BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IM CHAEM'S RESPONSE TO THE INTERNATIONAL CO-PROSECUTOR'S APPEAL OF CLOSING ORDER (REASONS)

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I. INTRODUCTION AND SUMMARY

1. Ms. IM Chaem, through her Co-Lawyers (the "Defence"), hereby submits this Response to the *International Co-Prosecutor's Appeal of Closing Order (Reasons)*[1] that dismissed all charges against Ms. IM Chaem due to lack of personal jurisdiction.[2]

Summary of the Appeal

2. The International Co-Prosecutor ("ICP") submits that the Co-Investigating Judges ("CIJs") erred in law and / or in fact in their analysis contained in the Closing Order.[3] Specifically, the Appeal argues that the CIJs i) failed to consider all of the facts of which they were seised in the Introductory and Supplementary Submissions and how these facts could impact on the issue as to whether Ms. IM Chaem falls within the ECCC's personal jurisdiction;[4] ii) the CIJs erred in their analysis and application of the elements of the crimes of extermination and enforced disappearances;[5] and iii) erred in finding that Ms. IM Chaem was neither the Koh Andet District Secretary nor the Sector 13 Committee Member.[6] On the basis of these alleged legal and factual errors, the ICP requests the Pre-Trial Chamber ("PTC") to either i) send the casefile back to the CIJs to re-evaluate whether Ms. IM Chaem falls within the personal jurisdiction of the ECCC, or in the alternative, ii) re-evaluate the case itself.[7]

Summary of the Response

3. In this Response, the Defence requests the PTC to dismiss the Appeal. The Appeal rests upon a fundamental misapprehension that any legal or factual error is capable of leading to a reversal of the decision and a re-evaluation of the governing law and applicable facts. Throughout the Appeal, the ICP fails to address the correct standard of appellate review and to demonstrate how the errors alleged in the Appeal, even if established, led to an abuse of the CIJs' discretion in concluding that the ECCC lacks personal jurisdiction over Ms. IM Chaem. In sum, the Defence submits that the CIJs i) did not err in law in assessing relevant facts of which they were seised for the purpose of determining personal jurisdiction in Case 004/1; ii)

1 International Co-Prosecutor's Appeal of Closing Order (Reasons), 9 August 2017, **D308/3/1/1** ("Appeal").
2 Closing Order (Reasons), 10 July 2017, **D308/3** ("Closing Order, **D308/3**").
3 Appeal, para. 1.
4 Appeal, paras. 11-37 (Grounds 1 and 2). *See also*, Appeal, para. 2.
5 Appeal, paras. 38-57 (Grounds 3 and 4). *See also*, Appeal, para. 2.
6 Appeal, paras. 58-81 (Grounds 5 and 6). *See also*, Appeal, para. 2.
7 Appeal, paras. 3, 82.

did not err in their analysis and application of the elements of the crimes of extermination and enforced disappearances; and iii) did not err in fact in concluding that Ms. IM Chaem was neither the Koh Andet District Secretary nor the Sector 13 Committee Member.

II. BACKGROUND

4. The Defence incorporates by reference the procedural history included in the Defence's Response to the ICP's Final Submission.[8] In addition, on 22 February 2017, the CIJs issued the dispositive part of the Closing Order in Case 004/1, with full reasons to follow.[9] On 10 July 2017, the CIJs issued the full reasons of the Closing Order confirming that Ms. IM Chaem falls outside of the ECCC's personal jurisdiction and the dismissal of all charges.[10] On 9 August 2017, the ICP filed the Appeal. On 14 August 2017, the Defence filed an Urgent Request for Extension of Time and Pages to respond to the Appeal[11] that was granted in part on 17 August 2017.[12]

III. PRELIMINARY OBSERVATIONS

5. In the Closing Order, the CIJs found that Ms. IM Chaem falls outside of the ECCC's personal jurisdiction based on: i) the geographical limitation of the charges (and contribution) to a single district;[13] ii) the limitation of her formal positions to that of a district secretary and sector committee member (and insufficient evidence of any elevated role);[14] iii) the fact that there existed over one hundred other persons of equivalent rank at the time;[15] and iv) the numbers of victims of the alleged crimes which, when considered in the context of Democratic Kampuchea as a whole (when seen together with Ms. IM Chaem's individual position, development, and actions).[16]

8 IM Chaem's Response to the International Co-Prosecutor's Rule 66 Final Submission against Her, 28 November 2016, **D304/6** ("Response to the ICP's Final Submission, **D304/6**"), paras. 7-14.
9 Closing Order (Disposition), 22 February 2017, **D308**.
10 Closing Order, **D308/3**, paras. 312-13, 325.
11 IM Chaem's Urgent Request for an Extension of Time and Pages to Respond to the International Co-Prosecutor's Appeal of the Closing Order (Reasons) (D308/3/1/1), 14 August 2017, **D308/3/1/2**.
12 Decision on IM Chaem's Urgent Request for an Extension of Time and Pages to Respond to the Appeal of the Closing Order, 17 August 2017, **D308/3/1/3** [granting a one-month extension of time and 15 additional pages].
13 Closing Order, **D308/3**, para. 313.
14 Closing Order, **D308/3**, para. 315.
15 Closing Order, **D308/3**, para. 316.
16 Closing Order, **D308/3**, paras. 317-19.

6. The ICP submits that the CIJs erred in law and / or in fact in their analysis in the Closing Order and seeks a re-evaluation of their finding that the ECCC lacks personal jurisdiction over Ms. IM Chaem.[17]

7. In these preliminary observations, the Defence submits that the totality of the Appeal should be summarily dismissed. In sum, i) throughout Grounds 1-6, the ICP has failed to address the correct standard of review. Demonstration of errors of law and or fact[18] without a consequential showing of an abuse of discretion fails to meet the standard for review. In addition, ii) Grounds 3 and 4 of the Appeal seek to argue Ms. IM Chaem's alleged criminal responsibility for the relevant alleged crimes and the specific contours of the crimes of extermination and enforced disappearances. Accordingly, they do not address any factor determinative of the Closing Order and fall outside of the PTC's power of review.

A. THE ICP FAILS TO ADDRESS THE APPLICABLE STANDARD OF REVIEW

8. Grounds 1 to 6 are defective. Each fails to argue the correct standard of appellate review. As discussed below, not every error of law or fact is capable of setting aside a discretionary decision of the CIJs.[19] As stated by the PTC, the Appellant has an obligation to demonstrate that i) the error of law invalidates the decision, ii) the error of fact occasions a miscarriage of justice, or iii) that the decision or order is so unreasonable as to force the conclusion that the CIJs failed to exercise discretion judiciously.[20] Arguments of a party that do not have the potential to cause the impugned decision to be reversed or revised may be dismissed immediately by the PTC and need not be considered on the merits.[21]

9. In sum, the Defence submits that the ICP i) fails to address the correct appellate standard applicable to discretionary decisions such as those determining personal jurisdiction and ii)

17 Appeal, paras. 1-3, 82.
18 Appeal, para. 10.
19 *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC62), Decision on the Ieng Thirith Defence Appeal Against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010, 14 June 2010, **D353/2/3**, para. 8; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC64), Decision on Ieng Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with Ieng Sary at the Detention Facility, 11 June 2010, **A371/2/12**, para. 22.
20 *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC64), Decision on Ieng Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with Ieng Sary at the Detention Facility, 11 June 2010, **A371/2/12**, para. 22.
21 *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 47 & 48), 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**, para. 22.

fails to identify and argue how the alleged legal and factual errors amount to an abuse of discretion requiring the PTC's intervention.

i. Standard of appellate review applicable to personal jurisdiction's decisions

10. The Closing Order considered that the assessment of the "most responsible" criterion of personal jurisdiction at the ECCC is largely discretionary.[22] More specifically, the CIJs concluded that such an assessment "entails a wide but not entirely non-justiciable margin of appreciation".[23] The CIJs enjoy the broadest of discretion when determining whether suspects are among those who were "most responsible" for crimes.

