BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO THE NATIONAL CO-PROSECUTOR'S APPEAL OF THE CASE 004 INDICTMENT (D382)

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I. INTRODUCTION

1. On 28 June 2019, the International Co-Investigating Judge ("ICIJ") issued a closing order ("Indictment") indicting Yim Tith for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code, and committing him for trial.[1] On the same day, the National Co-Investigating Judge ("NCIJ") issued a closing order ("Dismissal Order") dismissing all charges against Yim Tith, finding that he does not fall within the personal jurisdiction of the ECCC.[2] The National Co-Prosecutor ("NCP") appealed the Indictment ("NCP Appeal"), maintaining that the ECCC does not have personal jurisdiction over Yim Tith.[3] The International Co-Prosecutor ("ICP") now responds to the NCP Appeal in English first with a translation to follow at first opportunity.[4] The applicable law is set out in the relevant sections below.

II. SUBMISSIONS

2. The ICP submits that the NCP Appeal (i) does not meet the standard of review on appeal, as it does not demonstrate any legal or factual error in the Indictment or that the ICIJ abused his discretion in issuing the Indictment against Yim Tith; (ii) argues for a definition of personal jurisdiction that disregards the expressed intent of both the Royal Government of Cambodia ("RGC") and the United Nations ("UN"); (iii) fails to demonstrate that the RGC has the 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.

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1 **D382** Closing Order, 28 June 2019 ("Indictment"), EN 01620059-71. The Khmer translation of the Indictment was notified to the parties on 15 August 2019.

2 **D381** Order Dismissing the Case Against Yim Tith, 28 June 2019 ("Dismissal Order"), paras 684, 686-687. The English translation of the Dismissal Order was notified to the parties on 5 September 2019.

3 **D382/4/1** National Co-Prosecutor's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004, 13 September 2019 ("NCP Appeal"), paras 75-76.

4 **D382/4/1** NCP Appeal was filed in Khmer first and the English translation followed on 20 September 2019, making this response due on 30 September 2019 pursuant to the Practice Direction on Filing Documents before the ECCC (Rev. 8), amended on 7 March 2012, arts 8.3, 8.5. The ICP requested permission to file in English first in **D382/14** International Co-Prosecutor's Request to File Her Response to the National Co-Prosecutor's Appeal Against the Indictment in English First, 25 September 2019.

A. THE NCP APPEAL FAILS TO MEET THE STANDARD OF REVIEW ON APPEAL

3. Internal Rule 75(4) explicitly requires that submissions on appeal "contain the reasons of fact and law upon which the appeal is based."[5] As this Chamber has unanimously held,[6] a discretionary decision such as determining whether a Charged Person falls within the category of those "most responsible" for Democratic Kampuchea ("DK") crimes may be reversed only where it was based on an error of law invalidating the decision or an error of fact occasioning a miscarriage of justice, and/or was so unfair or unreasonable as to constitute an abuse of discretion.[7]

4. The NCP Appeal should be dismissed, as it does not raise any discernible ground of appeal that clearly and precisely articulates any legal or factual error or explain why that error would

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5 Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015, Rule 75(4). *See also* Case 002-**D427/1/30** Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011 ("Decision on Ieng Sary's Closing Order Appeal"), para. 104 ("The scope of [the PTC's] review is limited to the issues raised by the Appeal").

6 Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, para. 21 (unanimous holding). *See also* Case 002-**D427/1/30** Decision on Ieng Sary's Closing Order Appeal, paras 112-113, and citations therein; *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, Appeals Chamber, 3 April 2007 ("*Brđanin* AJ"), paras 7-9 (referring to Article 25 of the ICTY Statute and the caselaw of both ICTY and ICTR Appeal Chambers); *Rutaganda v. The Prosecutor*, ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003 ("*Rutaganda* AJ"), paras 17-18 (referring to Article 24 of the ICTR Statute).

7 It is well established in ECCC and international law that an appeal against an indictment or judgment that manifestly fails to meet these minimum requirements can be summarily dismissed without any examination of its merits. *See, e.g.* Case 001-**F28** Appeal Judgement, 3 February 2012 ("*Duch* AJ"), para. 20 ("Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Supreme Court Chamber and need not be considered on the merits. […] The Supreme Court Chamber may dismiss arguments that are evidently unfounded without providing detailed reasoning."); *Rutaganda* AJ, para. 18 ("Indeed, the Appeals Chamber is, in principle, not required to consider the arguments of a party if they do not allege an error of law invalidating the decision, or an error of fact occasioning a miscarriage of justice. […] Logically, therefore, where the arguments presented by a party do not have the potential to cause the impugned decision to be reversed or revised, the Appeals Chamber may immediately dismiss them as being misconceived, and would not have to consider them on the merits."); *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, Appeals Chamber, 17 March 2009 ("*Krajišnik* AJ"), paras 16 ("In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively. As well, the Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."), 18, 20; *Brđanin* AJ, paras 16 ("Arguments of a party which are evidently unfounded or do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits."), 19-31 (listing eight categories of appeal arguments that will be summarily dismissed including the arguments that are clearly irrelevant or lend support to the challenged findings or are contrary to common sense); *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002 ("*Kunarac* AJ"), para. 48; *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, Appeals Chamber, 25 February 2004, paras 10, 16-23.

invalidate the Indictment or occasion a miscarriage of justice, and it fails to allege that the ICIJ abused his discretion in issuing the Indictment.[8] While the NCP Appeal mentions the Indictment in its introduction,[9] it does not cite, quote or refer to it anywhere else. Instead, it makes general conclusions that often have no direct or apparent connection with the Indictment's legal or factual findings, and merely reiterates that "the NCP still considers that Yim Tith does not fall within the ECCC personal jurisdiction".[10]

