Tith took over for Ta Paet or led meetings to disseminate Khmer Rouge propaganda) merely buttress that Ta Paet was replaced by Ta Tith. (See YIM Tith’s Appeal (Indictment) (D382/22), para. 165 and Written Record of Interview of VY Phann, 18 November 2014, D219/85, at ERN (EN) 01061169 (A4-A5) (where VY Phann’s evidence illuminates YIM Tith’s role, including that YIM Tith took over for Ta Paet and led meetings where YIM Tith personally “spoke words of encouragement saying that we are a powerful nation and that the Khmer were the warrior race that had built Angkor Wat.”)).

⁷⁶⁹ Indictment (D382), para. 394. VY Phann also stated that Ta Tith came to replace Ta Pet around *one year* after Ta Vanh’s arrest, which was June 1977 (Written Record of Interview of VY Phann, 18 November 2014, D219/85, at ERN (EN) 01061169 (A3)).

⁷⁷⁰ Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 1044678 (A31) (NOP stating “Q: Can you confirm whether you were district-level cadre in Samlaut District? A31: I was Samlaut District Deputy Secretary.”).

⁷⁷¹ YIM Tith’s Appeal (Indictment) (D382/22), para. 165.

⁷⁷² Indictment (D382), para. 405 (viii) (holding that “[i]n 1978, Ta Mok and [YIM Tith] presided over several meetings at [Ta] Mok’s house in Battambang where they instructed hundreds of cadres from the sector, district and commune level”) citing Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 01044683-01044684 (A55-A56).



a district letter issued around October 1978,⁷⁷³ which was hand-written by “Uncle Tith”,⁷⁷⁴ detailing a “plan for security office construction from the Sector”.⁷⁷⁵

317. The Co-Lawyers further aver that the International Co-Investigating Judge “failed” to take into account the “contradictions in the witness evidence” of NANG Ny and LIES Kung in connection to “a meeting in Bay Damram” where YIM Tith made announcements.⁷⁷⁶ The International Judges are not convinced that the two witnesses attended the same meeting in Bay Damram because those witnesses reported different dates of July *versus* October 1978 and meetings of this nature were rather prevalent during this period.⁷⁷⁷ The International Co-Investigating Judge did not err by neglecting to consider the supposed ‘contradictions’ based on the assumption that those witnesses were in the same meeting.⁷⁷⁸ While the Co-Lawyers raise concern *vis-à-vis* the unidentical perspectives of NANG Ny and LIES Kung on YIM Tith’s appearance,⁷⁷⁹ the International Judges find no error in the instant case given that the International Co-Investigating Judge refrained from relying on physical descriptions of YIM Tith in formulating conclusions.⁷⁸⁰

318. While the Co-Lawyers allege that NUON Muon⁷⁸¹ stated that YIM Tith replaced *Ta*

⁷⁷³ Indictment (D382), para. 420(i), footnote 1108 citing Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 01044683 (A52).

⁷⁷⁴ Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 01044681 (A44) (“[t]he instructions or reports that were sent from the Sector at the time were hand-written by *Uncle Tith*”).

⁷⁷⁵ Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 01044682-01044683 (A51).

⁷⁷⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 165.

⁷⁷⁷ See also Indictment (D382), para. 405 (vii) (the International Judges note that the International Co-Investigating Judge also considered evidence on Khmer Rouge activities and other meetings in the region: see Indictment (D382), paras 239-240 (where the International Co-Investigating Judge made findings on activities in Bay Damram region, including as to the arrival of Southwest Zone cadres and killings, including around mid-1978.); para. 689 (referring to the meeting described by LIES Kung, which the International Co-Investigating held was “chaired by [YIM] Tith” in July 1978 and “[o]nlooking workers were told not to ‘follow their way’; none of them were seen again. The only reasonable inference is that they were killed.”; see also Written Record of Interview of CHHOEUNG Bean, 17 June 2015, D219/368, at ERN (EN) 01117723 (A94), with CHHOEUNG Bean attesting that YIM Tith was the only person who spoke at a meeting with Unit Chiefs and ordinary people around Wat Bay Damram in September or October 1978 and that YIM Tith “told them to pay attention only to cultivation”); see also Written Record of Interview of SOEUN Mat, 8 October 2015, D219/538, at ERN (EN) 01173583-01173584 (A57-A62) (SOEUN Mat describing another meeting in Bay Damram, led by a high-level female cadre who described fighting against the Vietnamese).

⁷⁷⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 165.

⁷⁷⁹ YIM Tith’s Appeal (Indictment) (D382/22), para. 165.

⁷⁸⁰ Indictment (D382), including, *inter alia*, paras 360-363.

⁷⁸¹ NUON Muon described himself as “an assistant to collect information from districts in Sector 1” around 1975 and, in October 1975, he became “an assistant for the Battambang district” and was also at some point an assistant to Chamlang Kuoy cooperative of the Battambang district (around three or four months in 1976 until January 1977; ultimately, NUON described that he was arrested when the South Westerners arrived “because they understood that I was a cooperative cadre of the Northwest”. (Written Record of Interview of NUON Muon, 30 May 2013, D118/69, at ERN (EN) 00950725-00950726 (A1-A7).



Paet after the latter was transferred out around October or November 1977,⁷⁸² the International Judges find no error seeing as how the International Co-Investigating Judge reasonably assessed this date discrepancy.⁷⁸³ Turning to CHHOEUNG Bean (a member of a mobile unit, including working in Tuol Mtes and building Kang Hort Dam)⁷⁸⁴ and the contention that this witness described YIM Tith replacing *Ta* Prum and *Ta* Vanh around late 1977 or early 1978 contrary to the International Co-Investigating Judge's own finding that *Ta* Vanh was replaced by *Ta* Paet in June 1977,⁷⁸⁵ the International Judges find that this challenge misrepresents CHHOEUNG Bean's evidence by excising a part of the testimony. CHHOEUNG Bean clarified in his same account that "*Ta* Vanh was arrested six or seven months before the arrival of *Ta* Tith"⁷⁸⁶ and that "when *Ta* Vanh was accused of being a traitor, *Ta* [Paet] was the person who replaced him. Later on, *Ta* [Paet] was [...] replaced by *Ta* Tith".⁷⁸⁷ Moreover, "*Ta* Tith took partial control of [Kang Hort] Dam in November or December 1977, and he took complete control of it in 1978."⁷⁸⁸ The International Judges find that the International Co-Investigating Judge's consideration of this witness is reasonable.

319. The Co-Lawyers assert that the International Co-Investigating Judge erred by relying on CHHEAN Hea (a bodyguard and messenger of *Ta* Paet)⁷⁸⁹ and his "uncorroborated" account of seeing *Ta* Paet's arrest following an order from *Ta* Mok around August 1978.⁷⁹⁰ The International Judges reaffirm that there is no requirement of corroboration in assessing evidence.⁷⁹¹ Furthermore, the International Judges are not convinced that the International Co-

⁷⁸² YIM Tith's Appeal (Indictment) (D382/22), para. 165 *citing* Written Record of Interview of NUON Muon, 30 May 2013, D118/69, at ERN (EN) 00950726-00950727 (A11). *See also* Written Record of Interview of NUON Muon, 30 May 2013, D118/69, at ERN (EN) 00950727 (A12).

⁷⁸³ Indictment (D382), para. 361, footnote 943, *see* Written Record of Interview of NUON Muon, 30 May 2013, D118/69, at ERN (EN) 00950726-00950727 (A11-A12) is cited to support the finding "[a]fter *Ta* Paet was demoted from his role, [YIM] Tith replaced him as Sector 1 Secretary." As to the date of *Ta* Paet's arrest (around August 1978), the witness was not referenced.

⁷⁸⁴ Written Record of Interview of CHHOEUNG Bean, 17 June 2015, D219/368, at ERN (EN) 01117715-01117716 (A1-A7).

⁷⁸⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 165 *citing* Written Record of Interview of CHHOEUNG Bean, 17 June 2015, D219/368, at ERN (EN) 01117716 (A10-A17), Indictment (D382), para. 361.

⁷⁸⁶ Written Record of Interview of CHHOEUNG Bean, 17 June 2015, D219/368, at ERN (EN) 01117717 (A26).

⁷⁸⁷ Written Record of Interview of CHHOEUNG Bean, 17 June 2015, D219/368, at ERN (EN) 01117718 (A39).

⁷⁸⁸ Written Record of Interview of CHHOEUNG Bean, 17 June 2015, D219/368, at ERN (EN) 01117726 (A116).

⁷⁸⁹ Written Record of Interview of CHHEAN Hea, 30 October 2013, D118/136, at ERN (EN) 00969636 (A1, A2); YIM Tith's Appeal (Indictment) (D382/22), paras 166-167.

⁷⁹⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 166; *see* Written Record of Interview of CHHEAN Hea, 23 March 2015, D219/233, at ERN (EN) 01090008 (A18) ("At that time, I saw two messengers of *Ta* Tith and *Ta* Mok coming to speak to *Ta* [Paet]. He was told to prepare his luggage because *Ta* Mok had ordered that he be moved to another location. Upon hearing this, I knew right away that he would surely be taken to be detained in a prison or killed. Therefore, I escaped into the forest.").

⁷⁹¹ *See supra* Ground 5 Evidentiary Considerations (holding that "there is no legal requirement that a witness' evidence on material facts needs to be corroborated by evidence from other sources at the pre-trial stage.").



Investigating Judge disregarded any contradictory or exculpatory evidence in relation to CHHEAN Hea.⁷⁹² First, the International Co-Investigating Judge's finding that *Ta Paet* was arrested around August 1978 is based on CHHEAN Hea's account that it happened two months after *Ta Nhim*'s arrest.⁷⁹³ This conclusion is corroborated by multiple sources of evidence cited by the International Co-Investigating Judge.⁷⁹⁴ The Co-Lawyers' contention placing the date of *Ta Paet*'s arrest in November 1978⁷⁹⁵ fails because it relies on the date of the witness's escape following the arrest⁷⁹⁶ or witness VY Phann's inaccurate recollection, as *supra*.⁷⁹⁷ Second, the International Judges are not persuaded by the remaining arguments that CHHEAN Hea: "did not know" YIM Tith's bodyguard, messenger or driver; did not witness *Ta Paet*'s arrest and escaped to the jungle when *Ta Paet* was ordered to move to another location; and that, after 1979, CHHEAN Hea met *Ta Paet* who told him that he had been assigned to cut a clump of bamboo in Oral Mountain, Kampong Speu Province (instead of having been arrested)⁷⁹⁸—these details are not directly related to the finding nor are they contradictory or exculpatory.

320. Having established that *Ta Paet* was arrested around August 1978, as *supra*,⁷⁹⁹ the International Judges cannot conclude that the International Co-Investigating Judge should have considered HAN Thy's evidence that he saw *Ta Paet* at a meeting three days before the Vietnamese arrived.⁸⁰⁰ Otherwise, bearing in mind the fabric of evidence in this case, the

detailing that Internal Rule 67 does not require corroboration of evidence in issuing an indictment. The International Judges further observe that the Co-Lawyers' overly narrow approach discounted the circumstantial evidence and witnesses detailing the demotion and arrest of *Ta Paet* around August of 1978, as considered by the International Co-Investigating Judge (*see* YIM Tith's Appeal (Indictment) (D382/22), para. 166; *see, inter alia*, Indictment (D382), paras 361-363).

⁷⁹² YIM Tith's Appeal (Indictment) (D382/22), para. 168.

⁷⁹³ Indictment (D382), para. 362, footnote 945 *citing* Written Record of Interview of CHHEAN Hea, 30 October 2013, D118/136, at ERN (EN) 00969643 (A37). *Ta Nhim* was removed from his position before 14 June 1978 (the date of his confession as S-21). *See* Indictment (D382), para. 358.

⁷⁹⁴ Indictment (D382), para. 362, footnote 945.

⁷⁹⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 168.

⁷⁹⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 168 *citing* Written Record of Interview of CHHEAN Hea, 30 October 2013, D118/136, at ERN (EN) 00969641 (A20).

⁷⁹⁷ *See supra* para. 315; *See* Indictment (D382), para. 394 (*citing* Written Record of Interview of VY Phann, 18 November 2014, D219/85, at ERN (EN) 01061168 (A3), the International Co-Investigating Judge held that: "Although the witness [VY Phann] claims that this meeting took place in late 1978, the presence of [*Ta*] Paet, who was arrested around August 1978, shows that the meeting must have taken place prior to this date, and the witness is mistaken about the date."); YIM Tith's Appeal (Indictment) (D382/22), para. 168.

⁷⁹⁸ *See* Heng Teav *alias* *Ta Pet* interview by Steve Heder, 14 August 1990, D34.1.9, at ERN (EN) 01181104. *Ta Pet* says he was arrested in 1978 and sent to Phnom Penh, but later sent to Kampong Speu and detained there until January 1979.

⁷⁹⁹ *See supra* para. 319.

⁸⁰⁰ Office of the Co-Prosecutors Interview of HAN Thy, 4 August 2008, D1.3.11.55, at ERN (EN) 00221584-00221585, 00221587; Written Record of Interview of HAN Thy, 21 May 2011, D20, at ERN (EN) 00710286.



International Judges find no merit in the position that one academic article neglecting to mention YIM Tith as a member of the CPK Committees in 1978 shows any error on the part of the International Co-Investigating Judge.⁸⁰¹

321. In conclusion, rejecting the Co-Lawyers' view that direct evidence or corroboration are required to reinforce the finding that YIM Tith was Secretary of Sector 1⁸⁰² and considering the failure of the Co-Lawyers to demonstrate any error on the part of the International Co-Investigating Judge, the International Judges find that the evidence at this pre-trial stage sufficiently supports that YIM Tith replaced *Ta Paet* and was appointed as the Secretary of Sector 1 (*de jure*) around June 1978 through the end of the regime.

b. YIM Tith's De Facto Authority as Secretary of Sector 1

322. Turning to the second issue of whether the International Co-Investigating Judge erred in concluding that YIM Tith exercised authority as the *de facto* Secretary of Sector 1, the International Judges consider the findings and evidence in relation to certain witnesses, some of whom arise more than once with respect to differing issues: SOEUN Mat, VY Phann, CHUON Than, NOP Ngim, CHHOEUNG Bean, CHHOENG Chhoeuth, NANG Ny, PHAR Pet and PREAP Kap.⁸⁰³

323. The Co-Lawyers assert that the International Co-Investigating Judge erred in finding that YIM Tith had authority and direct control over the military by relying on the uncorroborated evidence of SOEUN Mat (a member of the Decisive Mobile Unit who worked around Kang Hort Dam)⁸⁰⁴ and failing to consider that he "did not know who was in charge of Sector 1 at the time" and that he only overheard others mentioning YIM Tith's soldiers.⁸⁰⁵ The International Judges find this argument unpersuasive. SOEUN Mat "knew [YIM Tith] very well because [SOEUN Mat] sat close" to [YIM Tith] at a meeting in Banan;⁸⁰⁶ on another

Yet, HAN Thy completely forgot the meeting year in his final interview. See Written Record of Interview of HAN Thy, 20 March 2012, D105/8, at ERN (EN) 00803456 (A13-A15).

⁸⁰¹ YIM Tith's Appeal (Indictment) (D382/22), para. 169 referring to Article by Timothy CARNEY, "The Organization of Power", D1.3.15.2.

⁸⁰² YIM Tith's Appeal (Indictment) (D382/22), para. 165.

⁸⁰³ YIM Tith's Appeal (Indictment) (D382/22), paras 170-187.

⁸⁰⁴ Written Record of Interview of SOEUN Mat, 8 October 2015, D219/538, at ERN (EN) 01173573-01173575 (A9-A17), 01173573-01173581 (A49).

⁸⁰⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 171. See also Written Record of Interview of SOEUN Mat, 8 October 2015, D219/538, at ERN (EN) 01173583 (A56) ("Q: How did you learn that *Ta Tith* was a military commander? A56: The village chief and the unit chief mentioned *Ta Tith*'s soldiers. Therefore, I knew that he was a military commander.").

⁸⁰⁶ Written Record of Interview of SOEUN Mat, 8 October 2015, D219/538, at ERN (EN) 01173581 (A49).



occasion, SOEUN Mat “could see [YIM Tith] speaking” at a meeting where [YIM Tith] “announced the arrests”.⁸⁰⁷ Moreover, SOEUN Mat not only heard from his village or unit Chiefs about YIM Tith’s soldiers but, also, saw that YIM Tith’s soldiers guarded the area south of Banan,⁸⁰⁸ heard YIM Tith mentioning the struggle to reinforce his soldiers at the meeting⁸⁰⁹ and added that “everyone knew *Ta* Tith, because they heard that *Ta* Tith was a strong military leader”.⁸¹⁰ This account is corroborated by other evidence.⁸¹¹ Finally, the Co-Lawyers’ assertion that SOEUN Mat “did not provide a timeframe for his evidence”⁸¹² fails. The witness described his work and experience in the mobile unit from 1975 to 1979 and provided the year of the events, as he recalled, when asked to clarify.⁸¹³

324. As for the Co-Lawyers’ objection to the uncertainty of the notion of YIM Tith’s authority over “personal matters”,⁸¹⁴ this misreads what the Indictment described as “military and *personnel* matters”.⁸¹⁵

⁸⁰⁷ Written Record of Interview of SOEUN Mat, 8 October 2015, D219/538, at ERN (EN) 01173578 (A30).

⁸⁰⁸ Written Record of Interview of SOEUN Mat, 8 October 2015, D219/538, at ERN (EN) 01173584 (A62).

⁸⁰⁹ Written Record of Interview of SOEUN Mat, 8 October 2015, D219/538, at ERN (EN) 01173588 (A83).

⁸¹⁰ Written Record of Interview of SOEUN Mat, 8 October 2015, D219/538, at ERN (EN) 01173580 (A38).

⁸¹¹ See, for example, Indictment (D382), para. 181, “each [S]ector had a military unit which reported directly to the [S]ector [S]ecretary.”

⁸¹² YIM Tith’s Appeal (Indictment) (D382/22), para. 171.

⁸¹³ Written Record of Interview of SOEUN Mat, 8 October 2015, D219/538, at ERN (EN) 01173573 (A8-A9) (“Q: I would like you to describe your work from 1975 to 1979. What did you do? A9: For me, they assigned me to a mobile unit. I was not on the rear battlefield. They ordered me to the forward battlefield throughout.”); 01173574 (A14) (“A: [...] In late 1977, *Ta* Pet was arrested and detained in Ka Kaoh [] Prison. *Ta* Kao was arrested too. After *Ta* Kao was arrested, [*Ta*] Tith [] became the manager. [*Ta*] Tith was from the Southwest.”); 01173576 (A24) (Q: Do you remember the date of the meeting at Kang Hat Dam? A: I do not remember exactly. It was probably in late 1977.); 01173576-01173577 (A25) (Q: How long after the Southwest cadres arrived did YIM Tith [] arrange the meeting at Kang [Hort] Dam? A: The Southwest cadres arrived in 1977. The Southwest cadres first worked with the Northwest cadres. Later, the Northwest cadres were removed. I would like to add that the Northwest cadres killed more people than the Southwest cadres in 1975.”); 01173579 (A34) (“Q: Previously, you mentioned that in the meeting [held by YIM Tith], they spoke about the arrest of *Ta* Pet and *Ta* Kao in 1977. Can you clarify in what season it was? A34: I do not remember the month, because I did not care about dates at that time. I only through about work. I tried to work day and night so that I could survive. That meeting was held in 1977.”)

⁸¹⁴ YIM Tith’s Appeal (Indictment) (D382/22), paras 172-173.

⁸¹⁵ The International Judges find that the International Co-Investigating Judge did not err in considering VY Phann and CHUON Than with regard to ‘military and personnel’ matters. See Indictment (D382), para. 364(i), footnote 954 (citing Written Record of Interview of VY Phann, 18 November 2014, D219/85, at ERN (EN) 01061169 (A5) (Q: Did *Ta* Tith talk about internal enemies of *Angkar*? A5: Yes, he talked about internal enemies burrowing inside our movement and said Yuon, CIA, and KGB were hiding among us. *Ta* Tith told us to keep our eyes on them. If we obtained any information about their activities, we had to report to upper *Angkar* so that *Angkar* could smash them before they smashed us.”) and Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029382 (A17) (“Q: What did *Ta* Tith say at the meeting? A17: *Ta* Tith was the one who discussed all of the points I just mentioned. He said he had received a lot of information from the cooperative chairpersons regarding the thefts and the enemy’s activities at many bases. He instructed us to follow up on those activities continuously. If we followed up and saw such activities, we had to take those people to be re-educated first before we smashed them and reported to the upper echelons.”).



325. Next, the Co-Lawyers outline the supposed errors committed by the International Co-Investigating Judge in “failing to account for contradictory evidence and other relevant considerations” when evaluating six witnesses in support of YIM Tith’s authority over his subordinates in matters of security within the Sector.⁸¹⁶ For VY Phann’s November 1978 date, as *supra*, the International Co-Investigating Judge did not err in addressing this discrepancy.⁸¹⁷ As to CHUON Than, the International Judges do not find that the evidence of YIM Tith leading a meeting in Sector 3 is “irrelevant” as YIM Tith was also responsible for Sector 3 in tandem with Sector 1 and was a member of the Northwest Zone Committee as well.⁸¹⁸ Moreover, the details of this meeting—including YIM Tith’s acts and conduct—evidenced the manifestation of his leadership (as similar to Sector 1) along with YIM Tith’s role and his degree of authority and control at the relevant period.⁸¹⁹

326. With respect to NOP Ngim, the Co-Lawyers fail to illuminate how a Battambang meeting in September 1978 is ‘contradictory’⁸²⁰ as this arose after YIM Tith’s appointment around June 1978.⁸²¹ The International Judges further reject the Co-Lawyers’ argument that NOP Ngim “could not remember” what YIM Tith discussed at the meeting,⁸²² which misrepresents the evidence. NOP Ngim’s lack of knowledge was expressed in response to “whether *Ta* Tith gave *specific* information on smashing enemies”.⁸²³ The witness otherwise

⁸¹⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 174 (This concerns purported errors with respect to VY Phann, CHUON Than, NOP Ngim, CHHOEUNG Bean and CHHOENG Chhoeuth and NANG Ny).

⁸¹⁷ See *supra* para. 315; Indictment (D382), para. 394 (citing Written Record of Interview of VY Phann, 18 November 2014, D219/85, at ERN (EN) 01061168 (A3), the International Co-Investigating Judge held that: “Although the witness [VY Phann] claims that this meeting took place in late 1978, the presence of [Ta] Paet, who was arrested around August 1978, shows that the meeting must have taken place prior to this date, and the witness is mistaken about the date.”).

⁸¹⁸ The International Judges remark that the International Co-Investigating Judge concluded that, around 1978, YIM Tith “assumed the role of Secretary of Sector 3” and that a myriad of evidence indicates that YIM Tith “held this position from as early as June 1978, at the same time as serving as [S]ecretary of Sector 1.” (See Indictment (D382), para. 372). See also Indictment (D382), para. 380, which details the Northwest Zone Committee membership.

⁸¹⁹ Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029382 (A18) (“Q: How did they introduce Ta Tith at the meeting? A18: They said at the time that Ta Tith was on the Sector 1 Committee”); Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029381 (A16); Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029381-01029382 (A16-A17) (for example: “Q: What did Ta Tith say at the meeting? A17: Ta Tith was the one who discussed all the points I just mentioned [about farming and thefts at the bases]. He said that he had received a lot of information from the cooperative chairpersons regarding the thefts and the enemy’s activities at many bases. He instructed us to follow up on those activities continuously. If we followed up and saw such activities, we had to take those people to be re-educated first before we smashed them and reported to the upper echelons.”).

⁸²⁰ YIM Tith’s Appeal (Indictment) (D382/22), para. 174.

⁸²¹ Indictment (D382), para. 360.

⁸²² YIM Tith’s Appeal (Indictment) (D382/22), para. 174.

⁸²³ YIM Tith’s Appeal (Indictment) (D382/22), para. 174 *citing* Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 01044689 (A86) (emphasis added).



knew that YIM Tith reported on the “overall situation in the Sector he was in charge of” and, along with *Ta Mok*, detailed “the enemy situation” and how the attendees must “smash any enemy that opposed Angkar”.⁸²⁴

327. Turning to the Co-Lawyers’ complaint that CHHOEUNG Bean’s evidence concerns a meeting held in either September or October 1978 without any introduction of YIM Tith, the International Judges reject the challenge regarding the date of the meeting because this was held after YIM Tith’s appointment, as *supra*.⁸²⁵ Further, the absence of any introduction of YIM Tith at this meeting does not demonstrate any error given the witness’ explanation that he knew it was YIM Tith because “we were told a day before the meeting that [YIM Tith] who was on the sector committee would come to be a chair of the meeting”.⁸²⁶

328. While CHHOENG Chhoeuth (a worker with the Khmer Rouge regime, including at Kang Hort Dam)⁸²⁷ saw YIM Tith one time and his opportunity to view the Accused was from a distance at the meeting,⁸²⁸ the International Judges consider that a reasonable trier of fact could have considered, within the body of evidence, that CHHOENG Chhoeuth attended the meeting where YIM Tith spoke about enemies. The witness described learning around that time that “I was told [YIM Tith] had come to replace *Ta [Paet]*”.⁸²⁹ At the meeting, moreover, CHHOENG Chhoeuth detailed: seeing that YIM Tith was heavily guarded by soldiers;⁸³⁰ hearing “people saying that [YIM Tith] had come” and “people calling him *Ta*”,⁸³¹ and

⁸²⁴ See Indictment (D382), para. 364(ii), footnote 955 (citing voluminous evidence, including Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 01044683-01044684 (A55-A56) (The International Judges remark that NOP Ngim described that *Ta Tith* talked about the overall situation in the Sector he was in charge of and the situations in the districts in his Sector. He also advised the various district representatives in his Sector. “Q: In the meeting, did *Ta Tith* and *Ta Mok* talk about smashing enemies? A56: Yes. *Ta Mok* and *Ta Tith* talked about the enemy situation. They instructed us that we must smash any enemy that opposed Angkar. They did not say who the enemies were or say what methods were to be used to smash those enemies. I understood the phrase ‘Any enemy who betrays us, we must smash, meaning that the enemy must be killed.’” The International Judges note that the remaining citations provided by the Co-Lawyers as to NOP Ngim’s other interviews (D219/285 and D219/298) are not meaningful).

⁸²⁵ See *supra* para. 318.

⁸²⁶ Written Record of Interview of CHHOEUNG Bean, 27 July 2015, D219/430, at ERN (EN) 01128724 (A128).

⁸²⁷ Written Record of Interview of CHHOEUNG Chhoeuth, 17 March 2017, D219/953, at ERN (EN) 01451712 (A14).

⁸²⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 174.

⁸²⁹ YIM Tith’s Appeal (Indictment) (D382/22), para. 174; Written Record of Interview of CHHOEUNG Chhoeuth, 17 March 2017, D219/953, at ERN (EN) 01451716 (A56) (“Q: When did you first hear about YIM Tith or *Ta Tith*? A56: It was when they held the first meeting. I was told he had come to replace *Ta [Paet]*. After the meeting, I never met him again.”).

⁸³⁰ Written Record of Interview of CHHOEUNG Chhoeuth, 17 March 2017, D219/953, at ERN (EN) 01451716 (A17).

⁸³¹ Written Record of Interview of CHHOEUNG Chhoeuth, 17 March 2017, D219/953, at ERN (EN) 01451717 (A69).



witnessing YIM Tith declaring that “they wanted to purge the Yuon enemy”,⁸³² like the announcements YIM Tith disseminated at other cadre gatherings.⁸³³

329. As to NANG Ny (a mobile unit worker in Sector 1 from around April 1975 through 1979, including at Kang Hort Dam),⁸³⁴ the International Judges are not persuaded of any error over his sighting of YIM Tith around October 1978 or as to identification.⁸³⁵ The International Co-Investigating Judge reasonably considered that NANG Ny “knew only *Ta Tit*” and evidenced that YIM Tith was making announcements at a meeting in Bay Damram that the Northwest group had ‘Khmer bodies with Yuon heads’ and were collaborating with the Vietnamese and that was “why they arrested and killed the Northwest cadres”.⁸³⁶ The witness also testified that YIM Tith came to the meeting by military Jeep accompanied by two or three military men.⁸³⁷

330. Considering that the Co-Lawyers’ challenge against the six witnesses supporting YIM Tith’s authority over his subordinates in matters of security fails, as *supra*,⁸³⁸ the International Judges observe that the International Co-Investigating Judge’s findings on the orders, instructions or reporting in connection to YIM Tith and his subordinates within Sector 1 have sufficient evidentiary basis.⁸³⁹ Specifically, the Co-Lawyers extract two footnotes from the Indictment to show lack of evidence on the YIM Tith’s instruction to ‘re-educate’ or ‘smash’,⁸⁴⁰ but, *inter alia*, one witness cited in those footnotes stated, “[*Ta Tith*] talked about internal enemies [...] *Ta Tith* told us to keep our eyes on them. If we obtained any information about

⁸³² Indictment (D382), para. 364(ii), footnote 955, (citing, *inter alia*, Written Record of Interview of CHHOEUNG Chhoeuth, 17 March 2017, D219/953, at ERN (EN) 01451718 (A70-A75)).

⁸³³ See Written Record of Interview of VY Phann, 18 November 2014, D219/85, at ERN (EN) 01061169 (A5) (Q: Did *Ta Tith* talk about internal enemies of Angkar? A5: Yes, he talked about internal enemies burrowing inside our movement and said Yuon, CIA, and KGB were hiding among us. *Ta Tith* told us to keep our eyes on them. If we obtained any information about their activities, we had to report to upper Angkar so that Angkar could smash them before they smashed us.”; see also Written Record of Interview of NANG Ny, 23 June 2013, D118/77, at ERN (EN) 00970455-00970457 (A24-A33) (“I knew only *Ta Tit*” and described YIM Tith holding the microphone, making announcements and saying that the Northwest group had ‘Khmer bodies with Yuon heads’ while accusing them of collaborating with the Vietnamese and that “was why they arrested and killed the Northwest cadres.”).

⁸³⁴ Written Record of Interview of NANG Ny, 23 June 2013, D118/77, at ERN (EN) 00970451 (A1).

⁸³⁵ YIM Tith’s Appeal (Indictment) (D382/22), para. 174.

⁸³⁶ Indictment (D382), para. 364, footnote 955 citing Written Record of Interview of NANG Ny, 23 June 2013, D118/77, at ERN (EN) 00970456 (A28-A30).

⁸³⁷ Written Record of Interview of NANG Ny, 23 June 2013, D118/77, at ERN (EN) 00970459 (A46-A48). The International Judges do not consider that the ‘first time’ NANG Ny saw the Accused to be pertinent.

⁸³⁸ See *supra* paras 325-329 (VY Phann, CHUON Than, NOP Ngim, CHHOEUNG Bean, CHHOENG Chhoeuth, NANG Ny).

⁸³⁹ *Contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 175. See Indictment (D382), paras 364-365, footnotes 953-972.

⁸⁴⁰ YIM Tith’s Appeal (Indictment) (D382/22), para. 175 citing Indictment (D382), para. 365, footnotes 971-972.



their activities, we had to report to upper *Angkar* so that *Angkar* could smash them.”⁸⁴¹ The International Judges are further unpersuaded that the International Co-Investigating Judge neglected to “identify the subordinates” or “explain how exactly” YIM Tith exercised his effective control over them in Sector 1⁸⁴² as the International Co-Investigating Judge identified subordinates and delineated YIM Tith’s degree of authority and control over them (including YIM Tith’s “*de jure* authority over the district and commune level cadres in his sector”⁸⁴³ and YIM Tith’s conduct in relation to subordinates⁸⁴⁴).

331. Moving forward to PHAR Pet (a soldier stationed around Banan District, Kang Hort, Prey Touch),⁸⁴⁵ the Co-Lawyers’ argument that no reasonable trier of fact could have concluded, after relying on this “single witness”, that YIM Tith ordered the release of detained persons,⁸⁴⁶ fails. First, the Co-Lawyers allege that the International Co-Investigating Judge misstated PHAR Pet’s account of YIM Tith intervening to release detainees and quoted the relevant part of original statement by the witness.⁸⁴⁷ Yet, the quotation itself reveals that YIM Tith, who introduced himself as the Sector Chairman,⁸⁴⁸ arrived on the scene of *Ta Nen*, who was about to kill detainees, and made him release them by stating, “If you, Nen, Kill these people, who will protect you, Nen?”⁸⁴⁹ This unequivocally demonstrates YIM Tith’s power to shield individuals from executions. Second, given this account of PHAR Pet on the release of the soldiers by YIM Tith, the remaining contentions by the Co-Lawyer⁸⁵⁰ are extraneous or not

⁸⁴¹ Written Record of Interview of VY Phann, 18 November 2014, D219/85, at ERN (EN) 01061169 (A5) cited at Indictment (D382), para. 365, footnote 972.

⁸⁴² YIM Tith’s Appeal (Indictment) (D382/22), para. 175.

⁸⁴³ Indictment (D382), para. 364(v). Furthermore, The International Co-Investigating Judge elaborates on YIM Tith’s control over Sector 1 in paragraph 364 by describing, *inter alia*, that YIM Tith “had direct authority and control over military and personnel matters within the sector” and “subordinates in matters of security within the sector” and “economic matters”, including irrigation, agricultural production and Kang Hort Dam visits; *see* ICTR, *Prosecutor v. Karemera & Ngrumpatse*, ICTR-98-44-A, Judgement, Appeals Chamber, 29 September 2014, para. 370. (The ICTR Appeals Chamber opined with regards to that Indictment that “[t]he Appeals Chamber recalls the well-established principle that in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole. [...] Under certain circumstances, referring to an alleged subordinate by category can constitute sufficient notice of his or her identity.”).

⁸⁴⁴ Indictment (D382), paras 364-371, including particularly paragraph 365 (where, within the background of the Indictment, the International Co-Investigating Judge drew conclusions on YIM Tith giving orders at meetings on how to conduct irrigation, farming, and/or security matters and the imperative for meeting attendees to report or smash the enemy).

⁸⁴⁵ Written Record of Interview of PHAR Pet, 23 May 2014, D118/244, at ERN (EN) 01029409-01029410 (A2-A5).

⁸⁴⁶ YIM Tith’s Appeal (Indictment) (D382/22), paras 176-178.

⁸⁴⁷ Written Record of Interview of PHAR Pet, 23 May 2014, D118/244, at ERN (EN) 01029410 (A5).

⁸⁴⁸ Written Record of Interview of PHAR Pet, 23 May 2014, D118/244, at ERN (EN) 01029410 (A6).

⁸⁴⁹ Written Record of Interview of PHAR Pet, 23 May 2014, D118/244, at ERN (EN) 01029410 (A5).

⁸⁵⁰ YIM Tith’s Appeal (Indictment) (D382/22), para. 178 (submitting, *inter alia*, that the International Co-Investigating Judge “failed to take into consideration PHAR Pet’s evidence that he believed *Ta Nen* was on district



meriting consideration.

332. The International Judges find no error in the International Co-Investigating Judge's consideration of CHHOEUNG Bean's evidence that YIM Tith spared *Ta Saman*, a Northwest cadre.⁸⁵¹ The Co-Lawyers' contention that this was based on the witness's unsupported account that he saw *Ta Saman* alive after 1979⁸⁵² is unavailing. CHHOEUNG Bean stated in other interviews that upon *Ta Tith's* arrival, *Ta Saman* was made a controller of Kang Hort battlefield and took charge of economy and food supplies.⁸⁵³ Learning the details from *Ta Yuan*, who lived in the same commune as the witness at the time, CHHOEUNG Bean came to know that *Ta Tith's* arrival around Kang Hort correlated with *Ta Saman's* assignment of all that work and that the reason for *Ta Saman's* promotion was that *Ta Tith* did not know the area and *Ta Saman* was just the person who showed the path to *Ta Tith*.⁸⁵⁴

333. The Co-Lawyers' position that the International Co-Investigating Judge erred by failing to "provide any explanation of what 'in charge' means in terms of a person's criminal responsibility" is controverted by the methodical details in the Indictment.⁸⁵⁵ The International Judges consider that the Co-Lawyers' view that the International Co-Investigating Judge based his finding that YIM Tith was in charge of economics in Sector 1 "solely on a few speeches he

committee (although he did not know which one), he did not know whether '[*Ta*] Tith' or *Ta Nen* held a higher position, he knew nothing about members of the Zone, Sector and District, he had never heard about *Ta Vanh*, *Ta Nhim* or '*Ta Pet*,' and he heard about *Ta Mok* only after he was arrested. No reasonable trier of fact would conclude from the evidence that [YIM Tith] ordered the release of several soldiers' or had the power to shield individuals from arrest and execution.").

⁸⁵¹ YIM Tith's Appeal (Indictment) (D382/22), para. 179 (CHHOEUNG Bean being a member of a mobile unit, including working at Tuol Mtes and building Kang Hort Dam, *see* Written Record of Interview of CHHOEUNG Bean, 17 June 2015, D219/368, at ERN (EN) 01117715 (A1)).

⁸⁵² YIM Tith's Appeal (Indictment) (D382/22), para. 179 *citing* Written Record of Interview of CHHOEUNG Bean, 27 July 2015, D219/430, at ERN (EN) 01128710-01128711 (A20-A21).

⁸⁵³ Written Record of Interview of CHHOEUNG Bean, 17 June 2015, D219/368, at ERN (EN) 01117730 (A141).

⁸⁵⁴ Written Record of Interview of CHHOEUNG Bean, 17 August 2015, D219/465, at ERN (EN) 01139587-01139588 (A29-A32).