11. The issue of whether the determination of the "most responsible" category is a discretionary decision is raised before the PTC for the first time. However, useful guidance may be sought from previous ECCC rulings. In this respect, the Supreme Court Chamber ("SCC") in Case 001 made it plain that:

> [T]he determination of whether an accused is 'most responsible' requires a large amount of discretion. There is no discretion, for example, in determining the ECCC's temporal and subject matter jurisdictions. Both are expressed through sharp-contoured definitions and, as such, are verifiable by a suspect and the ECCC because they involve pure questions of law or fact that are eminently suitable for legal determination. By contrast, neither a suspect nor the ECCC can verify whether a suspect is "most responsible" pursuant to *sharp-contoured, abstract and autonomous criteria*.[24]

12. There are no cogent reasons to depart from this finding. On the contrary, in keeping with the principles of clarity and uniformity of the law,[25] and in light of the obvious correctness of the enunciated law, the CIJs had to adopt this approach.

13. As such, the PTC's review of discretionary decisions made by the CIJs is limited to determining the proper exercise of that discretion through an application of the test outlined in

22 Closing Order, **D308/3**, para. 9.
23 Closing Order, **D308/3**, para. 9.
24 *Case of KAING Guek Eav alias Duch*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, **F28** ("Case 001 Appeal Judgement, **F28**"), para. 62 (emphasis added).
25 Closing Order, **D308/3**, para. 10. *See also*, for the same view held by Judge Bohlander alone, Consolidated Decision on Meas Muth's Requests on Personal Jurisdiction, 1 February 2016, **D298.1**, para. 28 ["As a general rule, it is in the interests of legal certainty and equality before the law for the CIJs to apply legal principles and rules consistently with the views of the SCC, unless there are good reasons to the contrary. As the SCC stated, innovations by individual Chambers regarding already established legal concepts would render those concepts variable and undermine the legal certainty of the ECCC's law and procedure and 'in practice, they are to be avoided' (emphasis omitted)].

Milosević at the ICTY.[26] It is not for the PTC to replace its own view with that taken by the CIJs.[27] As observed by the PTC, the test is as follows:

> In reviewing this exercise of discretion, the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but rather 'whether the Trial Chamber has correctly exercised its discretion in reaching that decision.' In order to challenge a discretionary decision, appellants must demonstrate that 'the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion,' or that the Trial Chamber '[gave] weight to extraneous or irrelevant considerations, … failed to give weight or sufficient weight to relevant considerations, or … made an error as to the facts upon which it has exercised its discretion,' or that the Trial Chamber's decision was 'so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.'[28]

ii. Burden and standard of proof of legal and factual errors

14. As stated by the PTC, not every error of law or fact will lead the PTC to set aside a discretionary decision.[29] An error must have been *fundamentally determinative* of the exercise of the CIJs' discretion.[30] The Appellant must demonstrate that i) the error of law invalidates the decision, ii) the error of fact occasions a miscarriage of justice, or iii) that the decision or order is so unreasonable as to force the conclusion that the CIJs failed to exercise their discretion judiciously.[31] Arguments of a party that do not have the potential to cause the

[26] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC25), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, **D164/3/6**, paras. 25-26.

[27] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC25), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, **D164/3/6**, para. 26.

[28] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC25), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, **D164/3/6**, para. 25 (reference omitted).

[29] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC62), Decision on the Ieng Thirith Defence Appeal Against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010, 14 June 2010, **D353/2/3**, para. 8; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC64), Decision on Ieng Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with Ieng Sary at the Detention Facility, 11 June 2010, **A371/2/12**, para. 22.

[30] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC62), Decision on the Ieng Thirith Defence Appeal Against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010, 14 June 2010, **D353/2/3**, para. 8.

[31] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC64), Decision on Ieng Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with Ieng Sary at the Detention Facility, 11 June 2010, **A371/2/12**, para. 22.

impugned decision to be reversed or revised may be dismissed immediately and need not be considered on the merits.[32]

15. As will be further argued below, the Appeal rests upon a fundamental misapprehension that any legal or factual error is capable of leading to a reversal of the decision and a re-evaluation of the governing law and applicable facts. The ICP disregards his obligation to identify how those alleged errors, if established, led to an abuse of discretion in concluding that the ECCC lacks jurisdiction over Ms. IM Chaem. The Appeal should be dismissed as defective.

B. GROUNDS 3 AND 4 OF THE APPEAL ARE INADMISSIBLE

16. The Defence submits that Grounds 3 and 4 are inadmissible and should not be examined on their merits. As argued below, Ms. IM Chaem's alleged criminal responsibility and the PTC's approach to the contours of the crime against humanity of extermination and of enforced disappearance are not matters that fall within the PTC's power of review. Each relates to matters (*mens rea* and contours of the crimes) that are not determinative of the Closing Order or otherwise within the scope of permissible review.

i. The ICP impermissibly requests to correct alleged errors in the CIJs' findings on extermination and enforced disappearances for the purpose of establishing Ms. IM Chaem's criminal responsibility

17. The first obligation of a court is to ascertain its own competence.[33] A court's possession of jurisdiction predetermines the right of a judicial authority to make *any* legal findings on the

[32] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 47 & 48), 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**, para. 22.