1. The NCP Appeal fails to demonstrate any factual errors

5. The first part of the NCP Appeal "Submission" section discusses the creation of the Communist Party of Kampuchea ("CPK") and provides information on the Party Congress and its committees, the leadership of the CPK, the administrative structure of the zones, and Yim Tith's background and roles in Kirivong District and the Northwest Zone.[11] The factual assertions in this section are often stated in a conclusory fashion without citing any source of evidentiary support,[12] or they simply survey contradictory evidence on the case file.[13] Most importantly, none of these assertions refer to any part of the Indictment, nor do they contain any argument as to why the ICIJ erred. Merely offering an interpretation of the

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8 *See Kunarac* AJ, paras 43-44 ("It thus falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner. One cannot expect the Appeals Chamber to give detailed consideration to submissions of the parties if they are obscure, contradictory, vague, or if they suffer from other formal and obvious insufficiencies. […] An appellant must therefore clearly set out his grounds of appeal as well as the arguments in support of each ground"); *Prosecutor v. Kupreškić*, IT-95-16-A, Appeal Judgement, Appeals Chamber, 23 October 2001, para. 27 ("a party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber. […] If the party is unable to at least identify the alleged legal error, he or she should not raise the argument on appeal."); *Krajišnik* AJ, para. 26; *Rutaganda* AJ, para. 19; Case 001-**F28** *Duch* AJ, para. 20.

9 **D382/4/1** NCP Appeal, paras 1-2, 4-5.

10 **D382/4/1** NCP Appeal, para. 75.

11 **D382/4/1** NCP Appeal, paras 19-23 (creation of the CPK), 24-28 (the Party Congress and its committees), 29-33 (leadership of the CPK), 34-44 (administrative structure of the zones), 45-46 (Yim Tith's background), 47-48 (Yim Tith's role in Kirivong District), 49-51 (Yim Tith's role in the Northwest Zone).

12 *See, e.g.* **D382/4/1** NCP Appeal, paras 19-33, 35-44, and 49-51, which contain no footnotes whatsoever to support the assertions made in the text. *See also* paras 55-58, 68-69.

13 **D382/4/1** NCP Appeal, paras 46 ("[One] witness said that Ta Tith was one of the strongest guys at the time, whilst other witnesses asserted that Ta Tith was a gentle, good and honest person."), 47 (stating that there were two Kirivong District offices but discussing evidence of four locations), 48 and 51 (citing four witnesses who said Yim Tith was transferred to Battambang around mid-1977, but then asserting without any evidentiary support that Yim Tith arrived in the Northwest Zone roughly eight months before the end of the regime).

evidence[14] fails to discharge an appellant's burden to clearly identify factual findings being challenged[15] or demonstrate that no reasonable trier of fact could have reached such findings, occasioning a miscarriage of justice.[16]

2. The NCP Appeal fails to demonstrate any legal errors

6. The second part of the "Submission" section argues why, in the view of the NCP, the Pre-Trial Chamber ("PTC") should dismiss the case for lack of personal jurisdiction over Yim

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14 *See, e.g. Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, Appeals Chamber, 17 September 2003, para. 22 ("the Defence merely suggests another interpretation of the evidence and does not indicate how the Trial Chamber's evaluation was erroneous. […] submissions must also be presented as to the possible error made […], not by reference to possible interpretations of the evidence"); *Prosecutor v. Simić,* IT-95-9-A, Judgement, Appeals Chamber, 28 November 2006, para. 14 ("objections will be dismissed without detailed reasoning where […] the appealing party's argument unacceptably seeks to substitute its own evaluation of the evidence for that of the [finder of fact]"); *Prosecutor v. Halilović*, IT-01-48-A, Judgement, Appeals Chamber, 16 October 2007, para. 12; *Krajišnik* AJ, para. 27; *Kunarac* AJ, para. 48.

15 *See, e.g. Prosecutor v. Martić*, IT-95-11-A, Judgement, Appeals Chamber, 8 October 2008, para. 18 ("The Appeals Chamber recalls that an appellant is expected to identify the challenged factual finding and put forward its factual arguments with specific reference to the page number and paragraph number. […] As a general rule, where an appellant's references to the Trial Judgement are missing, vague or incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument"). Unchallenged key factual findings that helped the ICIJ establish personal jurisdiction over Yim Tith include **D382** Indictment, paras 327-352 (detailing Yim Tith's positions on the Kirivong District and Sector 13 committees during his tenure in the Southwest Zone, stating that his close familial ties to Ta Mok gave him "major" additional factual authority beyond his formal roles, extending to responsibilities at the zone level and continued authority over the area until the end of the DK regime), 353-363 (finding that Yim Tith worked alongside Ta Mok in the Northwest Zone from as early as mid- to late 1976 until the end of the regime despite the fact that it was not until June 1978 that he was formally appointed as Secretary of Sectors 1, 3, and 4 and as Deputy Secretary of the Northwest Zone), 364-385 (detailing the authority that Yim Tith exercised once appointed to his formal positions), 386-397 (detailing Yim Tith's contribution to the JCE seeking to eliminate the Khmer Krom), 398-411 (finding that Yim Tith played a central role in implementing the CPK's economic and agricultural policies in the Northwest Zone), 412-426 (detailing Yim Tith's role in helping orchestrate the purge of the Northwest Zone, including issuing specific orders to kill), 427 (finding that Yim Tith contributed to the CPK policy on the regulation of marriage), 433-585 (detailing crimes in Sector 13 at Wat Pratheat Security Centre, Kraing Ta Chan Security Centre, Preil Village Execution Site, Wat Angkun Execution Site, Slaeng Village Forest Execution Site, Wat Ang Serei Muny and Prey Sokhon Execution Site), 586-746 (detailing crimes in Sector 1 of the Northwest Zone at Koas Krala Security Centre, Thipakdei Cooperative, Kang Hort Dam Worksite, Banan Security Centre, Khnang Kou Security Centre, and the Kampong Kol Sugar Factory Worksite), 747-826 (detailing crimes in Sector 2 of the Northwest Zone at Phum Veal Security Centre, Svay Chrum Security Centre, Tuol Seh Nhauv Execution Site, and the Prey Krabau Execution Site), 829-849 (detailing crimes in Sector 3 of the Northwest Zone at Wat Kirirum Security Centre), 850-920 (detailing crimes in Sector 4 of the Northwest Zone at Wat Samdech Security Centre, Wat Po Laingka/Kach Roteh Security Centre, and the targeting of Khmer Krom in Kampong Prieng and Reang Kesei Communes), 921-948 (detailing crimes in Sector 7 of the Northwest Zone at Prison No. 8 and Veal Bak Chunching Execution Site), 949-991 (detailing forced marriages in Sectors 1 and 4).