⁸⁵⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 180. *See, inter alia*, Indictment (D382), para. 398 (holding that "[YIM Tith] and *Ta Mok* played a central role in implementing the CPK's economic and agricultural policies in the Northwest Zone, which aimed to increase DK's national production through the establishment of worksites and cooperatives. [YIM Tith] oversaw production and construction in areas under his control, inspected worksites, presided over meetings and gave speeches about agricultural production, trained work unit chiefs, and instructed the workforce to work hard in order to achieve CPK goals"); Indictment (D382), para. 405 (finding that "[YIM Tith] spoke at numerous other meetings where he exhorted CPK economic policy and provided instructions on dam and canal instruction, and other agricultural and labour practices."); Indictment (D382), para. 1021 (under the title 'Commission via JCE', concluding that "[YIM Tith] made a significant contribution to the policy on worksites and cooperatives by, *inter alia*, convening meetings with his subordinates and instructing them how to implement CPK economic policy, supervising and inspecting worksites, overseeing and monitoring construction and production, controlling and mobilising the workforce and resources for the operation of worksites and cooperatives, announcing that people who failed to complete their work satisfactorily would be considered enemies and, by implication, killed.").



gave in the months before the arrival of Vietnamese”⁸⁵⁶ is an oversimplification of the evidence, disregarding the wider context of the Indictment.⁸⁵⁷

334. Furthermore, with respect to the Co-Lawyers’ position that the International Co-Investigating Judge erred by neglecting to “provide any reasoning as to why” the evidence of YIM Tith’s appointment as Secretary of Sector 1 is relevant in establishing his authority, the International Judges find no error.⁸⁵⁸ Clearly, YIM Tith’s official appointment along with his accompanying role, duties and responsibilities bears on the degree of command or authority (*de facto* and/or *de jure*) that YIM Tith exercised within Sector 1, including over subordinates.⁸⁵⁹

335. The Co-Lawyers raise multiple objections to the International Co-Investigating Judge’s assessment of and reliance on NOP Ngim (who revoked part of her earlier statement as to the monthly meetings with YIM Tith).⁸⁶⁰ The International Judges find that the Co-Lawyers’ argument that the International Co-Investigating Judge relied on “one witness”, NOP Ngim, to substantiate the meetings and connected activities is unfounded as diverse evidence addresses YIM Tith’s meetings with subordinates in Sector 1 and the degree of his authority and control over agricultural and security matters and the plan to purge and target enemies.⁸⁶¹ The

⁸⁵⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 180.

⁸⁵⁷ See Indictment (D382), para. 381, footnote 1007 citing Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067706 (A58-A60) (where TOP Seung described seeing YIM Tith around 1978 (having replaced *Ta Paet*) and YIM Tith visiting Kang Hort Dam to inspect the progress on the construction)). Moreover, the International Judges find that the alleged speeches on irrigation and agriculture demonstrate YIM Tith’s exercise of authority and *de facto* influence (including, *inter alia*, YIM Tith: chairing large meetings himself, exerting power over the people, issuing instructions and orders to cadres, imparting strategies on work and procedures for escape). Written Record of Interview of CHHOEUNG Bean, 17 June 2015, D219/368, at ERN (EN) 01117723 (A93-A95) (“Q: How did *Ta Tith* introduce himself in the first meeting? A93: *Ta Tith* mentioned the objectives of his leadership. He intended to lead the people in order to progress, so that they had sufficient amounts of rice rather than just the rice porridge to eat. He then introduced people to the techniques that would promote agro-produce through using fertilizer, including using both cow dungs and human excrement as fertilizer. *Ta Tith* also told the people to correct him in case he led them in the wrong direction. However, no one dared to correct him. We always agreed with what he said.”).

⁸⁵⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 181.

⁸⁵⁹ The CPK statute cited by the International Co-Investigating Judge (Communist Party of Kampuchea Statute, January 1976, D1.3.20.1, ERN (EN) 00184041, Article 12(3)) provides basic understanding of *de jure* authority YIM Tith can exercise as a Sector Secretary). See also Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 459 (holding, *inter alia*, “[f]urthermore, this overview demonstrates that the doctrine of superior responsibility was understood not to be strictly limited to military commanders, but it was also extended to include non-military superiors. Therefore, this jurisprudence indicates that the exact nature of one’s role or function as a superior and whether it is *de jure* or *de facto* is less important than the degree of command or authority exercised over one’s subordinates.”).

⁸⁶⁰ YIM Tith’s Appeal (Indictment) (D382/22), paras 182-186.

⁸⁶¹ YIM Tith’s Appeal (Indictment) (D382/22), para. 182; see Indictment (D382), including para. 365 (holding with extensive citations, that “[YIM Tith] chaired and convened meetings, with representatives from districts, communes, cooperatives, including militiamen and mobile units, where he gave instructions to those in attendance



International Judges further reject the view that the International Co-Investigating Judge erred by “fail[ing] to differentiate between the roles and actions” of YIM Tith and *Ta Mok* at the meetings;⁸⁶² while the distinction between YIM Tith and *Ta Mok* could be more salient in certain parts of the case,⁸⁶³ the International Judges observe that NOP Ngim imputed the behaviour onto both YIM Tith and *Ta Mok* in her own narrative and also detailed YIM Tith’s acts and conduct, where possible, as considered by the International Co-Investigating Judge. For example, NOP Ngim described YIM Tith and *Ta Mok* leading a meeting and both of them “instruct[ing] us to smash any enemy that opposed Angkar”.⁸⁶⁴ NOP Ngim pinpointed that YIM Tith, at the same gathering, specifically “talked about the overall situation in the Sector he was in charge of and the situations in the districts in his Sector. [YIM Tith] also advised the various district representatives in his Sector.”⁸⁶⁵ NOP Ngim further related that YIM Tith, at a meeting, himself: “encouraged us to manage our work smoothly, unite all of us and try to construct and develop the country.”⁸⁶⁶

336. The International Judges find that the International Co-Investigating Judge’s reliance on NOP Ngim—despite her revocation—is addressed and sufficiently reasoned.⁸⁶⁷ The International Judges are not persuaded by the Co-Lawyers’ argument that NOP Ngim, after the Letter of Assurance, “did not need to protect” herself.⁸⁶⁸ First, this rationale fails considering

on agricultural and security matters within the respective localities, and told them to report of enemy activities, “re-educate”, or “smash”. (citations omitted)). See also *infra* Ground 5.3(i).

⁸⁶² YIM Tith’s Appeal (Indictment) (D382/22), para. 182.

⁸⁶³ See, for example, Written Record of Interview of NOP Ngim, 7 May 2015, D219/298, at ERN (EN) 01111860-011118601 (A16) (“Q: In the meetings, did you and other attendees engage in conversation, writing report or joining in advising on issues concerning security affairs or engaging in how to treat people who were not honest with *Angkar* and the enemies of *Angkar*? A16: Yes, we did. We were advised to be vigilant regarding the enemies who could hide in our unit. At that time, *Ta Mok* and *Ta Tith* told us that if we saw the enemies first we had to warn them to change. If they did not change, we would have to take them to be killed. In the meetings, the data including the mortality rate and birth rate and production of transplant in each commune level was discussed. Sometimes, *Ta Mok* and *Ta Tith* ordered a representative of each commune and district to report on what happened in each commune and district.”).

⁸⁶⁴ Indictment (D382), para. 366, footnote 973 citing Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 01044684 (A56).

⁸⁶⁵ Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 01044683 (A55).

⁸⁶⁶ Written Record of Interview of NOP Ngim, 7 May 2015, D219/298, at ERN (EN) 01111860-01111861 (A15).

⁸⁶⁷ Indictment (D382), para. 366, (the International Judges find that a reasonable trier of fact may have similarly concluded, the Indictment holding, *inter alia*, with regard to the revocation that NOP Ngim: (1) “clearly intended to protect her own position”; (2) was “not credible in light of her previous detailed evidence”; and (3) a separate witness, NOP Ngim’s husband, corroborated NOP Ngim with his own separate account of how he had “accompanied her to five or six such meetings.”); the International Judges further remark that, within the Indictment, the International Co-Investigating Judge reasonably weighed the value and impact of letters of assurance, including how such instruments did not “necessarily render witnesses less reluctant to discuss event” and that his assessment of the credibility of witnesses was “determined on the substance of their testimony and in accordance with their possible involvement in alleged criminal conduct [as NOP Ngim may have been intertwined], notwithstanding that letters of assurance were given.” (Indictment (D382), para. 148).

⁸⁶⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 184.



that the Letter of Assurance was issued at the start, before NOP Ngim's first and second statement were provided.⁸⁶⁹ Second, the International Judges consider that a Letter of Assurance may guard against potential indictments at the ECCC with respect to NOP Ngim but may not address every concern including, *inter alia*, social ramifications within the community, fear for personal safety or that of family members.⁸⁷⁰

337. As to the visual impairment of NOP Ngim's husband, PREAP Kap, the Co-Lawyers contend that the International Co-Investigating Judge erred by failing to consider his deficient eyesight in evaluating PREAP Kap's function as a messenger.⁸⁷¹ To the contrary, the International Judges hold that the International Co-Investigating Judge surveyed in detail the visual limitations of PREAP Kap in connection to NOP Ngim and PREAP Kap's marriage ceremony (where YIM Tith was purportedly present).⁸⁷² Furthermore, PREAP Kap revealed how he was able to execute his tasks (assisting YIM Tith or his wife), including how YIM Tith sometimes "sent a messenger to tell me to go back home with him and some other times [YIM Tith] rode a motorbike to my place, and we returned home" and, on other occasions, PREAP Kap was traveling by a car, which belonged to District Economics.⁸⁷³ As to the 'contradictory' evidence that PREAP Kap knew "nothing related to [NOP Ngim's] work",⁸⁷⁴ the International Judges find that this distorts the proof as PREAP Kap described how he assisted his wife⁸⁷⁵ and acknowledged that he did not know anything pertaining to how NOP Ngim was sent to serve as Deputy Secretary of Samlaut District.⁸⁷⁶

338. The Co-Lawyers assert that the International Co-Investigating Judge was

⁸⁶⁹ The International Judges note the chronology of the investigation, including: (1) on 21 April 2014, the International Co-Investigating Judge issued the Letter of Assurance to NOP Ngim; (2) on 12 August 2014, the first interview with NOP Ngim took place; and (3) on 20 September 2016, the second interview with NOP Ngim transpired, where she revoked part of her earlier testimony. According to the logic of the Co-Lawyers, the issuance of the Letter of Assurance makes her first and second statement (with the revocation) potentially 'reliable', which would render the argument incoherent.

⁸⁷⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 184.

⁸⁷¹ YIM Tith's Appeal (Indictment) (D382/22), para. 184.

⁸⁷² Indictment (D382), para. 983 (for example, considering the visual capacity of this witness, in holding that PREAP Kap "remembers reading this letter, by holding it close to his eyes, despite being quite short-sighted and having to rely on his wife to guide him around otherwise.").

⁸⁷³ Written Record of Interview of PREAP Kap, 3 November 2014, D219/62, at ERN (EN) 01053914 (A62).

⁸⁷⁴ YIM Tith's Appeal (Indictment) (D382/22), para. 184.

⁸⁷⁵ Written Record of Interview of PREAP Kap, 3 November 2014, D219/62, at ERN (EN) 01053914 (A64-A65). ("After our marriage, she went with me as her husband. [...] I was not her messenger. I went with her to assist her, especially when she got sick.").

⁸⁷⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 185; *see* Written Record of Interview of PREAP Kap, 3 November 2014, D219/62, at ERN (EN) 01053913 (A60); moreover, the International Judges find no reviewable challenge in NOP Ngim not confirming PREAP Kap's role in accompanying her or in the alleged meeting between NOP Ngim and YIM Tith.



“misrepresenting” evidence in reference to NOP Ngim recalling that “the district received instructions, handwritten by [YIM Tith], from the sector”, especially considering her illiteracy.⁸⁷⁷ This is baseless. NOP Ngim explained that “[t]he instructions or reports that were sent from the Sector at the time were hand-written by *Uncle Tith*”⁸⁷⁸ and, subsequently, conveyed that she knew the relevant letter was authored by the Accused because “*Bang Leng* read the letter to her.”⁸⁷⁹

339. Finally, contrary to the conclusory assertions of the Co-Lawyers and as elucidated *supra*,⁸⁸⁰ the International Judges are not convinced that the International Co-Investigating Judge derogated from the foundational principle of *in dubio pro reo* nor that he erred or reached any “patently incorrect conclusions” in law or fact, which require intervention at the pre-trial stage.⁸⁸¹

340. Therefore, given the totality of the evidence and the failure of the Co-Lawyers to demonstrate any error, the International Judges find that the International Co-Investigating Judge did not err in reasonably concluding that YIM Tith exercised *de facto* authority and control over subordinates within Sector 1 at the relevant time. Accordingly, Ground 5.2(iii) is dismissed.

Ground 5.2(iv): Alleged Error in Finding that YIM Tith was the Secretary of Sector 3

1. Submissions

341. The Co-Lawyers submit that the International Co-Investigating Judge erred in finding

⁸⁷⁷ YIM Tith’s Appeal (Indictment) (D382/22), para. 186 *citing* Indictment (D382), para. 369.

⁸⁷⁸ Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 01044681 (A44).

⁸⁷⁹ Written Record of Interview of NOP Ngim, 12-14 August 2014, D118/285, at ERN (EN) 01044688 (A82) (“Q: In yesterday’s interview questions 44 and 45, you said that you received instructions from *Ta Tith*’s Sector 1. How did you know that because you were illiterate? A82: I knew that the instructions were from the Sector led by *Ta Tith*, because *Bang Leng* read it to me.”).

⁸⁸⁰ See *supra* Ground 5.1: The International Judges recall the earlier finding in these Considerations that “the International Co-Investigating Judge did not improperly use YIM Tith’s family relationship with *Ta Mok* as a basis or shortcut to impute *de facto* or *de jure* authority; rather, the Indictment relied upon various witnesses [...] who gave testimony to the role and responsibilities of YIM Tith personally.”; see also *supra* Ground 5 Evidentiary Considerations (holding that the stage of the proceedings affects the standard of evidence and that the applicable standard of proof in the issuance of closing orders is “the existence of sufficient evidence [...] of the charges”). See also Ground 5 Evidentiary Considerations (rejecting the Co-Lawyers’ argument that a Co-Investigating Judge is required to show that it is beyond reasonable doubt that the evidence inescapably reaches the level of probability, in effect combining aspects of the standard of proof applicable at the trial/appellate stage of proceedings with that applicable at the pre-trial stage.).

⁸⁸¹ YIM Tith’s Appeal (Indictment) (D382/22), paras 187-188.



that YIM Tith assumed the role of Secretary of Sector 3 in the second half of 1978, alleging that there is no evidence on the Case File that YIM Tith was appointed to this position.⁸⁸² MOUL Eng, the sole witness who heard of YIM Tith's presence in Sector 3 and whose exculpatory evidence was ignored, merely assumed that YIM Tith held this position,⁸⁸³ making it impossible for the International Co-Investigating Judge to conclude that YIM Tith held *de jure* or *de facto* authority in Sector 3.⁸⁸⁴

342. In addition, the International Co-Investigating Judge erred in finding that YIM Tith: (i) chaired meetings and appointed cadres in Sector 3 from June 1978 (misrepresenting IM An and KEO Phay's evidence);⁸⁸⁵ (ii) sent and received written communications relating to security and economy at the District level (alleging that none of the cited witnesses support this finding);⁸⁸⁶ and (iii) appointed individuals to roles within the administrative structure of Sector 3 (alleging that none of the cited witnesses support this finding and that he misrepresented KEO Phay's evidence).⁸⁸⁷ Moreover, the International Co-Investigating Judge relied on irrelevant and unreliable evidence of five witnesses (who did not positively identify YIM Tith, were never present at meetings with YIM Tith, or met him in Sector 3), leading to the erroneous conclusion that YIM Tith "held meetings where workers and district level cadres from Sector 3 were in attendance".⁸⁸⁸ The Co-Lawyers conclude that the International Co-Investigating Judge erred in law and fact in finding that YIM Tith assumed the role of Sector 3 Secretary, by failing to accurately assess witness statements and to provide reasoning for his reliance on certain evidence, thereby effecting a miscarriage of justice that requires the Pre-Trial Chamber to reverse the findings.⁸⁸⁹

343. In response, the International Co-Prosecutor submits that no reviewable error has been shown regarding YIM Tith's position as Sector 3 Secretary, arguing that the International Co-Investigating Judge relied on consistent and clear evidence from his subordinates and others.⁸⁹⁰ Moreover, whether the International Co-Investigating Judge was referring to a *de jure* or *de facto* role is irrelevant, given his findings that YIM Tith was chairing meetings,

⁸⁸² YIM Tith's Appeal (Indictment) (D382/22), paras 189, 196.

⁸⁸³ YIM Tith's Appeal (Indictment) (D382/22), paras 189, 195.

⁸⁸⁴ YIM Tith's Appeal (Indictment) (D382/22), para. 189.

⁸⁸⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 190.

⁸⁸⁶ YIM Tith's Appeal (Indictment) (D382/22), paras 191-192, 195.

⁸⁸⁷ YIM Tith's Appeal (Indictment) (D382/22), paras 191, 193, 195.

⁸⁸⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 194 referring to witness evidence of NOP Nan, KEO Phay, TEP Sien, CHUON Than and VY Phann.

⁸⁸⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 197.

⁸⁹⁰ International Co-Prosecutor's Response (Indictment) (D382/27), para. 112.



appointing cadres, liaising with districts regarding security and economic matters and visiting district offices.⁸⁹¹

344. In the International Co-Prosecutor's view, the Co-Lawyers selectively challenge the evidence relied upon, including MOUL Eng's evidence (omitting that he regularly communicated with and received orders from YIM Tith, and that he said YIM Tith had the power to make arrests, resolve security problems in the Sector and remove Northwest Zone cadres).⁸⁹² The International Co-Prosecutor also highlights evidence from TEP Sien (stating that YIM Tith appointed persons to village and commune committees),⁸⁹³ CHUON Than (recalling YIM Tith's instructions to "re-educate" and "smash" all "enemies"),⁸⁹⁴ and LOCH Eng,⁸⁹⁵ in rebuttal to the Co-Lawyers' claim that no evidence shows YIM Tith exercised authority as Sector 3 Secretary.⁸⁹⁶

2. Discussion

345. At the outset, the International Judges observe that the International Co-Investigating Judge did not make an explicit finding as to whether YIM Tith held a *de jure* position or exercised *de facto* authority in Sector 3. Nevertheless, the International Judges are unpersuaded by the Co-Lawyers' allegation that the International Co-Investigating Judge did not explain what the term "assume" means in terms of YIM Tith's role and responsibilities⁸⁹⁷ as the Indictment presents sufficient evidence that YIM Tith exercised his authority by giving instructions, appointing cadres and holding meetings in Sector 3.⁸⁹⁸

346. Turning to the specific factual challenges, the International Judges find unconvincing the Co-Lawyers' allegation that MOUL Eng merely assumed that YIM Tith held the position of Sector 3 Secretary.⁸⁹⁹ While MOUL Eng did not witness YIM Tith's appointment,⁹⁰⁰ he

⁸⁹¹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 113.

⁸⁹² International Co-Prosecutor's Response (Indictment) (D382/27), paras 114-115.

⁸⁹³ International Co-Prosecutor's Response (Indictment) (D382/27), para. 116.

⁸⁹⁴ International Co-Prosecutor's Response (Indictment) (D382/27), para. 117.

⁸⁹⁵ International Co-Prosecutor's Response (Indictment) (D382/27), para. 119.

⁸⁹⁶ International Co-Prosecutor's Response (Indictment) (D382/27), para. 118.

⁸⁹⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 189.

⁸⁹⁸ Indictment (D382), paras 372-376.

⁸⁹⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 189.

⁹⁰⁰ Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111833-01111834 (A68-A73) ("[YIM Tith] attended that meeting but he was not assigned any roles."), 01111838 (Q-A112).



learned of YIM Tith's role in his capacity as the Bavel District Secretary,⁹⁰¹ and through their direct interactions. MOUL Eng met YIM Tith on several occasions⁹⁰² and provided detailed and credible evidence of YIM Tith's visit to the Bavel District Office, where he inspected rice fields and other crops and gave instructions to fend off enemies.⁹⁰³ After Bavel District was ceded to Sector 3, MOUL Eng reported to YIM Tith⁹⁰⁴ and communicated with him through his messenger on a weekly or monthly basis about rice production and output issues or other crops.⁹⁰⁵ He received orders from YIM Tith,⁹⁰⁶ and stated that YIM Tith had the authority to make arrests and resolve security problems.⁹⁰⁷ MOUL Eng met YIM Tith one last time in November or early December 1978 when they discussed the evolving situation in the eastern part of the country.⁹⁰⁸

347. Although MOUL Eng expressed some uncertainty as to whether YIM Tith was appointed as Sector 3 or Sector 2 Secretary,⁹⁰⁹ he clearly recalled that Bavel District was ceded under YIM Tith.⁹¹⁰ Additional evidence in the Indictment corroborated that Bavel District was part of Sector 3, not Sector 2.⁹¹¹ Accordingly, the International Judges find no error in the International Co-Investigating Judge's reliance on the evidence of MOUL Eng in finding that YIM Tith was the Sector 3 Secretary.

348. Concerning the finding that YIM Tith chaired meetings attended by *Ta Chheng* and

⁹⁰¹ Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111831 (A42-A43) ("YIM Tith commanded Sector 3 [...]. Q: Did you learn YIM Tith was Sector 3 Secretary due to your position as the district chief? A43: Yes, I did.").

⁹⁰² Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111830-01111831 (A41) ("A41: [...] and the second meeting was with Sector 3 Secretary by the name of *Ta Tith* [...]. Previously, I had been in Sector 5. Subsequently, I was in Sector 3 since part of Sector 5 were ceded to be under *Ta Tith* [...] Bavel District was subsequently ceded to be under *Ta Tith*"), 01111832 (A53-A54) ("I had met him [YIM Tith] twice. [...] We met the first time when Bavel District was ceded to Sector 3. The second meeting was when he came to meet me at my place, the Bavel District Office"), 01111834 (A73), 01111836-01111837 (A99-A101).

⁹⁰³ Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111834-01111835 (A76, A79-A81).

⁹⁰⁴ Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111836 (A97) ("Later when Bavel District was ceded to Sector 3, I had to report to *Ta Tith* who was the Sector 3 Secretary.").

⁹⁰⁵ Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111836 (A98), 01111843-01111844 (A161-A163, A168-A171).

⁹⁰⁶ Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111844 (A174-A181).

⁹⁰⁷ Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111845 (A189-A194).

⁹⁰⁸ Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111836-01111837 (A99-A101).

⁹⁰⁹ Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111838 (A110) ("After spending last night recollecting this event, I am not certain if *Ta Tith* was appointed as Sector 3 or Sector 2 Secretary."), 01111843 (A158). *See also* YIM Tith's Appeal (Indictment) (D382/22), para. 189.

⁹¹⁰ Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111838 (A110) ("I recall clearly that Bavel District was ceded to be under YIM Tith"), 01111843 (A157-A158) ("The district under my control had been ceded to *Ta Tith* because I did not attend the meetings chaired by *Ta Chay* anymore").

⁹¹¹ Indictment (D382), para. 164, footnote 358.



appointed cadres in Sector 3 from as early as June 1978, the International Judges are not persuaded that the International Co-Investigating Judge misrepresented evidence of witnesses IM An and KEO Phay, as challenged.⁹¹² While their evidence offered only partial support for this finding,⁹¹³ specifically that *Ta Chheng* was the Secretary of Phnom Sampeou District (located in Sector 3),⁹¹⁴ the International Judges observe that the evidence cited in succeeding paragraphs supported that YIM Tith held meetings and appointed cadres within the administrative structure of Sector 3 from as early as June 1978.⁹¹⁵

349. Similarly, the finding that YIM Tith “sent and received written communications to the district level on matters relating to both security and the economy”,⁹¹⁶ was only partially supported under the specific citation by MOUL Eng’s evidence.⁹¹⁷ However, the finding that YIM Tith “communicated with the district level *via* written communications” was repeated in the following paragraph and supported with additional evidence there.⁹¹⁸ The International Judges therefore hold that, even though the organisation of the supporting evidence in this section of the Indictment was lacking in terms of its accuracy, the findings were supported by witness evidence cited throughout.

350. Turning to the Co-Lawyers’ claim that none of the six witnesses cited stated that “YIM Tith appointed people to positions within the administrative structure of Sector 3”,⁹¹⁹ the

⁹¹² YIM Tith’s Appeal (Indictment) (D382/22), para. 190 *referring to* Indictment (D382), para. 372, footnote 990.

⁹¹³ Indictment (D382), para. 372, footnote 990.

⁹¹⁴ Indictment (D382), para. 372, footnote 990 *referring to* Written Record of Interview of IM An, 28 May 2013, D118/66, at ERN (EN) 00954058 (Q13-A13) (“[*Ta Chham*] was sector committee until late 1977 when he was killed by POL Pot clique. I don’t know who replaced him as sector committee. *Chhēng* [...] became district committee at that time [...].”); Written Record of Interview of KEO Phay [KEO Phea], 2 September 2013, D118/94, at ERN (EN) 00967048 (A11) (“Phnum Sampov District Committee [Chief] was *Ta Chheng*, [...]”).

⁹¹⁵ See Indictment (D382), para. 374 (where the International Co-Investigating Judge finds that “YIM Tith, as [S]ecretary of Sector 3, appointed people to positions within the administrative structure of Sector 3” and “held meetings where workers and district level cadres from Sector 3 were in attendance, including at Phnom Sampeou Pagoda”. These findings are supported by several witnesses besides IM An and KEO Phay, such as TEP Sien and CHUON Than. The International Judges deal with specific challenges to these witnesses below.).

⁹¹⁶ YIM Tith’s Appeal (Indictment) (D382/22), paras 191-192 *referring to* Indictment (D382), para. 374 and footnote 997.

⁹¹⁷ Indictment (D382), para. 374 and footnote 997 *referring to* Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111844 (A173-A175) (“[YIM Tith] had stated in writing that it was imperative to produce three tons of rice [per hectare]”), 01111845 (A183, A190-A194) (“I immediately requested assistance from the sector army personnel. [...] If any issue happened in my district, I would have sought assistance from sector militia. [...] [the Sector Secretary] were in charge of the sector military affairs”).

⁹¹⁸ Indictment (D382), para. 376 *referring to* Written Record of Interview of MOUL Eng, 4 May 2015, D219/294, at ERN (EN) 01111843 (Q-A160-A164) (“Did your reports to these [sector echelon] cadres detail the sector’s worksites or battlefield situation? A161: Yes, they did. I reported all the worksite activities, crop production, construction as well as the cooperative situation to the Sector cadres. Q: Did you write these reports based on reports from the communes and cooperatives? A162: Yes, I did. I combined the reports from the commune chiefs in particular. [...] A163: These reports were prepared by a clerk. [...] A164: Trēn [...] was the clerk”).

⁹¹⁹ YIM Tith’s Appeal (Indictment) (D382/22), paras 193, 195.



International Judges observe that TEP Sien recalled attending a meeting where YIM Tith announced that he was in charge of the Sector and appointed people to be in charge of the village and commune committees.⁹²⁰ While TEP Sien was unable to recall whether Voat Kor Commune was located in Sector 1, 3 or 4,⁹²¹ he asserted that Voat Kor was under District Secretary *Ta Chheng* who was in charge of Phnom Sampeou District in Sector 3 (as supported by IM An and KEO Phay).⁹²²

351. Regarding the allegation that there is no evidence in KEO Phay's statements that YIM Tith personally appointed him to any position,⁹²³ the International Judges observe that the International Co-Investigating Judge merely relied on KEO Phay's evidence for the substance of a meeting at Phnom Sampeou, not for his appointment to any position.⁹²⁴

352. In addition, the International Judges are unpersuaded by the Co-Lawyers' claim that five out of six witnesses cited in support of the finding that YIM Tith held meetings where workers and district level cadres from Sector 3 were in attendance, are irrelevant or unreliable.⁹²⁵ First, the allegation that TEP Sien and CHUON Than "did not positively identify" YIM Tith is unpersuasive.⁹²⁶ TEP Sien attended a meeting where YIM Tith introduced himself and announced that he was in charge of the sector. Participants from various villages and communes were in attendance.⁹²⁷ The fact that TEP Sien did not know YIM Tith before his arrival to the Northwest Zone and only met him once,⁹²⁸ does not undermine the reliability of his account on the substance of the meeting or his ability to identify YIM Tith after he was

⁹²⁰ Written Record of Interview of TEP Sien, 13 August 2013, D118/87, at ERN (EN) 00976972-00976974 (A15, A20-A26, A28) ("*Ta Chheng* [...] was the district secretary [in Voat Kor Commune] [...] Q: Who was on the sector committee while you were working in Voat Kor Commune? A20: *Ta Tit* [...] was on the sector committee. [...] A22: When I arrived here, I was told to join a meeting in which there was an announcement of who were in charge of the sector and the district. [...] *Ta Tit* also attended the first meeting. [...] He said he was in charge of the sector. [...] In the meeting, he appointed the persons to be in charge of the village and commune committees, and he talked about rice farming in each respective village and commune.").

⁹²¹ Written Record of Interview of TEP Sien, 13 August 2013, D118/87, at ERN (EN) 00976971 (A7).

⁹²² Written Record of Interview of TEP Sien, 13 August 2013, D118/87, at ERN (EN) 00976972-0097697 (A15, A20-A22).

⁹²³ YIM Tith's Appeal (Indictment) (D382/22), para. 193 *referring to* Indictment (D382), para. 375.

⁹²⁴ Indictment (D382), footnote 997 *referring to* Written Record of Interview of KEO Phay [KEO Phea], 24 August 2016, D219/817, at ERN (EN) 01486572 (A35) ("They did not talk about enemies. They focused only on increasing production to reach three to five tonnes per hectare. They also talked about the Vietnamese entering the country. Even if they had talked about anything else, they would not have told me because they killed my uncle and nephew already. They did not let me get close to them.").

⁹²⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 194.

⁹²⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 194.

⁹²⁷ Written Record of Interview of TEP Sien, 13 August 2013, D118/87, at ERN (EN) 00976973-00976974 (A22-A26) ("Q: Did *Ta Tith* introduce himself? A26: He said he was in charge of the sector.").

⁹²⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 194.



introduced.

353. Similarly, CHUON Than explained that members of the Sector Committee, including YIM Tith, were introduced at meetings and he described YIM Tith's appearance.⁹²⁹ While CHUON Than was responsible for a mobile unit in Sector 1,⁹³⁰ he recalled attending a meeting at Phnom Sampeou Pagoda (Sector 3) with chairpersons of units, cooperatives, communes and districts.⁹³¹ At this meeting, CHUON Than saw YIM Tith⁹³² who discussed different topics such as enemy activities.⁹³³ While CHUON Than referred to YIM Tith as the "committee chairman of Sector 1,"⁹³⁴ the fact that YIM Tith held this meeting in Sector 3, and that representatives from both Sector 1 and 3 were in attendance,⁹³⁵ corroborates the finding that YIM Tith "held [the Sector 3] position [...] at the same time as serving as secretary of Sector 1".⁹³⁶ Moreover, while KEO Phay did not mention YIM Tith in connection with any meeting, his evidence is corroborative of *Ta Chheng's* position, and more generally that meetings were held at Phnom Sampeou.⁹³⁷

354. Additionally, while VY Phann's evidence relates to a meeting at Kang Hort Dam in Sector 1,⁹³⁸ *Ta Chheng's* presence and his statements on moral misconduct in Voat Kor commune (Sector 3)⁹³⁹ support that Sector 3 cadres were also present at meetings in Sector 1. Finally, the International Judges see no error in the International Co-Investigating Judge's

⁹²⁹ Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029379, 01029382 (A5, A18-A19).

⁹³⁰ Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029378-01029379 (A4).

⁹³¹ Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029381-01029382 (A16).

⁹³² Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029378-01029379 (A4) ("I was called to attend a meeting in Phnum Sampov [...] during which I saw *Ta Tith* [...], the committee chairman of Sector 1.").

⁹³³ Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029381-01029382 (A16-A17).

⁹³⁴ Written Record of Interview of CHUON Than, 26 May 2014, D118/245, at ERN (EN) 01029378-01029379 (A4); Written Record of Interview of CHUON Than, 4 September 2014, D118/299, at ERN (EN) 01044757 (A24).

⁹³⁵ Written Record of Interview of CHUON Than, 4 September 2014, D118/299, at ERN (EN) 01044756 (A22) ("As far [as] I know, they were from units, cooperatives, communes, and districts in Sectors 1 and 3. The meeting was attended by leaders of various units, villages, communes and districts. It was called a Joint Meeting.").

⁹³⁶ Indictment (D382), para. 372.

⁹³⁷ Written Record of Interview of KEO Phay [KEO Phea], 24 August 2016, D219/817, at ERN (EN) 01486572 (A33-A35).

⁹³⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 194.

⁹³⁹ Written Record of Interview of VY Phann, 18 November 2014, D219/85, at ERN (EN) 01061168, 01061170 (A3, A7) ("Those who spoke were *Ta Tith*, *Ta Pèt*, and *Ta Chhēng*. Chhēng reported activities that occurred in seven communes under his administration. [...] Chhēng talked about issues of moral misconduct and infidelity which had come up in two communes: Voat Kor [...]. While Chhēng was reporting this, *Ta Tith* and *Ta Pèt* were sitting, listening, and taking notes.").



reliance on NOP Nan, who heard that the meeting he attended upon his arrival in Battambang, was organised on the orders of *Ta* Mok and YIM Tith.⁹⁴⁰

355. Considering the above, the International Judges are not convinced that “the only witness relevant to the events in Sector 3 is M[OU]L En[g]”,⁹⁴¹ or that MOUL Eng’s purported exculpatory evidence was disregarded.⁹⁴² The International Judges hold that the Co-Lawyers fail to demonstrate any errors of fact in the findings underpinning YIM Tith’s position as Sector 3 Secretary, and moreover note the existence of additional evidence on the Case File.⁹⁴³ In concluding that YIM Tith held the role of Sector 3 Secretary from June 1978, the International Co-Investigating Judge relied on the witnesses, discussed above, who gave credible testimony to the role and responsibilities of YIM Tith, based on personal experience. The International Judges therefore hold that the International Co-Investigating Judge did not fail to accurately assess witness statements or provide reasoning, as alleged. Accordingly, Ground 5.2 (iv) is dismissed.

Ground 5.2(v): Alleged Error in Finding that YIM Tith was the Secretary of Sector 4

1. Submissions

356. The Co-Lawyers submit that the International Co-Investigating Judge erred in fact and law by finding that YIM Tith was appointed as Sector 4 Secretary in mid-1978.⁹⁴⁴ Basing this finding solely on LOCH Eng, the International Co-Investigating Judge failed to consider his and TUM Soeun’s contradictory and exculpatory evidence.⁹⁴⁵ For example, LOCH Eng’s statement that YIM Tith replaced *Ta* Rin conflicts with TUM Soeun’s evidence that *Ta* Rin was the Sector 5 Secretary until the end of the regime. Moreover, LOCH Eng subsequently changed his evidence, asserting that he did not know YIM Tith’s position well and only attended one meeting with him.⁹⁴⁶ In addition, the Co-Lawyers argue that no other evidence

⁹⁴⁰ Written Record of Interview of NOP Nan, 31 August 2013, D118/92, at ERN (EN) 00967027-00967028 (A11-A12).

⁹⁴¹ YIM Tith’s Appeal (Indictment) (D382/22), para. 195.

⁹⁴² YIM Tith’s Appeal (Indictment) (D382/22), para. 195.

⁹⁴³ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 119 referring to Written Record of Interview of LOCH Eng, 10 December 2015, D219/627, at ERN (EN) 01187741 (A12-A13) (“[*Ta* Tith] was on the sector committee in Beong Prey and Phnom Sampov. [...] [W]hen he arrived in Phnom Sampov, he was assigned to take charge of the sector.”), 01187743 (A30) (“He was in charge of many places. He was not in charge of only one place”).

⁹⁴⁴ YIM Tith’s Appeal (Indictment) (D382/22), paras 198-202.

⁹⁴⁵ YIM Tith’s Appeal (Indictment) (D382/22), paras 198-199.

⁹⁴⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 199.



exists of YIM Tith's presence in Sector 4, nor that he exercised his power in this capacity or visited any of the crime sites in the Sector.⁹⁴⁷

357. Finally, the Co-Lawyers aver that the International Co-Investigating Judge's failure to correctly assess witness statements, consider contradictory and exculpatory evidence, apply the standard of probability and *in dubio pro reo* (by failing to explain why the evidence was so persuasive that no reasonable trier of fact could have reached any other conclusion) effected a miscarriage of justice that requires the Pre-Trial Chamber to reverse the findings.⁹⁴⁸

358. In response, the International Co-Prosecutor submits that the Co-Lawyers failed to demonstrate any reviewable error in the finding that YIM Tith was Sector 4 Secretary in mid-1978.⁹⁴⁹ First, she asserts that the Co-Lawyers failed to identify contradictory evidence, neglecting to explain why LOCH Eng's evidence on who was the outgoing Sector 4 Secretary must be considered.⁹⁵⁰ Second, according to the International Co-Prosecutor, LOCH Eng knew YIM Tith's position by virtue of YIM Tith chairing meetings and this was also common knowledge in the area.⁹⁵¹ Third, LOCH Eng knew what YIM Tith's position encompassed and the powers he possessed, for example, affirming that YIM Tith managed the Sector and had the power to order militiamen to track cadres and civilians.⁹⁵² She also highlights additional evidence in the Case File regarding the power that YIM Tith exercised in Sector 4.⁹⁵³

2. Discussion

359. The International Judges observe that in finding that YIM Tith was the Secretary of Sector 4 from mid-1978, the International Co-Investigating Judge relied on the evidence of LOCH Eng in addition to supporting evidence that the former Sector 4 Secretary, *Ta Vung*, was sent to S-21 in approximately mid-1978.⁹⁵⁴ At the outset, the International Judges recall that "there is no legal requirement that a witness evidence on material facts needs to be corroborated by evidence from other sources" and that the "testimony of a single witness can

⁹⁴⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 200.