[33] *See*, *Judgments of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational, Scientific and Cultural Organization*, (I.C.J. Reports 1956), Advisory Opinion, 23 October 1956, Dissenting Opinion of Judge Córdova, p. 163 **[Authority 23]**, cited in *Prosecutor v. Dusko Tadić* (IT-94-1), AC, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Decision on Jurisdiction"), para. 18 **[Authority 1]**. *See also*, *Prosecutor v. Milan Milutinović et al.* (IT-05-87-PT), TC, Decision on Ordanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, paras. 25, 40 [para. 40: "[T]he Trial Chamber holds that the form of responsibility set forth in paragraph 22 of the Proposed Amended Joinder Indictment did not exist in customary international law at the time of the events alleged in the Indictment. The Chamber recalls its observation in paragraph 25 above that, if either of the two prerequisites derived from the Appeals Chamber's May 2003 *Ojdanic* decision is not fulfilled in respect of a purported form of responsibility, the Tribunal has no jurisdiction to determine an accused's guilt pursuant to that form. Accordingly, the Chamber will not engage in an examination of whether the Statute would be broad enough to encompass "indirect co-perpetration" if such a form of responsibility did exist in custom." (references omitted)] **[Authority 7]**.

criminal responsibility of an individual. Axiomatically, a finding of a lack of jurisdiction equates to a lack of legitimate power to make any judicial decision on the merits of the case. As stated by the SCC in Case 001, a "competent court is a prerequisite to a fair trial. To proceed without jurisdiction would strike at the root of the ECCC's mandate, and would deprive the Trial Chamber of its legal authority to try an accused person".[34] Any finding of a court on the substance of the crimes – or alleged criminal responsibility of a suspect – without jurisdiction constitutes *coram non judice*.[35]

18. The fact that jurisdiction constitutes a necessary prerequisite to findings on the merits stems from the conceptual nature of jurisdiction. It is nothing less than "a legal power, hence necessarily a legitimate power, 'to state the law'".[36] Put more plainly, absent this legitimacy, a court "can make no finding, nor any observation whatever" on further questions of the substance of that case.[37]

[34] Case 001 Appeal Judgment, **F28**, para. 34.
[35] "Before one who is not a Judge", "without jurisdiction".
[36] *Tadić* Decision on Jurisdiction, para. 10.
[37] *Case Concerning Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, (I.C.J. Reports 2004), Judgment on Preliminary Objections, 15 December 2004, para. 128 ["When, however, as in the present case, the Court comes to the conclusion that it is without jurisdiction to entertain the claims made in the Application, it can make no finding, nor any observation whatever, on the question whether any such violation has been committed or any international responsibility incurred."] **[Authority 26]**; *Case Concerning East Timor (Portugal v. Australia)*, (I.C.J. Reports 1995), Judgment, 30 June 1995, paras. 35-36 [para. 36: "Having dismissed the first of the two objections of Australia which it has examined, but upheld its second [objection to jurisdiction], the Court finds that … it cannot rule on Portugal's claims on the merits, whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play."] **[Authority 25]**; *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, (I.C.J. Reports 2006), Judgment on Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, para. 127 ["[T]he Court has come to the conclusion that it cannot accept any grounds put forward by the DRC to establish its jurisdiction in the present case, and cannot therefore entertain the latter's Application"] **[Authority 27]**. *See also*, *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, (I.C.J. Reports 1954), Judgment on Preliminary Question, 15 June 1954, pp. 32-33 **[Authority 22]**; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, (I.C.J. Reports 1966), Second Phase Judgment, 18 July 1966, para. 59 **[Authority 24]**. Similar judicial reasoning has also been adopted at the ICTY (*See*, *Prosecutor v. Zejnil Delalić et al.* (IT-96-21), AC, Dissenting Opinion of Judge Bennouna on the Jurisdiction of the Appeals Chamber to Hear Provisional Release Matters, 22 February 1999, para. 1 ["I did not rule on the merits of this Motion since I believe that the Appeals Chamber does not have jurisdiction to decide that matter"] **[Authority 2]**) and at the International Criminal Court, where the Appeals Chamber held that once the exercise of its jurisdiction is declined, the matter is rendered "non-justiciable" and consequentially incapable of being heard on its substance by the Court (*See*, *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06 (OA4)), AC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, paras. 21-23 [para. 23: "The presence of anyone of the aforesaid impediments enumerated in article 17 [barriers to the exercise of the jurisdiction of the Court] renders the case inadmissible and as such non-justiciable."] **[Authority 20]**).

19. In other words, a finding that the ECCC lacks jurisdiction over Ms. IM Chaem[38] precluded any findings concerning the likelihood of her criminal responsibility for crimes.[39] Any finding of this nature strikes at the heart of the ECCC's mandate and is *ultra vires* any legitimate legal power. Accordingly, Grounds 3 and 4 of the Appeal, solely based on contentions related to Ms. IM Chaem's criminal responsibility, must be dismissed.

ii. The ICP impermissibly requests a re-examination of the CIJs' approach to the crimes against humanity of extermination and enforced disappearances

20. The Defence submits that it is not open for the PTC to re-examine the CIJs' approach to the crime against humanity of extermination and enforced disappearance because the specific contours of both crimes do not come within the scope of the PTC's power of review.

21. The ICP alleges that "[t]he CIJs erred in law by finding that the intent for the crime of extermination - kill on a 'massive' scale - must be formed '*ex ante*'."[40] Further, the ICP alleges "the CIJs wrongly applied the definition of the modern crime of enforced disappearance - which was not in existence in 1975 - instead of the elements of other inhumane acts as a crime against humanity."[41] However, these alleged legal errors fall outside the PTC's power of review.

38 *See*, Closing Order, **D308/3**, paras. 312, 325.
39 *See, e.g.*, Closing Order, **D308/3**, paras. 281-312 [In particular para. 307: "The evidence on [Ms. IM] Chaem's authority, responsibilities, and conduct strongly indicates that she could be criminally responsible for these crimes through the modes of liability listed in the Notification of Charges." (reference omitted)].
40 Appeal, para. 38.
41 Appeal, para. 47.

22. As confirmed by the PTC in Case 002, "challenges relating to the specific contours of a substantive crime … are matters to be addressed at trial. For example, challenges to the specific definition and application of elements of crimes charged are inadmissible at the pre-trial phase … This is because such challenges often involve factual or mixed questions of law and fact determinations to be made at trial upon hearing and weighing all of the evidence."[42]

23. The ICP's challenges to the CIJs' approach to the assessment of extermination and enforced disappearances are wide-ranging disputes concerning the specific contours of the crimes. Ground 3 involves mixed questions of law and fact that include the *actus reus* and *mens rea* of extermination,[43] the correct evidential approach to *mens rea* in the circumstances of the case (e.g., whether an *ex ante* intent to kill is demonstrated),[44] and whether the CIJs erred in fact by failing to find Ms. IM Chaem had the requisite *mens rea* for extermination.[45] Ground 4 involves mixed questions of law and fact that include the *actus reus* and *mens rea* of enforced disappearance,[46] whether the CIJs erred in requiring that persons must have enquired as to the victim's whereabouts,[47] and the correct evidential approach to enforced disappearances.[48] These questions of fact and law cannot be determined before the PTC within the confines of an appeal of a decision premised on jurisdiction but are matters that may only be determined at trial. Grounds 3 and 4 should be found inadmissible and dismissed.