16 *See, e.g.* Case 002-**D427/1/30** Decision on Ieng Sary's Closing Order Appeal, para. 113; *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgement, Appeals Chamber, 19 July 2010, para. 12; *Krajišnik* AJ, para. 14; *Brđanin* AJ, para. 19 (a miscarriage of justice "has been defined as a 'grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime'").

Tith.[17] In an almost entirely conclusory fashion, it discusses the CPK's enemy policy,[18] states that the category of "those who were most responsible" referred to "just S-21 Security Centre Chairman Kaing Guek Eav *alias* Duch",[19] asserts that the ICP's allegations against Yim Tith were arbitrary and failed to specify "whether Yim Tith was a member of the CPK Central Committee or even his role in the army",[20] and claims that Yim Tith had no authority and just followed Party lines.[21] None of these assertions are substantiated,[22] no errors are articulated, no explanation is provided as to how the allegations are "arbitrary", and no reference whatsoever is made to the Indictment to challenge key legal findings that, if reversed, would invalidate the ICIJ's conclusion that Yim Tith was one of those "most responsible" for crimes committed during the DK regime.[23] The NCP Appeal therefore fails to meet the standard necessary to demonstrate any legal errors in the Indictment.

3. The NCP Appeal fails to demonstrate that the ICIJ abused his discretion

7. Finally, the NCP Appeal arguments as to why the case against Yim Tith should be dismissed fail to demonstrate that the ICIJ's decision was so unfair or unreasonable that it constituted an abuse of discretion.[24] Each of the arguments are addressed in turn below.

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17 **D382/4/1** NCP Appeal, paras 53-75.

18 **D382/4/1** NCP Appeal, paras 53-58 (citing evidence only in paras 53 and 54).

19 **D382/4/1** NCP Appeal, para. 66.

20 **D382/4/1** NCP Appeal, para. 74.

21 **D382/4/1** NCP Appeal, para. 74.

22 With the exception of evidence relating to the 30 March 1976 decision to smash inside and outside of the ranks. *See* **D382/4/1** NCP Appeal, paras 53-54.

23 For example, the NCP Appeal does not dispute findings that Yim Tith was responsible for crimes including genocide and numerous crimes against humanity at over 20 sites (*see* **D382** Indictment, para. 995), that his participation in and orchestration of the genocide of the Khmer Krom in his areas of responsibility "alone places him solidly within the bracket of personal jurisdiction" (*see* **D382** Indictment, para. 996), that other civilians and former CPK cadres victimised under and by Yim Tith numbered in the tens of thousands (*see* **D382** Indictment, para. 997), or that Yim Tith and those he collaborated with subjected men and women "to the CPK's abhorrent social experiment" of forced marriage and the consummation of marriage that "marred the lives of many Khmer for decades" (*see* **D382** Indictment, para. 998).

24 *See, e.g. Prosecutor v. Orić*, MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, Appeals Chamber, 17 February 2016, para. 9; *Uwinkindi v. The Prosecutor,* ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, Appeals Chamber, 16 November 2011, para. 6; *Prosecutor v. Gotovina et al.,* IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, Appeals Chamber, 4 May 2007, para. 11; *S. Milošević v. Prosecutor,* IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, Appeals Chamber, 1 November 2004, para. 10.

B. THE NCP APPEAL ARGUES FOR A DEFINITION OF PERSONAL JURISDICTION THAT DISREGARDS THE EXPRESSED INTENT OF BOTH THE RGC AND THE UN

8. The NCP Appeal correctly notes that the ECCC was established under the agreement between the RGC and the UN ("ECCC Agreement" or "Agreement") and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia ("ECCC Law").[25] Both instruments provide that jurisdiction is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia.[26] However, the NCP Appeal wrongly asserts that pursuing a case against Yim Tith would improperly expand the scope of personal jurisdiction because the RGC's "idea for the ECCC Agreement" was that the ECCC's personal jurisdiction was limited to a small number of senior leaders and that "those most responsible" "referred to *just* S-21 Security Centre Chairman Kaing Guek Eav *alias* Duch".[27] Such a definition of personal jurisdiction disregards the expressed intent of both the RGC and the UN at the time of the Agreement.

9. While the ICP agrees that the ECCC's personal jurisdiction is limited, she disputes that only Duch was intended to qualify for the "most responsible" category. Such an interpretation is not supported by the plain language of the ECCC Agreement or ECCC Law, which both use the pronoun "*those* who were most responsible".[28] Written in the plural, this clearly refers to a *category* of people rather than a single person. The ECCC Agreement text is presumed to be an authentic expression of the intention of the two parties to the treaty, the RGC and the

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25 **D382/4/1** NCP Appeal, para. 60. *See* 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, Phnom Penh, 6 June 2003 ("ECCC Agreement" or "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, 10 August 2001 ("ECCC Law"), with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

26 ECCC Agreement, art. 1; ECCC Law, art. 1.

27 **D382/4/1** NCP Appeal, paras 66 (emphasis added and emphasis omitted), 72.

28 ECCC Agreement, art. 1 (emphasis added); ECCC Law, arts 1, 2*new* (emphasis added). This plural language occurs in all three (Khmer, English, and French) versions of the ECCC Agreement and the ECCC Law. The Khmer version specifies "ជនទាំងឡាយដែលទទួលខុសត្រូវខ្ពស់បំផុត", and the French version refers to "les principaux responsables".

UN.[29] If the parties had reached an understanding that Duch was the only "most responsible" person for the purposes of prosecution at the ECCC, they could have expressly provided for this in their Agreement, which the RGC would then have implemented in the ECCC Law. The text of the ECCC Agreement makes clear that they did not.