⁹⁴⁸ YIM Tith's Appeal (Indictment) (D382/22), paras 201-202.

⁹⁴⁹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 120.

⁹⁵⁰ International Co-Prosecutor's Response (Indictment) (D382/27), para. 121.

⁹⁵¹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 122.

⁹⁵² International Co-Prosecutor's Response (Indictment) (D382/27), para. 123.

⁹⁵³ International Co-Prosecutor's Response (Indictment) (D382/27), para. 123 referring to witnesses TOUCH Mary and LONH Lun.

⁹⁵⁴ Indictment (D382), para. 377.



establish a fact at issue where such evidence is sufficiently relevant and probative”.⁹⁵⁵

360. Regarding the factual challenges, the International Judges are unpersuaded by the Co-Lawyers’ allegation that the International Co-Investigating Judge failed to consider LOCH Eng’s allegedly contradictory and exculpatory evidence.⁹⁵⁶ The International Judges find that there are no material contradictions in LOCH Eng’s evidence as it pertains to YIM Tith’s position as Sector 4 Secretary and that he maintained consistent across his statements in asserting that YIM Tith was the Sector Committee Chief in the Boeng Prey Commune located in Doun Teav District (Sector 4).⁹⁵⁷

361. LOCH Eng explained that he learned of YIM Tith’s name approximately half a month after his arrival in Boeng Prey Commune in July 1978 and knew of YIM Tith’s position as the Sector Secretary because YIM Tith chaired meetings attended by the District and Commune Committee, and because LOCH Eng attended at least one of those meetings.⁹⁵⁸ LOCH Eng asserts that YIM Tith held these meetings in Boeng Prey Commune and although he never introduced himself “we all knew he was the Sector Committee [Chief]”.⁹⁵⁹ The International Judges consider that LOCH Eng’s acknowledgment that he found it hard to say what happened exactly because he was a new arrival, does not necessarily lessen the reliability of his evidence. Rather, the witness is forthcoming about events that he does not remember while maintaining that he knew that YIM Tith served on the Sector Committee throughout all his statements.⁹⁶⁰

⁹⁵⁵ See *supra* Ground 5 Evidentiary Considerations.

⁹⁵⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 199.

⁹⁵⁷ Written Record of Interview of LOCH Eng, 4 September 2013, D118/96, at ERN (EN) 00974060 (Q29-A29) (“When you came to work in Boeng Prey Commune, who was the Sector Committee [Chief]? A29: *Ta Tit* was the Sector Committee [Chief] at the time, but I did not know [who was] the Sector Deputy Chief or the members.”); Written Record of Interview of LOCH Eng, 10 December 2015, D219/627, at ERN (EN) 01187741-01187742 (A12) (“[YIM Tith] was on the sector committee in Beong Prey and Phnom Sampov”), (A18) (“I find it very hard to say what exactly happened because we were all just new arrivals there. I just know that when *Ta Tith* arrived, he served on the sector committee. I attended a meeting with him once.”), (A20) (“[YIM Tith] came and opened the meeting in Boeng Prey in late 1978”); Written Record of Interview of LOCH Eng, 8 December 2016, D219/884, at ERN (EN) 01476049 (Q3-A3, A13) (“[Y]ou said that when you arrived at Boeng Prey [...] Commune, the Sector Secretary was *Ta Tith* [...]. Do you still maintain this answer? A4: Yes, I do. [...] [YIM Tith] came here. We knew that he was the Sector Secretary. He managed it, but I forget the code name of that sector. He came there to manage the district.”).

⁹⁵⁸ Written Record of Interview of LOCH Eng, 4 September 2013, D118/96, at ERN (EN) 00974060 (A31) (“I knew because he chaired the meetings attended by the District Commune Committee [Chiefs], and I occasionally had meetings with him.”); Written Record of Interview of LOCH Eng, 10 December 2015, D219/627, at ERN (EN) 01187741-01187742 (A12, A18) (“I just know that when *Ta Tith* arrived, he served on the sector committee. I attended a meeting with him once.”).

⁹⁵⁹ Written Record of Interview of LOCH Eng, 4 September 2013, D118/96, at ERN (EN) 00974060 (A32-A33).

⁹⁶⁰ Written Record of Interview of LOCH Eng, 10 December 2015, D219/627, at ERN (EN) 01187741-01187742 (A18) (“I find it very hard to say what exactly happened because we were all just new arrivals there. I just know that when *Ta Tith* arrived, he served on the sector committee. I attended a meeting with him once.”).



362. As to the alleged contradictory evidence concerning *Ta Rin*,⁹⁶¹ the International Judges observe that the International Co-Investigating Judge found that YIM Tith replaced former Sector 4 Secretary *Ta Vung*⁹⁶² and thus did not rely on LOCH Eng's statement that "*Ta Tith* arrived and replaced *Ta Rin*".⁹⁶³ The International Judges recall that a reasonable trier of fact may accept certain parts of a witness's testimony and reject others.⁹⁶⁴ Moreover, the International Judges consider that whether or not *Ta Rin* remained Sector 5 Secretary until the end of the DK regime is immaterial to the evidence on YIM Tith's position in Sector 4 and observe that the Co-Lawyers misrepresent TUM Soeun's evidence,⁹⁶⁵ who does not state that *Ta Rin* remained Secretary until the end of the DK regime.⁹⁶⁶

363. Regarding the allegation that there is no evidence on the Case File that YIM Tith exercised his power as Sector 4 Secretary,⁹⁶⁷ the International Judges observe that LOCH Eng provides evidence of YIM Tith's exercise of authority, including that he chaired meetings where he ordered his subordinates to track cadres or ordinary people "who took irregular action" and to report it to the District,⁹⁶⁸ and that he managed the Sector.⁹⁶⁹ In addition, with regard to the allegation that the International Co-Investigating Judge failed to take into consideration his own finding that there is no evidence on the Case File that YIM Tith visited any of the crimes sites in Sector 4,⁹⁷⁰ the International Judges recall that an accused's presence at crime sites is not a prerequisite to establish authority or control over these sites.⁹⁷¹

364. In sum, while acknowledging that the evidence on Sector 4 is based almost exclusively on LOCH Eng's statements, the International Judges hold that the International Co-

⁹⁶¹ YIM Tith's Appeal (Indictment) (D382/22), para. 199.

⁹⁶² Indictment (D382), para. 377.

⁹⁶³ Written Record of Interview of LOCH Eng, 10 December 2015, D219/627, at ERN (EN) 01187741 (A13) ("*Tith* arrived in Phnom Sampov after me. I do not know what position he held when he was in the Southwest, but when he arrived in Phnom Sampov, he was assigned to take charge of the sector. Oh, I forget about *Ta Tith*; I just remember that *Ta Tith* arrived and replaced *Ta Rin*").

⁹⁶⁴ See *supra* Ground 5 Evidentiary Considerations.

⁹⁶⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 199 referring to Written Record of Interview of TUM Soeun, 16 October 2013, D119/65, at ERN (EN) 00966813 (A224).

⁹⁶⁶ Written Record of Interview of TUM Soeun, 16 October 2013, D119/65, at ERN (EN) 00966813 (A224) ("*Ta Chiel* [...] was replaced by *Ta Rin* [...] who was from the South West Zone.>").

⁹⁶⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 200.

⁹⁶⁸ Written Record of Interview of LOCH Eng, 4 September 2013, D118/96, at ERN (EN) 00974060 (A31-A35).

⁹⁶⁹ Written Record of Interview of LOCH Eng, 8 December 2016, D219/884, at ERN (EN) 01476049 (Q3-A3, A13) ("He came there to manage the district. We knew about this ourselves. Once in a while, he went to provide education at the worksites.>").

⁹⁷⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 200 referring to Indictment (D382), paras 869, 893, 920.

⁹⁷¹ See, e.g., Case 004/2 Considerations on Closing Order Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 513.



Investigating Judge's finding was not unreasonable. Accordingly, Ground 5.2(v) is dismissed.

**Ground 5.2(vi): Alleged Error in Finding that YIM Tith was a Member of the
Northwest Zone Committee**

1. Submissions

365. The Co-Lawyers submit that the International Co-Investigating Judge erred in law and fact by finding that YIM Tith was a member of the Northwest Zone Committee.⁹⁷² Firstly, the Co-Lawyers aver that there is no evidence on the Case File to support the assertion that YIM Tith was ever appointed to this position.⁹⁷³ The International Co-Investigating Judge erroneously relied on CHHEAN Hea and failed to consider other relevant and contradictory evidence from this witness, including his admission that he was too young to understand the positions held by certain individuals.⁹⁷⁴ Furthermore, LIM Tim's evidence is contradictory and was found unreliable by the International Co-Investigating Judge himself.⁹⁷⁵

366. Second, the International Co-Investigating Judge misrepresented evidence of HAN Thy, LIM Tim, HEM Moeun and PEOU Koeun as none of these witnesses support the finding that YIM Tith held a position on the Northwest Zone Committee or that YIM Tith was *de facto* second-in-command and *Ta Mok's* Deputy.⁹⁷⁶ Neither evidence of YIM Tith's family relationship with *Ta Mok*, nor the administrative organisation of the Northwest Zone,⁹⁷⁷ can attest to YIM Tith's *de jure* or *de facto* position.⁹⁷⁸

367. Third, the Co-Lawyers allege that the International Co-Investigating Judge failed to consider important exculpatory evidence regarding the position of Deputy Secretary in the Northwest Zone.⁹⁷⁹ The ECCC's "star witness" KAING Guek Eav, *alias* Duch, never mentioned YIM Tith in any of the available documents on Case File 004, indicating rather that Sarun was Deputy in January 1979.⁹⁸⁰ Timothy Carney's article, describing the structure of the

⁹⁷² YIM Tith's Appeal (Indictment) (D382/22), paras 203-215.

⁹⁷³ YIM Tith's Appeal (Indictment) (D382/22), paras 203-204.

⁹⁷⁴ YIM Tith's Appeal (Indictment) (D382/22), paras 205-206.

⁹⁷⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 207.

⁹⁷⁶ YIM Tith's Appeal (Indictment) (D382/22), paras 208, 214.

⁹⁷⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 209.

⁹⁷⁸ YIM Tith's Appeal (Indictment) (D382/22), paras 209, 214.

⁹⁷⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 209.

⁹⁸⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 210.



CPK, does not mention YIM Tith.⁹⁸¹ Finally, the Co-Lawyers submit that there is no evidence of YIM Tith exercising his power in these alleged positions.⁹⁸²

368. The International Co-Prosecutor responds that the Co-Lawyers have not demonstrated any reviewable error of law or fact in the finding that YIM Tith was a member of the Northwest Zone Committee and also the second most powerful person in the Zone after *Ta Mok*'s appointment as Northwest Zone Secretary.⁹⁸³ First, she considers that reliance on the evidence of CHHEAN Hea is justified, considering that his knowledge about YIM Tith's appointment is supported by other witness statements and circumstantial factors.⁹⁸⁴ Similarly, she rebuts the Co-Lawyers' assessment of LIM Tim's evidence.⁹⁸⁵ Second, in her view, the Co-Lawyers' reading of the evidence was piecemeal in that it disregarded important evidence from HAN Thy, PEOU Koeun, as well as indications of witness interference against HEM Moeun.⁹⁸⁶

369. Third, the International Co-Prosecutor submits that drawing parallels in evidence regarding YIM Tith's and *Ta Paet*'s Northwest Zone positions is permissible, particularly given consistent ECCC findings on the membership of a CPK Committee.⁹⁸⁷ Finally, she questions how Duch's evidence prevents the International Co-Investigating Judge from relying on the evidence of several witnesses who observed YIM Tith in the Northwest Zone and were informed that he was on the Committee, was *de facto* second-in-command of the Zone or was *Ta Mok*'s Deputy,⁹⁸⁸ including evidence not contested by the Co-Lawyers and other supporting evidence.⁹⁸⁹

2. Discussion

370. Under Ground 5.2(vi), the Co-Lawyers challenge the International Co-Investigating Judge's reliance on the evidence of certain witnesses in finding that YIM Tith was a member of the Northwest Zone Committee, as well as his alleged "preoccupation" with YIM Tith and

⁹⁸¹ YIM Tith's Appeal (Indictment) (D382/22), paras 211-212.

⁹⁸² YIM Tith's Appeal (Indictment) (D382/22), para. 213.

⁹⁸³ International Co-Prosecutor's Response (Indictment) (D382/27), para. 124.

⁹⁸⁴ International Co-Prosecutor's Response (Indictment) (D382/27), para. 125.

⁹⁸⁵ International Co-Prosecutor's Response (Indictment) (D382/27), para. 126.

⁹⁸⁶ International Co-Prosecutor's Response (Indictment) (D382/27), para. 127.

⁹⁸⁷ International Co-Prosecutor's Response (Indictment) (D382/27), para. 128.

⁹⁸⁸ International Co-Prosecutor's Response (Indictment) (D382/27), para. 129.

⁹⁸⁹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 129 referring to Indictment (D382), footnotes 1005, 1010.



Ta Mok's family association which "had a direct impact on his assessment of evidence."⁹⁹⁰ The International Judges will discuss these issues below.

371. First, as to the International Co-Investigating Judge's alleged reliance on YIM Tith and *Ta Mok's* family relationship, the International Judges refer to Ground 5.1 above, where they held that a close personal relationship "may serve as corroborative context supporting other evidence".⁹⁹¹ With regard to YIM Tith's position on the Northwest Zone Committee, the International Judges are not persuaded that the International Co-Investigating Judge reached a conclusion based exclusively on this family association or that this association had a direct adverse impact on his assessment of the evidence.⁹⁹²

372. Turning to the challenged factual findings, the International Judges are not convinced by the Co-Lawyers' allegation that there is no evidence on the Case File that YIM Tith was appointed as a member of the Northwest Zone Committee.⁹⁹³ CHHEAN Hea learned of YIM Tith's appointment to the Northwest Zone Committee through his close interactions with *Ta Paet* (member of the Northwest Zone Committee) as his bodyguard and messenger.⁹⁹⁴ While CHHEAN Hea did not personally attend meetings with YIM Tith and only saw him once,⁹⁹⁵ this does not impede him from providing probative evidence on YIM Tith's position. On the contrary, CHHEAN Hea explained that *Ta Paet* told him of YIM Tith's appointment to the Northwest Zone Committee during a meeting at Battambang University upon their return from this meeting.⁹⁹⁶ CHHEAN Hea's statement, in a later interview, that he did not know the military positions other leaders (*Ta Nhim* and *Ta Keu*) held because he was "still too young to

⁹⁹⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 203.

⁹⁹¹ See *supra* Ground 5 Evidentiary Considerations.

⁹⁹² YIM Tith's Appeal (Indictment) (D382/22), para. 203.

⁹⁹³ YIM Tith's Appeal (Indictment) (D382/22), para. 204.

⁹⁹⁴ Written Record of Interview of CHHEAN Hea, 13 October 2013, D118/136, at ERN (EN) 00969636-00969637 (A2-A3) ("I was a bodyguard and messenger of *Ta Pèt* [...] I was *Ta Pèt's* bodyguard and messenger until the Vietnamese almost arrived.").

⁹⁹⁵ Written Record of Interview of CHHEAN Hea, 13 October 2013, D118/136, at ERN (EN) 00969639 (A9) ("I never attended any meeting with *Ta Tit* because after *Ta Pèt* had been arrested, I escaped."); Written Record of Interview of CHHEAN Hea, 7 July 2014, D118/271, at ERN (EN) 01029420-01029421 (A25-A26) ("I was *Ta Pèt's* bodyguard and I always accompanied him to meet with *Ta Tith* when they needed to have meetings with one another, but I never attended those meetings. I met him in person only once, at Battambang University. At that time I was alongside *Ta Pèt* as his bodyguard.").

⁹⁹⁶ Written Record of Interview of CHHEAN Hea, 13 October 2013, D118/136, at ERN (EN) 00969639 (A13) ("I met [YIM Tith] once when he came to attend a meeting at Battambang University. *Ta Pèt* attended the meeting and while I was driving him back, he told me *Ta Tit* came to make an announcement and showed me the documents from the Centre which appointed him to be responsible for the Northwest Zone. *Ta Tit* announced that the Northwest Zone leaders were traitors as they were affiliated with the Vietnamese.").



understand these issues”⁹⁹⁷ does not lessen the reliability of his evidence concerning YIM Tith’s position, who he maintains was the close aide of *Ta Mok*.⁹⁹⁸

373. As to “a similar claim” made by LIM Tim,⁹⁹⁹ his evidence is not that YIM Tith was introduced as a member of the Northwest Zone Committee during a visit to the Kampong Kol Sugar Factory.¹⁰⁰⁰ Rather, this witness maintained that YIM Tith never visited the Sugar Factory,¹⁰⁰¹ and explained that he knew of YIM Tith’s position on the Northwest Zone Committee because he attended an assembly at Battambang University where YIM Tith was introduced as such.¹⁰⁰²

374. In addition, the Co-Lawyers unpersuasively argue that the International Co-Investigating Judge “found LIM Tim’s evidence unreliable”¹⁰⁰³ whereas this finding pertained solely to a specific part of his evidence. The International Judges recall that a fact-trier can “reasonably accept certain parts of a witness’s testimony and reject others” after having considered the whole of the testimony.¹⁰⁰⁴ Here, the International Co-Investigating Judge found LIM Tim’s evidence of arrests of Khmer Krom and/or Vietnamese at the Kampong Krol Sugar factory “too unreliable to base any specific conclusions on regarding the identity or number of the alleged victims”,¹⁰⁰⁵ but made no such finding of LIM Tim’s evidence on YIM Tith’s position on the Northwest Zone Committee. Nor did he find LIM Tim’s evidence generally unreliable.

375. The Co-Lawyers further allege that the International Co-Investigating Judge misrepresented evidence of HAN Thy, LIM Tim, HEM Moeun and PEOU Koeun in finding

⁹⁹⁷ Written Record of Interview of CHHEAN Hea, 7 July 2014, D118/271, at ERN (EN) 01029424 (Q45-A45) (“Q: Did you know which military positions *Ta Nhim* and *Ta Keu* held? A45: I have no comment to make because I was still too young to understand these issues.”).

⁹⁹⁸ Written Record of Interview of CHHEAN Hea, 13 October 2013, D118/136, at ERN (EN) 00969638 (A7) (“*Ta Mok* controlled the zone as a whole and *Ta Mok*’s close aide was *Ta Tit*”), 00969639 (A10) (“*Ta Tit* held a position in the Zone as well.”).

⁹⁹⁹ Indictment (D382), para. 384.

¹⁰⁰⁰ *Contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 207 (The Co-Lawyers allege that LIM Tim “provided evidence about a meeting in a sugar factory in mid-1978 where ‘*Ta Tith*’ was allegedly present and introduced as being on the Committee of the Northwest Zone” and that LIM Tim “later changed his statement and said that ‘*Ta Tith*’ ‘never visited the factory’.”).

¹⁰⁰¹ Written Record of Interview of LIM Tim, 24 September 2013, D118/108, at ERN (EN) 00976924 (A16) (“I knew *Ta Tit*; he was in charge of the Northwest Zone. He stayed in Battambang town, and he never came to the sugar factory. Only *Ta Mok* came to the factory.”).

¹⁰⁰² Written Record of Interview of LIM Tim, 24 September 2013, D118/108, at ERN (EN) 00976924 (A17-A18); Written Record of Interview of LOEM Tim [LIM Tim], 12 January 2016, D219/649, at ERN (EN) 01207436 (A37-A40), 01207438 (A48), 01207439 (A55).

¹⁰⁰³ YIM Tith’s Appeal (Indictment) (D382/22), para. 207.

¹⁰⁰⁴ *See supra* Ground 5 Evidentiary Considerations.

¹⁰⁰⁵ Indictment (D382), para. 741.



that YIM Tith held a position on the Northwest Zone Committee and was *de facto* second-in-command as well as Deputy to *Ta Mok*.¹⁰⁰⁶ The International Judges find these allegations unconvincing, especially in light of additional undisputed evidence cited in the Indictment and when assessing the evidence in a holistic manner.¹⁰⁰⁷ Nevertheless, the International Judges review the individual challenges to these witnesses below.

376. First, regarding a meeting attended by HAN Thy¹⁰⁰⁸ where YIM Tith announced that he was Chief of the Northwest Zone,¹⁰⁰⁹ although HAN Thy situated the meeting shortly before the arrival of the Vietnamese,¹⁰¹⁰ *Ta Paet*'s presence indicates that this meeting would have taken place earlier, as *Ta Paet* was arrested around August 1978.¹⁰¹¹ Although the exact timing of the meeting remains unclear, ultimately, the International Judges consider that the International Co-Investigating Judge's reliance on HAN Thy, for the content of the meeting, was reasonable and corroborative of other evidence.

377. Second, as discussed above, the International Co-Investigating Judge found a specific part of LIM Tim's evidence unreliable rather than the entirety of his statement or his evidence on YIM Tith's position.¹⁰¹² Third, HEM Moeun stated that he heard that *Ta Mok* made an announcement that YIM Tith was in charge of the Northwest Zone in his absence.¹⁰¹³

¹⁰⁰⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 208.

¹⁰⁰⁷ See, e.g., Indictment (D382), paras 380-382 referring to, e.g., Written Record of Interview of NUON Muon, 30 May 2013, D118/69, at ERN (EN) 00950727 (A14, A16) ("A14: The person who rose to replace him was *Ta Mok*, and *Ta Tith* became Deputy Chairman of *Ta Mok*'s Northwest Zone [...] Q: Why did you know that *Ta Tith* was Deputy of the Northwest Zone? A16: Because at the time there were only two high-ranking figures from the Southwest Zone – they were *Ta Mok* and *Ta Tith*, not anyone else."); Written Record of Interview of NHOEK Ly, 11 August 2013, D118/86, at ERN (EN) 00976962-00976963 (A20-A21) ("Later, after *Ta Koe* and *Ta Pèt* had been arrested, *Ta Mok* and *Ta Tit*, who had come from the Southwest, were in charge. [...] At the meeting, they announced that *Ta Nhim* had betrayed the party and colluded with the Vietnamese, and that *Ta Mok* and *Ta Tit* were to replace him because all the Northwest cadres had been arrested.").

¹⁰⁰⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 208 (The Co-Lawyers allege that "Han Thy saw 'Ta Tith' for the first time three days before the Vietnamese arrived.").

¹⁰⁰⁹ Written Record of Interview of HAN Thy, 21 May 2011, D20, at ERN (EN) 00710285-00710286 ("I once met [YIM Tith] during the opening of a meeting on determination to fight against the *Yvon* [...] *Ta Tith* said that he was Chief of the Northwest Zone.").

¹⁰¹⁰ Written Record of Interview of HAN Thy, 21 May 2011, D20, at ERN (EN) 00710286 ("Question: After the meeting, for how many days [had *Ta Paet*] escaped] prior to the Vietnamese's entry? Answer: The Vietnamese did make an entry, but I didn't know exactly [when he had escaped] – about three days earlier.").

¹⁰¹¹ Indictment (D382), para. 362.

¹⁰¹² See *supra* para. 374.

¹⁰¹³ Written Record of Interview of HEM Moeun, 21 November 2013, D118/150, at ERN (EN) 00975014-00975015 (A60-A61) ("In Battambang, *Ta Tit* ranked second after *Ta Mok*. *Ta Tit* was in charge of the Northwest Zone during *Ta Mok*'s absence. [...] Q: How did you know that *Ta Tit* was in charge of the Northwest Zone during *Ta Mok*'s absence? A61: Because *Ta Mok* made an announcement in front of the army that 'Ta Tit is in charge of the zone when I am absent.'"); Written Record of Interview of HEM Moeun, 3 April 2014, D118/222, at ERN (EN) 00988134 (A14) ("I heard this announcement about one week after I arrived in Battambang Province. [...] The meeting was held at a different place, not at my workplace; and I did not attend.").



Throughout his statements, HEM Moeun maintained consistency that he himself never attended the meeting where the announcement was made, nor did he ever state that he was present at any meeting with YIM Tith.¹⁰¹⁴

378. Contrary to the Co-Lawyers' allegation,¹⁰¹⁵ PEOU Koeun provided detailed evidence on YIM Tith's role in the Northwest Zone when asked specifically about YIM Tith, stating that *Ta* Keu announced that YIM Tith came to administer Battambang Province.¹⁰¹⁶ PEOU Koeun's later statement that he did not know who led the zone and sector "[u]nder the *Northeast Zone cadres*' control"¹⁰¹⁷ does not lessen the reliability of his prior evidence concerning YIM Tith's role. In addition, the International Judges hold that the fact that PEOU Koeun did not personally meet YIM Tith does not prevent him from providing evidence as to YIM Tith's position in the Northwest Zone.¹⁰¹⁸

379. Moreover, the International Judges observe that the Co-Lawyers fail to support their allegation that "the administrative organisation of the Northwest Zone" cannot attest to YIM Tith's *de jure* or *de facto* position.¹⁰¹⁹ Evidence that *Ta* Paet previously served as both Zone Committee Member and Sector 1 Secretary,¹⁰²⁰ would not on its own satisfy the "sufficient evidence" standard in support of a finding that YIM Tith also held these positions simultaneously. However, the International Co-Investigating Judge presented this evidence as merely one factor alongside individual witness statements attesting to YIM Tith's position on

¹⁰¹⁴ Written Record of Interview of HEM Moeun, 21 November 2013, D118/150, at ERN (EN) 00975015 (A61-A62) ("Ta Tith used to invite military commanders to the meetings on the university campus. I did not join the meetings though. I just guarded outside the meeting room. [...] Q: How many times did you join the meetings chaired by Ta Tith? A62: I never joined such meetings."); Written Record of Interview of HEM Moeun, 3 April 2014, D118/222, at ERN (EN) 00988134 (A14) ("I did not guard at the meeting place; I was guarding along the way [...] The meeting was held at a different place, not at my workplace; and I did not attend."); Case 002, Transcript of 2 August 2016 (HEM Moeun), D339.1.1, at ERN (EN) 01351805, p. 64.

¹⁰¹⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 208.

¹⁰¹⁶ Written Record of Interview of PEOU Koeun, 12 November 2014, D219/64, at ERN (EN) 01053949 (A27-A31) ("After the purge of the senior cadres here, Ta Tith arrived and administered here. Q: Did you know Ta Tith's position? A28: At the time, his position was Sector Committee. [...] Later Ta Tith administered the Northwest Zone as well. [...] A29: There was a meeting and a person subordinate to Ta Tith said, 'All of the leaders in Battambang Province were sent away to study. Comrade Tith controls Battambang Province.' [...] I attended two or three meetings. Ta Keu [...] made that announcement.").

¹⁰¹⁷ Written Record of Interview of PEOU Koeun, 3 February 2016, D219/682, at ERN (EN) 01216219 (A17) (emphasis added).

¹⁰¹⁸ Written Record of Interview of PEOU Koeun, 12 November 2014, D219/64, at ERN (EN) 01053949 (A31) ("I never met [YIM Tith]. In mid 1977, Ta Tith met with other senior cadres in Battambang City; then all those cadres left for different places. However, I heard the name Ta Tith.").

¹⁰¹⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 209.

¹⁰²⁰ Indictment (D382), para. 381.



the Northwest Zone Committee and as Secretary of Sector 1.¹⁰²¹ Accordingly, the International Judges see no error in the International Co-Investigating Judge's reliance on evidence of the CPK administrative structure combined with evidence that YIM Tith actually held these positions.

380. Similarly, the International Co-Investigating Judge did not unduly rely on YIM Tith's family association with *Ta Mok* or impute his acts to YIM Tith.¹⁰²² Rather, the findings are based on witness evidence recounting YIM Tith's authority, *inter alia*, that YIM Tith was appointed to the Northwest Zone Committee and that YIM Tith and *Ta Mok* co-chaired meetings together.¹⁰²³ The allegation that PECH Chim's evidence concerns the Southwest Zone only is unconvincing,¹⁰²⁴ as he explained that *Ta Mok*'s work extended to all zones.¹⁰²⁵ Furthermore, PECH Chim's statements alone are not determinative of the International Co-Investigating Judge's findings on YIM Tith's role.

381. Finally, the allegation that the International Co-Investigating Judge "failed to take into consideration important exculpatory evidence regarding the position of the [D]eputy [S]ecretary of the Northwest Zone"¹⁰²⁶ is without merit. The International Co-Investigating Judge clearly considered conflicting evidence on the third member of the Committee but found that this was of little consequence for the purposes of the Closing Order.¹⁰²⁷ The International Judges find that neither conflicting evidence on a third member of the Zone Committee, nor the fact that Duch or Timothy Carney's article do not mention YIM Tith,¹⁰²⁸ invalidates the International Co-Investigating Judge's finding on YIM Tith's position.

382. In line with the above analysis, the International Judges hold that the International Co-Investigating Judge did not err in finding that YIM Tith was a member of the Northwest Zone Committee from mid-1978 and that he was second-in-command to *Ta Mok* in this Zone. Accordingly Ground 5.2(vi) is dismissed.

¹⁰²¹ Indictment (D382), para. 380 *referring to* Written Record of Interview of NUON Muon, 30 May 2013, D118/69, at ERN (EN) 00950727 (A14-A17).

¹⁰²² YIM Tith's Appeal (Indictment) (D382/22), para. 209.

¹⁰²³ Indictment (D382), paras 380, 382-383 and footnotes 1004-1005, 1011-1013.

¹⁰²⁴ YIM Tith's Appeal (Indictment) (D382/22), para. 209 *referring to* Indictment (D382), para. 383.

¹⁰²⁵ Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000683-01000684 (A140-A142).

¹⁰²⁶ YIM Tith's Appeal (Indictment) (D382/22), paras 209-210.

¹⁰²⁷ Indictment (D382), para. 385.

¹⁰²⁸ YIM Tith's Appeal (Indictment) (D382/22), paras 210-211.



Ground 5.3(i): Alleged Error in Finding that YIM Tith Contributed to JCE A

1. Submissions

383. The Co-Lawyers argue that the International Co-Investigating Judge erred in finding that YIM Tith contributed to JCE A in the Northwest Zone from as early as 1976, despite the fact that the Indictment did not find that YIM Tith had *de jure* or *de facto* authority prior to his alleged appointments in June 1978. The International Co-Investigating Judge erred in law by exceeding the temporal scope of the investigation as he was not seised of YIM Tith's alleged criminal conduct in the Northwest Zone before mid-1977.¹⁰²⁹

384. First, regarding YIM Tith's alleged contributions to the establishment and operation of cooperatives and worksites in the Northwest Zone from the middle of 1976, the Co-Lawyers contend that the International Co-Investigating Judge erred in finding that YIM Tith "inspect[ed]" those sites and submit that he relied on uncorroborated evidence and failed to take into consideration contradictory and exculpatory evidence.¹⁰³⁰ In respect of the Kamping Puoy Worksite, the Co-Lawyers argue that the International Co-Investigating Judge: (i) did not charge YIM Tith for his alleged involvement in events at this site; (ii) was not seised of the crimes allegedly committed there;¹⁰³¹ (iii) relied on HUY Krim's evidence which concerned an event outside the temporal scope of the investigation;¹⁰³² and (iv) failed to take into account contradictory evidence.¹⁰³³

385. In addition, the Co-Lawyers submit that the International Co-Investigating Judge erred in finding that YIM Tith presided over meetings and study sessions at worksites, gave speeches and instructions, trained lower level cadres on construction and agriculture and "exhorted CPK

¹⁰²⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 222.

¹⁰³⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 223 *referring to* evidence from SORM Vanna (who stated that he worked at Kang Hort Dam Worksite but had never seen "Ta Tith", did not know his position, never saw him participate in meetings at Kang Hort Dam Worksite, and never saw him come to the worksite), CHHOEUNG Bean (who stated that "Ta Tith" started to come to Kang Hort Dam Worksite in May, June and July 1978 but then changed his evidence and said that he first saw "Ta Tith" in September 1978), and SAO Chobb (who claimed that he knew two people with the name "Ta Tith" but he was not able to distinguish between the two people in his evidence.).

¹⁰³¹ YIM Tith's Appeal (Indictment) (D382/22), para. 224.

¹⁰³² YIM Tith's Appeal (Indictment) (D382/22), para. 224.

¹⁰³³ YIM Tith's Appeal (Indictment) (D382/22), para. 225 (For example, the Co-Lawyers point to THEAM Robieb's (who worked at the Kamping Puoy Worksite) statement that he never heard of or saw YIM Tith inspecting the Kamping Puoy Worksite.).



economic policy” by failing to consider contradictory and exculpatory evidence.¹⁰³⁴ Similarly, the International Co-Investigating Judge erred in finding that YIM Tith contributed to the enforcement of strict discipline for workers, particularly at Kang Hort Dam Worksite, by relying solely on Civil Party applicant SORM Vanna and failing to account for the witness’ contradictory and exculpatory evidence.¹⁰³⁵

386. Moreover, the International Co-Investigating Judge’s findings concerning YIM Tith’s contributions to the establishment and operation of cooperatives and worksites in the Northwest Zone are contradicted by his finding that YIM Tith was not present in three out of the four investigated cooperatives and worksites.¹⁰³⁶ Finally, the Co-Lawyers contend that the International Co-Investigating Judge neither presented evidence of nor accounted for YIM Tith’s *mens rea* to commit crimes against humanity of imprisonment, enslavement and other inhumane acts.¹⁰³⁷

387. Second, regarding YIM Tith’s alleged contribution to the CPK policy on the re-education of “bad elements” and the killing of enemies, the Co-Lawyers argue that the International Co-Investigating Judge erred in finding that *Ta Mok* and YIM Tith selected and ordered Southwest Zone cadres to take control of the Northwest Zone between 1976 and 1978 and orchestrated purges from 1976 until the collapse of DK in January 1979.¹⁰³⁸ The Co-Lawyers contend that the documentary evidence cited by the International Co-Investigating Judge does not mention YIM Tith nor provides proof of his involvement in the purges.¹⁰³⁹ Moreover, the Co-Lawyers argue that none of the cited witnesses support the conclusion that YIM Tith assigned a small number of Southwest Zone cadres to work alongside Northwest Zone cadres in 1976¹⁰⁴⁰ or that YIM Tith in mid-1977 welcomed the Southwest Zone cadres

¹⁰³⁴ YIM Tith’s Appeal (Indictment) (D382/22), para. 227 *referring to* evidence allegedly contradicting the International Co-Investigating Judge’s finding that YIM Tith presided over meetings and study sessions at worksites, giving speeches and instructions and training lower level cadres on construction and agriculture from the middle of 1976 and exhorted CPK economic policy from LEK Phiv (who never positively identified YIM Tith or his role and LEK Phiv, who was present at the meetings with “Ta Tith” after the rainy season of 1978), DOS Doeum (whose evidence concerned a person named “Ta Tith” who was a Northwest Zone cadre in charge of Kanteu Muoy Commune in Banan District), CHUCH Punlork (who stated that the “Ta Tith” he knew did “farming like others”, worked like ordinary people, and was “not a leader of any kind”), and TIEP Tith (who allegedly attended one meeting where “Ta Tith” was present in January or February 1978 and did not positively identify YIM Tith and likely confused “Ta Tith” with Ta Paet.).

¹⁰³⁵ YIM Tith’s Appeal (Indictment) (D382/22), para. 228.

¹⁰³⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 229.

¹⁰³⁷ YIM Tith’s Appeal (Indictment) (D382/22), para. 230.

¹⁰³⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 232.

¹⁰³⁹ YIM Tith’s Appeal (Indictment) (D382/22), paras 232-234.

¹⁰⁴⁰ YIM Tith’s Appeal (Indictment) (D382/22), para. 235.



upon their arrival in Battambang and assigned them to replace cadres at various locations in the Northwest Zone.¹⁰⁴¹ In addition, the Co-Lawyers allege that some of the evidence cited by the International Co-Investigating Judge refers to the second half of 1978.¹⁰⁴²

388. Furthermore, the Co-Lawyers submit that the International Co-Investigating Judge failed to take into consideration relevant and contradictory evidence from HUON Choeum and erred in finding that YIM Tith was involved in the arrest of two unnamed battalion “chairmen” in charge of Kampong Kol Sugar Factory Worksite in mid-1977.¹⁰⁴³ Finally, they aver that the International Co-Investigating Judge neither presented evidence of nor accounted for YIM Tith’s *mens rea* to commit crimes against humanity of imprisonment, murder, extermination and other inhumane acts.¹⁰⁴⁴

389. Third, the Co-Lawyers argue that the International Co-Investigating Judge erred in finding that YIM Tith as part of his position in the Northwest Zone Committee, as Secretary of Sector 1 and Sector 4, and by his presence at one wedding ceremony held in August 1978, supported and contributed to the CPK policy on the regulation of marriage from at least 1977 until at least 1979.¹⁰⁴⁵ The International Co-Investigating Judge neither presented evidence of nor accounted for YIM Tith’s *mens rea* to commit the “crime against humanity of the regulation of marriage”.¹⁰⁴⁶ The Co-Lawyers argue that the International Co-Investigating Judge failed to explain how YIM Tith’s mere presence at one wedding in August 1978 amounted to a “significant contribution” to the policy of the regulation of marriage, as required by the law on JCE.¹⁰⁴⁷

¹⁰⁴¹ YIM Tith’s Appeal (Indictment) (D382/22), paras 236-237 (The Co-Lawyers point to YOUEM Kuonh (who arrived in Battambang in late 1978), PREAP Kap (who was blind at the time and never saw or heard about “Ta Tith” prior to his wedding on 20 August 1978 when his wife told him that “Ta Tith” attended their wedding ceremony), NOP Ngim (who came to the Northwest Zone in June 1978 and three months after she married PREAP Kap on 20 August 1978), and PEOU Koeun (who was a Northwest Zone soldier stationed at O Ta Krey from 1975 to late 1977, and he did not know any leaders who controlled zones and sectors, never met “Ta Tith”, and only heard his name, and did not know who were the leaders of the Northwest Zone when the Southwest Zone cadres arrived.)).