IV. RESPONSE

A. GROUND 1: THE CIJS DID NOT ERR BY FINDING THAT ALLEGATIONS IN THE INTRODUCTORY SUBMISSIONS MUST BE CHARGED IN ORDER TO BE PART OF A CLOSING ORDER

24. At paragraphs 11 to 22 of the Appeal, the ICP asserts that the "CIJs failed to consider [or reason] all of the factual allegations of which they were seised or the [ICP]'s arguments in his Final Submission as to how the evidence supports [Ms.] IM Chaem's criminal responsibility

42 *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, **D427/3/15**, para. 62, *citing inter alia*, *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, **D97/15/9**, para. 23 (other references omitted).
43 Appeal, paras. 38-44.
44 Appeal, paras. 38-40, 45-46.
45 Appeal, paras. 38, 45-46.
46 Appeal, paras. 47-51.
47 Appeal, paras. 52-55.
48 Appeal, paras. 56-57.

for several very serious crimes."[49] The ICP contends that the CIJs have an obligation to consider whether the evidence establishes that a suspect named in the Introductory and Supplementary Submissions "is criminally responsible for any crimes under any applicable mode of liability".[50]

25. In support of this claim, the ICP submits that the Introductory and Supplementary Submissions puts the Defence on notice as to the facts that could lead to an indictment;[51] and that the CIJs' contrary conclusion deprives the Prosecution of: i) the right to be heard on the evidence of Ms. IM Chaem's responsibility for these crimes;[52] and ii) the right to appeal the CIJs' findings concerning facts with which Ms. IM Chaem was not charged.[53] The Defence will address the arguments raised in the Appeal in relation to Ground 1 below.

i. The CIJs' adoption of the prevailing law in regard to facts that may lead to an indictment

26. The ICP claims that the "CIJs' reliance on a decision issued by their office during the Case 002 investigation is unpersuasive."[54] This claim is made in reference to the CIJs' *Order concerning the Co-Prosecutors' Request for Clarification of Charges* ("Clarification Order")[55] that stated that the CIJs "may not indict a person for facts in relation to which he or she has not first been charged".[56] The ICP argues that the CIJs rely upon a single sentence that has been taken out of context and the "preceding sentence is critical to interpreting the decision as a whole and directly contradicts the CIJs' assertion that the Closing Order can ignore facts contained in the Co-Prosecutors' Introductory or Supplementary Submissions simply because they have not 'charged' the suspect with these specific crimes or modes of liability."[57] The sentence reads:

> The Co-Investigating Judges have the obligation to make a decision, in the Closing Order, with respect to each of the facts of which they have been validly seised, either by issuing

[49] Appeal, para. 12.
[50] Appeal, para. 11.
[51] Appeal, paras. 13-14.
[52] Appeal, para. 15.
[53] Appeal, paras. 16-17.
[54] Appeal, para. 18.
[55] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, **D198/1**.
[56] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, **D198/1**, para. 10.
[57] Appeal, para. 19.

an indictment or dismissing the case.[58]

27. The ICP further contends that the "very purpose" of the Introductory and Supplementary Submissions is to inform "in detail of the nature and cause of the charges" alleged against charged persons.[59] These claims are factually and legally misconceived.

28. First, the ICP's claim that the CIJ's have not ruled consistently and unambiguously on this issue is wrong. At the time Ms. IM Chaem was charged *in absentia*, former International CIJ Harmon also made it plain that it *is* the Notification of Charges that informs a charged person in detail of the nature and cause of the charges. As stated:

> The cause and nature of the charges against Im Chaem, as well as her personal details and other relevant information are specified in the Notification of Charges attached to this decision.[60]

29. Second, self-evidently, the ICP's claim that the CIJs were obliged to make a decision, in the Closing Order, with respect to each of the facts of which they have been validly seised through either issuing an indictment or dismissing the case is wrong. The obligation to address each fact relevant to the charges and the issuance of an indictment or dismissal arises once jurisdiction has been determined.

30. As discussed at paragraphs 17-19 above, the establishment of jurisdiction is an indispensable prerequisite to any court making any decision on the merits of the case. The ICP's argument runs counter to this basic principle. A finding of a lack of jurisdiction and incompetence automatically leads to the dismissal of the case. It obviates the need and the obligation to make a decision on "each of the facts of which they [the CIJs] have been validly seised, either by issuing an indictment or dismissing the case".[61] Absent a showing that the ECCC had jurisdiction over Ms. IM Chaem, the question of the facts constituting the charges of any indictment did not arise. As will be demonstrated below with regards to Ground 2, the ICP fails to demonstrate otherwise.

[58] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order Concerning the Co-Prosecutors' Request Clarification of Charges, 20 November 2009, **D198/1**, para. 10.
[59] Appeal, para. 22.
[60] Decision to Charge Im Chaem *in Absentia*, 3 March 2015, **D239**, para. 75.
[61] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order Concerning the Co-Prosecutors' Request Clarification of Charges, 20 November 2009, **D198/1**, para. 10.

ii. The ICP misinterprets the reasoning that the Defence was put on notice as to the facts that could lead to an indictment

31. The ICP submits that the Defence was put on notice as to the facts that could lead to an indictment through access to the ICP's Introductory and Supplementary Submissions.[62] However, this argument disregards the critical issue, namely that once the judicial investigation concluded (on 18 December 2015 in Case 004/1[63]), Ms. IM Chaem was informed that the scope of the relevant and probative facts was to be determined by the Notification of Charges, and not the Introductory and Supplementary Submissions. The Defence's arguments on this issue are outlined in the Response to the Final Submission.[64] The object and purpose of the Notification of the Charges is to inform the parties, and particularly the suspect of the nature and cause of the charges that are relevant and capable of leading to indictment.

32. Accordingly, the ICP's claim that the Defence's filing of an investigative action request in relation to Trapeang Thma Dam on 15 December 2015[65] illustrates Ms. IM Chaem's awareness that she could be indicted for facts not charged[66] is misconceived. First, the Trapeang Thma Dam Request is not an investigative action request.[67] Contrary to the ICP's Request for Placement of Documents on Case File 004/1 which was considered a request for investigative action,[68] the Trapeang Thma Dam Request aimed at a consistent application of the Trial Chamber's decision to grant the OCIJ access to the confidential versions of all Case 002 transcripts.[69]

33. Second, the Trapeang Thma Dam Request was filed on 15 December 2015, three days prior to

62 Appeal, para. 13.
63 Notice of Conclusion of Judicial Investigation Against IM Chaem, 18 December 2015, **D285**.
64 Response to the ICP's Final Submission, **D304/6**, paras. 20-29. *See also*, IM Chaem's Response to the International Co-Prosecutor's Request in Response to the Order for Severance of IM Chaem from Case 004, 2 March 2016, **D300/1**, paras. 26-27; IM Chaem's Urgent Request for (1) a Retraction Order Against the International Co-Prosecutor's Summary of His Final Submission and (2) a Joint Public Statement from the Co-Investigating Judges, 16 December 2016, **D306**, para. 25.
65 IM Chaem's Request for Disclosure of Unredacted Case 002 Transcripts and Related Documents Relevant to Her, 15 December 2015, **D283** ("Trapeang Thma Dam Request, **D283**").
66 Appeal, para. 14 *relying on* Trapeang Thma Dam Request, **D283**.
67 In the Trapeang Thma Dam Request, the Defence requested that the CIJs grant it access to and place on Case File 004 transcripts of Case 002 relevant to Ms. IM Chaem. *See*, Trapeang Thma Dam Request, **D283**, p. 6.
68 Decision on International Co-Prosecutor's Request for Placement of Documents on Case File 004/1, 4 March 2016, **D300/2**, para. 9 ["The Pre-Trial Chamber has previously held that a request for an order to place materials on the Case File constitutes a request pursuant to Internal Rule 55(10) because it requires the CIJs to assess the materials for relevance to the investigation, and has as its purpose the establishment of the truth."].
69 Trial Chamber's Response to OCIJ's Request for Access to Confidential Transcripts of Trial Proceedings in Case 002, 22 November 2012, **D127/1**.