10. Moreover, contrary to the assertion that the RGC intended that those "most responsible" referred to "*just*" Duch,[30] the RGC agreed that "those who were most responsible" would be an open category whose membership could only be judicially determined. This is borne out in statements made by RGC officials during the ECCC Agreement negotiations. For example, Prime Minister Hun Sen publicly proclaimed to UN officials and U.S. Senator John Kerry that whomever the ECCC decided to indict and prosecute would depend entirely on the Court, and he promised that the RGC would not interfere in any way with ECCC proceedings.[31]

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29 Vienna Convention on the Law of Treaties, 23 May 1969 ("Vienna Convention"), 1155 UNTS 331, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose."). The parties expressly agreed that the Vienna Convention applies to the ECCC Agreement (*see* ECCC Agreement, art. 2(2)). *See also The Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 3 February 1994, ICJ Reports 1994, p. 6, para. 41 ("Interpretation must be based above all upon the text of the treaty."); *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, 15 December 2004, ICJ Reports 2004, p. 279, para. 100; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (second phase)*, Advisory Opinion, 18 July 1950, ICJ Reports 1950, p. 221, p. 229 ("It is the duty of the court to interpret the Treaties, not to revise them."); ILC Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 220, para. 11 ("Commentary to article 27 [now article 31]: The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this—the textual—approach to treaty interpretation.").

30 **D382/4/1** NCP Appeal, para. 66 (emphasis added).

31 **D324.22** Letter dated 24 March 1999 from the Prime Minister of Cambodia to the Secretary-General, UN Doc. A/53/875, S/1999/324, 24 March 1999, EN 01326021, paras 2-3 ("The Royal Government of Cambodia does not have any power to impose anything on the competent tribunal. [...] The issue of whether to try Ta Mok alone or any other Khmer Rouge leaders depends entirely on the competence of the tribunal. The Royal Government of Cambodia will not exert any influence on or interfere, in any form, in the normal proceedings of the judiciary, which will enjoy complete independence from the executive and legislative powers."). *Note* that in para. 4, Hun Sen requested that the letter be circulated as a General Assembly document; **D324.23** Statement made on 18 April 1999 by the Cabinet of Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia, UN Doc. S/1999/443, 19 April 1999, EN 01326023, para. 2 ("The indictment and prosecution of other Khmer Rouge leaders are the sole competence of the court. The Royal Government is not entitled to give orders to the judicial branch to do this or that."). *See also* Kyodo News International, *Hun Sen regrets stating number of K. Rouge leaders to be tried*, 7 January 2000 (in an interview with Japanese media: "Cambodian Prime Minister Hun Sen expressed regret Friday at having stated 'four to five' Khmer Rouge

11. As correctly noted by the NCP, limiting "the small number of those to be brought to trial" was "hotly debated" during the National Assembly sessions[32] that took place immediately before the Assembly approved the Agreement between the UN and the RGC in October 2004. Significantly, this debate unequivocally clarified that there was no specific number or list of people identified for indictment, as that was the task of the ECCC.[33] The ICP submits that the representations that Deputy Prime Minister Sok An (who headed the negotiations for the RGC) made to the National Assembly during this debate provide the best evidence of the intent of the Cambodian government at the time of the Agreement. Specifically, the debate transcript shows that several government lawmakers asked for clarification as to what the drafters meant by "those most responsible":

> H.E. Ly Thuch: "[O]ur people and civil society want to ask H.E. to make it clear that who are the senior leaders and those most responsible? Do they include also chairmen of units of organization?"[34]
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> H.E. Keo Remy: "On the subject of justice, who are the senior leaders? […] Will the zone chiefs be prosecuted? Or [is] this law only be[ing] made to try 4 or 5 leaders. Who else will be prosecuted? It is unfair if we try only 3 or 4 people."[35]
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> H.E. Eng Chhay Eang: "I am also not clear about *those most responsible*. For how much will those people have to be responsible? […] I want the representative of the government to clarify for how much greatest responsibility those people must hold. […] I would like to remind people not to be vague. If we emphasize only on the highest class, we meant Pol Pot, who died already."[36]

12. Sok An responded:

> If we ask the question 'who shall be indicted?,' neither the United Nations nor the Task Force of the Royal Government of Cambodia are able to give

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leaders will be put on trial […]. 'I should not comment on or say anything that is within the bounds of the judiciary,' he said. […] Hun Sen said anyone who specifies the number of leaders to be tried 'is wrong, and that includes U.N. legal experts who mentioned 20 or 30 people.' The prime minister said that by giving an exact number of the Khmer Rouge leaders to be tried, 'We abuse the court of law.'").

32 **D382/4/1** NCP Appeal, para. 67.

33 **D378/5.1.2** Transcript translated by DC-Cam of the First Session of the Third Term of Cambodian National Assembly, 4-5 October 2004 ("National Assembly Transcript"), EN 01593392-93.

34 **D378/5.1.2** National Assembly Transcript, EN 01593371.

35 **D378/5.1.2** National Assembly Transcript, EN 01593376.

36 **D378/5.1.2** National Assembly Transcript, EN 01593389.