¹⁰⁴² YIM Tith’s Appeal (Indictment) (D382/22), para. 235.

¹⁰⁴³ YIM Tith’s Appeal (Indictment) (D382/22), para. 238 (The Co-Lawyers point to the fact that (i) HUON Choeum never worked at Kampong Kol Sugar Factory, never saw “Ta Tit” in person, and never heard about any other event involving “Ta Tit”; and (ii) HUON Choeum gave a 90-page statement to DC-Cam on 17 July 2006 where he did not mention “Ta Tit” but eight years later on 22 September 2013 after the International Co-Prosecutor’s Third Introductory Submission was illegally released to the public, he suddenly, 35 years after the end of DK regime, remembered that he had heard something about “Ta Tit”).

¹⁰⁴⁴ YIM Tith’s Appeal (Indictment) (D382/22), para. 239.

¹⁰⁴⁵ YIM Tith’s Appeal (Indictment) (D382/22), para. 241.

¹⁰⁴⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 241.

¹⁰⁴⁷ YIM Tith’s Appeal (Indictment) (D382/22), para. 242.



390. The Co-Lawyers conclude that no reasonable trier of fact could have found that YIM Tith, “from at least early 1977 until at least 6 January 1979”, contributed to: (i) the establishment and operation of cooperatives and worksites in the Northwest Zone; (ii) the CPK policy on the re-education of “bad elements” and the killing of “enemies”; and (iii) the CPK policy on the regulation of marriage. The Co-Lawyers aver that these findings were so unfair and unreasonable as to constitute an abuse of discretion.¹⁰⁴⁸

391. The International Co-Prosecutor responds that the Co-Lawyers fail to demonstrate any reviewable error of law or fact or an abuse of discretion in finding that YIM Tith likely significantly contributed to JCE A.¹⁰⁴⁹ Contrary to ECCC jurisprudence, the Co-Lawyers split JCE A into distinct constituent policies and implicitly suggest that a contribution has to be made to each crime within the common plan.¹⁰⁵⁰

392. First, the International Co-Prosecutor argues that the Co-Lawyers fail to undermine the finding that YIM Tith likely significantly contributed to JCE A through his involvement in the establishment and operation of cooperatives and worksites.¹⁰⁵¹ Regarding YIM Tith’s inspections of worksites, the Co-Lawyers: (i) overlook that the Case 004 investigation into seized allegations was not temporally limited in the Northwest Zone; (ii) disregard that evidence relating to Kamping Puoy Worksite is relevant to facts that are within the scope of investigation;¹⁰⁵² (iii) erroneously suggest that there needs to be more than one witness who saw YIM Tith at a site on the same occasion;¹⁰⁵³ (iv) mischaracterise witness evidence of YIM Tith’s presence at Kang Hort Dam Worksite;¹⁰⁵⁴ and (v) make unfounded assumptions about evidence that they claim “directly contradicts” HUY Krim’s evidence of YIM Tith’s visits to various worksites such as Kamping Puoy Worksite.¹⁰⁵⁵

393. Furthermore, regarding YIM Tith’s attendance at meetings and study sessions, the

¹⁰⁴⁸ YIM Tith’s Appeal (Indictment) (D382/22), paras 231, 240, 243.

¹⁰⁴⁹ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 130.

¹⁰⁵⁰ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 130.

¹⁰⁵¹ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 131.

¹⁰⁵² International Co-Prosecutor’s Response (Indictment) (D382/27), para. 132.

¹⁰⁵³ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 133.

¹⁰⁵⁴ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 133 (The International Co-Prosecutor points to SORM Vanna (who (i) saw YIM Tith crossing the Kang Hort Dam Worksite area where SORM Vanna worked to reach another area of the worksite, (ii) discussed the impact YIM Tith’s presence had on him and other labourers, and (iii) attended a meeting with YIM Tith and the worksite chairperson) and SAO Chobb (who (i) attending meetings with YIM Tith at Kang Hort Dam Worksite, (ii) stated that “Tith who is related to Ta Mok is the man whom I often worked with and went places with”, and (iii) observed first-hand that YIM Tith was in the Northwest Zone prior to the arrival of Southwest Zone cadres.)).

¹⁰⁵⁵ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 134.



International Co-Prosecutor argues that the Co-Lawyers fail to holistically assess the evidence and therefore mischaracterise it as “contradictory and exculpatory”.¹⁰⁵⁶ In addition, the finding that YIM Tith was involved in the enforcement of strict discipline is not merely based on SORM Vanna’s evidence, who in any event, had sufficient knowledge of YIM Tith’s presence at Kang Hort Dam Worksite.¹⁰⁵⁷

394. Second, the International Co-Prosecutor argues that the Co-Lawyers fail to demonstrate any reviewable error in the finding that YIM Tith was likely involved in the targeting of CPK enemies.¹⁰⁵⁸ The Co-Lawyers fail to address the key findings regarding YIM Tith’s implementation of CPK policies in the Northwest Zone,¹⁰⁵⁹ overlook evidence that YIM Tith went to the Northwest Zone with his forces and *Ta Mok* to take control of it,¹⁰⁶⁰ and omit key aspects of HOUN Choeum’s evidence regarding YIM Tith’s involvement in the arrest of Kampong Kol Sugar Factory Committee members.¹⁰⁶¹

395. Third, concerning YIM Tith’s involvement in forced marriages, the International Co-Prosecutor argues that the Co-Lawyers fail to explain how the evidence of YIM Tith’s statements and conduct, such as his attendance prior to a forced marriage ceremony, or the fact that the forced marriages happened after YIM Tith became *de jure* Sector Secretary, do not support the finding that he made a significant contribution to JCE A.¹⁰⁶²

396. Finally, the International Co-Prosecutor avers that the International Co-Investigating Judge addressed YIM Tith’s *mens rea* for all the crimes that arose from the implementation of JCE A.¹⁰⁶³

¹⁰⁵⁶ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 135 (The International Co-Prosecutor discusses the evidence of LEK Phiv (who was not certain of YIM Tith’s and *Ta Paet*’s role when they chaired meetings together but, after *Ta Paet*’s arrest, LEK Phiv knew that YIM Tith chaired the meetings as Sector 1 Secretary) and TIEP Tith (who did not “likely” confuse seeing YIM Tith for *Ta Paet* at a meeting at Kang Hort Dam Worksite because it occurred after *Ta Vanh*’s arrest in June 1977 but before *Ta Yan*’s arrest in September 1977 and TIEP Tith stated that he only heard of *Ta Paet* and never saw him.)).

¹⁰⁵⁷ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 136.

¹⁰⁵⁸ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 137.

¹⁰⁵⁹ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 137.

¹⁰⁶⁰ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 138.

¹⁰⁶¹ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 138 (The International Co-Prosecutor contends that (i) HOUN Choeum worked for the Northwest Zone military from mid-1976 to mid-1978 and learned from a zone soldier that YIM Tith “personally led his forces” to the factory, (ii) HOUN Choeum’s statement regarding *Ta Yan*’s appointment is supported by witnesses who worked at the factory, and (iii) DC-Cam never asked HOUN Choeum about his specific knowledge of YIM Tith or the sugar factory.).

¹⁰⁶² International Co-Prosecutor’s Response (Indictment) (D382/27), para. 139.

¹⁰⁶³ International Co-Prosecutor’s Response (Indictment) (D382/27), para. 140.



2. Discussion

397. The International Judges observe that YIM Tith is indicted for the crimes against humanity of imprisonment, murder, extermination, enslavement, other inhumane acts and persecution as part of “JCE A”. The common purpose of JCE A is defined by the International Co-Investigating Judge as the implementation of CPK policies concerning the establishment of worksites and cooperatives, purges against “enemies” and the regulation of marriage at specific sites in the Northwest Zone of DK. The locations include, in particular, the Kang Hort Dam Worksite, the Thipakdei Cooperative, the Kampong Prieng Commune and the Reang Kesei Commune.¹⁰⁶⁴

398. As a preliminary matter, the Indictment explicitly covers YIM Tith’s *mens rea* for the crimes committed as part of JCE A.¹⁰⁶⁵ The International Judges consequently reject the Co-Lawyers’ contention that the International Co-Investigating Judge neither presented evidence nor accounted for YIM Tith’s *mens rea* to commit (i) crimes against humanity of imprisonment, enslavement and other inhumane acts in relation to the establishment of worksites and cooperatives;¹⁰⁶⁶ (ii) crimes against humanity of imprisonment, murder, extermination and other inhumane acts concerning the purges;¹⁰⁶⁷ and (iii) the “crime against humanity of the regulation of marriage”.¹⁰⁶⁸

399. Furthermore, the International Judges affirm the International Co-Investigating Judge’s reliance on evidence of YIM Tith’s contribution to JCE A before YIM Tith’s formal appointment to *de jure* positions in the Northwest Zone. The Indictment explained that YIM Tith gradually familiarised himself with the Northwest Zone’s geography and the responsibilities of Sector 1 Secretaries by visiting worksites and attending meetings with Sector 1 Secretaries before he was formally appointed in June 1978.¹⁰⁶⁹ Consequently, the allegation

¹⁰⁶⁴ See Indictment (D382), para. 1016. The International Judges note that the scope of JCE A is limited to the following sites in the Northwest Zone: Koas Krala Security Centre, Thipakdei Cooperative (including at Wat Thipakdei Security Centre and Tuol Mtes Security Centre and Worksite), Kang Hort Dam Worksite, Banan Security Centre, Khnang Kou Security Centre, Kampong Kol Sugar Factory Worksite, Samlaut District, Phum Veal Security Centre, Svay Chrum Security Centre, Tuol Seh Nhauv Execution Site, Prey Krabau Execution Site, Wat Kirirum Security Centre, Wat Samdech Security Centre, Kampong Prieng Commune (including at Kach Rotheh, Thmei and Sala Trav villages and Wat Po Laingka/Kach Rotheh Security Centre), Reang Kesei Commune, Prison No. 8, Veal Bak Chunching Execution Site.

¹⁰⁶⁵ See Indictment (D382), paras 1019, 1021, 1022, 1024, 1040.

¹⁰⁶⁶ *Contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 230.

¹⁰⁶⁷ *Contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 239.

¹⁰⁶⁸ *Contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 241.

¹⁰⁶⁹ See Indictment (D382), paras 353-356 and footnotes 927, 931.



that the International Co-Investigating Judge did not find that YIM Tith held *de facto* authority in the Northwest Zone prior to June 1978 is unfounded.¹⁰⁷⁰ This body of evidence of YIM Tith contributing to the establishment and operation of cooperatives and worksites prior to his formal appointment to *de jure* positions in the Northwest Zone may be assessed.¹⁰⁷¹ The International Judges first examine this aspect of YIM Tith's contribution to JCE A. Afterwards, the International Judges will examine YIM Tith's role in the implementation of CPK policies concerning purges and, lastly, the regulation of marriage.

a. YIM Tith's Contribution to the Establishment and Operation of Cooperatives and Worksites

400. In the Indictment, the International Co-Investigating Judge found that YIM Tith made a significant contribution to the establishment and operation of cooperatives and worksites in the Northwest Zone.¹⁰⁷² The Co-Lawyers challenge the findings that YIM Tith participated in JCE A by (i) inspecting worksites and cooperatives; (ii) presiding over meetings and giving instructions on construction and agriculture; and (iii) participating in the enforcement of strict discipline for workers, particularly at Kang Hort Dam Worksite.¹⁰⁷³ The International Judges will examine each of these challenges in turn.

i. YIM Tith's Inspection of Worksites and Cooperatives in the Northwest Zone

401. The Co-Lawyers specifically contest the evidence supporting the finding that YIM Tith contributed to the establishment and operation of cooperatives and worksites by "inspecting" the sites from mid-1976.¹⁰⁷⁴ In particular, the Co-Lawyers challenge the evidence of SORM Vanna, CHHOUENG Bean and SAO Chobb. Upon review, the International Judges are not convinced by the Co-Lawyers' specific examples where contradictory or exculpatory evidence was supposedly disregarded.

¹⁰⁷⁰ *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 222; *see also* Indictment (D382), paras 353-356, 694-699, 994.

¹⁰⁷¹ With regards to the Co-Lawyers' argument concerning the temporal scope, the International Judges recall that, as found in Ground 3 *supra*, the temporal scope of YIM Tith's criminal charges in the Northwest Zone is from early 1977 until the end of DK. The International Judges also recall that evidence outside the temporal scope may be used for the exclusive purpose of assessing personal jurisdiction (although the evidence could not serve as a basis for criminal charges for trial). *See* Internal Rule 66*bis*(5).

¹⁰⁷² Indictment (D382), para. 1021.

¹⁰⁷³ YIM Tith's Appeal (Indictment) (D382/22), paras 222-231.

¹⁰⁷⁴ YIM Tith's Appeal (Indictment) (D382/22), para. 223.



402. First, the Co-Lawyers' contention that SORM Vanna (a worksite worker) never saw YIM Tith at the Kang Hort Dam Worksite fails. Instead, SORM Vanna stated that "we worked very hard whenever *we saw Ta Tith* approaching"¹⁰⁷⁵ and "when *Ta Tith* came to the worksite, he was always followed by three soldiers."¹⁰⁷⁶ Even if SORM Vanna did not know YIM Tith's exact title, he understood that YIM Tith was in a position of authority as he saw YIM Tith walk across his worksite towards the "worksite leader's place".¹⁰⁷⁷ In addition, SORM Vanna testified that "if we saw *Ta Tith* during daytime, people would disappear that night".¹⁰⁷⁸ The International Judges find no error in the Indictment's reliance on SORM Vanna's testimony in this regard.

403. Second, CHHOUENG Bean did not change his evidence as to when he first saw YIM Tith as alleged by the Co-Lawyers. Instead, CHHOUENG Bean confirmed in his statement that he first saw YIM Tith inspecting the Kang Hort Dam Worksite in May, June and July 1978 with *Ta Paet* (Sector 1 Secretary from mid-1977 until his arrest in mid-1978).¹⁰⁷⁹ Later in September 1978,¹⁰⁸⁰ when YIM Tith was on the Sector Committee, the witness saw him again chairing meetings at the Krala Peas Cooperative.¹⁰⁸¹ The witness further specified that a day before the meeting, he was told "*Ta Tith* who was on sector committee would come to be chair of the meeting".¹⁰⁸² The International Judges thus find no error in the Indictment's reliance on CHHOUENG Bean's testimony that YIM Tith inspected the Kang Hort Dam Worksite in mid-1978.

404. Third, contrary to the Co-Lawyers' challenge, SAO Chobb was able to make a clear distinction between the two individuals named "*Ta Tith*". SAO Chobb clarified that one was "an ordinary soldier and he behaved like others", while the other individual, with whom he

¹⁰⁷⁵ Written Record of Interview of SORM Vanna, 7 October 2014, D219/46, at ERN (EN) 01050674 (A43) (emphasis added).

¹⁰⁷⁶ Written Record of Interview of SORM Vanna, 7 October 2014, D219/46, at ERN (EN) 01050674 (A41).

¹⁰⁷⁷ Written Record of Interview of SORM Vanna, 7 October 2014, D219/46, at ERN (EN) 01050674-01050675 (A44).

¹⁰⁷⁸ Written Record of Interview of SORM Vanna, 7 October 2014, D219/46, at ERN (EN) 01050674 (A41).

¹⁰⁷⁹ Written Record of Interview of CHHOUENG Bean, 25 July 2015, D219/430, at ERN (EN) 01128723 (A121) ("He started coming to this worksite [Kang Hort Dam Worksite] from May, June and July 1978. First I saw *Ta Tith* with *Ta Paet* three times before *Ta Tith* started working on the sector committee. After that, I saw *Ta Tith* chairing the meetings at the cooperative").

¹⁰⁸⁰ Written Record of Interview of CHHOUENG Bean, 25 July 2015, D219/430, at ERN (EN) 01128720 (A98) ("In August 1978, I returned to my cooperative. In September, I saw him chairing a meeting in my cooperative").

¹⁰⁸¹ Written Record of Interview of CHHOUENG Bean, 25 July 2015, D219/430, at ERN (EN) 01128719 (A88) ("I saw him coming with *Ta Paet* three times before he served on the sector committee. Later, I saw *Ta Tith* presiding two meetings that took place at Krala Peas Cooperative").

¹⁰⁸² Written Record of Interview of CHHOUENG Bean, 25 July 2015, D219/430, at ERN (EN) 01128724 (A128).



often worked, “is related to *Ta Mok*”.¹⁰⁸³ The witness testified that he directly saw YIM Tith inspecting the Kang Hort Dam Worksite and the Tuol Mtes Worksite in the Northwest Zone from 1976 until 1977¹⁰⁸⁴ and only fled into the forest in 1978,¹⁰⁸⁵ and not in 1977 as alleged by the Co-Lawyers.¹⁰⁸⁶ The International Judges therefore see no error in the International Co-Investigating Judge’s finding that YIM Tith’s involvement in the establishment and administration of worksites and cooperatives in the Northwest Zone began as early as 1976.¹⁰⁸⁷

405. Finally, notwithstanding that corroboration is not *per se* required,¹⁰⁸⁸ from the evidence discussed above, the International Judges consider that there is corroborated evidence of YIM Tith “inspecting” worksites and cooperatives in the Northwest Zone, particularly with regards to his activities at Kang Hort Dam Worksite from 1976 until mid-1978.

406. Concerning the Co-Lawyers’ specific challenge regarding the Kamping Puoy Worksite, as a legal matter, the International Judges note that YIM Tith is not being charged for crimes at the Kamping Puoy Worksite, nor is the site included in the scope of JCE A.¹⁰⁸⁹ The International Judges hold that facts outside the scope of a judicial investigation may nevertheless be relied upon by the Co-Investigating Judges to the extent that they are relevant to facts within the scope of the case for the specific purpose of assessing the accused’s responsibility as part of the personal jurisdiction determination (although these outside facts could not serve as an independent basis for criminal charges for trial).¹⁰⁹⁰ Accordingly,

¹⁰⁸³ Written Record of Interview of SAO Chobb, 21 March 2017, D219/956, at ERN (EN) 01456265 (A10-A11).

¹⁰⁸⁴ Written Record of Interview of SAO Chorp, 17 May 2016, D219/763, at ERN (EN) 01337026 (A71) (“Q: In which year did you see *Ta Tit* in Kang-Hort? A71: In ’76 and ’77. At that time Kang-Hort Dam was built. He supervised the construction of the Kang-Hort Dam”); Written Record of Interview of SAO Chorp, 17 May 2016, D219/763, at ERN (EN) 01337036 (A146-A147) (“Q: Did you see *Ta Tit* inspecting Tuol Mtes construction site? A146: Yes, he did. Q: In which year? A147: In ’76-’77”).

¹⁰⁸⁵ Written Record of Interview of SAO Chobb, 29 April 2017, D219/983, at ERN (EN) 01519565-01519566 (A59, A61); Written Record of Interview of SAO Chorp, 17 May 2016, D219/763, at ERN (EN) 01337023 (A44); Written Record of Interview of SAO Chobb, 21 March 2017, D219/956, at ERN (EN) 01456270 (A64).

¹⁰⁸⁶ *Contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 223, footnote 658.

¹⁰⁸⁷ Indictment (D382), para. 400; *contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 223.

¹⁰⁸⁸ *Contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 223; *see generally supra* Ground 5 Evidentiary Considerations.

¹⁰⁸⁹ *See* Indictment (D382), paras 1012-1015. The International Judges note that the International Co-Investigating Judge was not seised of crimes allegedly committed at this specific worksite. *See* Third Introductory Submission (D1).

¹⁰⁹⁰ The International Judges stress that all the evidence available may be considered in assessing that YIM Tith falls within the Court’s personal jurisdiction as one of those “most responsible”. The Internal Rules confirm this conclusion. For example, Internal Rule 66*bis*(5), which allows the Co-Investigating Judges to terminate the judicial investigation concerning excluded facts, provides that excluded facts “shall not form the basis for charges against any person(s) named to be investigated in the relevant Introductory and/or Supplementary Submission(s). Evidence relating to the facts excluded from the scope of judicial investigation may however be relied upon by the Co-Investigating Judges and the parties to the extent it is relevant to the remaining facts.” This buttresses the notion that facts outside the scope of a judicial investigation may nevertheless be relied upon to the extent it is



evidence involving the Kamping Puoy Worksite can be assessed in determining whether YIM Tith falls within the ECCC's personal jurisdiction.

407. As an evidentiary matter, the Co-Lawyers correctly note that the International Co-Investigating Judge's conclusion that YIM Tith "inspected" the Kamping Puoy Worksite in 1977 is mainly based on the evidence of HUY Krim who allegedly watched a CPK film documenting YIM Tith "inspecting" the Kamping Puoy Worksite in 1976.¹⁰⁹¹ The International Judges, however, for the reasons stated above, reject the contention that HUY Krim's testimony should be disregarded for purportedly falling outside the temporal scope of the investigation.

408. In addition, the International Judges are not convinced that the International Co-Investigating Judge erred in assessing HUY Krim's evidence, including allegedly contradictory evidence from other witnesses.¹⁰⁹² First, the International Co-Investigating Judge acknowledged that although HUY Krim stated that he watched the film in 1976,¹⁰⁹³ the film was most likely shot in late 1977 or 1978 based on other evidence.¹⁰⁹⁴ For example, IM An stated that the construction of Kamping Puoy Worksite only began in "early 1977 and ended in late 1977".¹⁰⁹⁵ Second, the International Judges are not convinced that THEAM Robieb's

relevant to a determination of the accused's responsibility for strictly personal jurisdiction purposes, even as these outside facts could not serve as a basis for criminal charges for trial. *See also* ECCC Agreement, Art. 1 (defining "those who were most responsible" with reference to "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*." (emphasis added); ECCC Law, Art. 1 (same, referring to the entire period from 17 April 1975 to 6 January 1979).

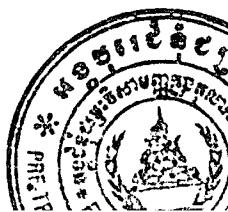
¹⁰⁹¹ Written Record of Interview of HUY Krim, 20 June 2013, D118/75, at ERN (EN) 00976618-00976619 (A29-A34). *See also* Written Record of Interview of TEA Nguon, 21 July 2015, D219/421, at ERN (EN) 01135109 (A13); Written Record of Interview of HUN Moeun, 28 January 2016, D219/667, at ERN (EN) 01204500 (A35). With regards to TEA Nguon's and HUN Moeun's evidence, the International Judges note that the International Co-Investigating Judge referred to these testimonies for the purpose of establishing the location of the Kamping Puoy Dam, and not to support the finding that YIM Tith inspected this specific worksite. *See* Written Record of Interview of TEA Nguon, 21 July 2015, D219/421, at ERN (EN) 01135115 (A39); Written Record of Interview of HUN Moeun, 28 January 2016, D219/667, at ERN (EN) 01204501 (A43).

¹⁰⁹² YIM Tith's Appeal (Indictment) (D382/22), para. 224.

¹⁰⁹³ Written Record of Interview of HUY Krim, 20 June 2013, D118/75, at ERN (EN) 00976619 (A34) ("I saw that movie only once, at the end of 1976, after the completion of the Ream Kun Basin construction").

¹⁰⁹⁴ Indictment (D382), para. 401; Written Record of Interview of THEAM Robieb, 1 February 2017, D219/914, at ERN (EN) 01517538 (A39-A40) ("Q: In which year was the film shot? A40: It was probably shot at the end of 1977 or in 1978.").

¹⁰⁹⁵ Written Record of Interview of IM An, 17 June 2008, D6.1.165, at ERN (EN) 00274160. *See also* Written Record of Interview of SAR Sarin, 5-6 May 2009, D219/882.1.3, at ERN (EN) 00739527-00739528 ("The visit [...] was concluded on 18 November 1976. [...] It was actually a Kamping Poy Dam [...] There was no dam yet"). *See also* Written Record of Interview of MOM Krath, 23 June 2016, D219/784, at ERN (EN) 01485068 (A49) ("In 1976 and 1977, we went to build Kamping Puoy Dam"). With regards to MOM Krath's evidence, the International Judges note that the International Co-Investigating Judge referred to this testimony for the purpose of establishing the time period of the construction of Kamping Puoy Dam, and not to support the finding that YIM Tith inspected this specific worksite. The witness' knowledge of YIM Tith (or lack thereof) is therefore without



evidence is contradictory.¹⁰⁹⁶ The witness, who was featured in the film and worked at Kamping Puoy in 1977 and 1978, stated that even though he never saw YIM Tith inspecting the worksite, there were two different construction sites at Kamping Puoy Worksite and that YIM Tith might have inspected the first one (Ta Kream) as the witness was working on the second site at that time.¹⁰⁹⁷ Moreover, THEAM Robieb stated that the workers were not allowed to approach senior officials forming part of the film crew and that they might have been at Ta Kream.¹⁰⁹⁸ Thus, THEAM Robieb's testimony does not necessarily contradict HUY Krim's evidence that YIM Tith inspected the Kamping Puoy Worksite.

409. Lastly, the Co-Lawyers point to the absence of YIM Tith's name or picture in the DK magazines found in the Case File to rebut HUY Krim's evidence.¹⁰⁹⁹ The International Judges, however, are not convinced that the Co-Lawyers' failure to identify YIM Tith in the available DK magazines can be a valid rebuttal to HUY Kim's detailed statement.¹¹⁰⁰ In any event, the International Judges do not consider that the International Co-Investigating Judge acted unreasonably in relying on HUY Krim's testimony, for the reasons expressed above and especially given the Indictment's reasoning concerning the temporal inconsistency.¹¹⁰¹

ii. YIM Tith's Meetings and Instructions on Construction and Agriculture

410. The Co-Lawyers highlight allegedly contradictory and exculpatory evidence from four witnesses cited in support of the International Co-Investigating Judge's finding that YIM Tith presided over meetings, gave instructions on construction and agriculture and "exhorted CPK economic policy" from the middle of 1976.¹¹⁰²

consequence. *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 225. See Written Record of Interview of MOM Krath, 23 June 2016, D219/784, at ERN (EN) 01485068 (A48) ("I have never heard of the [...] names YIM Tith [...]").

¹⁰⁹⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 225.

¹⁰⁹⁷ Written Record of Interview of THEAM Robieb, 1 February 2017, D219/914, at ERN (EN) 01517538 (A38).

¹⁰⁹⁸ Written Record of Interview of THEAM Robieb, 1 February 2017, D219/914, at ERN (EN) 01517538 (A42) ("They did not allow us to get close to them; we made our preparation far from them [...]. Probably the senior officials were at Ta Kream. Thus, I have no idea who the film crew were").

¹⁰⁹⁹ Written Record of Interview of HUY Krim, 20 June 2013, D118/75, at ERN (EN) 00976618-00976619 (A29-A31) ("Q: Do you remember what the magazine talked about? A29: It was talking about [him] and soldiers [coming] down to visit the railroads and the construction of dams, canals and the water basin at Ream Kun").

¹¹⁰⁰ Written Record of Interview of HUY Krim, 20 June 2013, D118/75, at ERN (EN) 00976618 (A27) ("I said that because the militiamen who came to collect palm juice at my place showed me a Democratic Kampuchea magazine in which there was a picture of Ta Tit").

¹¹⁰¹ The International Judges summarily dismiss the conclusory allegations found in paragraph 226 of the Appeal.

¹¹⁰² YIM Tith's Appeal (Indictment) (D382/22), para. 227 referring to LEK Phiv, DOS Doeun, CHUCH Punlork and TIEP Tith. The Co-Lawyers also refer to SORM Vanna's statement that he never saw YIM Tith participate



411. First, concerning SORM Vanna's allegedly exculpatory evidence¹¹⁰³ and CHUCH Punlork's statements that YIM Tith "did farming like others", "was working like ordinary people" and was "not a leader of any kind",¹¹⁰⁴ the International Judges note that both witnesses later provided differing evidence in subsequent interviews testifying on YIM Tith's attendance to meetings and provision of instructions on agricultural productivity.¹¹⁰⁵ The International Judges consider that the International Co-Investigating Judge's reliance on the latter statements is not unreasonable in light of the context and totality of the evidence.¹¹⁰⁶

412. Second, the International Judges observe that, while LEK Phiv (who was working as Chief of Phnom Thipakdei Cooperative in 1977) was not certain of YIM Tith's exact role in relation to *Ta Paet*, he clearly identified both YIM Tith and *Ta Paet* as being on the Sector 1 Committee in 1977 in his testimony.¹¹⁰⁷ Furthermore, LEK Phiv stated that YIM Tith took over *Ta Paet*'s role after *Ta Paet*'s disappearance during the rainy season of 1978, and became Sector 1 Secretary.¹¹⁰⁸ The witness relevantly testified that YIM Tith held meetings in late 1978 talking about "policies related to cultivation" and encouraging belief in the CPK.¹¹⁰⁹

413. Third, the International Judges are not convinced that DOS Doeun's statement—that YIM Tith was a Northwest Zone cadre in charge of Kanteu Muoy commune in Banan District—is contradictory.¹¹¹⁰ Instead, considering DOS Doeun's evidence as a whole, the

in meetings at Kang Hort Dam Worksite in an earlier paragraph. *See* YIM Tith's Appeal (Indictment) (D382/22), para. 223.

¹¹⁰³ Written Record of Interview of SORM Vanna, 7 October 2014, D219/46, at ERN (EN) 01050675 (A47) ("Q: In the four meetings that you attended in in Kanghot, did you ever hear that *Ta Tith* had participated in these meetings? A47: I never heard that.").

¹¹⁰⁴ Written Record of Interview of CHUCH Punlork, 22 May 2011, D22, at ERN (EN) 00707678.

¹¹⁰⁵ Written Record of Interview of SORM Vanna, 25 March 2015, D219/239, at ERN (EN) 01092951 (A13) ("They [YIM Tith and *Ta Sou*] said the revolutionary wheel was moving. If anyone was unable to reach it, they would be destroyed. In the big meeting there were many people. *Ta Tith* and *Ta Sou* told us about this through the microphone"); Written Record of Interview of CHUCH Punlork, 21 June 2013, D118/76, at ERN (EN) 00976629-00976630 (A42) ("Q: Did you ever attend a meeting with *Ta Tith*? A42: I attended a meeting with him at the worksite in Koul Ampil [...]. The chairperson was the chief of my worksite, but *Ta Tit* was invited to join and add some comments when necessary. He told us to help boots agricultural productivity for *Angkar*, and encouraged the people to work hard. I believed that *Ta Tit* might have held another position there").

¹¹⁰⁶ *See* Case 002/1 Appeal Judgment (F36), para. 357 ("The Supreme Court Chamber considers that, depending on the circumstances of the case, it is not generally unreasonable for a trial chamber to accept certain parts of a person's testimony while rejecting others"). *See generally supra* Ground 5 Evidentiary Considerations.

¹¹⁰⁷ Written Record of Interview of LEK Phiv, 20 March 2015, D219/236, at ERN (EN) 01092932 (A18), 01092930 (A1).

¹¹⁰⁸ Written Record of Interview of LEK Phiv, 4 March 2015, D219/210, at ERN (EN) 01088522 (A5-A6).

¹¹⁰⁹ Written Record of Interview of LEK Phiv, 4 March 2015, D219/210, at ERN (EN) 01088522-01088523 (A4-A8); Written Record of Interview of HAM Sorm, 20 November 2013, D118/149, at ERN (EN) 00974996 (A24-A25).

¹¹¹⁰ *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 227; Written Record of Interview of DOS Doeun, 16 July 2016, D219/797, at ERN (EN) 01337080 (A213).



International Judges note that the witness clearly referred to YIM Tith, affirming that YIM Tith had authority over Sector 1 worksites and was not removed after the Southwest Zone cadres arrived.¹¹¹¹ Accordingly, the International Co-Investigating Judge relevantly relied on DOS Doeun's testimony to establish that YIM Tith presided over meetings and gave instructions on construction in Banan District in 1976 or 1977.¹¹¹²

414. Finally, the allegation that TIEP Tith confused YIM Tith with *Ta Paet* is unfounded.¹¹¹³ While the witness stated that he saw YIM Tith only once in both of his testimonies,¹¹¹⁴ careful analysis of his statements reveals that he was in fact referring to two different meetings where YIM Tith was present. Indeed, one was held with *Ta Vanh* (Sector 1 Secretary from 1976 until mid-1977) during a General Assembly meeting, the other was held after *Ta Vanh*'s arrest at Kang Hort Dam Worksite in June 1977¹¹¹⁵ for a different agenda where YIM Tith gave his "impressions" on the opening of the worksite.¹¹¹⁶ In addition, the International Judges note that *Ta Paet* replaced *Ta Vanh* approximately in mid-1977 and was arrested later in August 1978.¹¹¹⁷ Accordingly, TIEP Tith already saw YIM Tith speaking with *Ta Vanh* at the General Assembly before his arrest and knew YIM Tith before *Ta Paet* became Sector 1 Secretary. The International Judges reject the claim that TIEP Tith "likely confused" YIM Tith with *Ta Paet*.¹¹¹⁸

415. In conclusion, the International Judges find that the International Co-Investigating Judge did not err in regards of the overall finding that YIM Tith presided over meetings and study sessions at worksites and cooperatives in furtherance of JCE A.¹¹¹⁹

¹¹¹¹ Written Record of Interview of DOS Doeun, 16 July 2016, D219/797, at ERN (EN) 01337081 (A215-A220); Written Record of Interview of DOS Doeun, 25 February 2016, D219/698, at ERN (EN) 01213451 (A49) ("Sometimes he [YIM Tith] was at Banan, and sometimes he was at Kanghat. He was walking around while people were digging canals"). See also Written Record of Interview of DOS Doeun, 25 February 2016, D219/698, at ERN (EN) 01213451 (A58).

¹¹¹² Indictment (D382), para. 405; Written Record of Interview of DOS Doeun, 25 February 2016, D219/698, at ERN (EN) 01213451 (A52-A56) ("Q: In which year was the meeting held? A56: It was held in 1976 or 1977. They held a meeting [in Banan District] to instruct people to dig canals.").

¹¹¹³ YIM Tith's Appeal (Indictment) (D382/22), para. 227.

¹¹¹⁴ Written Record of Interview of TIEP Tith, 19 August 2015, D219/464, at ERN (EN) 01151249 (A34); Written Record of Interview of TIEP Tith, 2 November 2013, D118/138, at ERN (EN) 00970098 (A37).

¹¹¹⁵ [Office of the Co-Investigating Judges] S-21 Prisoner List, D219/825.1.2, ERN (EN) 01222369.

¹¹¹⁶ Written Record of Interview of TIEP Tith, 19 August 2015, D219/464, at ERN (EN) 01151249 (A34-A38) ("The meeting was held at Kanghat Worksite [...] the meeting was held to open the worksite, and *Ta Tith* was invited to give his impressions").

¹¹¹⁷ [Office of the Co-Investigating Judges] S-21 Prisoner List, D219/825.1.2, ERN (EN) 01222369; Indictment (D382), paras 361-362.

¹¹¹⁸ *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 227.

¹¹¹⁹ Indictment (D382), paras 402-405.



iii. Enforcement of Strict Discipline

416. First, the Co-Lawyers submit that the International Co-Investigating Judge erred in finding that YIM Tith contributed to the enforcement of strict discipline for workers, particularly at Kang Hort Dam Worksite, by relying only on one witness, as well as disregarding contradictory and exculpatory evidence.¹¹²⁰ The International Judges reject the contention that the International Co-Investigating Judge relied solely on SORM Vanna's testimony,¹¹²¹ as he also referred to TOP Seung's testimony regarding YIM Tith's contribution to enforcement of discipline at the Kang Hort Dam Worksite.¹¹²² Moreover, the International Judges are not convinced that SORM Vanna's evidence is exculpatory and contradictory. The Co-Lawyers' contention that the witness never saw YIM Tith at the Kang Hort Dam Worksite fails. Instead, SORM Vanna stated that "we worked very hard whenever *we saw Ta Tith approaching*"¹¹²³ and "when *Ta Tith* came to the worksite, he was always followed by three soldiers."¹¹²⁴ Even if the witness did not know YIM Tith's exact title, SORM Vanna understood that YIM Tith was in a position of authority as the witness saw YIM Tith walk across his worksite towards the "worksite leader's place".¹¹²⁵ In addition, SORM Vanna testified that "if we saw *Ta Tith* during daytime, people would disappear that night".¹¹²⁶ The International Judges find no error in the Indictment's reliance on SORM Vanna's testimony in this regard. Furthermore, contrary to the Co-Lawyers' allegation,¹¹²⁷ the International Judges find that other evidence in the Case File supports YIM Tith's involvement in the enforcement of discipline for workers in the Northwest Zone.¹¹²⁸

¹¹²⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 228.

¹¹²¹ Indictment (D382), para. 407, footnotes 1078 and 1079 *referring to, inter alia*, Written Record of Interview of SORM Vanna, 25 March 2015, D219/239, at ERN (EN) 01092951 (A13) ("They [YIM Tith and *Ta Sou*] said the revolutionary wheel was moving. If anyone was unable to reach it, they would be destroyed."); Written Record of Interview of SORM Vanna, 17 October 2014, D219/46, at ERN (EN) 01050674 (A41) ("If we saw *Ta Tith* during daytime, people would disappear that night").

¹¹²² Indictment (D382), para. 408, footnote 1080 *referring to, inter alia*, Written Record of Interview of TOP Seung, 8 December 2014, D219/117, at ERN (EN) 01067719 (A152-A153) ("Every time after *Ta Tith* came to meet Ye, she always called a meeting to urge us to work harder" [...] "She said that if a person was frequently sick, we had to consider that as enemy activity").

¹¹²³ Written Record of Interview of SORM Vanna, 7 October 2014, D219/46, at ERN (EN) 01050674 (A43) (emphasis added).

¹¹²⁴ Written Record of Interview of SORM Vanna, 7 October 2014, D219/46, at ERN (EN) 01050674 (A41).