the conclusion of the judicial investigation;[70] at a time Ms. IM Chaem could still have been charged by the CIJs for additional crimes (that were not eventually contained in the Notification of Charges). However, following the conclusion of the investigation on 18 December 2015,[71] the Notification of Charges provided final information to Ms. IM Chaem of the *actual* charges and the delineation of the scope of any potential indictment. As correctly concluded by the CIJs, a charged person "may thus only be indicted for crimes that he or she has been charged with and duly notified of".[72] Any allegation of crimes falling outside of the charges outlined in the Notification of the Charges was no longer relevant or the subject of Defence preparation.

iii. "Right to be heard" on the evidence related to Ms. IM Chaem's alleged criminal responsibility and "right to appeal" the CIJs findings

"Right to be heard"

34. The ICP's claim that "the CIJ's position effectively denies the Co-Prosecutors the right to be heard on the evidence of [Ms.] IM Chaem's responsibility for these crimes"[73] is a complaint that has no basis in law. As correctly pointed out in the ICP's Appeal, the "Internal Rules do not provide the Co-Prosecutors any opportunity to be heard on which crimes the CIJs should include in their notification of charges pursuant to Rule 57."[74] It is the CIJs who have an obligation to investigate all facts contained in the Introductory and Supplementary Submissions and are empowered to identify which facts may form the basis of a charge(s)[75] on the basis of "clear and consistent evidence".[76] Consistent with the equality of arms, neither the

70 *See*, Notice of Conclusion of Judicial Investigation Against IM Chaem, 18 December 2015, **D285**.
71 Notice of Conclusion of Judicial Investigation Against IM Chaem, 18 December 2015, **D285**.
72 Closing Order, **D308/3**, para. 245.
73 Appeal, para. 15.
74 Appeal, para. 15.
75 *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, **D198/1**, para. 10.
76 Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 9), adopted on 12 June 2007 (as revised on 16 January 2015), Rule 55(4); *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order Concerning the Co-Prosecutors' Request Clarification of Charges, 20 November 2009, **D198/1**, para. 10 ["The obligation to investigate all the facts referred to the Co-Investigating Judges must not be mistaken for an 'obligation to charge' in relation to those facts; such an obligation could not be imposed upon the Co-Investigating Judges without depriving them of the essential powers attaching to their functions as independent Judges … [C]harges may only be laid if there is clear and consistent evidence indicating that a person may be criminally responsible for the commission of a crime alleged in the OCP submission"]; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order Refusing Request for Further Charging, 16 February 2010, **D298/2**, para. 13 ["'[C]harging' … is not a mere procedural formality, but rather a judicial decision made by the Co-Investigating

ICP nor the Defence had the right to be heard prior to the determination of these issues by the CIJs.

35. The ICP's claim that he was not invited to "hearings where [Ms. IM Chaem] was notified of the charges"[77] is equally devoid of principle or practical application. Ms. IM Chaem was notified of the charges *in absentia* through a judicial decision.[78] There was no hearing. If charging had taken place at an initial appearance hearing, and not *via* a judicial decision, Internal Rule 57 (governing the procedure for charging at an initial appearance hearing) does not provide for the ICP to be present during the Initial Appearance. ECCC practice allows counsel for the suspects only to be present during the charging of their clients.[79]

36. However, prior to the conclusion of the judicial investigation, the ICP could have filed a stand-alone submission to argue for modification of the charges, including the evidential basis for the addition of charges. This was a course of action undertaken by the Co-Prosecutors in Case 002 who requested that Duch be charged with crimes in advance of a potential indictment in that case.[80] For reasons that remain unexplained, the ICP declined to take advantage of that specific procedural safeguard.

"Right to appeal"

37. The ICP claims that that there "was no 'decision' for the Co-Prosecutors to appeal at any time during the investigation"[81] and therefore there has been a denial of the Prosecution's right to appeal the CIJs' decisions concerning the "reasonableness of any decision not to charge specific crimes or modes of responsibility".[82] This claim is wholly without merit. The ICP was notified of the Decision to Charge IM Chaem *in Absentia*, and its accompanying

Judges once they have found clear and consistent evidence of criminal responsibility against any person. By such a decision, taken on their authority, the Co-Investigating Judges decide the proper timing and content of the judicial investigation." (reference omitted)].

77 Appeal, para. 15.

78 *See*, Decision to Charge Im Chaem *in Absentia*, 3 March 2015, **D239**.

79 *See, e.g.*, *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ, Written Record of Initial Appearance of AO An, 27 March 2015, **D242**, p. 2; *Case of YIM Tith*, 004/07-09-2009-ECCC/OCIJ, Written Record of Initial Appearance of YIM Tith, 9 December 2015, **D281**, p. 1; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Written Record of Initial Appearance of IENG Sary, 12 November 2007, **E3/92**, p. 4.

80 *See*, *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Request for Notification of Charges to KAING Guek Eav *alias* Duch, 21 January 2010, **D334**, paras. 1-4.

81 Appeal, para. 16.

82 Appeal, para. 16.

Notification of Charges in Case 004/1 at the same time as the Defence.[83]

38. Both the ICP and the Defence had a right to appeal this decision, allowing any challenges to the reasonableness of the decision (not to charge certain facts) to be heard. The Defence appealed the Decision[84] and the ICP responded to the Appeal.[85] Accordingly, there was no impediment in principle or practice to prevent the ICP presenting any reasoned view concerning the evidence, the applicability of the "clear and consistent evidence" threshold, and the appropriateness of additional charges (based upon relevant and probative facts). A failure to take advantage of these opportunities cannot form the basis for a retrospective claim of a violation of a right to appeal, let alone one that amounts to an error of law capable of invalidating the CIJs' findings on personal jurisdiction.

39. In light of the above, the ICP's argument concerning the power to reduce the scope of the investigation pursuant to Rule 66 *bis* is irrelevant to the issues at stake. The ICP's argument, that the CIJs "cannot simply drop the investigation of facts for which they were seised without hearing from the Co-Prosecutors"[86] is inapposite. Rule 66 *bis* provides for the right to be heard under specific circumstances, including the reduction of the scope of the investigation. However, the CIJs did not reduce the scope of the investigation in Ms. IM Chaem's case. The mere fact that Ms. IM Chaem was not charged with all the allegations noted in the Introductory and Supplementary Submissions does not mean that the CIJs reduced the scope of the investigation without hearing from the parties as provided for in Rule 66 *bis*. It simply means that the threshold for charging specific facts had not been met. Moreover, as outlined at paragraphs 36-38 above, there was ample opportunity and several procedural safeguards that allowed the ICP to be heard and to challenge those findings. There can now be no valid compliant or appeal on the basis of that failure.

[83] *See*, Decision to Charge Im Chaem *in Absentia*, 3 March 2015, **D239**; Notification of Charges against Im Chaem, 3 March 2015, **D239.1**.