> a response. Because this is the task of the courts: the Extraordinary Chambers. If we list the names of people for the prosecution instead of the courts, we violate the power of the courts. Therefore, we cannot identify A, B, C, or D as the ones to be indicted. As a solution, we have identified two targets: *senior leaders* and *those most responsible*. Considering *senior leaders*, we refer to no more than 10 people, but we don't clearly state that they are the members of the Standing Committee. This is the task of the Co-Prosecutors to decide who are the senior leaders. […] However, there is still the second target. They are not the leaders, but they committed atrocious crimes. That's why we use the term *those most responsible*. There is no specific amount of people in the second group to be indicted.[37]

13. As for the UN's view, the Group of Experts assigned by the Secretary-General to explore options that would best bring about justice stated in 1999:

> [T]he Group recommends that any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities. We do not wish to offer a numerical limit on the number of such persons who could be targets of investigation. It is, nonetheless, the sense of the Group from its consultations and research that the number of persons to be tried might well be in the range of some 20 to 30.[38]

14. These recommendations formed the basis for the UN's negotiating position. David Scheffer, who was the U.S. Ambassador-at-Large for War Crimes Issues and heavily involved in the negotiations,[39] recalled in an article published in 2011 that UN negotiator Ralph Zacklin visited Phnom Penh in late August 1999 and left with the impression that Cambodian authorities only wanted to prosecute Ta Mok and Duch, but the RGC's position *changed* as negotiations progressed through the rest of 1999 and 2000.[40] The article details Scheffer's own involvement in the negotiations, particularly relating to the considerations regarding

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37 **D378/5.1.2** National Assembly Transcript, EN 01593392-93 (emphasis added).

38 **D324.15** Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, UN Doc. No. A/53/850, S/1999/231, 16 March 1999 ("UN Group of Experts Report"), para. 110 (emphasis added).

39 **D378/5.1.205** Scheffer, D., *The Negotiating History of the ECCC's Personal Jurisdiction*, Cambodia Tribunal Monitor, 22 May 2011 ("Scheffer article"), EN 01595691 ("My own involvement in the negotiating process [was] both to represent U.S. interests and to serve as a de facto mediator between the Cambodian and U.N. negotiators").

40 **D378/5.1.205** Scheffer article, EN 01595691.

Duch and the "most responsible" category.[41] He wrote: "[W]e were only interested in the surviving senior leaders who demonstrated significant responsibility *as well as other top functionaries, like Duch*, who had such instrumental roles in the atrocities."[42] Clearly, the UN understanding was that the category would not be limited only to Duch.

15. By March 2000, the Cambodian government had proposed the wording "those responsible", which broadened the category beyond what the UN had intended, and UN Secretary-General Kofi Annan and UN Legal Counsel Hans Corell both expressed concern to the RGC that the group was now too large.[43] On 2 January 2001, the Cambodian National Assembly adopted the draft ECCC Law with the wording "those who were *most* responsible".[44] Notably, Scheffer did not recall that during the negotiations there was any "concession by U.N. negotiators to interpret the personal jurisdiction language so as to limit the suspect pool to only five specific individuals".[45]

16. In sum, the ECCC negotiating history shows that the intent of both the RGC and the UN at the time of the ECCC Agreement was that "those who were most responsible" was an open category whose membership would only be determined by the Co-Prosecutors and Co-Investigating Judges of the ECCC based on the totality of the evidence and acting independently of any instructions. This interpretation has been confirmed by the Supreme Court Chamber in its Appeal Judgment in Case 001[46] and reiterated by both Co-Investigating

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41 **D378/5.1.205** Scheffer article, particularly EN 01595691-93.

42 **D378/5.1.205** Scheffer article, EN 01595693 (emphasis added and original emphasis omitted).

43 **D378/5.1.205** Scheffer article, EN 01595693-96.

44 **D378/5.1.205** Scheffer article, EN 01595696 (emphasis added).

45 **D378/5.1.205** Scheffer article, EN 01595698.

46 Case 001-**F28** *Duch* AJ, paras 62-81, particularly paras 62 ("the determination of whether an accused is 'most responsible' requires a large amount of discretion"), 63 ("the term 'most responsible' should be interpreted as investigatorial and prosecutorial policy for the Co-Investigating Judges and Co-Prosecutors that is not justiciable before the Trial Chamber."), 70, fn. 133 ("As the term 'most responsible' is not a jurisdictional requirement of the ECCC [but constitutes investigatorial and prosecutorial policy], neither could a charged person appeal to the Pre-Trial Chamber under Internal Rule 74(3)(a) (Rev. 8) on the basis that s/he falls outside of the ECCC's jurisdiction because s/he is not 'most responsible'", absent an abuse of discretion).

Judges in the Case 004/1 Closing Order and the NCIJ in his Case 004/2, 003, and 004 dismissal orders.[47]

C. THE NCP APPEAL FAILS TO DEMONSTRATE THAT THE RGC HAS THE POWER TO UNILATERALLY RESTRICT PERSONAL JURISDICTION

17. The NCP Appeal implicitly acknowledges the RGC's public statements aimed at restricting ECCC personal jurisdiction but asserts that these efforts are merely the RGC "playing a role" as the UN Security Council did with the ICTY, ICTR, and SCSL.[48] The NCP Appeal then urges the PTC to act in line with the RGC determination and spirit of the ECCC Law on personal jurisdiction.[49]

18. The NCP Appeal bases this argument on Security Council Resolutions 1503 and 1534, which were adopted approximately 10 years after the founding of the ICTY and ICTR and related to the completion plans of the two tribunals.[50] These resolutions directed the ICTY and ICTR to focus their efforts on "the most senior leaders suspected of being most responsible for crimes" and refer other cases to national jurisdictions in order to achieve the goals in the tribunals' completion plans.[51] From this, the NCP Appeal erroneously concludes that "[t]he RGC, a founder of the ECCC Agreement, may have an influence on the functioning of the ECCC and the termination of its mandate" and that "a restriction on the scope of personal jurisdiction" is a "method acceptable for terminating the ECCC mandate" because it was employed at the ICTY and ICTR.[52]

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47 Case 004/1-**D308/3** Closing Order (Reasons), 10 July 2017, para. 37; Case 004/2-**D359** Order Dismissing the Case Against Ao An, 16 August 2018, para. 461; Case 003-**D266** Order Dismissing the Case Against Meas Muth, 28 November 2018, para. 364; **D381** Dismissal Order, para. 603.

48 **D382/4/1** NCP Appeal, para. 65.

49 **D382/4/1** NCP Appeal, para. 65.