¹¹²⁵ Written Record of Interview of SORM Vanna, 7 October 2014, D219/46, at ERN (EN) 01050674-01050675 (A44).

¹¹²⁶ Written Record of Interview of SORM Vanna, 7 October 2014, D219/46, at ERN (EN) 01050674 (A41).

¹¹²⁷ *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 228.

¹¹²⁸ Written Record of Interview of DOS Doeun, 16 July 2016, D219/797, at ERN (EN) 01337081 (A218-A219) ("He [YIM Tith] walked around; he checked on those who were working". [...] "If anyone was lazy, they would be taken to be killed"); Written Record of Interview of PEOU Koeun, 12 November 2014, D219/64, at ERN (EN)



417. Second, with regards to YIM Tith's presence at Northwest Zone worksites, the International Judges recall that presence at crime sites is not a requirement for participation or contribution in a JCE.¹¹²⁹ Moreover, while the Co-Lawyers correctly note that the International Co-Investigating Judge could not find sufficient evidence to establish that YIM Tith visited Kampong Kol Sugar Factory,¹¹³⁰ Kampong Prieng or Reang Kerei,¹¹³¹ the Co-Lawyers' allegations regarding the Thipakdei Cooperative fail. Instead, the Indictment expressly highlighted that "[o]ne witness attended site inspections with Y[IM] Tith in Phnom Thipakdei Cooperative, including Tuol Mtes" and "[a]nother witness places Y[IM] Tith at a meeting at Tuol Mtes".¹¹³²

418. In conclusion, the International Co-Investigating Judge did not err in finding that YIM Tith significantly contributed to the enforcement of strict discipline for workers, particularly at Kang Hort Dam Worksite.¹¹³³

iv. Conclusion

419. In light of the findings that YIM Tith (i) inspected worksites and cooperatives in the Northwest Zone; (ii) held meetings and gave instructions on construction and agriculture; and (iii) contributed to the enforcement of strict discipline for workers, particularly at Kang Hort Dam Worksite, as examined above, the International Judges reject the Co-Lawyers' allegation that no reasonable trier of fact could have made the finding that YIM Tith significantly contributed to the establishment and operation of cooperatives and worksites in the Northwest

01053949 (A30) ("I heard from others that *Ta* Tith ordered *Ta* Kcu, 'If cotton cannot be grown, if grubs eat the cotton, then grubs will eat humans too.' After that, *Ta* Kcu tried to work very hard"); Written Record of Interview of SOK Cheat, 17 February 2016, D219/689, at ERN (EN) 01216244 (A17) ("At that time, *Ta* Tith was in charge. People were taken for re-education every day. It was in 1977, but I do not remember the month").

¹¹²⁹ ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005 ("*Kvočka* Appeal Judgment (ICTY)"), para. 112 ("The Appeals Chamber affirms that a co-perpetrator in a [JCE] need not physically commit any part of the *actus reus* of the crime involved. Nor is the participant in a [JCE] required to be physically present when and where the crime is being committed.").

¹¹³⁰ Indictment (D382), para. 746.

¹¹³¹ Indictment (D382), para. 920.

¹¹³² Indictment (D382), paras 650-651; Written Record of Interview of SAO Chorp, 17 May 2016, D219/763, at ERN (EN) 01337035 (A139) ("Q: When *Ta* Mok inspected Kang-Hort and Phom Thipakdei Cooperative, did *Ta* Tit go with *Ta* Mok? A139: We went there together after the meetings. They inspected the sites."); Written Record of Interview of LORM Len, 14 March 2017, D219/943, at ERN (EN) 01523946 (A29-A37) ("Q: Yesterday you stated that you saw *Ta* Tith during a meeting. Is that correct? A29: Yes I saw him during a meeting [...]. Q: Where was the meeting held? [...] A31: [...] they held that meeting at Tuol Mtes.").

¹¹³³ Indictment (D382), para. 406.



Zone from at least early 1977 until at least 6 January 1979.¹¹³⁴

b. YIM Tith's Contribution to the Purges and Targeting of Specific Groups

420. The Co-Lawyers challenge the findings that YIM Tith contributed to JCE A by (i) ordering the selection and deployment of Southwest Zone cadres between 1976 and 1978 to take control of the Northwest Zones, and assigning a small number of Southwest Zone cadres to work alongside Northwest cadres in 1976; (ii) welcoming in mid-1977 the Southwest Zone cadres upon their arrival in Battambang and assigning them to replace cadres at various locations in the Northwest Zone; and (iii) orchestrating the purges and killings in the Northwest Zone, including arresting two battalion “chairmen” in charge of Kampong Kol Sugar Factory Worksite. The International Judges will examine each of these challenges in turn.

i. YIM Tith's Involvement in the Selection, Deployment and Assignment of Southwest Zone Cadres to the Northwest Zone

421. First, with regards to YIM Tith ordering the selection and deployment of Southwest Zone cadres,¹¹³⁵ the International Judges find no error in the International Co-Investigating Judge's treatment of evidence concerning *Ta Mok* and YIM Tith's activities.¹¹³⁶ Relevantly, HEM Moeun (referred to as *Ta Mok's* nephew) testified that “*Ta Tit[h]* brought his forces from Takeo with *Ta Mok*. In Battambang, *Ta Tit[h]* ranked second after *Ta Mok*. *Ta Tit[h]* was in charge of the Northwest Zone during *Ta Mok's* absence” and explained that “[w]e were sent to the Northwest Zone because they wanted to get rid of the Northwest Zone cadres. Only the Southwest Zone cadres and soldiers were sent to take control over the Northwest Zone.”¹¹³⁷ The International Judges find that this account sufficiently demonstrates YIM Tith's role in the purges and his relation to *Ta Mok*. In addition, the lack of reference to YIM Tith in the CPK documents cited in the Indictment¹¹³⁸ does not constitute any error because the documents are referenced to support findings on CPK policy regarding the purge of the Northwest Zone before

¹¹³⁴ *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 231.

¹¹³⁵ Indictment (D382), para. 296.

¹¹³⁶ *See generally supra* Ground 5.1.

¹¹³⁷ Written Record of Interview of HEM Moeun, 21 November 2013, D118/150, at ERN (EN) 00975014-00975015 (A60).

¹¹³⁸ *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 233 referring to Indictment (D382), para. 295.



YIM Tith's arrival.¹¹³⁹

422. Second, the Co-Lawyers' contention that none of the witnesses cited by the International Co-Investigating Judge provided evidence that YIM Tith was involved in the purges is inapposite.¹¹⁴⁰ While most of the witnesses cited by the Co-Lawyers (except for HEM Moeun) had never heard of YIM Tith nor gave evidence relevant to his alleged involvement in the purges,¹¹⁴¹ the International Judges observe that the International Co-Investigating Judge cited these witnesses in the Indictment for findings other than those specifically on YIM Tith's involvement in the purges.¹¹⁴²

423. Lastly, concerning YIM Tith's assignment of a small number of Southwest Zone cadres to work alongside Northwest Zone cadres in 1976,¹¹⁴³ the International Judges find sufficient evidence to support the Indictment's finding. For instance, HUON Choeum's testimony expressly referred to YIM Tith and stated that he was among the first to organise the Southwest Zone cadre group in the Northwest Zone at the end of 1976.¹¹⁴⁴

ii. YIM Tith's Involvement in the Welcoming of Southwest Zone Cadres upon their Arrival in Battambang and in their Assignment to Replace Northwest Zone Cadres

424. The International Judges find that the International Co-Investigating Judge did not err in regards of the finding that beginning in mid-1977 before his formal appointment in the Northwest Zone, YIM Tith welcomed the Southwest Zone cadres in Battambang and assigned

¹¹³⁹ Indictment (D382), para. 295, footnote 743.

¹¹⁴⁰ *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 234.

¹¹⁴¹ YIM Tith's Appeal (Indictment) (D382/22), para. 234, footnote 698.

¹¹⁴² The International Judges note that the International Co-Investigating Judge mainly referred to such evidence for the purposes of depicting (i) the beginning of purges in the Northwest Zone under ROS Nhim's authority (Northwest Zone Secretary from 1975); (ii) the selection and deployment of Southwest Zone cadres on orders of Ta Mok; and (iii) the orchestration of purges of the Northwest Zone cadres by the Southwest Zone cadres generally, in the course of 1976 until January 1979. The Co-Lawyers confined their challenge here under paragraphs 295, 296 and 412 of the Indictment (D382), whereas the International Co-Investigating Judge's evidentiary basis for YIM Tith's involvement in the purges is described under paragraphs 413 to 426 of the Indictment (D382).

¹¹⁴³ Indictment (D382), para. 298.

¹¹⁴⁴ Written Record of Interview of HUON Choeum, 22 September 2013, D118/106, at ERN (EN) 00978419 (A12) ("[...] when the Southwest group first came to the Northwest Zone, they did not make any arrests-they monitored the Northwest group. I think Ta Mok and Ta Tit were the first ones to organize this Northwest Zone [...]"); Written Record of Interview of HUON Choeum, 22 September 2013, D118/106, at ERN (EN) 00978424 (A39) ("Q: In what year did the Southwest people first come? A39: They first came at the end of 1976, and they used this ruse- their leadership said that they would be leaving their men for education because they had committed wrongdoing in the Southwest Zone; but in fact, those men had come to investigate").



them to replace cadres in the Northwest Zone.¹¹⁴⁵ In particular, it rejects the submission that none of the four witnesses cited by the International Co-Investigating Judge supports the finding or specifically mentions YIM Tith or “*Ta Tith*”.

425. Concerning YIM Tith’s role in welcoming Southwest Zone cadres and assigning them to replace Northwest cadres in mid-1977,¹¹⁴⁶ the International Judges observe that one of the four witnesses cited by the International Co-Investigating Judge explicitly supports this finding. While (i) PREAP Kap was welcomed by *Ta Mok* in Battambang in August 1978;¹¹⁴⁷ (ii) YOEM Kuonh was welcomed by YIM Tith in Battambang in late 1978;¹¹⁴⁸ and (iii) NOP Nan was assigned with other Southwest Zone workers to work in the Northwest Zone “on orders of *Ta Mok* and *Ta Tith*” upon his arrival in Battambang in May or June 1978,¹¹⁴⁹ PEOU Koeun stated that “I never met him. In mid-1977, *Ta Tith* met with other senior cadres in Battambang City, then all those cadres left for different places. However, I heard the name *Ta Tith*.”¹¹⁵⁰ Furthermore, contrary to the Co-Lawyers’ allegation that PEOU Koeun did not know any leaders who controlled zones and sectors,¹¹⁵¹ the witness clearly identified YIM Tith as being on the Sector 1 Committee after the purges of senior cadres in 1977 and testified that YIM Tith later “administered the Northwest Zone”.¹¹⁵²

iii. YIM Tith’s Involvement in the Northwest Zone Purges and the Arrest of Two Battalion Chairmen in Charge of Kampong Kol Sugar Factory Worksite

426. The International Judges find insufficient evidence as to YIM Tith’s involvement in the arrest of two battalion “chairmen” in charge of Kampong Kol Sugar Factory.¹¹⁵³ However, the International Co-Investigating Judge did not explicitly find that YIM Tith was involved in the

¹¹⁴⁵ Indictment (D382), para. 299.

¹¹⁴⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 236.

¹¹⁴⁷ Written Record of Interview of PREAP Kap, 3 November 2014, D219/62, at ERN (EN) 01053908 (A32, A35).

¹¹⁴⁸ Written Record of Interview of YOEM Kuonh, 24 January 2017, D219/904, at ERN (EN) 01517498 (A47), 01517499-01517500 (A70, A71).

¹¹⁴⁹ Written Record of Interview of NOP Nan, 31 August 2013, D118/92, at ERN (EN) 00967025, 00967027 (A3, A11). The International Judges note that the Co-Lawyers incorrectly challenged the Written Record of Interview of NOP *Ngim* (PREAP Kap’s wife), whereas the International Co-Investigating Judge referred to the testimony of NOP *Nan*. See Indictment (D382) para. 299, footnote 758; YIM Tith’s Appeal (Indictment) (D382/22), para. 236, footnote 713.

¹¹⁵⁰ Written Record of Interview of PEOU Koeun, 12 November 2014, D219/64, at ERN (EN) 01053949 (A31).

¹¹⁵¹ YIM Tith’s Appeal (Indictment) (D382/22), para. 236, footnote 716 referring to Written Record of Interview of PEOU Koeun, 3 February 2016, D219/682, at ERN (EN) 01216218-01216219 (A17-A19).

¹¹⁵² Written Record of Interview of PEOU Koeun, 12 November 2014, D219/64, at ERN (EN) 01053949 (A27-A29).

¹¹⁵³ YIM Tith’s Appeal (Indictment) (D382/22), para. 238.



purge of the two battalion secretaries. In the Indictment, the International Co-Investigating Judge introduced the content of HUON Choeum's anonymous hearsay testimony and acknowledged the limited probative value of the evidence.¹¹⁵⁴ Moreover, the reference to HUON Choeum's evidence regarding Kampong Kol Sugar Factory in the Indictment was not a decisive factor in establishing YIM Tith's contribution to the purges in the wider Northwest Zone, given the fact that YIM Tith was not indicted for the purge in Kampong Kol Sugar Factory Worksite regarding the two battalion "chairmen",¹¹⁵⁵ and the International Co-Investigating Judge acknowledged that there is no reliable evidence that YIM Tith visited the Kampong Kol Sugar Factory Worksite while *Ta Mok* was a regular visitor.¹¹⁵⁶

427. Notwithstanding the foregoing, the International Judges can find sufficient evidence supporting YIM Tith's significant contribution to the CPK policy on killing enemies, both inside and outside CPK ranks, apart from HUON Choeum's evidence.¹¹⁵⁷ Concerning the purge of Northwest Zone people inside the CPK ranks, CHHEAN Hea affirmed that during a meeting YIM Tith announced that "the Northwest Zone leaders were traitors as they were affiliated with the Vietnamese".¹¹⁵⁸ NANG Ny (a mobile unit worker at Kang Hort Dam Worksite) similarly testified that YIM Tith expressly stated that Northwest cadres had "Khmer bodies with Yuon heads".¹¹⁵⁹ SAO Chobb also explained that YIM Tith specifically assigned the Southwest cadres to search and arrest "CIA agents" and Vietnamese within the Northwest group.¹¹⁶⁰ Other evidence establishes that YIM Tith participated in the purges with arrests of Northwest Zone cadres at the zone, sector and cooperative levels.¹¹⁶¹ Moreover, the

¹¹⁵⁴ Indictment (D382), para. 418 ("This witness does not state when this incident occurred or when he heard about it.").

¹¹⁵⁵ See Indictment (D382), p. 480 ("political persecution of the Northwest Zone cadres" not charged for Kampong Kol Sugar Factory Worksite); see also Indictment (D382), para. 743.

¹¹⁵⁶ See Indictment (D382), para. 746 (emphasis added). See also Written Record of Interview of LIM Tim, 24 September 2013, D118/108, at ERN (EN) 00976924 (A16) ("I knew *Ta Tit*; he was in charge of the Northwest Zone. He stayed in Battambang town, and he never came to the sugar factory. Only *Ta Mok* came to the factory.").

¹¹⁵⁷ *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 240. See Indictment (D382), paras 413-426.

¹¹⁵⁸ Written Record of Interview of CHHEAN Hea, 30 October 2013, D118/136, at ERN (EN) 00969639 (A13).

¹¹⁵⁹ Written Record of Interview of NANG Ny, 23 June 2013, D118/77, at ERN (EN) 00970456 (A30) ("[*Ta Tit*] said that the Northwest group had "Khmer bodies with Yuon Heads". They accused them of collaborating with Vietnam. That was why they arrested and killed the Northwest cadres. When the Southwest group had taken complete control of this Sector, they arrested and killed the Northwest cadres such as the Mobile Units and the Cooperative Chairman and took them away for execution in Baydamran Village, Baydamran Commune.").

¹¹⁶⁰ Written Record of Interview of SAO Chabb, 28 April 2017, D219/982, at ERN (EN) 01517552 (A33) ("The killings took place from 1975 until 1977 when the Southwest Zone cadres arrived. In 1976 and 1977, *Ta Tith* assigned them to search for the CIA agents and Vietnamese. The searches and arrests took place continuously until the arrival of the Southwest Zone cadres.").

¹¹⁶¹ Written Record of Interview of NUON Muon, 15 February 2012, D105/3, at ERN (EN) 00787176 (A33-A34) ("I heard that both *Ta Mok* and *Ta Tith* were from the Southwest Zone and that they arrested all the Northwest Zone cadres from the Zone level down to the Sector level, all the way through the cooperative level. Q: Were the arrests made under the authority of *Ta Mok* and *Ta Tith*? A34: Yes.").



International Judges note that YIM Tith's involvement in the purges also extended to the general population.¹¹⁶² For example, NOP Ngim (Deputy Secretary of Samlaut District) explained that during a meeting in 1978, YIM Tith specifically instructed her and other cadres to "smash" any enemy opposed to the CPK regime.¹¹⁶³ Furthermore, YIM Tith directly told her that in the event "enemies" refused to change, they "would have to take them to be killed".¹¹⁶⁴

428. Consequently, while the International Judges consider that the evidence is insufficient to establish that YIM Tith was involved in the arrest of two battalion "chairmen" in charge of Kampong Kol Sugar Factory in mid-1977, they however uphold the remaining finding of his involvement in the Northwest Zone purges. The International Judges find that the International Co-Investigating Judge did not act unreasonably in finding that YIM Tith supported and contributed significantly to the CPK policy on the re-education of so-called "bad elements" and the killing of enemies both inside and outside the CPK ranks.

c. YIM Tith's Contribution to the Regulation of Marriage

429. In the Indictment, the International Co-Investigating Judge found that YIM Tith made a significant contribution to the CPK policy on the regulation of marriage.¹¹⁶⁵ The International Judges note that the International Co-Investigating Judge's finding is based on one wedding account supported by a witness couple, NOP Ngim and PREAP Kap (a disabled soldier). The Co-Lawyers contend that YIM Tith's "mere presence" at one wedding ceremony in Samlaut District in Battambang in August 1978 cannot amount to a significant contribution to a JCE.¹¹⁶⁶

430. The International Judges find the above contention unpersuasive. In the view of the International Judges, YIM Tith was not "merely present" but made active contributions to the

¹¹⁶² See Indictment (D382), paras 413-426. See, e.g., Written Record of Interview of SOK Cheat, 17 February 2016, D219/689, at ERN (EN) 01216248 (A54) ("Q: Do you know why those people were taken to be re-educated? A54: That's because they broke yokes, tore their earth buckets, broke hoe handles or made small complaints. They were accused of being the enemies and therefore taken to be re-educated for such small things").

¹¹⁶³ Written Record of Interview of NOP Ngim, 12 August 2014, D118/285, at ERN (EN) 01044684 (A56) ("Ta Mok and Ta Tith talked about the enemy situation. They instructed us that we must smash any enemy opposed to Angkar. [...] I understood the phrase "Any enemy who betrays us, we must smash, meaning that enemy must be killed").

¹¹⁶⁴ Written Record of Interview of NOP Ngim, 7 May 2015, D219/298, at ERN (EN) 01111860-01111861 (A16) ("Ta Mok and Ta Tith told us that if we saw the enemies first we had to warn them to change. If they did not change we would have to take them to be killed").

¹¹⁶⁵ Indictment (D382), paras 427 and 1024.

¹¹⁶⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 242.



mass wedding ceremony in his capacity as Sector 1 Secretary.¹¹⁶⁷ For example, YIM Tith participated in the preparation of beds, mosquito nets and a letter to the newlywed couple,¹¹⁶⁸ and PREAP Kap explained that YIM Tith made a speech during the wedding in which he instructed the newlyweds “to love each other, have solidarity”.¹¹⁶⁹ The International Judges also note that the ceremony was a planned mass wedding of 38 couples where disabled soldiers were matched to women from Srae Ambel.¹¹⁷⁰ Furthermore, a few days after the wedding, YIM Tith made follow-up visits and remarks as he asked the couples if they consented to living together and advised them to “live together happily”.¹¹⁷¹ NOP Ngim, who had no other option but to marry if she did not want to be killed,¹¹⁷² directly understood from YIM Tith’s instructions that “once one was married, it was a must to be sleeping there together”.¹¹⁷³ Lastly, YIM Tith and *Ta* Mok conducted birth rate data monitoring,¹¹⁷⁴ including meetings on “how many babies were delivered in a month”.¹¹⁷⁵

431. The International Judges find that the International Co-Investigating Judge did not act unreasonably in finding that YIM Tith contributed significantly to the CPK policy on the regulation of marriage.

d. Conclusion

¹¹⁶⁷ Written Record of Interview of NOP Ngim, 14 August 2014, D118/285, at ERN (EN) 01044685 (A63) (“Q: Did you know whether *Ta* Tith had another position besides Sector 1 Secretary? A63: I only knew that he was Sector 1 Secretary”); Written Record of Interview of PREAP Kap, 3 November 2014, D219/62, at ERN (EN) 01053910 (A46). *See also supra* Ground 5.2(iii) (upholding finding that YIM Tith was Sector 1 Secretary).

¹¹⁶⁸ Written Record of Interview of PREAP Kap, 3 November 2014, D219/62, at ERN (EN) 01053909-01053910 (A44).

¹¹⁶⁹ Written Record of Interview of PREAP Kap, 3 November 2014, D219/62, at ERN (EN) 01053910 (A45-A46).

¹¹⁷⁰ Transcript of Hearing on the Substance in Case 002/02 [NOP Ngim], 5 September 2016, D219/974.1.2, at ERN (EN) 01382714, lines 14-21; Written Record of Interview of NOP Ngim, 14 August 2014, D118/285, at ERN (EN) 01044685-01044686 (A68).

¹¹⁷¹ Transcript of Hearing on the Substance in Case 002/02 [NOP Ngim], 5 September 2016, D219/974.1.2, at ERN (EN) 01382721, lines 3-6 (“a few days after the ceremony, *Ta* Tith came to ask how we were all going or anybody did not consent to living together, and he advised us to live together happily”).

¹¹⁷² Transcript of Hearing on the Substance in Case 002/02 [NOP Ngim], 5 September 2016, D219/974.1.2, at ERN (EN) 01382711, lines 23-24 (“If I had refused, I would have been killed [...]”), 01382723, lines 19-23 (“I had no options but to go along with Angkar’s plan”; “I did not want to get married and I wanted to run away”).

¹¹⁷³ Written Record of Interview of NOP Ngim, 20 September 2016, D219/835, at ERN (EN) 01432970 (A151-A152) (“A151: [...] Once one was married, it was then a must to be sleeping there together. Q: Is it correct that this was what you understood by *Ta* Tith’s instructions? A152: Yes”).

¹¹⁷⁴ Written Record of Interview of NOP Ngim, 7 May 2015, D219/298, at ERN (EN) 01111861 (A16) (“In the meetings, the data including the [...] birth rate [...] in each commune level was discussed. *Ta* Mok and *Ta* Tith ordered a representative of each commune and district to report on what happened in each commune and district.”).

¹¹⁷⁵ Written Record of Interview of NOP Ngim, 7 May 2015, D219/298, at ERN (EN) 01111861 (A18) (“Q: Do you remember what *Ta* Tith and *Ta* Mok said about the data regarding the people? A18: In the meetings, he asked us how many babies were delivered in a month [...]”).



432. In conclusion, the International Judges hold that the International Co-Investigating Judge did not err in finding that YIM Tith made a significant contribution to the furtherance of JCE A through his implementation of the CPK policies on (i) the establishment and operation of cooperatives and worksites; (ii) purges and targeting of “enemies” and other specific groups; and (iii) the regulation of marriage. Consequently, Ground 5.3(i) is dismissed.

Ground 5.3(ii): Alleged Error in Finding that YIM Tith Contributed to JCE B

1. Submissions

433. In appealing the International Co-Investigating Judge’s findings concerning JCE B, the Co-Lawyers assert error in the finding that YIM Tith made a “significant contribution” to the CPK policy on the elimination of the Khmer Krom from “some point in 1976 until the end of the regime.”¹¹⁷⁶ The Co-Lawyers point to a number of YIM Tith’s alleged speeches, warnings and comments purportedly containing anti-Vietnamese rhetoric relied on in the Indictment, arguing that these statements lack “content, context, and precise dates”.¹¹⁷⁷ Furthermore, the International Co-Investigating Judge failed to explain how these statements constitute a “significant contribution” to the genocidal elimination of the Khmer Krom, particularly in the context where YIM Tith was allegedly serving under a regime at war with Vietnam.¹¹⁷⁸

434. The Co-Lawyers aver that the International Co-Investigating Judge failed to distinguish YIM Tith’s individual contribution from the general CPK policy, stressing that “JCE is not an open-ended concept that permits convictions based on guilt by association”.¹¹⁷⁹ Finally, the Co-Lawyers allege that the International Co-Investigating Judge failed to explain how the “coinciding” of YIM Tith’s alleged statements with the mass killing of Khmer Krom proves that YIM Tith made a significant contribution to genocide, and furthermore, which of these statements were temporally and geographically proximate or how they prompted the mass killing.¹¹⁸⁰ The Co-Lawyers conclude that no reasonable trier of fact would have reached the International Co-Investigating Judge’s findings at issue.¹¹⁸¹

¹¹⁷⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 244.

¹¹⁷⁷ YIM Tith’s Appeal (Indictment) (D382/22), paras 246-247.

¹¹⁷⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 247.

¹¹⁷⁹ YIM Tith’s Appeal (Indictment) (D382/22), para. 248.

¹¹⁸⁰ YIM Tith’s Appeal (Indictment) (D382/22), para. 249.

¹¹⁸¹ YIM Tith’s Appeal (Indictment) (D382/22), para. 250.



435. The International Co-Prosecutor responds that the Co-Lawyers fail to demonstrate any reviewable error concerning YIM Tith's significant contribution to JCE B.¹¹⁸² She argues that the Co-Lawyers selectively cite and mischaracterise the extensive findings on YIM Tith's conduct in the Southwest and Northwest Zones,¹¹⁸³ emphasising that the Khmer Krom victims in areas under YIM Tith's authority were civilians, including children.¹¹⁸⁴ Furthermore, the International Co-Prosecutor argues that the Co-Lawyers' suggestion that the International Co-Investigating Judge was required to explain how YIM Tith's statements "were temporally and geographically proximate or how they prompted the mass killing" misunderstands the applicable law, namely that an accused's contribution to a JCE does not have to be "indispensable".¹¹⁸⁵ In any event, such statements are clearly relevant to the killings of the Khmer Krom in the context of the hierarchical structure of the CPK and how policies were implemented by those in authority. Finally, the Co-Lawyers' assertion that the International Co-Investigating Judge failed to explain which findings relate to YIM Tith's contribution to the JCE and which relate to the CPK's policies misunderstands the Indictment, because contribution to JCE B was the same as contribution to the CPK's policy.¹¹⁸⁶

2. Discussion

436. The Co-Lawyers' Appeal in respect of YIM Tith's contribution to JCE B,¹¹⁸⁷ concerning the genocidal elimination of the Khmer Krom, raises the questions of whether (i)

¹¹⁸² International Co-Prosecutor's Response (Indictment) (D382/27), para. 141.

¹¹⁸³ International Co-Prosecutor's Response (Indictment) (D382/27), paras 142-144 (the International Co-Prosecutor contends that for conduct in the Southwest Zone that contributed to JCE B, the International Co-Investigating Judge found that (i) YIM Tith warned attendees at a meeting in Kirivong District in mid-1975 that anyone who "ran off to the join the Yuon" was an enemy and would be killed; (ii) YIM Tith and other Sector 13 officials attended a 10-day meeting in late 1976 in Angkor Chey District at which the Vietnamese and those who had relatives from Kampuchea Krom were considered as enemies; and (iii) in frequent meetings in late 1977 or early 1978 in Kirivong District attended by, *inter alia*, commune and district chiefs, YIM Tith referred to the "Yuon Khmer" when discussing internal security issues and said that the Vietnamese had infiltrated and spied on all levels of the CPK and called on attendees to report any such individual to the upper level. For conduct in the Northwest Zone, the International Co-Prosecutor contends that the International Co-Investigating Judge found that (i) at numerous locations in Sector I from early 1977 until at least mid-1978, YIM Tith spoke at meetings attended by military and civilian cadres about how the Vietnamese wanted to swallow Cambodia; (ii) during a specific meeting at Kang Hort Dam prior to August 1978, attended by 700 to 800 people including district and commune chairpersons and ordinary citizens, YIM Tith stated that Yuon and other "internal enemies" were hiding among the population and that attendees should monitor and report such enemies so that "Angkar" could kill them; and (iii) YIM Tith held a meeting in 1978 to discuss the "Yuon enemy" at which he stated that "[a]nyone who could speak Vietnamese and [was] connected with Vietnamese blood was [to be] executed.").

¹¹⁸⁴ International Co-Prosecutor's Response (Indictment) (D382/27), para. 144.

¹¹⁸⁵ International Co-Prosecutor's Response (Indictment) (D382/27), para. 145.

¹¹⁸⁶ International Co-Prosecutor's Response (Indictment) (D382/27), para. 146.

¹¹⁸⁷ A full definition of "JCE B" is found in the Indictment (D382), para. 1016(ii).



as a matter of law, YIM Tith's activities amounted to a "significant contribution" to the JCE; and whether (ii) as a matter of fact, sufficient evidence supported the International Co-Investigating Judge's impugned findings relating thereto. The International Judges address these questions in turn.

437. The International Judges recall that, as affirmed by the ECCC's consistent jurisprudence, the correct legal standard applicable to the participation of an accused in the implementation of the common purpose of a JCE is that the accused's contribution must be "significant, but not necessarily indispensable."¹¹⁸⁸ The determination of a significant contribution should "always be based on an assessment of activities of the accused."¹¹⁸⁹ The accused's particular contributions "should not be assessed in isolation"¹¹⁹⁰ and "[t]he significance of a contribution to the JCE is to be determined on a case-by-case basis, taking into account a variety of factors including the position of the [a]ccused, the level and efficiency of the participation, and any efforts to prevent crimes".¹¹⁹¹

438. In the view of the International Judges, the International Co-Investigating Judge was not bound to explain which of YIM Tith's particular statements were "proximate" or "prompted" the mass killing of the Khmer Krom, as suggested by the Co-Lawyers.¹¹⁹² The relevant inquiry was whether YIM Tith's activities, assessed in their totality (and not merely his statements), met the threshold of a "significant" contribution, as opposed to a "necessary or substantial" contribution.¹¹⁹³ The International Judges thus proceed to examine the factors identified by the International Co-Investigating Judge in concluding that YIM Tith made the requisite significant contribution.

439. In the Indictment, the International Co-Investigating Judge found that "Y[IM] Tith, Ta

¹¹⁸⁸ Case 002/1 Appeal Judgment (F36), para. 980; Case 002 JCE Decision (D97/14/15), para. 38; Case 001 Trial Judgment (E188), para. 508. *See also* Brđanin Appeal Judgment (ICTY), para. 430 ("although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible").

¹¹⁸⁹ Case 002/1 Appeal Judgment (F36), para. 984.

¹¹⁹⁰ Case 002/1 Appeal Judgment (F36), para. 980 *referring to* Kvočka Appeal Judgment (ICTY), para. 95; ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, Appeals Chamber, 23 January 2014, paras 920, 970-972; ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, Appeals Chamber, 17 March 2009 ("*Krajišnik* Appeal Judgment (ICTY)"), para. 217.

¹¹⁹¹ Case 002/1 Appeal Judgment (F36), para. 980 *quoting* Case 002/1 Trial Judgment (E313), para. 693 *referring to* ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgement, Trial Chamber, 2 November 2001, para. 311. *See also* Case 002 JCE Decision (D97/14/15), para. 41.

¹¹⁹² *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 249. *See generally* Case 002 JCE Decision (D97/14/15), para. 101.

¹¹⁹³ Case 002/1 Appeal Judgment (F36), para. 980 *referring to* Krajišnik Appeal Judgment (ICTY), para. 215. *See also* Kvočka Appeal Judgment (ICTY), paras 97-98.



Mok and other Southwest Zone cadres shared the common objective to implement in specific areas of DK a nationwide plan for the elimination in whole or in part of the Khmer Krom.”¹¹⁹⁴ He further found that YIM Tith “made a significant contribution” to this JCE by, *inter alia*:

[P]articipating in meetings in both [Northwest and Southwest] Zones; identifying and denouncing as traitors and enemies persons among these groups to be purged; ordering arrests and killings; convening meetings with his subordinates about purge operations and ordering them to be constantly vigilant in carrying out arrests and killings; monitoring the implementation of the purge; and coordinating a network of security centres and killing sites through which prisoners were routinely identified, screened, interrogated, tortured, and killed. Along with his attestations expressing his commitment to carry out the plans of *Angkar*, this demonstrates his intent to implement the policies to [...] target [the Khmer Krom].¹¹⁹⁵

440. From the above, it is evident that the Co-Lawyers’ undue focus on YIM Tith’s speeches and comments¹¹⁹⁶ ignores the myriad activities expressly identified by the International Co-Investigating Judge as furthering the common purpose of the genocidal killing of the Khmer Krom. The International Judges hold that these activities, considered in their totality, were capable of amounting to a significant contribution to the JCE at issue. Furthermore, the International Judges find that these activities are YIM Tith’s personal, individual conduct, which were directed in furtherance of the CPK policy on elimination of the Khmer Krom. In light of these findings, the International Judges cannot accept the contention that YIM Tith’s responsibility pursuant to JCE B was based on impermissible guilt by association and, accordingly, dismiss the Co-Lawyers’ arguments in this regard.¹¹⁹⁷

441. Finally, the International Judges are satisfied that there was sufficient evidence to support the International Co-Investigating Judge’s determination of YIM Tith’s significant contribution to the realisation of JCE B. The International Judges, in particular, take note of the following conduct and evidence:

- YIM Tith personally visited Wat Pratheat Security Centre on “at least three occasions between the end of 1976 and January 1978”, where Khmer Krom were detained and subsequently killed and where YIM Tith questioned and identified prisoners as enemies.¹¹⁹⁸

¹¹⁹⁴ Indictment (D382), para. 1016(ii).

¹¹⁹⁵ Indictment (D382), para. 1022.

¹¹⁹⁶ *Contra* YIM Tith’s Appeal (Indictment) (D382/22), para. 247.

¹¹⁹⁷ The International Judges summarily dismiss the Co-Lawyers’ unsubstantiated or repeated arguments which merely cross-reference other grounds of appeal without demonstration of a specific error. *Contra* YIM Tith’s Appeal (Indictment) (D382/22), paras 245, 249, 250. *See also supra* Grounds 2.2, 5.1, 5.2.

¹¹⁹⁸ Indictment (D382), para. 392. *See also infra* Ground 5.3(iii).



- According to YOU Phnom,¹¹⁹⁹ YIM Tith talked about the “*Yuon*” Khmer as an internal security issue, who had “spied” and “embedded their agents inside the cadre networks [...] all the way up to the Center”. The witness understood that the orders given by YIM Tith came “through the chain of command”, and this hierarchical structure allowed upper-level cadre to collect information and take measures to monitor the embedded persons.
- At a meeting at Kang Hort Dam Worksite with 700 to 800 attendees, YIM Tith talked about “*fighting the Yuon*”, who were among the “internal enemies burrowing” among the population. YIM Tith urged the people to “monitor and report” such enemies “to upper *Angkar* so that *Angkar* could smash them before they smashed us”.¹²⁰⁰
- According to LIM Tim,¹²⁰¹ a former security personnel at Kampong Kol Sugar Factory in Sangkae District, during an assembly in early to mid-1978 at Battambang University where YIM Tith was introduced as Secretary of the Northwest Zone, YIM Tith gave a speech asking attendees to prevent the “*Yuon*” from setting fire or otherwise destroying the factory. Notwithstanding the International Co-Investigating Judge’s reliance on this evidence, the International Judges observe that he found unreliable another portion of the witness’ testimony concerning the subsequent arrest and forced transfer of Vietnamese and Khmer Krom workers at the sugar factory.¹²⁰² The International Judges are satisfied that the International Co-Investigating Judge properly considered evidentiary inconsistencies and the overall credibility of this witness, and in this regard find no error.¹²⁰³
- According to CHHOENG Chhoeuth,¹²⁰⁴ at a meeting between YIM Tith and his subordinates, YIM Tith said he “wanted to purge the *Yuon* enemy”. The purpose of the meeting was to call for the execution of “[a]nyone who could speak Vietnamese and connected with Vietnamese blood”. During the meeting, YIM Tith exhorted: “*Brothers and sisters! Do not join hands with the Yuon. Work together with the Southwest Zone cadres*”.

¹¹⁹⁹ Written Record of Interview of YOU Phnom, 10 July 2015, D219/406, at ERN (EN) 01139572-01139573 (A175-A185).

¹²⁰⁰ Written Record of Interview of VY Phann, 18 November 2014, D219/85, at ERN (EN) 01061168-01061169 (A3-A5); Indictment (D382), para. 394.

¹²⁰¹ Written Record of Interview of LIM Tim, 24 September 2013, D118/108, at ERN (EN) 00976924-00976925 (A17-A19), 00976928-00976929 (A47-A54); Written Record of Interview of LOEM Tim, 12 January 2016, D219/649, at ERN (EN) 01207440-01207441 (A62, A64, A69), 01207443-01207444 (A79-A83, A86-A87); Indictment (D382), para. 395.

¹²⁰² See Indictment (D382), paras 741, 745.

¹²⁰³ As recalled, a fact-trier can reasonably accept certain parts of a witness’s testimony and reject others after having considered the whole of the testimony. See Case 002/1 Appeal Judgment (F36), para. 357. See generally *supra* Ground 5 Evidentiary Considerations.