[84] IM Chaem's Appeal against the International Co-Investigating Judge's Decision to Charge her *In Absentia*, 2 April 2015, **D239/1/2**.

[85] International Co-Prosecutor's Response to IM Chaem's Appeal against the Decision to Charge her *In Absentia*, 16 June 2015, **D239/1/6**.

[86] Appeal, para. 17.

B. GROUND 2: THE CIJs DID NOT ERR IN LAW IN THEIR APPROACH TO THE FACTS OF WHICH THEY WERE SEISED BUT NOT CHARGED

40. At paragraphs 23 to 37 of the Appeal, the ICP submits that the CIJs erred in law by failing to address "numerous allegations" constituting "very significant crimes" set out in the Final Submission of which they "were seised in the Introductory and Supplementary Submissions that were not 'charged' by the CIJs."[87] The ICP identifies five categories of facts, with which Ms. IM Chaem was not charged, that were allegedly not considered:[88] i) the purge of the Northwest Zone; ii) forced marriages in Sector 13 and Sector 5; iii) persecution of the Vietnamese in Sector 5; iv) crimes against the Khmer Krom in Sector 13; and v) several other crimes of which the CIJs were seised.[89]

41. The Defence submits that Ground 2 is formally defective. The ICP fails to address the correct appellate standard applicable to determining personal jurisdiction and fails to identify how the alleged legal and factual errors amounted to an abuse of discretion. Moreover, as outlined below, the Defence submits that the CIJs i) properly assessed and considered all facts, including those that were merely seised; and ii) appropriately considered and expressly reasoned all relevant facts in determining personal jurisdiction.

i. The CIJs properly assessed and considered all facts, including those that were merely seised and not only charged

42. As accepted by the Co-Prosecutors in Case 002, Internal Rule 67(3) provides that the CIJs are not bound by the Co-Prosecutor's Submissions when making their Closing Order.[90] As long as there is no indication that the CIJs completely disregarded any particular piece of evidence, they were not required to make an express determination concerning each of the ICP's allegations and there was no obligation to refer to every fact or piece of evidence.[91] A

87 Appeal, para. 23.
88 *See*, Appeal, para. 23, *referring to* Closing order, **D308/3**, para. 246.
89 Appeal, para. 23. *See also*, Appeal, paras. 24-37.
90 *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC71), Co-Prosecutors' Response to IENG Sary's Expedited Appeal against OCIJ's Refusal to Accept Defence Response to OCP's Final Submission and Request for Stay of Proceedings, 8 September 2010, **D390/1/2/2**, paras. 2 ["Final Submissions contain recommendations that do not bind the Co-Investigating Judges."], 7 ["Rules 66 and 67 establishes the procedure where at the end of the judicial investigation the Co-Prosecutors are required to file a Final Submission and consequently the Co-Investigating Judges issue their Closing Order independently, not bound by the Co-Prosecutors' Final Submission."].
91 *See*, *Prosecutor v. Momčilo Krajišnik* (IT-00-39-A), AC, Judgement, 17 March 2009, para. 19 **[Authority 11]**.

Chamber is not required to adopt a mechanical approach to each and every argument raised by a party.[92]

43. As notified to the parties on several occasions, the main issue in Case 004/1 was that of personal jurisdiction.[93] Despite the fact that the CIJs concluded that, in regard to the allegations related to facts with which Ms. IM Chaem was not charged, it was "not necessary … to examine in detail the extent to which evidence of facts not charged against [Ms.] IM Chaem may be used to make personal jurisdiction determinations,"[94] they did consider them and expressly concluded that they would not materially impact the Closing Order.[95] Accordingly, there is no merit to the assertion that the CIJs failed to assess the totality of the available facts.

44. The fact that the CIJs elected to weigh the facts not charged did not create any obligation to provide detailed reasoning in relation to each set of these crimes. Notwithstanding, as argued below, the CIJs provided a reasoned opinion that met all relevant due process requirements.

ii. The CIJs appropriately considered all relevant facts and dismissed irrelevant facts in determining personal jurisdiction

45. The ICP's arguments are defective. Under each sub-ground, the ICP contends that evidentiary materials were not considered, but fails to argue how this alleged dereliction led to an abuse of discretion.

Allegations related to the Southwest Zone

46. The ICP contends that the CIJs erred in law by failing to consider allegations related to i) forced marriages in Sector 13 of the Southwest Zone[96] and ii) crimes against the Khmer Krom

92 *See*, *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SCC, Appeal Judgement, 23 November 2016, **F36** ("Case 002/1 Appeal Judgement, **F36**"), para. 207, *citing Van de Hurk v. The Netherlands* (Application no. 16034/90), ECtHR, Judgement, 19 April 1994, para. 61 ["Article 6 para. 1 [of the European Convention on Human Rights] obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument"] **[Authority 28]**; *García Ruiz v. Spain* (Application no. 30544/96), ECtHR, Grand Chamber Judgement, 21 January 1999, para. 26 **[Authority 30]**; *Helle v. Finland* (Application no. 157/1996/776/977), ECtHR, Judgement, 19 December 1997, para. 55 **[Authority 29]**.

93 Notice of Intent to Dismiss the Charges Against IM Chaem and to Sever the Proceedings Against Her, 18 December 2015, **D286**, para. 5; Notice to Defence on Deadline to Respond to the Co-Prosecutors' Rule 66(5) Final Submissions, 1 November 2016, **D304/4**, para. 6.

94 Closing Order, **D308/3**, para. 246.

95 Closing Order, **D308/3**, para. 246.

96 Appeal, paras. 27-28.

in Sector 13 of the Southwest Zone.[97] However, a review of the Closing Order shows, not only does the ICP disregard the plain reasoning outlined above at paragraphs 42-44, but fails to show how any error led to an abuse of discretion.

47. The CIJs first assessed the evidence related to Ms. IM Chaem's role and authority in the Southwest Zone. The CIJs assessed and provided a detailed analysis of the ICP's allegations[98] and concluded that Ms. IM Chaem's role in the Southwest Zone was limited to heading the Sector 13 Women's Association.[99] In this position, "she was responsible for the political education of women in the various districts of Sector 13."[100] In light of this finding, the CIJs correctly concluded – as will be argued in detail under Grounds 5 and 6 below – that Ms. IM Chaem was not involved in the decision-making affecting Koh Andet District and Sector 13.[101] They further concluded that there was no evidence of Ms. IM Chaem's involvement with Wat Ang Srei Mealy and Prey Sokhon, the two crime sites located in the Southwest Zone.[102]

48. In light of the findings that Ms IM Chaem was not involved in the Southwest Zone's decision-making, the CIJs were not required to assess in detail the evidence related to crimes allegedly committed in the Southwest Zone and in relation to which Ms. IM Chaem was not charged (forced marriages in Sector 13 and crimes against the Khmer Krom in Sector 13). Nonetheless, the Defence provides a brief analysis of the ICP's arguments to further expose the lack of merit in the ICP's arguments underpinning the Grounds of Appeal.