50 **D382/4/1** NCP Appeal, para. 62. Although the text of para. 62 refers to Security Council Resolution 2004, the related footnote makes it clear that the correct resolution number is 1534. Moreover, Resolution 2004 relates to extending the mandate of the UN Interim Force in Lebanon (UNIFIL), not to the ICTY, the ICTR, or their completion plans. *See* **D378/5.1.12** Security Council Resolution 1503, 28 August 2003 ("Resolution 1503"), S/RES/1503 (2003); **D378/5.1.13** Security Council Resolution 1534, 26 March 2004 ("Resolution 1534"), S/RES/1534 (2004); Security Council Resolution 2004, 30 August 2011, S/RES/2004 (2011).

51 **D378/5.1.12** Resolution 1503, EN 01593497-98; **D378/5.1.13** Resolution 1534, paras 4-5.

52 **D382/4/1** NCP Appeal, para. 61.

19. This is an inapt analogy. The ICTY and ICTR were originally established by Security Council resolutions,[53] and in adopting Resolutions 1503 and 1534 relating to the completion plans, the Security Council went through precisely the same process, with all of the same procedural safeguards, as it had when it initially set up the *ad hoc* tribunals. All of the members of the Security Council had the right to participate in the debate on Resolutions 1503 and 1534 and to be heard on the merits of changing the tribunals' case selection strategy. Every member of the Security Council then had the right to vote on the proposed resolutions before they were adopted. Clearly, if a single member of the Security Council had expressed a view that the *ad hoc* tribunals should change their case selection strategy, to have any effect, it would have had to first go through the process of debate and a vote to adopt a formal resolution.

20. In the case of the ECCC, the proper analogy to the Security Council resolutions establishing the *ad hoc* tribunals is the ECCC Agreement, which was approved by both the UN and the RGC following negotiations in which the parties were equal participants. The ECCC Agreement provides that "[i]n case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties."[54] This provision makes it clear that any change in policy regarding matters addressed by the ECCC Agreement (which includes personal jurisdiction) must be approved by *both* parties following a discussion in which *both* parties participate. To date, neither the RGC nor the UN have sought to amend the provision regarding the personal jurisdiction of the ECCC. Accordingly, the scope of personal jurisdiction set out in the ECCC Agreement and ECCC Law defines the personal jurisdiction of the ECCC and constitutes the law that the Pre-Trial Chamber must apply.

21. Recognising the UN's right to participate in changes to the policy on personal jurisdiction in no way diminishes Cambodia's sovereignty: all states have the power to voluntarily enter into binding agreements, and, having done so, every state from the largest to the smallest is

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53 **D378/5.1.10** Security Council Resolution 827, 25 May 1993, S/RES/827 (1993) (establishing the ICTY); **D378/5.1.11** Security Council Resolution 955, 8 November 1994, S/RES/955 (1994) (establishing the ICTR).

54 ECCC Agreement, art. 2(3).

obligated to follow such agreements unless and until they are amended or the state formally withdraws. Having ratified the ECCC Agreement, both the RGC and the UN are bound by its terms, and neither side can modify the meaning of those terms by unilateral policy declarations made after its adoption.[55] If the RGC no longer wishes to entrust the ECCC with the responsibility of bringing to trial those most responsible for crimes committed during the DK regime, the Government could seek to withdraw from the Agreement[56] or amend the ECCC Law with the consent of the UN. No effort has been made to do either.

22. Unlike the RGC's "influence on the functioning of the ECCC",[57] Resolutions 1503 and 1534 did not purport to have any effect on whether a given case was to be prosecuted; rather, they affected only the court in which a particular case was tried. Resolution 1503 instructed the *ad hoc* tribunals to focus on cases against "the most senior leaders suspected of being most responsible", but other cases were not dismissed—rather, they were to be "transferr[ed] […] to competent national jurisdictions."[58] Indeed, the Security Council emphasised that the adoption of Resolution 1503 was not intended to reduce the number of people to be investigated and tried for mass atrocity crimes: the Resolution explicitly stated that the tribunals' completion plans "in no way alter the obligation of Rwanda and the countries of the former Yugoslavia to investigate those accused whose cases would not be tried by the ICTR or ICTY and take appropriate action with respect to indictment and prosecution".[59] Resolutions 1503 and 1534 did not promote impunity for crimes within the jurisdiction of the *ad hoc* tribunals; rather, they simply divided the task of investigation and prosecution between the *ad hoc* tribunals and national courts.

23. Critically, the Security Council respected judicial independence by never expressing any views on the appropriate disposition of any particular case at the ICTY or ICTR. While the Council *did* set out the criterion of "the most senior leaders suspected of being most

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55 It is presumably obvious that if a UN official were to state that the term "most responsible" included, for example, any Khmer Rouge cadre of any level who had killed more than 25 people, this would not be a persuasive basis for arguing that that was the proper definition of the term unless the RGC also agreed to it and both parties amended the ECCC Law.

56 Vienna Convention, arts 54, 56.

57 **D382/4/1** NCP Appeal, para. 61.

58 **D378/5.1.12** Resolution 1503, EN 01593497-98.

59 **D378/5.1.12** Resolution 1503, EN 01593498.

responsible for crimes" as the test for which cases should be retained, it never expressed any view as to whether any particular case met that test.[60] The application of the test was appropriately left entirely to the independent discretion of the ICTY's and ICTR's judges, who chose to refer some cases to national courts while determining that others were best prosecuted at the *ad hoc* tribunals.

24. The ECCC Agreement and ECCC Law both require that ECCC judges be free to undertake the same exercise of independent discretion. Article 10 *new* of the ECCC Law provides, in part: "Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source." The prohibition on judges accepting instructions from governments or any outside source also appears in Article 3(3) of the ECCC Agreement.

25. The requirement for an independent judiciary is also reflected in the Cambodian Constitution[61] and in multiple human rights instruments and statements of best practices and minimum standards. These include the Beijing Statement of Principles of the Independence of the Judiciary promulgated by the Law Association for Asia and the Pacific,[62] the Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly,[63] and the New Delhi Code of Minimum Standards of Judicial Independence adopted by the International Bar Association.[64] All of these impose a duty upon governmental and other institutions to respect and observe the independence of the judiciary and to refrain from exerting any form of pressure on judges.[65]

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60 **D378/5.1.12** Resolution 1503, EN 01593497.