¹²⁰⁴ Written Record of Interview of CHHOENG Chhoeuth, 17 March 2017, D219/953, at ERN (EN) 01451718 (A70-A73, A82), 01451719 (A84); Written Record of Interview of CHHOENG Chhoeuth, 18 March 2017, D219/954, at ERN (EN) 01451518 (A7); Indictment (D382), para. 397.



442. Faced with such evidence of YIM Tith's enthusiastic participation in the common plan to commit genocide against the Khmer Krom in the areas under his control, the International Judges must reject Ground 5.3(ii).

Ground 5.3(iii): Alleged Error in Finding that YIM Tith Contributed to JCE C

1. Submissions

443. The Co-Lawyers submit that the International Co-Investigating Judge erred in finding that YIM Tith contributed to the common objective of JCE C of furthering a system of ill-treatment at Wat Pratheat Security Centre from October 1975 until the end of the regime as an element of JCE 1 or JCE 2 liability.¹²⁰⁵

444. First, concerning YIM Tith's regular visits to Wat Pratheat, the Co-Lawyers aver that the International Co-Investigating Judge wrongly deduced YIM Tith's contribution to JCE C from his alleged membership of the Kirivong District Committee.¹²⁰⁶ Moreover, the International Co-Investigating Judge failed to take into consideration the totality of the evidence of: (i) DOK Chann (whose evidence is temporally irrelevant and contradictory); (ii) YOU Phnom (who did not go near the security office and whose actual visits to the site can be called into question); (iii) TUN Soun (who was at Wat Pratheat for only a short period of four days); (iv) ORK Chan (whose account lacks clear dates and who was unable to identify YIM Tith), and; (v) HOR Yan (who gave conflicting and unreliable evidence, clarified that he was imprisoned in 1973 and was unable to identify YIM Tith from a photograph).¹²⁰⁷

445. Second, the Co-Lawyers submit that International Co-Investigating Judge erred in finding that YIM Tith directly participated in interrogations at Wat Pratheat on two occasions, based on a single statement by TUN Soun.¹²⁰⁸ In relying on TUN Soun, the International Co-Investigating Judge failed to take into consideration contradictory evidence and that he did not mention YIM Tith interrogating prisoners in previous interviews and communications.¹²⁰⁹

¹²⁰⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 251.

¹²⁰⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 252.

¹²⁰⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 253.

¹²⁰⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 255 *referring to* Written Record of Interview of TUN Soun, 4 December 2014, D219/110.

¹²⁰⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 255 *referring to* Interview Notes (TUN Soun), 15 August 2008, D13.11.56; Civil Party Application of TUN Soun, 29 July 2009, D5/122; Written Record of Interview of TUN Soun, 29 September 2010, D3/8; Written Record of Interview of TUN Soun, 6 May 2011, D13; Written



Moreover, it is unclear whether he derived his information from direct experience or was influenced by the illegal public disclosure of the Third Introductory Submission, or his interactions with investigators, NGO's or through public discussions.¹²¹⁰ With regard to TUN Soun's 14 December 2014 statement (where he first mentioned that YIM Tith interrogated prisoners on two occasions), the Co-Lawyers point out that TUN Soun was not permitted to enter the prisoner detention area yet claimed to have heard the specific questions asked by YIM Tith during the interrogations,¹²¹¹ and that the timing of his alleged imprisonment is unclear and cannot be relied upon.¹²¹²

446. Third, the Co-Lawyers aver that International Co-Investigating Judge erred in finding that YIM Tith directly participated in killings at Wat Pratheath by giving the order to "cut open prisoners".¹²¹³ The International Co-Investigating Judge based this finding solely on HOR Yan, whose evidence is full of inconsistencies, who was detained in 1973 and stated that "he did not see what happened".¹²¹⁴ Further, DOK Chann's evidence concerning YIM Tith's meetings with Ta Pring (the Wat Pratheath Chief) lacks detail and it is unclear how he could have been aware of the specifics of the reporting structure.¹²¹⁵ In addition, the International Co-Investigating Judge erroneously relied on the chain-of-command in Kirivong District, based on a few lines of HOK (ORK) Chan's testimony and a misrepresentation of HOR Yan's evidence.¹²¹⁶ The International Co-Investigating Judge failed to consider ORK Chan's statements, *inter alia*, that YIM Tith did not issue orders.¹²¹⁷

447. The Co-Lawyers conclude that no reasonable trier of fact would have reached the findings that YIM Tith regularly visited Wat Pratheath Security Centre, was directly involved in the questioning of prisoners and gave orders to "cut open prisoners".¹²¹⁸ The Co-Lawyers submit that the International Co-Investigating Judge's findings were so unfair and unreasonable as to constitute an abuse of his discretion.¹²¹⁹

Record of Interview of TUN Soun, 20 February 2013, D118/22; Written Record of Investigation Action, 15 December 2014, D219/122.

¹²¹⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 255.

¹²¹¹ YIM Tith's Appeal (Indictment) (D382/22), para. 256.

¹²¹² YIM Tith's Appeal (Indictment) (D382/22), para. 257.

¹²¹³ YIM Tith's Appeal (Indictment) (D382/22), para. 259.

¹²¹⁴ YIM Tith's Appeal (Indictment) (D382/22), para. 260.

¹²¹⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 261.

¹²¹⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 262.

¹²¹⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 263.

¹²¹⁸ YIM Tith's Appeal (Indictment) (D382/22), paras 254, 258, 264.

¹²¹⁹ YIM Tith's Appeal (Indictment) (D382/22), paras 254, 258, 264.



448. In response, the International Co-Prosecutor argues that the Co-Lawyers fail to demonstrate any reviewable error in the finding that YIM Tith likely significantly contributed to the system of ill-treatment at Wat Pratheath.¹²²⁰ Contrary to the Co-Lawyers' claims, the International Co-Investigating Judge did not deduce YIM Tith's contribution to JCE C from his alleged membership of the District Committee as the Indictment is replete with evidence of YIM Tith's likely authority over, and involvement in, the crimes committed at Wat Pratheath.¹²²¹

449. First, the International Co-Prosecutor argues that the Co-Lawyers fail to demonstrate any reviewable error in the finding that YIM Tith likely visited Wat Pratheath regularly.¹²²² The Co-Lawyers disregard core evidence of witnesses DOK Chann, YOU Phnom, ORK Chan and HOR Yan.¹²²³ With regard to DOK Chann, the Co-Lawyers fail to explain the alleged contradictions in his testimony and erroneously characterise his evidence as temporally irrelevant.¹²²⁴ Concerning HOR Yan, the International Co-Prosecutor alleges that the Co-Lawyers inaccurately represent his evidence and that his inability to identify YIM Tith on a photograph does not undermine his statements because the International Co-Investigating Judge relied on the totality of the evidence.¹²²⁵ Finally, the International Co-Prosecutor avers that the Co-Lawyers misrepresent YOU Phnom's evidence as to whether he visited Wat Pratheath,¹²²⁶ and that the allegations concerning ORK Chan's evidence are misplaced since, *inter alia*, the witness already knew YIM Tith.¹²²⁷

450. Second, the International Co-Prosecutor argues that the Co-Lawyers fail to demonstrate any reviewable error in the International Co-Investigating Judge's finding that YIM Tith was likely involved in interrogations at Wat Pratheath.¹²²⁸ The Co-Lawyers do not clarify what they mean by "direct participation"¹²²⁹, and their description of TUN Soun's evidence is inaccurate and improperly suggests that he first mentioned YIM Tith interrogating prisoners after being questioned by investigators.¹²³⁰ The Co-Lawyers' further implicit suggestion that TUN Soun's evidence may have been influenced by the disclosure of the Third Introductory Submission in

¹²²⁰ International Co-Prosecutor's Response (Indictment) (D382/27), para. 147.

¹²²¹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 147.

¹²²² International Co-Prosecutor's Response (Indictment) (D382/27), para. 148 (title).

¹²²³ International Co-Prosecutor's Response (Indictment) (D382/27), para. 148.

¹²²⁴ International Co-Prosecutor's Response (Indictment) (D382/27), para. 149.

¹²²⁵ International Co-Prosecutor's Response (Indictment) (D382/27), para. 150.

¹²²⁶ International Co-Prosecutor's Response (Indictment) (D382/27), para. 151.

¹²²⁷ International Co-Prosecutor's Response (Indictment) (D382/27), para. 152.

¹²²⁸ International Co-Prosecutor's Response (Indictment) (D382/27), para. 153.

¹²²⁹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 153.

¹²³⁰ International Co-Prosecutor's Response (Indictment) (D382/27), para. 154.



2011 is unfounded speculation.¹²³¹ Additional evidence shows YIM Tith's involvement in, and responsibility for, the conduct of interrogations at Wat Pratheat.¹²³²

451. Third, the International Co-Prosecutor argues that the Co-Lawyers fail to demonstrate any reviewable error in the International Co-Investigating Judge's finding that YIM Tith was likely involved in killings at Wat Pratheat and that he ordered prisoners to be "cut open".¹²³³ The Co-Lawyers suggestion that this finding was based solely on HOR Yan's evidence is contradicted by their subsequent challenges to, *inter alia*, DOK Chann's evidence.¹²³⁴ In addition, the Co-Lawyers fail to demonstrate that the Indictment analysed evidence incorrectly as certain inconsistencies in HOR Yan's evidence were expressly addressed and he clearly had sufficient knowledge of YIM Tith's role and authority.¹²³⁵ Finally, the Co-Lawyers erroneously assert that DOK Chann did not have knowledge of the structure and operations at Wat Pratheat¹²³⁶ and inaccurately depict ORK Chan's testimony.¹²³⁷

2. Discussion

452. Under Ground 5.3(iii), the Co-Lawyers challenge the International Co-Investigating Judges' findings that: (i) YIM Tith regularly visited Wat Pratheat;¹²³⁸ (ii) YIM Tith directly participated in interrogations at Wat Pratheat, and; (iii) YIM Tith directly participated in killings at Wat Pratheat.¹²³⁹ These challenges concern YIM Tith's significant contribution to JCE C which is defined as the furthering of a system of ill-treatment at Wat Pratheat Security Centre.¹²⁴⁰

a. YIM Tith's Visits to Wat Pratheat

¹²³¹ International Co-Prosecutor's Response (Indictment) (D382/27), para. 155.

¹²³² International Co-Prosecutor's Response (Indictment) (D382/27), para. 156.

¹²³³ International Co-Prosecutor's Response (Indictment) (D382/27), para. 157.

¹²³⁴ International Co-Prosecutor's Response (Indictment) (D382/27), para. 157.

¹²³⁵ International Co-Prosecutor's Response (Indictment) (D382/27), paras 158-160.

¹²³⁶ International Co-Prosecutor's Response (Indictment) (D382/27), para. 161.

¹²³⁷ International Co-Prosecutor's Response (Indictment) (D382/27), para. 162.

¹²³⁸ The International Judges observe that the International Co-Investigating Judge refers to "regular visits" by the various District Committee members and not just by YIM Tith. The Indictment reads that YIM Tith visited Wat Pratheat on multiple occasions and "a minimum of three times". See Indictment (D382), paras 335, 439, 463.

¹²³⁹ The International Judges note that the Co-Lawyers refer to YIM Tith's "direct participation" in the interrogations and killings, without further clarification. In this regard, the International Judges observe that the Indictment does not qualify YIM Tith's acts as the direct commission of a crime but rather as commission through his participation in a JCE. YIM Tith's participation in the killings and interrogations are part of his significant contribution to the implementation of the common purpose of JCE C.

¹²⁴⁰ Indictment (D382), para. 1016 (iii).



453. The International Judges consider unfounded the Co-Lawyers' allegation that the International Co-Investigating Judge relied solely on YIM Tith's membership of the District Committee¹²⁴¹ to conclude that YIM Tith visited Wat Pratheat Security Centre on several occasions.¹²⁴² In fact, the International Co-Investigating Judge found that the various District Committee members, including YIM Tith, regularly visited the site,¹²⁴³ that "Yim Tith also visited the district level Wat Pratheat Security Centre on multiple occasions"¹²⁴⁴ and that "between the end of 1976 and early 1978, Yim Tith visited the Security Centre a minimum of three times".¹²⁴⁵ In support of these findings, the International Co-Investigating Judge relied on the evidence of five witnesses or Civil Party applicants each attesting to YIM Tith's presence at the Security Centre,¹²⁴⁶ and not merely on evidence that the Kirivong District Committee directly oversaw the site.¹²⁴⁷ Individual challenges to the evidence of these five witnesses or Civil Party applicants, DOK Chann, YOU Phnom, TUN Soun, ORK Chan and HOR Yan are discussed below.¹²⁴⁸

454. With regard to the alleged temporal irrelevance of DOK Chann's evidence,¹²⁴⁹ while the witness stated that he was not at Wat Pratheat Security Centre after June 1975 (although his name was still listed as a prison staff member until mid-1977), the International Co-Investigating Judge considered this statement not credible "because he was credibly and reliably identified as "*Chan*" by two witnesses detained at Wat Pratheat Security Centre in 1977" and because "his brother Y[OU] Ph[h]om [*sic*] stated that he regularly visited Dok Chann at the security centre between the rainy season in 1976 and the end of DK".¹²⁵⁰ During these visits, YOU Phnom also witnessed YIM Tith's visits to the Security Centre.¹²⁵¹ The

¹²⁴¹ The International Judges recall that the determination of an Accused's significant contribution to a JCE depends on a myriad of factors, including "the position of the Accused, the level and efficiency of the participation, and any efforts to prevent crimes" (*see supra* Ground 5.3(ii)). Accordingly, YIM Tith's role as a member of the Kirivong District Committee, which directly oversaw Wat Pratheat Security Centre, is a highly relevant factor that should be taken into account.

¹²⁴² YIM Tith's Appeal (Indictment) (D382/22), para. 252.

¹²⁴³ Indictment (D382), para. 439.

¹²⁴⁴ Indictment (D382), para. 335.

¹²⁴⁵ Indictment (D382), para. 463. *See also* Indictment (D382), para. 392.

¹²⁴⁶ Indictment (D382), paras 464-469 (stating that "[f]ive witnesses or civil party applicants, including three former detainees, provide evidence on YIM Tith's visits to the crime site" and referring to the evidence of DOK Chann, YOU Phnom, TUN Soun, ORK Chan and HOR Yan.).

¹²⁴⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 252 *referring to* Indictment (D382), para. 439.

¹²⁴⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 253.

¹²⁴⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 253.

¹²⁵⁰ Indictment (D382), para. 438 (footnotes omitted).

¹²⁵¹ Written Record of Interview of YOU Phnom, 1 December 2014, D219/108, at ERN (EN) 01076891 (A3) ("[M]y older brother, DOK Chann, [...] was a prisoner supervisor at Wat Preah Theat Pagoda. I used to visit him there"). 01076892 (Q8-A8) ("Q: Did you ever see *Ta* Tith or *Ta* Tom come to inspect Wat Preah Theat Security Office? A8: Yes, I did. *Ta* Tith and *Ta* Tom often came to inspect the security office, but I did not know what



International Judges recall that a fact-trier can “reasonably accept certain parts of a witness’s testimony and reject others” after having considered the whole of the testimony,¹²⁵² and thus find that the International Co-Investigating Judge did not err in reasonably relying on DOK Chann’s testimony regarding structure and personnel of the Security Centre and YIM Tith’s involvement there.

455. Further, the International Judges are unpersuaded by the Co-Lawyers’ allegations concerning HOR Yan’s purportedly contradictory evidence about the number of times he saw YIM Tith at Wat Pratheat.¹²⁵³ HOR Yan referred to his various “contacts” with YIM Tith, including when he saw YIM Tith,¹²⁵⁴ met YIM Tith¹²⁵⁵ and the number of times YIM Tith came to Wat Pratheat to collect gallbladders.¹²⁵⁶ Ultimately, the International Co-Investigating Judge relied on his evidence conservatively, stating that HOR Yan recalled seeing YIM Tith at Wat Pratheat Security Centre at least once.¹²⁵⁷ The International Judges consider that this was reasonable and not in error.

456. Concerning the allegation that it is unclear how HOR Yan, as a prisoner, could have known who YIM Tith was or what his role was,¹²⁵⁸ HOR Yan explained that he knew YIM Tith and was informed of YIM Tith’s visit beforehand.¹²⁵⁹ Moreover, in respect of the allegation that HOR Yan was at Wat Pratheat in 1973, not in 1978,¹²⁶⁰ the International Co-Investigating Judge duly acknowledged and considered the inconsistencies in HOR Yan’s statements concerning the timing of his incarceration, ultimately finding it likely that he was

they did. [...] I did not see *Ta* Tith and *Ta* Tom talk to prisoners. I only saw them talking with security office staff.”); Written Record of Interview of YOU Phnom, 2 December 2014, D219/109, at ERN (EN) 01081740 (Q12-A12) (“Q: Why did you have the right of access and travel inside Wat Preah Theat Security Office compound? A12: Because my older brother was staff at that Security Office, and my study office was located nearby.”).

¹²⁵² See *supra* Ground 5 Evidentiary Considerations.

¹²⁵³ YIM Tith’s Appeal (Indictment) (D382/22), para. 253.

¹²⁵⁴ SOAS/HRW Interviews of HO Yan [HOR Yan], 27 August 2005, D1.3.11.18, at ERN (EN) 00217607 (stating that “Tèut came only occasionally” but is unclear if HOR Yan saw him personally); Written Record of Interview of HOR Yan, 9 March 2012, D105/6, at ERN (EN) 00841978 (A22) (“I saw him come here about more than 10 times”).

¹²⁵⁵ Written Record of Interview of HAO Yan [HOR Yan], 6 December 2013, D118/155, at ERN (EN) 00978592 (A48) (“I did not meet him often. I met him twice.”).

¹²⁵⁶ Written Record of Interview of HAO Yan [HOR Yan], 27 October 2014, D219/55, at ERN (EN) 01053831 (Q10-A10) ([H]ow many times did you see *Ta* Tith come there when they took prisoners to be killed to get gallbladders? A10: *Ta* Tith came only once, when they cut open 30 prisoners’ abdomens to take the gallbladders”), 01053833 (A20) (“I want to clarify that *Ta* Tith came to take gallbladders from that prison only once.”).

¹²⁵⁷ Indictment (D382), para. 469.

¹²⁵⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 253.

¹²⁵⁹ Written Record of Interview of HAO Yan, 6 December 2013, D118/155, at ERN (EN) 00978592 (Q46-A47), 00978602 (A119).

¹²⁶⁰ YIM Tith’s Appeal (Indictment) (D382/22), para. 253.



in Wat Pratheat from 1977 to 1978.¹²⁶¹

457. With regard to YOU Phnom's statement that he did not dare to go near the Security Office,¹²⁶² the International Judges observe that this particular answer is a clear reference to the detention building (the former monks dining hall) within the Wat Pratheat Security Centre compound.¹²⁶³ YOU Phnom's evidence that he saw YIM Tith at Wat Pratheat while visiting his brother DOK Chann is in clear support of the International Co-Investigating Judge's finding that YIM Tith visited Wat Pratheat.¹²⁶⁴ Regarding TUN Soun, the International Judges are not convinced of the allegation that the International Co-Investigating Judge "extrapolated" his findings on the basis TUN Soun's four-day detention period.¹²⁶⁵ While TUN Soun was detained at Wat Pratheat for a short period of time, this does not, on its own, diminish the probative value of his unequivocal statement that he saw YIM Tith twice during his detention at the Security Centre¹²⁶⁶ or prevent the International Co-Investigating Judge from relying on him.¹²⁶⁷ Further challenges to TUN Soun's evidence are discussed in detail below.¹²⁶⁸

458. Further, the claim that ORK Chan's account lacks clear dates and refers in general terms to the period 1975-1979 is unfounded.¹²⁶⁹ ORK Chan stated that he was detained at Wat Pratheat for approximately three months in 1977.¹²⁷⁰ However, ORK Chan is not consistent as

¹²⁶¹ Indictment (D382), para. 455 ("Given that he was detained for eight months at a time when the Vietnamese troops first attacked Kirivong District, and at a time when YIM Tith visited the security centre, it is likely that Hor Yan was at Wat Pratheat in 1977 to 1978"). This is further supported by evidence that the security centre commenced operations at Wat Pratheat in early 1975. *See* Indictment (D382), para. 434 and footnote 1154.

¹²⁶² YIM Tith's Appeal (Indictment) (D382/22), para. 253.

¹²⁶³ Written Record of Interview of YOU Phnom, 1 December 2014, D219/108, at ERN (EN) 01076893 (A9) ("When I visited my older brother, I was with him at his place. I saw a school nearby, and I knew there were prisoners detained at the school. That school had been a former dining hall for monks."); Written Record of Interview of YOU Phnom, 2 December 2014, D219/109, at ERN (EN) 01081739 (Q9-A9) ("Q: When you went to visit your older brother at Wat Preah Theat Security Office, how many detained prisoners did you see there? A9: I cannot estimate the number because I did not dare go near the Security Office.").

¹²⁶⁴ Written Record of Interview of YOU Phnom, 1 December 2014, D219/108, at ERN (EN) 01076892 (Q8-A8) ("Q: Did you ever see *Ta* Tith or *Ta* Tom come to inspect Wat Preah Theat Security Office? A8: Yes, I did. *Ta* Tith and *Ta* Tom often came to inspect the security office, but I did not know what they did. [...] I did not see *Ta* Tith and *Ta* Tom talk to prisoners. I only saw them talking with security office staff.").

¹²⁶⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 253.

¹²⁶⁶ Written Record of Interview of TUN Soun, 29 May 2015, D219/346, at ERN (EN) 01116113 (A48). *See also* Written Record of Interview of TUN Soun, 14 December 2014, D219/110, at ERN (EN) 01076896 (A1-A3).

¹²⁶⁷ Indictment (D382), para. 464.

¹²⁶⁸ Additional challenges to TUN Soun's evidence are discussed in the section on YIM Tith's participation in the interrogation of prisoners at Wat Pratheat, *see infra* paras 461-465.

¹²⁶⁹ YIM Tith's Appeal (Indictment) (D382/22), para. 253.

¹²⁷⁰ Written Record of Interview of ORK Chan, 8 March 2012, D105/5, at ERN (EN) 00803448 (A71-A73); Written Record of Interview of HOK Chan [ORK Chan], 19 June 2015, D219/369, at ERN (EN) 01128260 (A80); Office of the Co-Prosecutors Interview of AOK Chan [ORK Chan], 15 August 2008, D1.3.11.2, at ERN (EN) 00219253.



to the number of times that YIM Tith visited Wat Pratheath.¹²⁷¹ When confronted, he clarified that he encountered YIM Tith frequently during the Khmer Rouge regime but personally only saw him twice during his period of detention.¹²⁷² The International Judges consider that the International Co-Investigating Judge did not err in relying on ORK Chan's clarification regarding YIM Tith's visit to Wat Pratheath.¹²⁷³

459. In addition, ORK Chan stated that there were no windows in the building where he was detained (the former monks dining hall) and could not see anything *outside*.¹²⁷⁴ Yet, contrary to the Co-Lawyers assertion that it is unclear how he could have known that YIM Tith visited the prison under such circumstances,¹²⁷⁵ ORK Chan persuasively explained that he knew YIM Tith prior to this visit, having worked in the District Production Unit, that YIM Tith entered the detention building and walked around the cells to see prisoners, and that the cells were dark only at night.¹²⁷⁶ The International Judges further consider that ORK Chan's inconsistent statements regarding Wat Slaeng Pagoda, a different prison,¹²⁷⁷ are irrelevant to the reliability of his evidence on YIM Tith's visits to Wat Pratheath.

460. Finally the International Judges find that the International Co-Investigating Judges' assessment of HOR Yan and ORK Chan's inability to identify YIM Tith from a January 2011

¹²⁷¹ Office of the Co-Prosecutors Interview of AOK Chan [ORK Chan], 15 August 2008, D1.3.11.2, at ERN (EN) 00219254 ("He stated that Ta Teut came to the prison around once per week."); Written Record of Interview of ORK Chan, 8 March 2012, D105/5, at ERN (EN) 00803451 (A98) ("I saw him come about twice. I did not know if he often came here or not because I was still in prison cell.").

¹²⁷² Written Record of Interview of ORK Chan, 9 December 2013, D118/156, at ERN (EN) 00980474 (Q75-A78). ("Q: In your interview with the Office of Co-Prosecutors in 2008 [...] you stated "Ta Tit visited Voat Preah Theat Pagoda Prison once a week. An[d] in your interview with the Office of the Co-Investigating Judges [...] you stated, "I saw Ta Tit only twice." Can you clarify this? A75: I saw Ta Tit only twice during my three-month detainment.").

¹²⁷³ The International Judges note that in a later statement, ORK Chan stated that he saw YIM Tith only once but also that he does not remember how many times YIM Tith came to the prison. See Written Record of Interview of HOK Chan [ORK Chan], 19 June 2015, D219/369, at ERN (EN) 01128260 (Q83-A88), especially, (Q86) ("Did you see him once or many times? A86: I saw him only once"). The International Judges consider that in light of the totality of the witness evidence, the International Co-Investigating Judge's reliance on his earlier statements upon confrontation, in which ORK Chan clarified that he saw YIM Tith twice during his detention, was not unreasonable.

¹²⁷⁴ Written Record of Interview of ORK Chan, 9 December 2013, D118/156, at ERN (EN) 00980466-00980467 (Q9-A12).

¹²⁷⁵ YIM Tith's Appeal (Indictment) (D382/22), para. 253.

¹²⁷⁶ Written Record of Interview of ORK Chan, 8 March 2012, D105/5, at ERN (EN) 00803451 (A98-A100) ("[...] I was still in prison cell. [...] He just walked around to see prisoners and returned. Q: Did he enter the detention office? A100: Yes. The detention centre or the detention office consisted of three rooms."); Written Record of Interview of ORK Chan, 9 December 2013, D118/156, at ERN (EN) 00980472 (A61-A64) ("[YIM Tith] walked around and looked at the prisoners in the detention cells."), 00980474 (Q76-A76) ("You said that there were no windows in the prison cells, so how did you know that the one who came to look at the prisoners was Ta Tit? A76: I already knew him back then because I had worked in the District Production Unit. The cells were dark only at night").

¹²⁷⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 253.



photograph¹²⁷⁸ - observing that “the passage of time between the events in question and the date of the photograph explain the witness’ failure to identify YIM Tith” and that this did not materially affect the reliability of their evidence - is reasonable.¹²⁷⁹ The International Judges further note that both witnesses clearly explained how they were able to identify YIM Tith during his visits to Wat Pratheat, having known him previously¹²⁸⁰ or because his visit was announced beforehand.¹²⁸¹

b. YIM Tith’s Participation in Interrogations at Wat Pratheat

461. The Co-Lawyers challenge the International Co-Investigating Judge’s finding, based on TUN Soun’s 14 December 2014 statement,¹²⁸² that YIM Tith questioned detainees at Wat Pratheat on two occasions.¹²⁸³ The International Judges observe that while TUN Soun stated in his 14 December 2014 interview, that he was detained at Wat Pratheat for four days and saw YIM Tith questioning detainees there,¹²⁸⁴ he did not provide a detailed account of his own direct experience at Wat Pratheat in his previous interviews.¹²⁸⁵ Nevertheless, the International Judges are unpersuaded by the allegations that TUN Soun’s evidence is contradictory or unreliable because he did not mention YIM Tith in connection with the interrogation of prisoners in previous statements.¹²⁸⁶

462. With regard to his 15 August 2008 interview with the Office of the Co-Prosecutors during the Preliminary Investigation,¹²⁸⁷ the International Judges are unable to draw the conclusion that TUN Soun “had no direct knowledge of Wat Pratheat”, as alleged,¹²⁸⁸ due to

¹²⁷⁸ Indictment (D382), paras 468-469 and footnotes 1271, 1277.

¹²⁷⁹ Indictment (D382), paras 468-469. The photograph was not formally verified as identifying YIM Tith, *see* YIM Tith’s Appeal (Indictment) (D382/22), para 253; Indictment (D382), footnote 1277.

¹²⁸⁰ Written Record of Interview of ORK Chàn, 9 December 2013, D118/156, at ERN (EN) 00980474 (A76) (“I already knew him back then because I had worked in the District Production Unit. The cells were dark only at night.”).

¹²⁸¹ Written Record of Interview of HAO Yàn [HOR Yan], 6 December 2013, D118/155, at ERN (EN) 00978592 (Q46-A47), 00978602 (A119).

¹²⁸² Written Record of Interview of TUN Soun, 14 December 2014, D219/110.

¹²⁸³ YIM Tith’s Appeal (Indictment) (D382/22), para. 255 *referring to* Indictment (D382), paras 463, 467 and footnotes 1264-1266.

¹²⁸⁴ Written Record of Interview of TUN Soun, 14 December 2014, D219/110, at ERN (EN) 01076896 (A1-A3). *See also* Written Record of Interview of TUN Soun, 29 May 2015, D219/346, at ERN (EN) 01116113-01116114 (A53-A62).

¹²⁸⁵ Interview Notes (TUN Soun), 15 August 2008, D1.3.11.56; Civil Party Application of TUN Soun, 29 July 2009, D5/122; Written Record of Interview of TUN Soun, 29 September 2010, D3/8; Written Record of Interview of TUN Soun, 6 May 2011, D13; Written Record of Interview of TUN Soun, 20 February 2013, D118/22.

¹²⁸⁶ YIM Tith’s Appeal (Indictment) (D382/22), para. 255.

¹²⁸⁷ Interview Notes (TUN Soun), 15 August 2008, D1.3.11.56.

¹²⁸⁸ YIM Tith’s Appeal (Indictment) (D382/22), para. 255 *referring to* Interview Notes (TUN Soun), 15 August 2008, D1.3.11.56, at ERN (EN) 00219281.



the limited information provided in the Interview Notes.¹²⁸⁹ Further, TUN Soun's 29 September 2010 interview with the Office of the Co-Investigating Judges was conducted with a view to confirm or correct his 15 August 2008 interview, and he was not asked further questions about Wat Pratheat.¹²⁹⁰ In his Civil Party application, TUN Soun does not mention his own short detention or re-education at Wat Pratheat, merely stating that he received certain information from prisoners, such as that they were kept in shackles.¹²⁹¹ This is not inconsistent with his later interviews, in which he maintained that he was sent to Wat Pratheat for re-education or training,¹²⁹² was detained in the monk's monastery,¹²⁹³ and never entered the detention building (where the shackled prisoners were held).¹²⁹⁴

463. Moreover, TUN Soun stated that he was sent for "training" at Wat Pratheat in his 6 May 2011 interview,¹²⁹⁵ prior to the disclosure of the Third Introductory Submission.¹²⁹⁶ Further, contrary to the Co-Lawyers allegations,¹²⁹⁷ TUN Soun first mentioned that YIM Tith interrogated prisoners at Wat Pratheat in a 20 February 2013 statement (albeit not on two occasions).¹²⁹⁸ The International Judges find that the initial absence of references to YIM Tith's involvement in the questioning of prisoners at Wat Pratheat in TUN Soun's evidence, does not

¹²⁸⁹ The International Judges observe that the Office of the Co-Prosecutors' Interview Notes are not a full transcript of the interview but rather a summary of information provided by the witness. These Notes do not include the questions asked by the Investigator. Although the Interview Notes read "[t]he witness stated that the prison was a restricted area and they were not allowed to approach the place" and "he stated that entering the prison was prohibited and to do so meant arrest.", it is unclear whether TUN Soun stated that he never entered the compound himself or that this was generally a restricted area for those not in detention. In later statements, TUN Soun also stated that he did not know or witness certain things because he "was banned from going within a hundred metres of the Voat Preah Thiet Pagoda fence" while also stating that he was "re-educated at Voat Preah Thiet Prison" and that he "enter[ed] the pagoda compound". See Written Record of Interview of TUN Soun, 20 February 2013, D118/22, at ERN (EN) 00976606, 00976607, 00976609 (A12, A15, A33).

¹²⁹⁰ Written Record of Interview of TUN Soun, 29 September 2010, D3/8. The International Judges observe that TUN Soun was merely read the Office of the Co-Prosecutors' 15 August 2008 interview and asked if he would like to make any corrections or changes to the information provided therein. The investigator explicitly stated that he may return another time with more detailed questions.

¹²⁹¹ Civil Party Application of TUN Soun, 29 July 2009, D5/122, at ERN (EN) 00426758. The International Judges further note that a Civil Party application is drawn up in narrative form and with a purpose distinct from a normal witness interview.

¹²⁹² Written Record of Interview of TUN Soun, 6 May 2011, D13, at ERN (EN) 00698809; Written Record of Interview of TUN Soun, 20 February 2013, D118/22, at ERN (EN) 00976606 (A12).

¹²⁹³ Written Record of Interview of TUN Soun, 29 May 2015, D219/346, at ERN (EN) 01116110 (A10).

¹²⁹⁴ Written Record of Interview of TUN Soun, 20 February 2013, D118/22, at ERN (EN) 00976607, 00976610 (A15, A34).

¹²⁹⁵ Written Record of Interview of TUN Soun, 6 May 2011, D13, at ERN (EN) 00698809 ("I was sent to attend training there for only three or four days.").

¹²⁹⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 255.

¹²⁹⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 256.

¹²⁹⁸ Written Record of Interview of TUN Soun, 20 February 2013, D118/22, at ERN (EN) 00976605 (A4-A6), 00976606 (A12) ("a Kiri Vong district cadre took me to be re-educated at Voat Preah Thiet Prison for two or three days"), 00976607 (A16) ("I knew this through hearing militiamen and *Ta Tit* interrogating the prisoners.").



sufficiently call in to question the reliability of his later statements.¹²⁹⁹

464. The Co-Lawyers provide no concrete support for their allegation that TUN Soun's answers may have been influenced by the public disclosure of the Third Introductory Submission in 2011 or through his interactions with investigators and/or NGO's.¹³⁰⁰ The International Co-Investigating Judge recognised that TUN Soun's 20 February 2013 interview did not establish whether the information concerning YIM Tith's involvement in the questioning of prisoners came from TUN Soun's own experience.¹³⁰¹ Subsequent investigative actions¹³⁰² and interviews were held with a view to clarifying this issue. The International Judges find no improper action by the Investigators, as implied.¹³⁰³

465. Turning to the specific challenges involving TUN Soun's 14 December 2014 statement, the International Judges observe that the Co-Lawyers do not fully and accurately represent TUN Soun's evidence. For example, the Co-Lawyers allege that TUN Soun could not have heard the specific questions asked by YIM Tith as he was "not permitted to enter the prisoner detention area".¹³⁰⁴ Yet, TUN Soun stated that the prisoners were taken out of the detention area and were questioned beneath the monk's monastery at a short distance from him.¹³⁰⁵ Similarly, the claim that TUN Soun was unsure whether YIM Tith spoke to prisoners or prison staff,¹³⁰⁶ is inaccurate. TUN Soun's evidence is that he heard YIM Tith asking *detainees* certain

¹²⁹⁹ The International Judges further note that TUN Soun was asked: "In interview transcript document D13 (ERN00698808-00698810), you told Judge Blunk, the International Co-Investigating Judge, that you knew *Ta* Tith was Kiri Vong District Committee, but when the judge asked you what you knew about *Ta* Tith, you said you did not know anything. Would you please clarify this point?", and whether "anyone has influenced your answers to ECCC questions?". TUN Soun stated that he did not remember what he said to Judge Blunk because it "happened so long ago" and that no one had influenced his answers. See Written Record of Interview of TUN Soun, 14 December 2014, D219/110, at ERN (EN) 01076898-01076899 (Q9-A10).

¹³⁰⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 255.

¹³⁰¹ Written Record of Investigation Action, 15 December 2014, D219/122, at ERN (EN) 01047275 ("On 3 Dec. 2014 the team travelled [...] to locate Mr. TUN Soun. The reason for his inclusion was to clarify testimony he gave [...] in [a Written Record of Interview] D118/22 wherein the witness stated that *Ta* Tith interrogated prisoners and it was unclear whether this was hearsay information. [...] On 04 Dec. 2014 the team returned [...] to interview TUN Soun. He provided a Civil Party [Written Record of Interview] in which he provided details of two incidents in late 1976 where *Ta* Tith attended Wat Pratheat [Security Centre] and interrogated detainees."). See also Written Record of Interview of TUN Soun, 20 February 2013, D118/22, at ERN (EN) 00976607 (A16).

¹³⁰² Written Record of Investigation Action, 15 December 2014, D219/122 (regarding a 3 December 2014 meeting with TUN Soun).

¹³⁰³ YIM Tith's Appeal (Indictment) (D382/22), para. 255.

¹³⁰⁴ YIM Tith's Appeal (Indictment) (D382/22), para. 256 and footnote 817.

¹³⁰⁵ Written Record of Interview of TUN Soun, 14 December 2014, D219/110, at ERN (EN) 01076897 (A4) ("I saw *Ta* Tith and Yeay Bau call a prisoner out of detention to beneath a nearby monastery, and then I saw them stand and talk with that prisoner."); Written Record of Interview of TUN Soun, 29 May 2015, D219/346, at ERN (EN) 01116113 (A57-A59).

¹³⁰⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 256 and footnote 819.



questions whereas he did not hear YIM Tith speaking to the prison staff.¹³⁰⁷ Finally, the inconsistency regarding the timing of TUN Soun's imprisonment¹³⁰⁸ was recognised and addressed by International Co-Investigating Judge who found that his evidence likely relates to 1977 and that, despite this inconsistency, the witness gave a clear account of the incident.¹³⁰⁹

c. YIM Tith's Participation in Killings at Wat Pratheath

466. The Co-Lawyers aver that the International Co-Investigating Judge erred in finding that "[YIM Tith] ordered, passed on the order to, or at least acquiesced to the [...] killing of prisoners"¹³¹⁰ and that YIM Tith participated in killings at Wat Pratheath by giving an order to "cut open" prisoners,¹³¹¹ based solely on HOR Yan's evidence.¹³¹²

467. In respect of HOR Yan,¹³¹³ the International Judges reaffirm that a fact-trier can "reasonably accept certain parts of a witness's testimony and reject others" after having considered the whole of the testimony.¹³¹⁴ The International Co-Investigating Judge considered certain contradictions in HOR Yan's evidence, including his statement that he was imprisoned in 1973¹³¹⁵ and did not see what happened once the prisoners were taken away.¹³¹⁶ The International Judges further observe that, precisely because of these inconsistencies, the International Co-Investigating Judge opted not to rely on some of HOR Yan's statements, finding that "it cannot be concluded with the necessary certainty that YIM Tith was directly present at the very spot where and when the prisoners had their gallbladders cut out and were killed".¹³¹⁷

¹³⁰⁷ Written Record of Interview of TUN Soun, 29 May 2015, D219/346, at ERN (EN) 01116113 (A52-A57) ("Q: Did you hear *Ta* Tith speaking to the prison staff A52: No I did not"; "A57 [YIM Tith] asked a prisoner [...]").