- ***Forced marriages in Sector 13***

49. The ICP asserts that the CIJs failed to consider evidence of Ms. IM Chaem's responsibility for forced marriages in Sector 13 of the Southwest Zone.[103]

50. However, the entirety of the Prosecution's case concerning Ms. IM Chaem's alleged involvement in forced marriages in the Southwest Zone rested on a single, unsupported

97 Appeal, paras. 33-34.
98 *See*, Closing Order, **D308/3**, paras. 143-50.
99 Closing Order, **D308/3**, paras. 143, 150.
100 Closing Order, **D308/3**, para. 143.
101 Closing Order, **D308/3**, para. 247.
102 Closing Order, **D308/3**, paras. 247, 251.
103 Appeal, paras. 27-28.

allegation according to which she "forced young women in Sector 13 to marry disabled soldiers".[104]

51. First, it does not relate to events that occurred in Sector 13 of the Southwest Zone; but in Svay in the Northwest Zone.[105] Second, even if it was relevant, the evidence is incapable of possessing any meaningful relevance or probative value. It is uncorroborated and unsourced hearsay.[106] Had these allegations been charged, any reasonable Chamber would have been duty bound to place no weight on this evidence. The ICP fails to show how the evidence was "clearly relevant" or how its dismissal constitutes an abuse of discretion.

- ***Crimes against the Khmer Krom***

52. The allegation that crimes against the Khmer Krom should have been considered by the CIJs essentially rests on the ICP's assertions that i) the CIJs noted that "the Khmer Krom were one of the main groups detained at Wat Mealy Security Centre and killed at Prey Sokhon Execution site",[107] and ii) Ms. IM Chaem was the Secretary of Koh Andet District, in which the two crime sites were located.[108]

53. As noted at paragraph 47 above and detailed in response to Ground 5 below, the CIJs found that Ms. IM Chaem was neither the Secretary of Koh Andet District, nor had any executive authority in that area.[109] Further, whilst the CIJs indeed considered that "the Khmer Krom were one of the main groups detained at Wat Mealy Security Centre and killed at Prey Sokhon Execution site",[110] the CIJs also found that there was no evidence that Ms. IM Chaem had any involvement with the crime site.[111] It follows that the ICP's submissions are baseless and wholly misconceived.

104 Appeal, para. 27, *referring to* International Co-Prosecutor's Rule 66 Final Submission against IM Chaem, 27 October 2010, **D304/2** ("Final Submission, **D304/2**"), para. 134 (*referring to* Written Record of Interview of SOK Rum, 19 March 2014, **D119/108**, A108).

105 Written Record of Interview of SOK Rum, 19 March 2014, **D119/108**, Q-A108 ["Q: Did you ever attend any meeting while you were *in Svay*? A: I never attended any meeting there. Those older sisters attended the meetings with *Yeay* Chaem. *Yeay* Chaem always encouraged those women to get married …"].

106 Written Record of Interview of SOK Rum, 19 March 2014, **D119/108**, A108-09.

107 Appeal, para. 33, *referring to* Closing Order, **D308/3**, para. 248.

108 Appeal, para. 33.

109 Closing Order, **D308/3**, paras. 143, 247.

110 Appeal, para. 33, *referring to* Closing Order, **D308/3**, para. 249.

111 Closing Order, **D308/3**, para. 251.

Allegations related to facts in the Northwest Zone

54. The ICP contends that the CIJs erred in law by failing to consider allegations and arguments concerning i) the purge of the Northwest Zone; ii) forces marriages in Sector 5; iii) persecution of the Vietnamese in Sector 5; and iv) "several other crimes" in the Northwest Zone of which the CIJs were seised.[112]

- ***The purge of the Northwest Zone***

55. A review of the Closing Order demonstrates that the CIJs examined the evidence related to Ms. IM Chaem's alleged involvement in the purges of the Northwest Zone at length.[113] They assessed all relevant considerations, including her relationship with *Ta* Mok[114] and her role.[115] Contrary to the ICP's claim, the CIJs did not conclude that Ms. IM Chaem "led and participated in what the CIJs describe as the 'major coordination task' that was purging the Northwest Zone."[116] At its highest, the CIJs found that she led the *transfer* of Southwest Zone cadres to the Northwest Zone.[117]

56. Having dismissed the claim that she played a key role in the crimes, the *details* of the crimes (as opposed to their essential characteristics and nexus to Ms. IM Chaem) were of marginal relevance in determining personal jurisdiction. Accordingly, the ICP, not only misrepresents the Closing Order, but also fails to show any error of law or abuse of discretion.

- ***Forced marriages in Sector 5***

57. The ICP asserts that the CIJs failed to consider evidence of Ms. IM Chaem's responsibility for forced marriages[118] at crime sites under Ms. IM Chaem's alleged authority, including at Spean Sreng Canal Worksite ("SSWS")[119] and Trapeang Thma Dam[120] in the Northwest Zone.

112 Appeal, para. 23. *See also*, Appeal, paras. 24-37.
113 *See*, Closing Order, **D308/3**, paras. 151-55.
114 Closing Order, **D308/3**, para. 284. *See also*, Closing Order, **D308/3**, paras. 151 ["*Ta* Mok sent groups of Southwest Zone cadres to replace local cadres in the administrative structure of the Northwest Zone."], 152 ["*Ta* Mok sent Southwest Zone cadres to the Northwest Zone in three main waves"], 153 ["*Ta* Mok tasked Southwest Zone military forces with purging the Northwest Zone cadres"], 154 ["*Ta* Mok's purge"].
115 Closing Order, **D308/3**, paras. 152-53, 156, 316.
116 Appeal, para. 24. *See also*, Appeal, para. 26.
117 Closing Order, **D308/3**, paras. 152, 156, 316.
118 Appeal, paras. 27-28.
119 Appeal, para. 27, *referring to* Final Submission, **D304/2**, para. 269.
120 Appeal, para. 27, *referring to* Final Submission, **D304/2**, para. 288.

58. With regards to SSWS, first, the ICP refers to paragraph 269 of his Final Submission, citing a single civil party applicant, SEN Sophon, in support of the claim that forced marriages took place at the crime site.[121] A review of SEN Sophon's evidence reveals that the civil party applicant did not allege that Ms. IM Chaem was involved in forced marriage ceremonies[122] and indicates that the witness did "not know much about her" when asked about Ms. IM Chaem.[123]

59. With regards to Trapeang Thma Dam, the CIJs found that, whilst Ms. IM Chaem visited the site, "the extent of her involvement and authority over that project is somewhat unclear."[124] This was not challenged by the ICP. It follows that any evidence of forced marriage ceremonies at Trapeang Thma Dam was irrelevant to the Closing Order.

60. Lastly, the ICP refers to the evidence provided by THANG Thoeuy and contends that Ms. IM Chaem presided over a forced marriage ceremony in the Northwest Zone and then ordered subordinates to spy on couples in order to ensure that marriages were consummated.[125] This statement was the only evidence relevant to establishing Ms. IM Chaem's alleged involvement in a course of conduct entailing forced marriages. No reasonable tribunal could have relied upon it in the manner suggested by the ICP. Logic dictates that Ms. IM Chaem's "contributions to this campaign of forced marriage"[126] had to be supported by a *weight* of eyewitnesses or other sources. By definition, one witness cannot provide sufficiently serious, consistent, or corroborated evidence to provide more than nominal probative support for such a course of conduct.