61 The Constitution of the Kingdom of Cambodia, adopted 21 September 1993 and amended 4 March 1999, arts 51 ("The Legislative, Executive, and the Judicial powers shall be separate."), 128 (former art. 109) ("The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens."), 129 (former art. 110) ("Only judges shall have the right to adjudicate."), 130 (former art. 111) ("Judicial power shall not be granted to the legislative or executive branches.").

62 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 ("Beijing Principles"), arts 3(a), 4-5.

63 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 ("Basic Principles"), paras 1-2, 4.

64 The New Delhi Code of Minimum Standards of Judicial Independence, International Bar Association, 22 October 1982 ("New Delhi Code"), art. 16.

65 *See* Beijing Principles, arts 3(a), 4-5; Basic Principles, paras 1-2, 4; New Delhi Code, arts 16, 18.

26. Finally, a fundamental principle of the rule of law is that while the legislature or executive is responsible for *making the law* through legislation, executive acts, and treaties, it is solely the judiciary that decides *how to apply the law* to individual cases. In a system governed by the rule of law, judicial independence is respected. Judges must make their rulings based on the law, the evidence, and their own judgement and conscience without taking instructions from governments or any outside sources.

D. AN INDEPENDENT JUDICIAL RESOLUTION OF CASES 003, 004 AND 004/2 WILL PROMOTE BOTH JUSTICE AND RECONCILIATION

27. The NCP Appeal asserts that the preamble of the ECCC Agreement requires "striking a balance between 'justice' and 'national reconciliation'", avers that Cases 001 and 002 have already brought justice to victims, and implies that the continuation of proceedings against Yim Tith would undermine national reconciliation.[66] However, the NCP Appeal does not provide any evidence that bringing Yim Tith to account for the very serious crimes with which he is charged would in any way hinder national reconciliation. On the contrary, it is clear that making Yim Tith answer at trial to the compelling evidence of his role in crimes that affected tens of thousands of Cambodians would help achieve some measure of justice for additional victims, thus addressing the preamble's concerns.

28. First, it is important to note that the UN Group of Experts on Cambodia stated in its report to the Secretary-General in 1999 that "[a]ccountability for the past and national reconciliation for the future are […] not innate opposites or even competing goals. […] [I]f justice is brought about with sensitivity to a country's own situation, accountability and national reconciliation are, in fact, complementary, even inseparable."[67] Indeed, UN General Assembly Resolution 57/228 recognises that "the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a State".[68]

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66 **D382/4/1** NCP Appeal, paras 70-72.

67 **D324.15** UN Group of Experts Report, para. 3.

68 **D324.34** Resolution 57/228, adopted by the General Assembly about the Khmer Rouge trials, 27 February 2003, EN 01326103.

29. Second, there is simply no indication whatsoever that an independent judicial resolution of Cases 004/2, 004, and 003 on the merits—whatever that resolution might be—would threaten the peace and security of Cambodia. As the ICP has previously observed, the resolutions of Cases 001 and 002 with convictions and life sentences have not negatively affected national reconciliation or peace. To the contrary, the convictions were widely lauded both within and outside of Cambodia and they appear to have *promoted* reconciliation.[69] These cases involved accused both at a lower level of authority to Yim Tith (Duch) and those above him in the CPK hierarchy (Nuon Chea and Khieu Samphan). In addition, there have been no negative public reactions to the announcements that Yim Tith, Ao An, and Meas Muth have been indicted by the ICIJ and therefore no reason to believe that sending Yim Tith to trial would threaten national reconciliation. Moreover, Cambodia has now enjoyed over two decades of peace and stability.[70] There are no armed groups exercising power over Cambodian territory. The Khmer Rouge has ceased to exist as a political or military organisation, its former cadres are now elderly, the Pol Pot regime is almost universally denounced, and there is no evidence of any support for a resurgence of the movement.[71]

30. In contrast, there are strong indications that victims do not agree with the contention that no further justice is needed after the trial of Cases 001 and 002.[72] Since the inception of the ECCC, several studies concerning the Cambodian public's perception of the ECCC have been published. While these studies differ in their approach, target groups, and research questions, they all indicate that the Cambodian public has a strong interest in seeing the remaining cases proceed.

31. The most recent study was published in November 2018 and was conducted by the Marburg Centre for Conflict Studies, the Phnom Penh Centre for the Study of Humanitarian Law, and

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69 **D378/2** International Co-Prosecutor's Rule 66 Final Submission Against Yim Tith, 4 June 2018 ("ICP Final Submission"), para. 1151.

70 Even in 1998, during the visit of the Group of Experts to Cambodia, members of the Cambodian public and of the government did not express support for the absolute precedence of issues of security over the interest of justice. As the Group of Experts observed, "Concerning public opinion, the Group did hear a strong desire among Cambodians in and out of Government for peace. But none suggested that peace and trials were irreconcilable, or that Cambodians saw peace as a substitute for justice." *See* **D324.15** UN Group of Experts Report, para. 100.

71 **D378/2** ICP Final Submission, para. 1153.

72 *Contra* **D382/4/1** NCP Appeal, para. 72.

Swisspeace (the "Marburg Study").[73] The study focused on victim participation, surveying 439 victims of the Khmer Rouge who were randomly selected from four predetermined groups.[74] Notably, when asked whether the ECCC should address Cases 003 and 004 (also encompassing Case 004/2), 80.2 percent of the respondents were in favour of the cases going ahead.[75] The five main reasons cited, from most to least frequent, were (i) it would provide the respondent with a sense of justice, (ii) it would mean justice for the victims generally, (iii) it would mean Khmer Rouge leaders could not escape justice, (iv) it would provide more truth about the Khmer Rouge regime, and (v) it would bring justice to Cambodia.[76] Only 2.77 percent of the respondents believed the cases should not proceed because they could lead to conflict.[77]

32. The Open Society Justice Initiative conducted a study from October 2013 until January 2014 ("OSJI Study") that focused on the impact of the ECCC on ordinary Cambodians.[78] The sample size of the respondents interviewed was smaller than the Marburg Study, but more diverse, including victims/survivors, accused perpetrators, bystanders, and youth.[79] At the time the data was collected, of the 49 respondents who were asked about and had knowledge of Cases 003 and 004, 29 wanted the cases to continue, while six were ambivalent.[80] The 14

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73 Williams, T. *et al.*, *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process*, Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: swisspeace, November 2018 ("Marburg Study"). Data collection for the study ran from 29 January until 7 June 2018 (*see* Marburg Study, p. 23).