¹³⁰⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 257.

¹³⁰⁹ Indictment (D382), para. 467 and footnote 1269.

¹³¹⁰ YIM Tith's Appeal (Indictment) (D382/22), para. 264 *referring to* Indictment (D382), para. 463.

¹³¹¹ YIM Tith's Appeal (Indictment) (D382/22), para. 259 *referring to* Indictment (D382), paras 456-457.

¹³¹² YIM Tith's Appeal (Indictment) (D382/22), para. 260.

¹³¹³ YIM Tith's Appeal (Indictment) (D382/22), para. 260.

¹³¹⁴ *See supra* Ground 5 Evidentiary Considerations.

¹³¹⁵ Indictment (D382), para. 455 ("One former prisoner, Hor Yan, states in one interview that he was detained at Wat Pratheath in 1973. However, he gives many inconsistent answers regarding the timing of his incarceration. Given that he was detained for eight months at a time when the Vietnamese troops first attacked Kirivong District, and at a time when YIM Tith visited the security centre, it is likely that Hor Yan was at Wat Pratheath in 1977 to 1978.") (footnotes omitted). The International Co-Investigating Judge's finding that HOR Yan was likely at Wat Pratheath in 1977 and 1978 and not 1973 is further supported by evidence that Wat Pratheath commenced operations in early 1975. *See* Indictment (D382), para. 434 and footnote 1154.

¹³¹⁶ Indictment (D382), para. 457 ("However, Hor Yan changed his account in a subsequent interview in 2014, stating that "*he did not see what happened*" once the prisoners were taken away to the paddy field.")

¹³¹⁷ Indictment (D382), para. 457.



468. In relation to other alleged contradictions,¹³¹⁸ the International Judges observe that HOR Yan's statement that he did not know YIM Tith's role in Kirivong District does not necessarily conflict with his evidence that YIM Tith was on the Kirivong District Committee.¹³¹⁹ The International Judges further observe that HOR Yan maintains consistent in stating that YIM Tith was on the Kirivong District,¹³²⁰ that everyone in the District knew him,¹³²¹ and that Wat Pratheat was a District-Level Security Office.¹³²² The International Judges consider that these statements sufficiently explain how HOR Yan could have known that YIM Tith and other district leaders were above Wat Pratheat in terms of hierarchy.¹³²³

469. Having considered certain inconsistencies in HOR Yan's evidence, the International Co-Investigating Judge ultimately found that it is "sufficiently certain [YIM Tith] gave the order to "cut open" the prisoners and that he saw the gallbladders being put in a bucket and that he received them together with Ta Nam."¹³²⁴ The Indictment demonstrates that the International Co-Investigating Judge carefully examined HOR Yan's evidence in its totality. Therefore, the International Judges hold that the above finding was not unreasonable.

470. The Co-Lawyers further challenge findings related to the reporting structure and the chain of command in the Kirivong District above Wat Pratheat.¹³²⁵ More specifically, their challenges relate to the International Co-Investigating Judge's reliance on DOK Chan's evidence in the finding that YIM Tith attended district level meetings with Ta Pring, Chief of

¹³¹⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 260 and footnote 832. The alleged inconsistency regarding the number of times that HOR Yan "saw" or was in contact with YIM Tith at Wat Pratheat has previously been addressed in the section concerning YIM Tith's visits to Wat Pratheat.

¹³¹⁹ Written Record of Interview of HOR Yan [HOR Yan], 19 March 2012, D105/6, at ERN (EN) 00841977 (A11-A12) ("Do you remember what role Ta Tit had in Kirivong District? A12: I did not know because I did not join them."). The International Judges observe that this question is not unambiguous and consider that HOR Yan's answer that he did not know YIM Tith's role in the Kirivong District could refer to YIM Tith's specific functions on the Kirivong District Committee.

¹³²⁰ Written Record of Interview of HAO Yan [HOR Yan], 27 October 2014, D219/55, at ERN (EN) 01053829 (A1) ("The Kiri Vong District Committee was then Ta Tith [...], Yeay Beau [...] and Ta Nam [...]."), 01053832 (A15); Written Record of Interview of HAO Yan [HOR Yan], 6 December 2013, D118/155, at ERN (EN) 00978588 (A14) ("Ta Tit and Ta Nam were on the district committee."). See further SOAS/HRW interview of HO Yan [HOR Yan], 27 August 2005, D1.3.11.18, at ERN (EN) 00217607 ("The District Committee comprised: Têut").

¹³²¹ Written Record of Interview of HAO Yan [HOR Yan], 6 December 2013, D118/155, at ERN (EN) 00978602 (A119).

¹³²² Written Record of Interview of HAO Yan [HOR Yan], 27 October 2014, D219/55, at ERN (EN) 01053839 (A43) ("Correct. It was a district level security office").

¹³²³ YIM Tith's Appeal (Indictment) (D382/22), para. 260. The Co-Lawyers allege that the source of his evidence that "Teut, Tom, Beau (f), and Nam were above the Voat Pratheat" is unclear.

¹³²⁴ Indictment (D382), para. 457.

¹³²⁵ YIM Tith's Appeal (Indictment) (D382/22), paras 261-263.



Wat Pratheath,¹³²⁶ and ORK Chan's evidence concerning YIM Tith's authority to give orders.¹³²⁷

471. Although DOK Chan did not provide evidence as to the contents of Pring's reports or its format, as alleged,¹³²⁸ the International Judges are unpersuaded that this level of detail would have been required to make the finding on the reporting structure and the chain of command in the Kirivong District. The International Judges further observe that DOK Chann was himself a staff member at Wat Pratheath and was aware of the administrative structure of the Security Centre, including Pring's role as Security Office Chairman.¹³²⁹ DOK Chann stated that Wat Pratheath was a district prison,¹³³⁰ that Pring reported to District 109 and that YIM Tith became District Secretary after the transfer of *Ta Tom*.¹³³¹ He explained that the general population knew YIM Tith's name and role because his position was announced at every joint meeting, which he regularly attended himself.¹³³² Accordingly, the allegations that DOK Chann could not have known of the reporting structure or that he did not give evidence on the role of YIM Tith is unconvincing.¹³³³

472. Finally, ORK Chan stated that, according to the law in the DK era, kill orders stemmed from the Sector level, but that the District level (YIM Tith) delivered the kill orders to the prison chief,¹³³⁴ later stating that kill orders were issued by the District Committee members.¹³³⁵ With regard to his own release,¹³³⁶ ORK Chan explained that he did not hear YIM Tith issue a release order, but he believed the order stemmed from YIM Tith because he was

¹³²⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 261 *referring to* Indictment (D382), para. 439.

¹³²⁷ YIM Tith's Appeal (Indictment) (D382/22), para. 263 and footnote 841.

¹³²⁸ YIM Tith's Appeal (Indictment) (D382/22), para. 261 and footnote 836.

¹³²⁹ Written Record of Interview of DOK Chann, 20 November 2014, D219/86, at ERN (EN) 01056873 (A3-A4).

¹³³⁰ Written Record of Interview of DOK Chann, 20 November 2014, D219/86, at ERN (EN) 01056874 (A6) ("Yes, Wat Pratheath Pagoda was a prison of the district.").

¹³³¹ Written Record of Interview of DOK Chann, 20 November 2014, D219/86, at ERN (EN) 01056874 (Q7-A7).

¹³³² Written Record of Interview of DOK Chann, 21 November 2014, D219/87, at ERN (EN) 01056884 (A16-A17).

¹³³³ YIM Tith's Appeal (Indictment) (D382/22), para. 261.

¹³³⁴ Written Record of Interview of ORK Chan, 9 December 2013, D118/156, at ERN (EN) 00980472 (A58-A60) ("Because the law during the Khmer Rouge era was to follow the hierarchy; there had to be orders from sector level before district level killed. [...] The prison chief could execute the prisoners only when he received orders from above. Q:[...] who issued such kill orders to the prison chief? A60: Someone from the district delivered the kill orders to the prison chief."). *See further* Written Record of Interview of ORK Chan, 8 March 2012, D105/5, at ERN (EN) 00803446 (A55) ("For example, for the first, second and third persons in the district committee, if there was a killing plan from the upper echelon, they would just implement the planned killing."), 00803450 (A95) ("[YIM Tith] came here with an order form the Sector saying which prisoners would be killed.").

¹³³⁵ Written Record of Interview of HOK Chan [ORK Chan], 19 June 2015, D219/369, at ERN (EN) 01128261 (A101).

¹³³⁶ YIM Tith's Appeal (Indictment) (D382/22), para. 263 and footnote 842.



released after YIM Tith came to inspect the prison.¹³³⁷ While the International Judges note that ORK Chan did not directly hear YIM Tith issue any orders, his evidence is in fact corroborative of the finding that YIM Tith ordered *or passed on* the order to kill prisoners at Wat Pratheat.

473. In conclusion, the International Judges find that the Co-Lawyers failed to demonstrate errors in the International Co-Investigating Judge's findings that YIM Tith visited Wat Pratheat, questioned prisoners and ordered or passed on the order to kill prisoners. The International Judges are satisfied that there is sufficient evidence to support the determination of YIM Tith's significant contribution to the realisation of JCE C. Accordingly, Ground 5.3(iii) is dismissed.

Conclusion

474. Following review of the ten sub-grounds of appeal submitted by the Co-Lawyers, the International Judges conclude that the Co-Lawyers' argument that the International Co-Investigating Judge systematically erred in evaluating the evidence is without merit. The International Judges reject, in this connection, the submissions that the International Co-Investigating Judge systematically failed to consider contradictory and exculpatory evidence, failed to provide adequate reasoning for his findings, and that he misapplied the standard of proof in reaching his conclusions about YIM Tith's *de jure* positions and *de facto* authority in the Northwest and Southwest Zones.¹³³⁸

475. The International Judges further consider that the evidence firmly establishes YIM Tith's membership and significant contribution to JCEs A, B and C.¹³³⁹ Moreover, the fact that YIM Tith was not a member of the Central or Standing Committee and did not formulate CPK policies is not, by itself, sufficient to preclude the finding that YIM Tith was amongst the "most responsible".¹³⁴⁰

¹³³⁷ Written Record of Interview of HOK Chan [ORK Chan], 19 June 2015, D219/369, at ERN (EN) 01128261 (A104-A112).

¹³³⁸ *Contra* YIM Tith's Appeal (Indictment) (D382/22), paras 218, 220, 266.

¹³³⁹ *Contra* YIM Tith's Appeal (Indictment) (D382/22), para. 219.

¹³⁴⁰ *Contra* YIM Tith's Appeal (Indictment) (D382/22), paras 217, 219. *See generally* Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 441; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, paras 321, 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, should not automatically exclude those at lower levels who are directly implicated in the most serious atrocities").



476. The International Judges uphold as a reasonable exercise of the International Co-Investigating Judge's discretion his determination that YIM Tith was amongst the "most responsible" and thus falls within the ECCC's personal jurisdiction.¹³⁴¹ Consequently, the International Judges dismiss Ground 5.

E. Conclusion for the Co-Lawyers for YIM Tith's Appeal of the Indictment

477. For the foregoing reasons, the International Judges conclude that the International Co-Investigating Judge did not commit errors or abuses fundamentally determinative of the exercise of his discretion in finding that YIM Tith was amongst the "most responsible" for the crimes committed during the period from 17 April 1975 to 6 January 1979. The International Judges accordingly uphold the International Co-Investigating Judge's Indictment and find that YIM Tith is subject to the ECCC's personal jurisdiction.

478. The International Judges further uphold the Counts as set out in the International Co-Investigating Judge's Indictment. YIM Tith is accordingly indicted and committed to trial in proceedings before the Trial Chamber.

THE NATIONAL CO-PROSECUTOR'S APPEAL

1. Submissions

479. The National Co-Prosecutor submits that the case against YIM Tith should be dismissed because: (i) he is "free of liability"; and (ii) he does not fall under the ECCC's personal jurisdiction.¹³⁴²

480. First, the National Co-Prosecutor argues that YIM Tith is not liable for the charged crimes as it was the Standing Committee of the CPK—which consisted of seven people including POL Pot and NUON Chea—that had authority over decision-making and laid out policies of purge and suppression.¹³⁴³ The National Co-Prosecutor contends that the purge policy was reflected in the 30 March 1976 Decision of the CPK Central Committee, which clearly stated that purges at the zone were to be decided by the Zone Standing Committee,¹³⁴⁴

¹³⁴¹ *Contra* YIM Tith's Appeal (Indictment) (D382/22), paras 265, 267.

¹³⁴² National Co-Prosecutor's Appeal (D382/4/1), paras 53-76.

¹³⁴³ National Co-Prosecutor's Appeal (D382/4/1), paras 53-58.

¹³⁴⁴ National Co-Prosecutor's Appeal (D382/4/1), paras 53-54.



and further avers that the suppression policy became widespread in the country after the Decision.¹³⁴⁵

481. Second, the National Co-Prosecutor avers that YIM Tith did not have any authority, but rather, he merely followed Party lines, and thus does not fall within the remit of the ECCC's personal jurisdiction as stated in Article 1 of the ECCC Law.¹³⁴⁶ The National Co-Prosecutor asserts that for the restriction of the ECCC personal jurisdiction, the Royal Government of Cambodia "is playing a role as the [United Nations] Security Council did with the ICTY, ICTR and SCSL".¹³⁴⁷ She argues that "founders of international tribunals" may have an "influence on the scope of personal jurisdiction and judicial affairs without prejudice to [the] impartiality and independence of [such] tribunals".¹³⁴⁸

482. The National Co-Prosecutor contends that the determination of the Royal Government of Cambodia and the spirit of the ECCC Law require the Court to bring to investigation and trial only senior leaders and those "most responsible" during the DK period.¹³⁴⁹ According to the National Co-Prosecutor, the Royal Government of Cambodia's intention for the ECCC Agreement was to screen just a small number of "senior leaders" within the ECCC personal jurisdiction, *i.e.* aiming at the members of the Party Central and Standing Committees.¹³⁵⁰ In her view, "those most responsible" refers to S-21 Security Chairman KAING Guek Eav *alias* Duch as he played a key role in the commission of crimes, having autonomy and *de facto* authority.¹³⁵¹ In this regard, the National Co-Prosecutor notes that YIM Tith's name does not appear in DK contemporary documents and contends that the International Co-Prosecutor's allegations against YIM Tith are arbitrary and do not specify YIM Tith's role in the army or whether he was a member of the CPK Central Committee.¹³⁵²

483. The National Co-Prosecutor further avers that, with the United Nations' recognition of the Government and the Cambodian people's legitimate concerns in the Preamble of the ECCC Agreement—that a balance must be struck between "justice" and "national reconciliation"—the ECCC Law and Agreement aim at, as noted above, only the DK senior leaders and those

¹³⁴⁵ National Co-Prosecutor's Appeal (D382/4/1), para. 58.

¹³⁴⁶ National Co-Prosecutor's Appeal (D382/4/1), paras 59-75.

¹³⁴⁷ National Co-Prosecutor's Appeal (D382/4/1), paras 59-65.

¹³⁴⁸ National Co-Prosecutor's Appeal (D382/4/1), para. 65.

¹³⁴⁹ National Co-Prosecutor's Appeal (D382/4/1), paras 59-73.

¹³⁵⁰ National Co-Prosecutor's Appeal (D382/4/1), paras 66-68.

¹³⁵¹ National Co-Prosecutor's Appeal (D382/4/1), para. 66.

¹³⁵² National Co-Prosecutor's Appeal (D382/4/1), para. 74.



who were “most responsible” to be brought to trial.¹³⁵³ In this regard, the National Co-Prosecutor notes that expanding the scope of personal jurisdiction to YIM Tith, beyond that of Cases 001 and 002, will waste unnecessary time and expenditure, particularly given that justice has already been brought to the victims through the trials of Cases 001 and 002.¹³⁵⁴

484. In the Response, the International Co-Prosecutor submits that the National Co-Prosecutor’s Appeal: (i) does not meet the standard of review on appeal; (ii) argues for a definition of personal jurisdiction that disregards the expressed intent of both the Royal Government of Cambodia and the United Nations; (iii) fails to demonstrate that the Royal Government of Cambodia has power to unilaterally restrict personal jurisdiction without formally amending the ECCC Agreement; and (iv) unpersuasively claims that Cases 001 and 002 brought a sufficient measure of justice and contribution to national reconciliation.¹³⁵⁵

485. First, the International Co-Prosecutor avers that the National Co-Prosecutor’s Appeal should be dismissed because it does not raise any discernible ground of appeal.¹³⁵⁶ The Appeal fails to demonstrate factual¹³⁵⁷ or legal errors¹³⁵⁸ or that the International Co-Investigating Judge abused his discretion.¹³⁵⁹ Instead, the Appeal makes general conclusions that have no direct or apparent connection with the Indictment’s legal or factual findings.¹³⁶⁰

486. Second, the National Co-Prosecutor’s definition of personal jurisdiction disregards the expressed intent of both the Royal Government of Cambodia and the United Nations by wrongly asserting that “those most responsible” refers solely to KAING Guek Eav *alias* Duch.¹³⁶¹ The plain text of the ECCC Agreement and ECCC Law clearly mentions a category of persons rather than a single person¹³⁶² and the ECCC negotiating history shows that the Royal Government of Cambodia and the United Nations intended “those who were most responsible” to be an open category whose membership would be determined by the

¹³⁵³ National Co-Prosecutor’s Appeal (D382/4/1), paras 70-71.

¹³⁵⁴ National Co-Prosecutor’s Appeal (D382/4/1), para. 72.

¹³⁵⁵ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D382/16), paras 2-35.

¹³⁵⁶ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D382/16), para. 4.

¹³⁵⁷ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D382/16), paras 4-5.

¹³⁵⁸ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D382/16), paras 4, 6.

¹³⁵⁹ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D382/16), paras 4, 7.

¹³⁶⁰ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D382/16), para. 4 *referring to* National Co-Prosecutor’s Appeal (D382/4/1), para. 75.

¹³⁶¹ International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D382/16), para. 8 *referring to* National Co-Prosecutor’s Appeal (D382/4/1), paras 66, 72.

¹³⁶² International Co-Prosecutor’s Response to the National Co-Prosecutor’s Appeal (D382/16), para. 9 *referring to* ECCC Agreement, Art. 1; ECCC Law, Arts 1 and 2 *new*.



Co-Prosecutors and Co-Investigating Judges¹³⁶³ based on the totality of the evidence and independent of any instructions.¹³⁶⁴

487. Third, the Royal Government of Cambodia does not have the power to unilaterally restrict personal jurisdiction without formally amending the ECCC Agreement.¹³⁶⁵ The National Co-Prosecutor's analogy to the United Nations Security Council's "influence" over the ICTR and ICTY through Resolutions 1503 and 1534 is inapt¹³⁶⁶ and any change in policy addressed by the ECCC Agreement, including personal jurisdiction, must be approved by both parties. To date, neither party has sought to amend the provisions related to personal jurisdiction.¹³⁶⁷ Furthermore, the fundamental rule of law principle of judicial independence—enshrined in the ECCC Agreement, ECCC Law, Cambodian Constitution and multiple human rights instruments—imposes a duty on governmental and other institutions to refrain from exerting any form of pressure on judges as they must issue decisions solely on the basis of the law, the evidence, and their own judgment and conscience.¹³⁶⁸

488. Finally, the International Co-Prosecutor avers that the independent judicial resolution of Cases 003, 004 and 004/2 will promote rather than undermine both justice and reconciliation.¹³⁶⁹ There is no indication that the resolution of these Cases would threaten peace and security in Cambodia.¹³⁷⁰ Moreover, considering that Cases 003, 004 and 004/2 include issues and crimes sites that have not been addressed in Cases 001 and 002, numerous victims

¹³⁶³ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16), paras 10-16 referring to "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", First Session of the Third Term of the Cambodian National Assembly, 4-5 October 2004, partial transcript printed in *Searching for the Truth (Documentation Center of Cambodia [OR DC-Cam] Magazine)*, Special English Edition (Third Quarter 2004), D378/5.1.2, ERN (EN) 01593392-01593393; *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, 16 March 1999, UN Docs A/53/850 and S/1999/231, D324.15, para. 110.

¹³⁶⁴ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16), para. 16.

¹³⁶⁵ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16), paras 2, 17-26.

¹³⁶⁶ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16), paras 19, 20-23; SC Res. 1503, 28 August 2003, UN Doc. S/RES/1503 (2003), D378/5.1.12; SC Res. 1534, 26 March 2004, UN Doc. S/RES/1534 (2004), D378/5.1.13.

¹³⁶⁷ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16), para. 20 referring to ECCC Agreement, Art. 2(3).

¹³⁶⁸ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16), paras 25-26 referring to *Constitution of Cambodia* (24 September 1993); Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, The Law Association for Asia and the Pacific, 28 August 1997; Basic Principles on the Independence of the Judiciary, endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; The New Delhi Code of Minimum Standards of Judicial Independence, International Bar Association, 22 October 1982.

¹³⁶⁹ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16), paras 2, 27-35.

¹³⁷⁰ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16), para. 29.



and Civil Party applicants have a strong interest in hearing the truth and do not consider that justice had already been served by Cases 001 and 002.¹³⁷¹

489. The National Co-Prosecutor did not file a Reply.

2. Discussion

490. As a preliminary note, the International Judges observe that the Co-Prosecutors may appeal against all orders by the Co-Investigating Judges¹³⁷² and reiterate that the National Co-Prosecutor's Appeal is admissible.¹³⁷³ Nevertheless, the International Judges recall that the arguments of a party that do not have the potential to cause the impugned decision to be reversed or revised may be dismissed without analysis of their substance.¹³⁷⁴ The International Judges further reaffirm that they will not consider in detail allegations which are obscure, vague or suffer from other formal and obvious insufficiencies.¹³⁷⁵

491. The International Judges observe that the National Co-Prosecutor makes submissions on the historical context and YIM Tith's background without articulating a precise error committed by the International Co-Investigating Judge.¹³⁷⁶ She further merely asserts her interpretation of "senior leaders of Democratic Kampuchea" and "those most responsible" within the ECCC personal jurisdiction.¹³⁷⁷ In support of her position, the National Co-

¹³⁷¹ International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal (D382/16), paras 30-34 referring to T. WILLIAMS *et al.*, *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transnational Justice Process* (Marburg: Centre for Conflict Studies, Phnom Penh: Centre for the Study of Humanitarian Law, Bern: Swisspeace, November 2018); H. RYAN and L. MCGREW, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia* (New York: Open Society Justice Initiative, 2016); P. PHAM *et al.*, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Center, University of California, Berkley School of Law, June 2011).

¹³⁷² Internal Rule 74(2).

¹³⁷³ See *supra* para. 39.

¹³⁷⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 649; Case 002, Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5 ("Case 002 Decision on Civil Party Applications (D250/3/2/1/5)"), para. 22 referring to *Rutaganda* Appeal Judgment (ICTR), para. 18; ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 13.

¹³⁷⁵ Case 002 Decision on Civil Party Applications (D250/3/2/1/5), para. 22.

¹³⁷⁶ National Co-Prosecutor's Appeal (D382/4/1), paras 19-51 (discussing CPK history, structure and leadership, the DK regime administrative structure, as well as YIM Tith's personal background and position in the Northwest Zone).

¹³⁷⁷ National Co-Prosecutor's Appeal (D382/4/1), paras 59-75. The International Judges observe that although the notion of "those who were most responsible" is not defined in the ECCC Agreement or Law, resorting to the ECCC negotiation history is needed only if the application of general rules of interpretation—that the term shall be interpreted in the context and in the light of the object and purpose of the Court's founding documents, taking into account applicable international law rules—was ineffective. The International Judges consider that it is not



Prosecutor does not provide any precise references to the Indictment's findings to which challenge is being made.¹³⁷⁸ Accordingly, the International Judges consider that the National Co-Prosecutor's Appeal fails to clearly identify and substantiate any reviewable errors in the International Co-Investigating Judge's Indictment.¹³⁷⁹ The International Judges thus find that the present submissions do not have a capability to cause the reversal or revision of the impugned decision and summarily dismiss the Appeal in its entirety.

492. Notwithstanding the summary dismissal, the International Judges reaffirm the discretionary power to, *inter alia*, address issues of general significance for the ECCC's jurisprudence and legacy.¹³⁸⁰ Accordingly, the International Judges find it appropriate to clarify two issues raised by the National Co-Prosecutor, namely: (i) the position and power of the Royal Government of Cambodia concerning the ECCC personal jurisdiction;¹³⁸¹ and (ii) the alleged "balance between justice and national reconciliation" for the victims in Case 004.¹³⁸²

493. First, the International Judges consider the National Co-Prosecutor's contention—that the Royal Government of Cambodia is similar to the United Nations Security Council and may have an influence of the functioning of the ECCC¹³⁸³—is erroneous and fully reject it. In this regard, the International Judges observe that the ECCC Agreement was stipulated and adopted by both the Royal Government of Cambodia and the United Nations following negotiations between the parties. Accordingly, as a party to the ECCC Agreement, the Royal Government of Cambodia is bound by its terms and must perform it in good faith.¹³⁸⁴ Neither the ECCC Agreement, nor any other applicable law prescribes that the Royal Government of Cambodia has unilateral power to "influence on the scope of the personal jurisdiction and judicial affairs" of the Court.¹³⁸⁵ On the contrary, the principle of judicial independence—prescribed by both the ECCC Agreement and ECCC Law—imposes an obligation to respect and observe the

the case and that the meaning of those "most responsible" may be determined by examining relevant international law jurisprudence. *See* Vienna Convention, Arts 31-32.

¹³⁷⁸ National Co-Prosecutor's Appeal (D382/4/1), paras 19-76.

¹³⁷⁹ *See* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 191.

¹³⁸⁰ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), paras 32-33; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), para. 193; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 73 *referring to* ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, paras 19, 23-24; ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, paras 247, 281, 316; ICTY, *Prosecutor v. Mucić et al*, IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, para. 221.

¹³⁸¹ National Co-Prosecutor's Appeal (D382/4/1), paras 59-68.

¹³⁸² National Co-Prosecutor's Appeal (D382/4/1), paras 70-72.

¹³⁸³ National Co-Prosecutor's Appeal (D382/4/1), para. 65.

¹³⁸⁴ *See* Vienna Convention, Art. 26.

¹³⁸⁵ *Contra* National Co-Prosecutor's Appeal (D382/4/1), para. 65.



independence of judiciary in the performance of their functions.¹³⁸⁶ The International Judges find that the National Co-Prosecutor's viewpoint on the ECCC's negotiating history—demonstrating only the Royal Government of Cambodia's “idea for the ECCC Agreement”¹³⁸⁷—does not offer a sufficient basis for the interpretation of the ECCC Agreement and ECCC Law regarding personal jurisdiction.

494. Second, the International Judges note that the Preamble of the ECCC Agreement affirms the United Nations General Assembly's recognition of “the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security”.¹³⁸⁸ The International Judges consider the National Co-Prosecutor's assertion—that “striking a balance between ‘justice’ and ‘national reconciliation’” amounts to delivering justice to victims in Case 004 through the Cases 001 and 002 trials¹³⁸⁹—to be flawed. Considering the ECCC Agreement's purpose prescribed in Article 1 of the ECCC Agreement together with its Preamble,¹³⁹⁰ the International Judges are of the view that “national reconciliation, stability, peace and security” are ensured through “justice” by bringing to trial senior leaders of DK and those who were “most responsible” for the crimes. Noting the importance of justice to reconciliation, the International Judges observe that impunity, instead, may affect reconciliation for victims.¹³⁹¹

495. Further, victims participating as Civil Party applicants in the ECCC proceedings need to establish a link to a particular defendant's crime.¹³⁹² Accordingly, the National Co-Prosecutor's contention that “justice has been brought to [victims] through the trial of Cases 001 and 002”¹³⁹³ is unpersuasive, as Cases 001 and 002 reasonably could not include all victims of alleged crimes during the DK regime. The National Co-Investigating Judge, in his Dismissal in Case 004, estimated thousands of victims at 24 crime sites under his investigation.¹³⁹⁴ In

¹³⁸⁶ ECCC Agreement, Art. 3(3); ECCC Law, Art. 10 *new*.

¹³⁸⁷ National Co-Prosecutor's Appeal (D382/4/1), paras 66-68.

¹³⁸⁸ ECCC Agreement, Preamble.

¹³⁸⁹ National Co-Prosecutor's Appeal (D382/4/1), paras 70-72.

¹³⁹⁰ ECCC Agreement, Preamble, Art. 1.

¹³⁹¹ *See also* Considerations regarding the Co-Prosecutors' Disagreement (D1/1.3), paras 33-36, 45 (where the National Co-Prosecutor similarly alleged that initiating new prosecutions may hinder national reconciliation. Although, the Pre-Trial Chamber has not attained the required supermajority to reach a decision on the merits, it considered that the case shall proceed to the judicial investigation stage).

¹³⁹² Internal Rule 23*bis*(1)(b).

¹³⁹³ National Co-Prosecutor's Appeal (D382/4/1), para. 72.

¹³⁹⁴ Dismissal (D381), paras 589, 680 (finding that around 53,050 people were killed at 24 crime sites in the Northwest Zone and Southwest Zone), *see also* para. 212 (finding that more than a hundred people died at Kraing Ta Chan Security Office), para. 220 (estimating that more than one thousand Khmer Krom people were killed at Preil Village Execution Site), para. 260-262 (considering that hundreds of victims perished at Wat Koas Klara



Case 004, around 2,000 Civil Party applicants applied to participate in the proceedings, of which 1,064 Civil Party applicants were declared admissible by the International Co-Investigating Judge.¹³⁹⁵ Moreover, the International Judges duly note that approximately 900 Civil Party applicants whose applications were rejected by the Admissibility Order, are currently appealing against the International Co-Investigating Judge's Decision.¹³⁹⁶

496. YIM Tith is charged with, *inter alia*, genocide, which “by its very nature, entail[s] serious violations of fundamental human rights of [...] victims” and invokes a State's duty to prosecute as part of an effective remedy to the victims under Article 2(3) of the ICCPR.¹³⁹⁷ The International Judges are not convinced that the exercise of personal jurisdiction over YIM Tith “will lengthen the time and spend money unnecessarily”.¹³⁹⁸ Pursuing reconciliation at the expense of justice to all the DK regime victims, including those in Case 004, will be contrary to their rights of access to justice and redress¹³⁹⁹ and may impede on the facilitation of a reconciliation process itself.

497. In conclusion, the International Judges find that the National Co-Prosecutor's Appeal does not demonstrate any articulable or substantiated errors in the impugned Indictment and therefore summarily dismiss this Appeal entirely.

THE INTERNATIONAL CO-PROSECUTOR'S APPEAL

1. Submissions

498. The International Co-Prosecutor appeals the Dismissal and requests the Pre-Trial Chamber to: (i) reverse the Dismissal's finding that YIM Tith is not a senior leader or amongst “those most responsible” and therefore not subject to the ECCC's personal jurisdiction; and (ii) order that the case proceeds to trial on the basis of the Indictment.¹⁴⁰⁰

Security Office), para. 367 (finding that around three hundred corpses were found at Prey Kabau Execution Site), and para. 416 (assessing that thousands of people died at Prison No. 8).

¹³⁹⁵ See Case 004, Annex A – List of Civil Party Applications Admissible, 28 June 2019, D384.1; Case 004, Annex B – List of Civil Party Applications Inadmissible, 28 June 2019, D384.2.

¹³⁹⁶ Case 004, Appeal against Order on the Admissibility of Civil Party Applicants, 13 September 2019, D384/5, paras 2-3.

¹³⁹⁷ Case 002 Decision on Closing Order Appeals (NUON Chea and IENG Thirith) (D427/2/15 & D427/3/15), para. 118 referring to ICCPR, Art. 2(3).

¹³⁹⁸ National Co-Prosecutor's Appeal (D382/4/1), para. 72.

¹³⁹⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, 29 November 1985, A/RES/40/34, para. 4; Internal Rule 21(1)(c).

¹⁴⁰⁰ International Co-Prosecutor's Appeal (D381/19), paras 2-3, 176-177.



499. The International Co-Prosecutor submits that the National Co-Investigating Judge made several factual and legal errors, leading him to wrongly find that YIM Tith does not fall within the ECCC's personal jurisdiction and invalidating the Dismissal,¹⁴⁰¹ as addressed in the Grounds A to F sections below. In addition to appeal grounds, she makes submissions on the consequences of the conflicting Closing Orders.¹⁴⁰²

A. Ground A: Legal Error of Finding that Duch is the Only "Most Responsible" Person

500. The International Co-Prosecutor submits that the National Co-Investigating Judge erred in law by finding that "the category of 'those who were most responsible' could only ever apply to Duch",¹⁴⁰³ asserting that this finding contradicts (i) previous holdings in the Case 004/1 Closing Order and the Case 004/2 Dismissal Order;¹⁴⁰⁴ (ii) the unambiguous language of the ECCC Agreement and ECCC Law;¹⁴⁰⁵ and (iii) the "expressed understanding of personal jurisdiction when the ECCC was established" shared by the Royal Government of Cambodia and the United Nations.¹⁴⁰⁶

B. Ground B: Legal Error of Failing to Render a Reasoned Decision Concerning Crimes Committed and YIM Tith's Criminal Liability

501. The International Co-Prosecutor submits that the National Co-Investigating Judge failed "to render a reasoned decision on the commission of crimes" and YIM Tith's purported criminal liability for any of those crimes.¹⁴⁰⁷ First, according to the International Co-Prosecutor, the Dismissal lacks legal findings necessary to a reasoned decision.¹⁴⁰⁸ Although some of the factual findings made by the Dismissal clearly acknowledged the commission of crimes and YIM Tith's responsibility, the National Co-Investigating Judge failed to legally characterise them as such.¹⁴⁰⁹ The International Co-Prosecutor avers that had the Dismissal made the necessary legal conclusions, a "reasoned explanation would be required as to why [YIM] Tith is not among 'those who were most responsible'".¹⁴¹⁰ Moreover, the International Co-

¹⁴⁰¹ International Co-Prosecutor's Appeal (D381/19), para. 19.

¹⁴⁰² International Co-Prosecutor's Appeal (D381/19), paras 164-175.

¹⁴⁰³ International Co-Prosecutor's Appeal (D381/19), paras 20-21.

¹⁴⁰⁴ International Co-Prosecutor's Appeal (D381/19), para. 22 *referring to* Case 004/2, Order Dismissing the Case against AO An, 16 August 2018, D359, para. 461; Case 004/1 Closing Order (Reasons) (D308/3), para 37.

¹⁴⁰⁵ International Co-Prosecutor's Appeal (D381/19), paras 23-24.

¹⁴⁰⁶ International Co-Prosecutor's Appeal (D381/19), paras 25-36.

¹⁴⁰⁷ International Co-Prosecutor's Appeal (D381/19), paras 37-69.

¹⁴⁰⁸ International Co-Prosecutor's Appeal (D381/19), paras 38-43.

¹⁴⁰⁹ International Co-Prosecutor's Appeal (D381/19), paras 39-42.

¹⁴¹⁰ International Co-Prosecutor's Appeal (D381/19), para. 43.



Prosecutor contends that the impugned order adopted an approach of simply surveying evidence and failed to provide the necessary legal findings concerning YIM Tith's liability for specific crimes.¹⁴¹¹

502. Second, the International Co-Prosecutor asserts that the National Co-Investigating Judge failed to properly assess evidence and make findings regarding YIM Tith's *de facto* position and power, which was "the most important aspect of [YIM] Tith's responsibility".¹⁴¹² Third, the International Co-Prosecutor argues that the Dismissal improperly excluded Tuol Mtes, Tuol Andaet and forced marriages in Kampong Prieng Commune from consideration without sufficient reasoning.¹⁴¹³ Further, the International Co-Prosecutor contends that the Dismissal failed to consider YIM Tith's "likely responsibility for genocide of Khmer Krom" in the assessment of personal jurisdiction, despite making extensive factual findings on the targeting and killing of Khmer Krom and YIM Tith's specific intent to destroy the Khmer Krom people.¹⁴¹⁴ Finally, in his assessment of personal jurisdiction, the National Co-Investigating Judge failed to consider the suffering of victims of crimes, namely imprisonment, torture, enslavement and forced marriage, and regarded only those victims who had been killed.¹⁴¹⁵

C. Ground C: Legal Error of Considering Superior Orders and Duress

503. The International Co-Prosecutor submits that the National Co-Investigating Judge erred in law by his heavy reliance on superior orders and duress in determining personal jurisdiction over YIM Tith.¹⁴¹⁶ Specifically, the International Co-Prosecutor challenges the Dismissal's (i) emphasis on "superior orders in its assessment of personal jurisdiction" and its finding "that Y[IM] Tith was subject to superior orders";¹⁴¹⁷ (ii) reliance on duress, which was not demonstrated in the instant case, because YIM Tith "willingly and enthusiastically" participated in the common criminal plan with no "fear of punishment";¹⁴¹⁸ and (iii) arbitrarily different treatment of superior orders and duress in Cases 001 and 004 Closing Orders, despite the fact that YIM Tith "had far *more* discretion" in carrying out orders than Duch.¹⁴¹⁹

¹⁴¹¹ International Co-Prosecutor's Appeal (D381/19), para. 43.