74 ECCC civil party applicants comprised the first group, accounting for more than half of the respondents. These civil party applicants were divided into eight subgroups with varying degrees of participation in the proceedings, and some were civil parties in Cases 003 and 004 (Case 004 was used as an umbrella term to also encompass Case 004/2). The second group was comprised of complainants, *i.e.* individuals registered with the Court because they provided information, but they had not applied to become civil parties. The third group contained victims who had participated in NGO activities related to transitional justice in Cambodia. The fourth group was made up of individuals who neither took part in ECCC proceedings nor in such NGO projects. All but two of the respondents considered themselves victims of the Khmer Rouge, and the average age of the respondents was 62.4 years. *See* Marburg Study, pp. 19, 21-22, 28.

75 Marburg Study, p. 62.

76 Marburg Study, p. 63. *Note* that the respondents were allowed to give multiple answers.

77 Marburg Study, pp. 62-63. Only 14% of the 19.8% of respondents who did not support Cases 003 and 004 cited this reason, comprising only 2.77% of the entire respondent group.

78 Ryan, H. and McGrew, L., *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia*, New York: Open Society Justice Initiative, 2016 ("OSJI Study"), pp. 126-127, en. 210.

79 OSJI Study, pp. 126-127, en. 210. *Note* that the respondents were drawn from OSJI's existing contacts in Cambodia and therefore the sample group was not random. Out of the 122 total respondents, 109 were Cambodian.

80 OSJI Study, p. 82.

respondents who did *not* want the cases to continue thought the proceedings were too lengthy and/or cited concerns about government interference and fears of unrest in their communities, particularly those who lived in former Khmer Rouge strongholds or were former cadres themselves.[81] The OSJI Study noted, however, that the respondents' fears of unrest were often based on two misconceptions: (i) that Cases 003 and 004 would target low-level leaders, and (ii) that cases beyond 003 and 004 would follow, moving further down the DK hierarchy.[82]

33. A 2011 study conducted by the Human Rights Center at the Berkeley School of Law selected 1,000 participants from 250 randomly chosen villages to assess Cambodians' knowledge, perception and attitudes toward social reconstruction and the ECCC.[83] A large majority (83 percent) agreed that the ECCC should be involved in responding to what happened during the DK regime, 93 percent agreed that it was necessary to find the truth about what happened during the DK period, and 83 percent believed that people could not feel better if they did not know what happened to their loved ones.[84] All of these aims would be further fulfilled by Cases 003, 004, and 004/2 moving ahead (should the evidence warrant it) and were the very goals that led to the establishment of this Court.

34. In light of the results from these studies and considering that Cases 003, 004 and 004/2 all include issues and crime sites that have not been the subject of Cases 001 or 002, there are numerous victims and family members of victims with a strong interest in hearing the truth about what happened at these locations and about who was responsible for the crimes. The 1,063 civil party applicants who applied to take part in the Case 004 proceedings and have been certified as admissible by the ICIJ[85] certainly did not believe that justice had been fully served by Cases 001 and 002, or they would not have applied to participate in Case 004 or

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81 OSJI Study, pp. 82-83.

82 OSJI Study, p. 83.

83 Pham, PN *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*, Berkeley: Human Rights Center, University of California, June 2011 ("Berkeley Study"), p. 16. *Note* that although the study was published in June 2011, the information was collected in the first 20 days of December 2010.

84 Berkeley Study, pp. 26, 31. *Note* that these three figures reflect the 2010/2011 study results (rather than the 2008 baseline results).

85 **D384.1** Annex A: List of Civil Party Applications Admissible, annexed to **D384** Order on Admissibility of Civil Party Applications, 28 June 2019.

plan to appeal the NCIJ's Dismissal Order.[86] Moreover, the Co-Lawyers for the 901 civil party applicants who were declared inadmissible by the ICIJ have expressed an intention to challenge the ICIJ's admissibility decision in order to safeguard their clients' interests in fully participating in Case 004 if it goes ahead.[87]

35. In short, the NCP Appeal argument that Yim Tith should not face trial because "justice has been brought" to the victims through the trial of Cases 001 and 002 does not take account of the victims' actual needs and wishes.[88]

III. RELIEF SOUGHT

36. Based on the foregoing reasons, the ICP respectfully requests that the PTC dismiss the NCP Appeal, uphold the ICIJ's finding that Yim Tith was one of "those who were most responsible" for crimes during the DK regime, and send Case 004 for trial on the basis of the Indictment issued by the ICIJ.

Respectfully submitted,

Date	**Name**	**Place**	**Signature**
30 September 2019	Brenda J. HOLLIS International Co-Prosecutor	Phnom Penh	

86 **D381/11** Civil Party Notice of Appeal Against the Order Dismissing the Case Against Yim Tith (D381), 19 September 2019.

87 *See* **D384.2** Annex B: List of Civil Party Applications Inadmissible, annexed to **D384** Order on Admissibility of Civil Party Applications, 28 June 2019; **D384/3** Civil Party Co-Lawyers' Urgent Request for an Extension of Time and Pages to Appeal the Civil Party Admissibility Decisions in Case 004, 2 August 2019, paras 9-12; **D384/1** Civil Party Lawyer's Urgent Request for an Extension of Time and Pages to Appeal the Civil Party Admissibility Decisions in Case 004, 26 July 2019, paras 9-12.

88 *Contra* **D382/4/1** NCP Appeal, para. 72.