¹⁴¹² International Co-Prosecutor's Appeal (D381/19), paras 44-54.

¹⁴¹³ International Co-Prosecutor's Appeal (D381/19), paras 55-58 *referring to, inter alia*, Internal Rules 66bis, 76, 67.

¹⁴¹⁴ International Co-Prosecutor's Appeal (D381/19), paras 59-67.

¹⁴¹⁵ International Co-Prosecutor's Appeal (D381/19), para. 68.

¹⁴¹⁶ International Co-Prosecutor's Appeal (D381/19), paras 70-95.

¹⁴¹⁷ International Co-Prosecutor's Appeal (D381/19), paras 71-77.

¹⁴¹⁸ International Co-Prosecutor's Appeal (D381/19), paras 78-88.

¹⁴¹⁹ International Co-Prosecutor's Appeal (D381/19), paras 89-95.



D. Ground D: Legal Error of Assessing YIM Tith's Participation in and Proximity to Crimes

504. The International Co-Prosecutor submits that the National Co-Investigating Judge erred in his assessment of YIM Tith's participation in and proximity to crimes in determining his level of responsibility.¹⁴²⁰ According to the International Co-Prosecutor, the errors include: (i) exclusive focus on "direct participation"—which was erroneously characterised as direct perpetration—in crimes and "deliberate exclusion" of the consideration of other modes of liability;¹⁴²¹ and (ii) failure to "to consider perpetration through a JCE" in assessment of personal jurisdiction.¹⁴²² Moreover, the International Co-Prosecutor contends that numerous findings in the Dismissal demonstrate the likelihood of YIM Tith's participation and significant contribution to the common criminal purpose, as well as his intent and knowledge of the commission of crimes pertaining to forced movement, forced labour, targeting groups and killing enemies, forced marriage and prohibiting religion.¹⁴²³

E. Ground E: Erroneous Factual Findings Occasioning a Miscarriage of Justice

505. The International Co-Prosecutor submits that a miscarriage of justice has been occasioned due to the erroneous factual findings made in the Dismissal.¹⁴²⁴ Amongst the alleged factual errors, the International Co-Prosecutor challenges the Dismissal's findings that (i) approximately 13 people, including Zone Secretaries such as *Ta Mok*, made all of the decisions about whom to kill in the DK and YIM Tith was not one of them, thus excluding him from the ECCC's personal jurisdiction;¹⁴²⁵ (ii) only military cadres had the right to kill people, permitting YIM Tith's responsibility as a civil cadre to be underestimated;¹⁴²⁶ (iii) YIM Tith could not have held two positions in both the Northwest and Southwest Zones at the same time;¹⁴²⁷ (iv) YIM Tith's "only role at the Northwest Zone level was that of committee member", rather than the Northwest Zone Deputy Secretary;¹⁴²⁸ (v) YIM Tith had no subordinates, contradicting evidence regarding the CPK and DK administrative structures and

¹⁴²⁰ International Co-Prosecutor's Appeal (D381/19), paras 96-124.

¹⁴²¹ International Co-Prosecutor's Appeal (D381/19), paras 97-104.

¹⁴²² International Co-Prosecutor's Appeal (D381/19), paras 105-124.

¹⁴²³ International Co-Prosecutor's Appeal (D381/19), paras 113-122.

¹⁴²⁴ International Co-Prosecutor's Appeal (D381/19), paras 125-151.

¹⁴²⁵ International Co-Prosecutor's Appeal (D381/19), paras 126-135.

¹⁴²⁶ International Co-Prosecutor's Appeal (D381/19), paras 136-137.

¹⁴²⁷ International Co-Prosecutor's Appeal (D381/19), para. 138.

¹⁴²⁸ International Co-Prosecutor's Appeal (D381/19), para. 139.



the impugned order's own findings;¹⁴²⁹ and (vi) "killings decreased after an alleged K[HIEU] Samphan announcement in mid-1978".¹⁴³⁰

F. Ground F: Legal Error of Giving Weight to Facts of Marginal Relevance

506. The International Co-Prosecutor submits that the National Co-Investigating Judge "erred in law by giving weight to facts of marginal relevance" in his analysis of personal jurisdiction.¹⁴³¹ In the International Co-Prosecutor's view, the errors include: (i) giving weight to "finding that Y[IM] Tith was not a member of the People's Representative Assembly", despite the lack of power of this institution as acknowledged by the Dismissal itself;¹⁴³² (ii) excessive weight to the finding that YIM Tith held no position in the army;¹⁴³³ (iii) focusing on his "finding that Y[IM] Tith was not involved in preparations for the transfer of Southwest Zone cadres to the Northwest Zone";¹⁴³⁴ (iv) according weight to finding that "the purge had already partially begun and some crime sites were already in operation prior to Y[IM] Tith's arrival in the Northwest Zone";¹⁴³⁵ (v) basing his conclusion on personal jurisdiction on the fact that approximately 100 cadres "served at the sector and zone levels in the DK regime", thus implying that YIM Tith was not holding an important position;¹⁴³⁶ and (vi) overreliance on witnesses who "had not heard" of YIM Tith.¹⁴³⁷

G. Submissions regarding Conflicting Closing Orders¹⁴³⁸

507. Regarding the existence of conflicting Closing Orders, the International Co-Prosecutor considers that the Dismissal should be reversed and the Case File sent to the Trial Chamber for trial on the basis of the Indictment against YIM Tith.¹⁴³⁹ The International Co-Prosecutor submits that in the event that the Pre-Trial Chamber is unable to reach the supermajority required for a decision, or in the event that the Pre-Trial Chamber denies all appeals finding

¹⁴²⁹ International Co-Prosecutor's Appeal (D381/19), paras 140-145.

¹⁴³⁰ International Co-Prosecutor's Appeal (D381/19), paras 146-150.

¹⁴³¹ International Co-Prosecutor's Appeal (D381/19), paras 152-163.

¹⁴³² International Co-Prosecutor's Appeal (D381/19), paras 153-154.

¹⁴³³ International Co-Prosecutor's Appeal (D381/19), para. 156.

¹⁴³⁴ International Co-Prosecutor's Appeal (D381/19), para. 157.

¹⁴³⁵ International Co-Prosecutor's Appeal (D381/19), para. 158.

¹⁴³⁶ International Co-Prosecutor's Appeal (D381/19), para. 159.

¹⁴³⁷ International Co-Prosecutor's Appeal (D381/19), paras 160-163.

¹⁴³⁸ These submissions are not submitted as formal appeal grounds, but address "possible scenarios" which may arise after the Pre-Trial Chamber rules on all appeals in this case. *See* International Co-Prosecutor's Appeal (D381/19), para. 164. The International Judges discuss in detail the issue of the Two Closing Orders in a separate section. *See supra* paras 161-177.

¹⁴³⁹ International Co-Prosecutor's Appeal (D381/19), para. 164.



that both impugned Closing Orders were issued within the discretionary power of the Co-Investigating Judges, the case shall proceed to trial.¹⁴⁴⁰ Relying on the legal framework and jurisprudence of the ECCC,¹⁴⁴¹ the International Co-Prosecutor contends that Internal Rule 1(2) combined with Internal Rule 77(13)(b), which is *lex specialis* and prevails over the general terms of Internal Rule 77(13)(a), makes clear that if the Indictment is not reversed on appeal, the case must be sent to trial.¹⁴⁴²

508. In the Response, the Co-Lawyers do not address any issues raised by the International Co-Prosecutor in Grounds A to F.¹⁴⁴³ Instead, the Co-Lawyers make submissions on the issuance of the two Closing Orders.¹⁴⁴⁴

509. In the Reply, the International Co-Prosecutor maintains that Case 004 must be sent to trial on the basis of the Indictment.¹⁴⁴⁵

2. Discussion

510. The International Judges note that the Co-Prosecutors may appeal against all orders issued by the Co-Investigating Judges.¹⁴⁴⁶ The International Judges recall that despite the Co-Investigating Judges' illegal course of action to evade the disagreement settlement procedure and issue two Closing Orders simultaneously, the Indictment is valid as it is in conformity with the ECCC legal framework.¹⁴⁴⁷ On the contrary, the International Judges reaffirm that, for reasons stated previously, the issuance of the Dismissal has been deemed to be an attempt to

¹⁴⁴⁰ International Co-Prosecutor's Appeal (D381/19), para. 164.

¹⁴⁴¹ See, e.g., International Co-Prosecutor's Appeal (D381/19), paras 165-171 *quoting* Internal Rule 77(13), 1(2), 79(1); Case 001 Appeal Judgment (F28), para. 65; Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 272, 274.

¹⁴⁴² International Co-Prosecutor's Appeal (D381/19), para. 166.

¹⁴⁴³ YIM Tith's Response to the International Co-Prosecutor's Appeal (D381/26).

¹⁴⁴⁴ YIM Tith's Response to the International Co-Prosecutor's Appeal (D381/26), paras 7-34. In effect, the Co-Lawyers submit that the Appeal is moot, since: (i) the Pre-Trial Chamber unanimously held that there is no legal basis for the Co-Investigating Judges to issue two Closing Orders; (ii) both Closing Orders in Case 004 are null and void; and consequently, (iii) all appellate submissions on the merits are now irrelevant.

¹⁴⁴⁵ International Co-Prosecutor's Reply (D381/28), paras 1, 9. The International Co-Prosecutor submits that (i) the Case 004/2 Considerations do not demonstrate that *both* Closing Orders are invalid; (ii) Internal Rule 67(2) is inapplicable to the consequences of the issuance of two opposing closing orders; and (iii) the Co-Lawyers fail to demonstrate how the *issuance* of two opposing closing orders violates fair trial rights. See International Co-Prosecutor's Reply (D381/28), paras 1-5.

¹⁴⁴⁶ Internal Rule 74(2).

¹⁴⁴⁷ See *supra* para. 176; ECCC Agreement, Art. 5(4) ("The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, *the investigation shall proceed* unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7") (emphasis added). See also ECCC Law, Art. 23*new*, para. 3.



defeat the default position enshrined in the ECCC legal framework and is thus *ultra vires*.¹⁴⁴⁸ Accordingly, the International Judges declare the International Co-Prosecutor's Appeal moot as it concerns the Dismissal which is null and void.¹⁴⁴⁹

THE CO-LAWYERS FOR CIVIL PARTIES' APPEAL

1. Submissions

511. The Co-Lawyers for Civil Parties appeal against the National Co-Investigating Judge's Dismissal, asserting that he erred in law and fact in finding that YIM Tith does not fall within the ECCC's personal jurisdiction.¹⁴⁵⁰

512. The Co-Lawyers for Civil Parties submit that the National Co-Investigating Judge erred in concluding that YIM Tith was not amongst the persons "most responsible" for the Khmer Rouge's crimes.¹⁴⁵¹ Recalling the two-pronged test established by the ECCC's jurisprudence examining the severity of the alleged crimes and the level of responsibility of the accused,¹⁴⁵² the Co-Lawyers for Civil Parties contend that the Dismissal's own findings demonstrate that YIM Tith's crimes were sufficiently severe.¹⁴⁵³ Specifically, 39 crimes sites under investigation were under YIM Tith's control, and in 24 of these sites, approximately 53,050 victims were killed or died.¹⁴⁵⁴ The Co-Lawyers for Civil Parties further aver that YIM Tith's level of responsibility was rather high because his hierarchical positions exceeded those of Duch.¹⁴⁵⁵ Referring to the Indictment's findings, the Co-Lawyers for Civil Parties highlight YIM Tith's direct involvement in the genocide of the Khmer Krom, mass imprisonment and

¹⁴⁴⁸ See *supra* paras 175-176. See also Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 262; Case 004/2, Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 324-326.

¹⁴⁴⁹ See *supra* para. 176. See also Case 004/2, Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 682 referring to, *inter alia*, ICC, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, ICC-01/05-01/08 A2 A3, Decision on the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 21 June 2016 entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 June 2018, para. 8; Case 002 (PTC70), Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Constructive Denial of Ieng Sary's Two Applications to Seize the Pre-Trial Chamber with Requests for Annulment, 15 September 2010, D381/1/2, para. 2.

¹⁴⁵⁰ Civil Parties' Appeal (D381/20), para. 5.

¹⁴⁵¹ Civil Parties' Appeal (D381/20), paras 7-12.

¹⁴⁵² Civil Parties' Appeal (D381/20), para. 8 referring to Case 001 Appeal Judgment (F28), para. 80; Case 001 Trial Judgment (E188), para. 22; Case 004/1 Closing Order (Reasons) (D308/3), paras 37-41.

¹⁴⁵³ Civil Parties' Appeal (D381/20), para. 9.

¹⁴⁵⁴ Civil Parties' Appeal (D381/20), para. 9 referring to Dismissal (D381), paras 673, 675, 589-590.

¹⁴⁵⁵ Civil Parties' Appeal (D381/20), para. 9 referring to Case 001 Trial Judgment (E188), para. 208.



forced marriages,¹⁴⁵⁶ and his authority as the *de facto* second-in-command of *Ta Mok* in the Southwest and Northwest Zones.¹⁴⁵⁷

513. The Co-Lawyers for Civil Parties request the Pre-Trial Chamber to overturn the finding that YIM Tith was not amongst those “most responsible”.¹⁴⁵⁸ Alternatively, if the Pre-Trial Chamber fails to reach a supermajority, the Co-Lawyers for Civil Parties make submission that the case should proceed to trial on the basis of the Indictment against YIM Tith.¹⁴⁵⁹

2. Discussion

514. Pursuant to Internal Rule 74(4)(f), the Co-Lawyers for Civil Parties may challenge a dismissal order where the Co-Prosecutors appealed.¹⁴⁶⁰ The International Judges observe that the International Co-Prosecutor challenged the Dismissal in the present case,¹⁴⁶¹ allowing Civil Party applicants to appeal before the Chamber against the impugned order.

515. The International Judges reaffirm that while the International Co-Investigating Judge’s Indictment stands as it remains in conformity with the ECCC legal framework, the National Co-Investigating Judge’s Dismissal is *ultra vires* and void.¹⁴⁶² In light of the foregoing, the International Judges declare that the Co-Lawyers for Civil Parties’ Appeal against the Dismissal is moot.¹⁴⁶³

CONCLUSION

516. The following will address the International Judges’ findings on the instant Appeals and effect of the present Considerations. Further, having been faced with chronic institutional challenges that have obstructed the mechanism of law in the ECCC, the International Judges,

¹⁴⁵⁶ Civil Parties’ Appeal (D381/20), para. 10 *referring to* Indictment (D382), paras 996-998.

¹⁴⁵⁷ Civil Parties’ Appeal (D381/20), para. 10 *referring to* Indictment (D382), paras 994-995.

¹⁴⁵⁸ Civil Parties’ Appeal (D381/20), para. 11.

¹⁴⁵⁹ Civil Parties’ Appeal (D381/20), paras 12-38. This submission addresses “possible scenarios” which may arise after the Pre-Trial Chamber rules on all appeals of the split Closing Orders in this case. The International Judges discussed in detail the issue of the Two Closing Orders in a separate section. *See supra* paras 161-177.

¹⁴⁶⁰ Internal Rule 74(4)(f). *See also* Internal Rule 67(5).

¹⁴⁶¹ International Co-Prosecutor’s Appeal (D381/19).

¹⁴⁶² *See supra* paras 175-176. *See also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 262; Case 004/2, Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 324-326.

¹⁴⁶³ Civil Parties’ Appeal (D381/20), paras 7-12. *See also* Case 004/2, Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 682; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 252.



for the fulfilment of their duties as judges duly nominated by the United Nations and His Majesty King NORODOM Sihamoni, will make final remarks, including on the responsibility of the Royal Government of Cambodia and the wider international community with respect to the Genocide Convention.

1. Findings on the Appeals and Effect of the Present Considerations

517. For the foregoing reasons, the International Judges summarily dismiss the National Co-Prosecutor's Appeal as it failed to demonstrate any articulable or substantiated errors in the Indictment. With respect to the International Co-Prosecutor's Appeal and the Civil Parties' Appeal, each addressing the Dismissal, the International Judges declare these Appeals moot given that the Dismissal is *ultra vires* and, thus, null and void, deprived of legal effect.

518. As to the Co-Lawyers for YIM Tith's Appeal (Two Closing Orders), the International Judges dismiss this Appeal.¹⁴⁶⁴ While the Co-Investigating Judges' agreement to issue the two separate and opposing Closing Orders violated the foundational legal framework of this Tribunal,¹⁴⁶⁵ the International Judges conclude that the Indictment stands whereas the Dismissal is invalid.¹⁴⁶⁶

519. As to the Co-Lawyers for YIM Tith's Appeal (Indictment), as aligned with the reasoning *supra*, the International Judges dismiss Grounds 2.2, 3, 4 and 5.

520. The International Co-Investigating Judge, in the Indictment, considered that provisional detention of YIM Tith pending trial was not a necessary measure to avert any of the risk factors under Internal Rule 63(3)(b)¹⁴⁶⁷ and that "the procedural uncertainty resulting from the opposing closing orders" was a further reason against ordering detention.¹⁴⁶⁸ Pursuant to Internal Rule 44 and the facts on the record, the International Judges find that the International Co-Investigating Judge erred by failing to properly consider the issuance of an arrest warrant.¹⁴⁶⁹

¹⁴⁶⁴ See *supra* paras 176-177.

¹⁴⁶⁵ See *supra* paras 95-115.

¹⁴⁶⁶ See *supra* para. 176.

¹⁴⁶⁷ Indictment (D382), para. 1041.

¹⁴⁶⁸ Indictment (D382), para. 1042.

¹⁴⁶⁹ Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, paras 355-356, 358; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 690-693.



521. Turning to the legal consequences of the present Considerations, the International Judges consider that the Dismissal of the National Co-Investigating Judge, as discussed above,¹⁴⁷⁰ is null and void by circumventing the essential and mandatory legal framework of the ECCC. Thus, it cannot reasonably be considered to exert any legal effect.

522. Therefore, the International Judges conclude that pursuant to Internal Rule 77(13)(b), as the required majority of at least 4 (four) affirmative votes to reverse an indictment was not attained, the default decision of the Chamber shall be that “the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges.”¹⁴⁷¹

523. Consequently, the Trial Chamber shall be seised on the basis of the International Co-Investigating Judge’s Indictment. The International Judges clarify that by virtue of Internal Rule 77(14), the present Considerations with the appended Opinions shall be notified to the Co-Investigating Judges, the Co-Prosecutors, the Co-Lawyers and the Civil Parties in the present case. Furthermore, the Co-Investigating Judges shall immediately proceed in accordance with the present Considerations.¹⁴⁷²

2. Final Considerations

524. In the final section of their Opinion, the International Judges will draw conclusions on the consequences of the ECCC and the Cambodian authorities’ failure to effectively prosecute the last ECCC cases, which exemplify some of the most egregious crimes of genocide, crimes against humanity and war crimes of modern history.

a. *The Obligation to Prosecute Under the Genocide Convention*

525. Following the Pre-Trial Chamber’s well-established jurisprudence,¹⁴⁷³ the International Judges reiterate that the ECCC’s applicable law does not preclude national jurisdiction and that ordinary Cambodian courts inherently have full jurisdiction over matters of criminal justice. The Pre-Trial Chamber already considered that “[p]rior to the establishment of the ECCC, the

¹⁴⁷⁰ See *supra* paras 161-177.

¹⁴⁷¹ See also Internal Rule 79(1) (“The Trial Chamber shall be seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.”).

¹⁴⁷² See Internal Rule 77(14).

¹⁴⁷³ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 59; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 75, 79. See also Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 170.



Royal Government of Cambodia was not only free, but *even had an obligation under international law*, to prosecute senior leaders of DK or those alleged to be “most responsible” for international crimes, as a basic exercise of its jurisdiction.”¹⁴⁷⁴

526. The International Judges observe that the Royal Government of Cambodia, being a State Party to the Genocide Convention,¹⁴⁷⁵ is obliged under Article VI of that Convention to ensure that persons charged with genocide are tried by a competent national tribunal or an international criminal tribunal.¹⁴⁷⁶

527. Consistent with Article VI of the Genocide Convention¹⁴⁷⁷ and the Pre-Trial Chamber’s constant case law,¹⁴⁷⁸ the International Judges find that when a Khmer Rouge-era case encompassing genocide acts is no longer under the seisin or the jurisdiction of the ECCC, including for cases allegedly falling outside its personal jurisdiction¹⁴⁷⁹ or those which purportedly cannot be transferred to trial for administrative reasons,¹⁴⁸⁰ it is the responsibility of the national courts to continue the pursuit of criminal justice by deciding to exercise their

¹⁴⁷⁴ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 57 (emphasis added); Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 75.

¹⁴⁷⁵ The Royal Government of Cambodia acceded to the instrument on 14 October 1950. In referring to this multilateral convention, the Co-Lawyers for the Civil Parties point out that sources of international law are binding on Cambodia, obliging States to prosecute perpetrators of grave crimes; they further assert that advancing the Indictment of YIM Tith to the Trial Chamber would therefore be consistent with a reading of the ECCC Agreement in light of international law. *See* Civil Parties’ Appeal (D381/20), paras 34-35.

¹⁴⁷⁶ *See* Genocide Convention, Art. VI (“Persons charged with genocide or any of the other acts enumerated in article III *shall be tried* by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”) (emphasis added)).

¹⁴⁷⁷ *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* (ICJ), para. 442 (“Article VI [...] obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction”).

¹⁴⁷⁸ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 59; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 75, 79. *See also* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 170.

¹⁴⁷⁹ In particular, a dismissal order rendered on the ground of lack of ECCC personal jurisdiction does not rule on whether there is sufficient evidence against the Charged Person, within the terms of Internal Rule 67(3)(c). *See* Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 171. In other words, it is not a judicial determination on the criminal charges and must be distinguished from a judicial acquittal of the Charged Person based on affirmative findings regarding the charges concerned. *See also, e.g.,* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 340.

¹⁴⁸⁰ The International Judges previously concluded that the alleged administrative prerequisites of notification and transmission were crafted as a convenient pretext to bring the proceedings to an end, noting that the Supreme Court Chamber’s reasoning regarding the Trial Chamber’s inability to move forward was based on a serious legal flaw of equating and conflating the administrative formality of transferring the Case File with a jurisdictional bar precluding the Trial Chamber from action. Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, footnote 594. *Contra* Case 004/2 Decision on Immediate Appeal (E004/2/1/1/2), paras 49-50, 57.



full adjudicative jurisdiction¹⁴⁸¹ in the same manner as they would for any alleged offence of a serious nature under the national law.¹⁴⁸² It is therefore clear that dismissal or termination of a genocide case by the ECCC on jurisdictional grounds—unconnected to the substance of the criminal charges involved—does not relieve national jurisdictions of the exercise of their judicial duties.¹⁴⁸³

528. The International Judges observe with regret that, following the dismissal or termination of the proceedings against AO An in Case 004/2 (accused of genocide of the Cham) and MEAS Muth in Case 003 (accused of genocide of the Vietnamese),¹⁴⁸⁴ the national prosecutorial authorities of Cambodia did not act—or express any intention to act—to initiate any criminal proceedings against these persons.

529. The International Judges further note that, contrary to their finding that the Office of the Co-Prosecutors of the ECCC has the ability and “bears the responsibility” to initiate prosecution in the national courts,¹⁴⁸⁵ the International Co-Prosecutor indicated that she did not intend to pursue prosecutions of ECCC Charged Persons in the ordinary Cambodian courts, nor did she believe that her national colleague or other Cambodian authorities intended to do so, describing this course of action as “unrealistic” and “highly speculative”.¹⁴⁸⁶

530. In light of the continued absence of genuine prosecutorial efforts by the Cambodian

¹⁴⁸¹ Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 59; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 79 (“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”); Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 170.

¹⁴⁸² *Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (20 July), p. 422 (“*Obligation to Prosecute or Extradite (ICJ)*”), pp. 454 and 456, paras 90, 94.

¹⁴⁸³ Similarly, in *Obligation to Prosecute or Extradite (Belgium v. Senegal)*, when faced with Senegal’s argument that it was “subject to the authority” of the ECOWAS Court of Justice regarding the Hissène HABRÉ case, the ICJ relevantly “consider[ed] that Senegal’s duty to comply with its obligations under the Convention [Against Torture] cannot be affected by the decision of the ECOWAS Court of Justice.” *Obligation to Prosecute or Extradite (ICJ)*, paras 110-111.

¹⁴⁸⁴ Similarly, no action was taken by the Cambodian national authorities against IM Chaem in Case 004/1 following the dismissal of her case for lack of personal jurisdiction. Although IM Chaem was not charged with the crime of genocide, the International Judges noted that the serious allegations against her, including crimes against humanity and war crimes, ought to have been addressed before a national court. See Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 340; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 175. See also Case 004/1 Closing Order Reasons (D308/3), paras 306-311.

¹⁴⁸⁵ Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, paras 173-174.

¹⁴⁸⁶ Case 003, International Co-Prosecutor’s Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, D270, 19 April 2021, para. 17.



authorities both at the domestic and international levels,¹⁴⁸⁷ the International Judges recall the obligations *erga omnes partes* of the Royal Government of Cambodia under the Genocide Convention¹⁴⁸⁸ to ensure that Khmer Rouge cadres charged with genocide are prosecuted and tried by a competent court of justice and reaffirm that in light of the evidence collected in Case 003 and Case 004, the national authorities are indubitably obligated to take on the responsibility to prosecute the Defendants should the ECCC not proceed further.

b. Conclusions on the Legal Implications of the Situation Arising from the Contradictory Orders Issued by the Co-Investigating Judges

531. The ECCC has demonstrated its ability to conduct investigations. Indeed, since 2009, four investigations have been completed under extremely complex conditions.¹⁴⁸⁹ These investigations have revealed the involvement of four individuals¹⁴⁹⁰ in crimes of such gravity that the International Co-Prosecutor was justified in initiating prosecution. While jurisdiction is disputed, no investigating judge and no judge of the Pre-Trial Chamber contests the substance of the matters in question. Indeed, there is no doubt that four persons were implicated in the commission of the serious crimes investigated in Cases 003, 004/1, 004/2 and 004.¹⁴⁹¹ The Pre-Trial Chamber as a whole has no doubt that these persons must be brought before a court of law to answer for their actions.¹⁴⁹² In the event that this cannot be arranged before the

¹⁴⁸⁷ As has been observed in Cases 004/1, 004/2 and 003 and now potentially also Case 004.

¹⁴⁸⁸ See Genocide Convention, Preamble (“in order to liberate mankind from such an odious scourge, international co-operation is *required*”) (emphasis added) & Art. IX. Further, the ICJ recently explained in the Hissène HABRÉ case in the context of the Convention against Torture that States parties to the Convention “have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. [...] All the other States parties have a common interest in compliance [...] All the States parties “have a legal interest” in the protection of the rights involved. These obligations may be defined as “obligations *erga omnes partes*” in the sense that each State party has an interest in compliance with them in any given case. In this respect, *the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide* [...] It follows that any State party to the Convention [against Torture] *may invoke the responsibility of another State party* with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, [...] and to bring that failure to an end”, Obligation to Prosecute or Extradite (ICJ), paras 68-69 (emphasis added).

¹⁴⁸⁹ See, e.g., Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, paras 238, 242 (regarding the Cambodian Co-Investigating Judge’s decision not to take into account any evidence submitted to the Case File after 29 April 2011 and his refusal to recognise the actions of the duly appointed Reserve International Co-Investigating Judge).

¹⁴⁹⁰ One of them, AO An, has since died.

¹⁴⁹¹ See Case 004 Indictment (D382), paras 323-991; Case 004 Dismissal (D381), paras 188-423; Case 003, Closing Order, 28 November 2018, D267, paras 149-455; Case 003, Order Dismissing the Case against MEAS Muth, 28 November 2018, D266, paras 55-353; Case 004/2, Closing Order (Indictment), 16 August 2018, D360, paras 157-696; Case 004/2 Dismissal (D359), paras 77-420; Case 004/1 Closing Order (Reasons) (D308/3), paras 140-243.

¹⁴⁹² By validating the Dismissal in Case 004/2, the Dismissal and Indictment in Case 003 and the Dismissal in Case 004, the National Judges of the Pre-Trial Chamber adopt, in these cases, the contrary positions of the National and International Co-Investigating Judges on the personal jurisdiction of the ECCC with respect to the accused



Trial Chamber of the ECCC, national courts naturally assume jurisdiction.¹⁴⁹³

532. The question of whether such trials will take place before national courts is not to be determined by the judges of the Pre-Trial Chamber but is the responsibility of the Cambodian judicial authorities, under the scrutiny of the international community.¹⁴⁹⁴

533. The ECCC has demonstrated its ability to investigate facts of unprecedented gravity since those examined at the Nuremberg Trials, and this was made possible by the rigorous application of the ECCC's relevant texts, including certain norms enacted by the judges themselves in the form of the Internal Rules. This strict application of the texts ensured that proceedings remained fair and that the mechanism under the principle of continuation of the investigation and prosecution was set in motion. This mechanism was at the heart of the ECCC and carried international value for the signatories of the ECCC Agreement.¹⁴⁹⁵ It embodied ultimate legal value for judges and prosecutors, whether national or international, called upon to serve at the Court.¹⁴⁹⁶

534. While the ECCC has demonstrated its ability to investigate these facts, it is now showing its inability to hold the trial of those accused. This is because this fundamental principle of continuation of the investigation and prosecution no longer functions. It no longer works because some ECCC bodies have radically departed from the texts in favour of arbitrary interpretations and so-called discretionary practices. The Co-Investigating Judges' agreement has caused such confusion that it has deliberately and irreparably compromised the understanding of the legal mechanisms essential to the ECCC, including the principle of

persons, but they do not question, in general, the existence of the facts investigated and the roles of the accused persons. They only refuse to identify them as among those "most responsible" for the crimes of the Khmer Rouge. *See, e.g.*, Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges PRAK, NEY and HUOT, para. 292 ("[T]he International Co-Investigating Judge's Closing Order (Indictment) makes no mention of the result of the investigation into the personal jurisdiction and focuses only on facts; with such investigation, all the Khmer Rouge officials would become the subject of prosecution at the ECCC. [...] The International Co-Investigating Judge's action contradicts the subject of the disagreement between both Co-Prosecutors on the personal jurisdiction, not on facts.").

¹⁴⁹³ Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 79; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), para. 57; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, paras 170, 172.

¹⁴⁹⁴ *See supra* para. 530.

¹⁴⁹⁵ *See* ECCC Agreement, Preamble.

¹⁴⁹⁶ *See, e.g.*, Considerations regarding the Co-Prosecutors' Disagreement (D1/1.3) (the National Judges of the Pre-Trial Chamber had disagreed with the commencement of the prosecution in Cases 003 and 004 but had rightly accepted the primacy of the principle of continuation of the investigation and prosecution); Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges PRAK, NEY and HUOT, para. 274 ("the National Co-Prosecutor registered a disagreement to be brought before the Pre-Trial Chamber. The Pre-Trial Chamber failed to reach a decision by the required majority. As a result, in compliance with the ECCC legal framework, the Introductory Submission stood.").



continuation of the investigation and prosecution.

535. With regard to Case 004/2, the International Judges recalled on several occasions that the proceedings had been referred to the Trial Chamber by two Pre-Trial Chamber Greffiers.¹⁴⁹⁷ Arbitrary actions were then taken, revealing a certain edginess. These included a legally baseless email sent by the President of this Chamber,¹⁴⁹⁸ a complacent interpretation by the entire Office of Administration,¹⁴⁹⁹ and the issuance of a simple press release¹⁵⁰⁰ by the Trial Chamber declining a Request from the International Co-Prosecutor to consider the referral.¹⁵⁰¹

536. In Case 003, the International Co-Investigating Judge who had ordered the indictment of an individual for genocide, crimes against humanity, war crimes and other national crimes, now expresses, verging on arbitrariness, his readiness to archive his case.¹⁵⁰²

537. Of all the difficulties encountered by the ECCC, the legal chaos caused by the issuance of contradictory Closing Orders by the two Co-Investigating Judges has the distinguishing

¹⁴⁹⁷ Although only one Greffier of the Chamber formally requested the transfer of the case, a second Pre-Trial Chamber Greffier was present when the filing and notification documents were delivered to the Administration. In any event, the International Judges reiterate that all necessary and required steps for the transfer of Case 004/2 to the Trial Chamber have been duly completed, *see* Case 004/2, Filing and Notification Form regarding Considerations on Closing Orders Appeals (D359/24 & D360/33), Annex A to the International Judges' Interoffice Memorandum regarding the Transfer of Case 004/2, 19 December 2019, D359/36.1 & D360/45.1; Case 004/2, Instructions Form for Hand Delivery by a Pre-Trial Chamber Greffier to the Case File Officer for the Purpose of Notification of Considerations on Closing Orders Appeals (D359/24 & D360/33) to the Trial Chamber, Annex 4 to the International Judges' Interoffice Memorandum regarding the Transfer of Case 004/2, 28 January 2020, D359/36.4 & D360/45.4.

¹⁴⁹⁸ *See* Case 004/2, Email from the International Pre-Trial Chamber Greffier informing the International Judges of the Instruction Given by the National Greffier to the Case File Officer regarding the Notification of the Considerations on Closing Orders Appeals in Case 004/2, Annex 3 to the International Judges' Interoffice Memorandum regarding the Transfer of Case 004/2, D359/36.3 & D360/45.3. In violation of the principles of international validity, continuation of proceedings and of supermajority, the email in question required the unanimity of the Judges to transfer the Case to the Trial Chamber.

¹⁴⁹⁹ *See* Case 004/2, Interoffice Memorandum from the Office of Administration Requesting Clarification Pursuant to Internal Rule 10(2) regarding the Notification of the Considerations in Case 004/2, Annex 7 to the Internal Memorandum from the International Judges regarding the Transfer of Case 004/2, D359/36.7 & D360/45.7.

¹⁵⁰⁰ ECCC Press Release, "Statement of the Judges of the Trial Chamber of the ECCC regarding Case 004/2 Involving AO An", 3 April 2020, available at: <https://www.eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao>.

¹⁵⁰¹ Case 004/2, International Co-Prosecutor's Request that the Trial Chamber Take Action to Obtain Access to the Case 004/2 (AO An) Indictment and Case File, 4 February 2020, D363/1.1.8.

¹⁵⁰² *See* Case 003, Decision on International Co-Prosecutor's Request to Forward Case File 003 to the Trial Chamber, 20 May 2021, D270/7, para. 19 ("Had we been given such notice of the [Pre-Trial Chamber's] allegedly joint views in a timelier manner, all remaining cases could have been dealt with as soon as possible by joint decision – which, as we will explain further below, could only have meant the immediate termination of all cases remaining after the dismissal in case 004/1. This would, last but not least, have saved us an enormous amount of time and efforts, and, not to put too fine a point on it, the international donors as well as the [Royal Government of Cambodia] a large part of their financial contributions to the ECCC budget.").



feature of being disastrous for the final proceedings.

538. The Pre-Trial Chamber has previously outlined its views on the legally baseless *mauvaises pratiques* of the Co-Investigating Judges. The Chamber was not able to decide on each of the Closing Orders with five unanimous votes. But that was not the duty of its judges, which is to rule personally and publicly on the issues before them.¹⁵⁰³ It is wholly unreasonable to expect the Pre-Trial Chamber to issue a unanimous decision where the principle of continuation provides the legal framework for the solution.

539. At this stage, there is no doubt that the Indictments are valid.¹⁵⁰⁴ There is no doubt that the principle of continuation of the investigation and prosecution applies to Case 004, as it did to Case 003 before it.¹⁵⁰⁵ There is no doubt that the criminal facts brought to light in Case 004 and, prior to that in Cases 004/1 and 003, call for urgent consideration of the serious charges brought against the Accused persons.¹⁵⁰⁶

¹⁵⁰³ See, e.g., ECCC Law, Art. 20^{new} (7) which clearly states that a “[...] decision of the Pre-Trial Chamber [...] requires the affirmative vote of at least four judges”, which necessarily implies that the judges of the Pre-Trial Chamber are free to decide according to their own conviction; Case 003, Consolidated Decision on the Requests of the International Co-Prosecutor and the Co-Lawyers for MEAS Muth concerning the Proceedings in Case 003, 8 September 2021, D271/5 & D272/3 (paras 66, 68).

¹⁵⁰⁴ See *supra* para. 176; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges PRAK, NEY and HUOT, para. 115; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 284, Disposition, p. 145; Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, para. 326, Disposition, p. 266.

¹⁵⁰⁵ See *supra* para. 174; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, Disposition, p. 169. See also Case 004/2 Considerations on Closing Orders Appeals (D359/24 & D360/33), Opinion of Judges BAIK and BEAUVALLET, paras 315-328.

¹⁵⁰⁶ See *supra* paras 525-530; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 340; Case 003 Considerations on Closing Orders Appeals (D266/27 & D267/35), Opinion of Judges BEAUVALLET and BAIK, para. 176.




DISPOSITION

FOR THESE REASONS, THE INTERNATIONAL JUDGES OF THE PRE-TRIAL CHAMBER HEREBY:

- **DISMISS** the National Co-Prosecutor's Appeal;
- **DECLARE** the International Co-Prosecutor's Appeal moot;
- **DECLARE** the Co-Lawyers for Civil Parties' Appeal moot;
- **DISMISS** the Co-Lawyers for YIM Tith's Appeal (Two Closing Orders);
- **DISMISS** Grounds 2.2, 3, 4, 5 of the Co-Lawyers for YIM Tith's Appeal (Indictment);
- **FIND** that the Dismissal is null and void;
- **CONFIRM** the Indictment;
- **FIND** that the Trial Chamber must be seized of Case 004 on the basis of the Indictment pursuant to Internal Rule 77(13)(b).

Phnom Penh, 17 September 2021



Judge Olivier BEAUVALLET



Judge Kang Jin BAIK