61. In light of the above, the CIJs were well within their discretion to accord little or no probative value to the evidence implicating Ms. IM Chaem in forced marriages. The ICP has failed to show any error or abuse of discretion.

[121] Appeal, para. 27, *referring to* Final Submission, **D304/2**, para 269 ["Unit chiefs under the control of **Im Chaem** arranged forced marriages for workers at Spean Spreng worksite. People could not refuse to marry or else they would be considered an 'enemy'.", *citing* Transcript of Trial Proceedings (SEN Sophon), 27 July 2015, **D219/494.1.1** and Written Record of Interview of SEN Sophon, 15 September 2015, **D219/506**].
[122] Transcript of Trial Proceedings (SEN Sophon), 27 July 2015, **D219/494.1.1**, EN ERN 01122690.
[123] Written Record of Interview of SEN Sophon, 15 September 2015, **D219/506**, A36.
[124] Closing Order, **D308/3**, para. 174.
[125] Appeal, para. 27, *referring to* Final Submission, **D304/2**, para. 132.
[126] Appeal, para. 28.

- ***The persecution of the Vietnamese in Sector 5 of the Northwest Zone***

62. The ICP contends that the CIJs failed to consider the "majority of allegations" regarding Ms. IM Chaem's treatment of the Vietnamese, including the Prosecution's arguments concerning the gravity of the crimes and her responsibility.[127] The ICP asserts that the CIJs failed to consider allegations concerning arrests, detentions, and executions at Chamkar Khnol Security Office, Prey Ta Ruth Execution Site, Trapeang Thma Dam Worksite, Phnum Chakrey Security Centre, and Wat Preah Net Preah.[128] The ICP's arguments are meretricious and should be dismissed.

63. As was a reasonable approach to determining the relevance and probative value of the evidence in regards to determining personal jurisdiction, the CIJs first assessed the evidence relating to Ms. IM Chaem's role and authority in the Northwest Zone and found it failed to show the "contours of her authority over sector-related matters"[129] at Wat Chamkar Khnol[130] and Trapeang Thma Dam[131] or in relation to deaths and arrests at Wat Preah Net Preah.[132]

64. Since Ms. IM Chaem's authority over the crime sites had not been established, they were no longer relevant to the question of personal jurisdiction. A finding of authority over the alleged persecution of Vietnamese at Wat Chamkar Khnol, Trapeang Thma Dam, and Wat Preah Net Preah was a prerequisite for those crimes to be taken into further consideration. No reasonable trier of fact and law could have determined otherwise. They will not be considered further in this Response.

65. However, the Defence will briefly analyse the remainder of the ICP's arguments concerning crimes allegedly not considered by the CIJs in their assessment of personal jurisdiction. They include Prey Ta Ruth Execution Site, Phnum Chakrey Security Centre, and the alleged killing of two Vietnamese women at an unknown location.[133] It is accepted that the CIJs did not provide express and individual reasoning in relation to Ms. IM Chaem's authority concerning these crime sites.

[127] Appeal, para. 32. *See also*, Appeal, paras. 29-32.
[128] Appeal, para. 31, *referring to* Final Submission, **D304/2**, paras. 189, 191, 474.
[129] Closing Order, **D308/3**, para. 173.
[130] Closing Order, **D308/3**, para. 247.
[131] Closing Order, **D308/3**, paras. 174, 247.
[132] Closing Order, **D308/3**, para. 259.
[133] Appeal, para. 31.

66. With regards to allegations of an organised campaign of arrests, detentions and executions of Vietnamese at Prey Ta Ruth Execution Site, the ICP seeks to rely upon the statements of two witnesses.[134] The first witness, SIN Khin,[135] was a DC-Cam investigator involved in the drafting of a report that documented a field-mission to various crime sites on 29 April 1997.[136] The ICP has not shown that the CIJs' assessment of the report as having "very little probative value" and "unreliable"[137] and therefore not to be relied upon[138] is in any way unreasonable. Moreover, the statement cited is not even relevant to Prey Ta Ruth, but to Chamkar Khnol;[139] a site over which the CIJs found that Ms. IM Chaem had no involvement.[140] The remaining witness, MAK Vonny, stated that an unnamed person, since deceased, told him that people accused of being Vietnamese had been arrested and killed at Prey Ta Ruth.[141] No reasonable Chamber could have placed any weight on this uncorroborated hearsay.

67. Further, with regards to allegations concerning Phnum Chakrey, the ICP's allegations are based on the same statement from MAK Vonny referred to above.[142] Moreover, the statement does not relate to Phnum Chakrey, but to Prey Ta Ruth.[143] As described above, the CIJs were

[134] Appeal, para. 31, *referring to* Final Submission, **D304/2**, para. 189, fn. 946-47 (*referring to* Written Record of Interview of SIN Khin, 15 March 2015, **D219/206**, A20-21 [Witness went to Chamkar Khnol: "Q: Regarding those remains [in Chamkar Khnor], where they of the people who were executed on the site or did they include those who had been executed elsewhere but later on buried together at that site? A20: Those people were brought in trucks from the prison. There were about 10 to 20 truckloads of them. They were not brought from elsewhere. It's most likely that they had been detained before they were brought for execution. Q: What kind of people were they? A21: They were former LON Nol soldiers, officials, civilians, students, professors, police officers, and military police, and so on. They include Khmers, Chinese and Vietnamese. They were of all walks of life"]; Written Record of Interview of MAK Vonny, 9 May 2014, **D119/125**, A18 [Witness was a mobile unit worker sent to Chob Veari commune and lived next to the path leading to Prey Ta Ruth: "A man who survived after the Khmer Rouge cut his throat (he is now dead) told me that those who were arrested, taken by lorry, and killed at Prey Tarut were accused of being Vietnamese, and even those who had white skin were also accused of being Vietnamese and taken to be killed at Prey Tarot"]).

[135] Appeal, para. 31, *referring to* Final Submission, **D304/2**, para. 189, fn. 946 (*referring to* Written Record of Interview of SIN Khin, 15 March 2015, **D219/206**).

[136] Closing Order, **D308/3**, paras. 113-14.

[137] Closing Order, **D308/3**, para. 135.

[138] Closing Order, **D308/3**, para. 135.

[139] *See*, Written Record of Interview of SIN Khin, 15 March 2015, **D219/206**, A13, A20-21.

[140] Closing Order, **D308/3**, para. 247.

[141] Appeal, para. 31, *referring to* Final Submission, **D304/2**, para. 189, fn. 947 (*referring to* Written Record of Interview of MAK Vonny, 9 May 2014, **D119/125**, A18).

[142] Appeal, para. 31, *referring to* Final Submission, **D304/2**, para. 474. The only reference to the treatment of Vietnamese at Phnum Chakrey at paragraph 474 of the Final Submission is under footnote 2177, in turn referring to paragraphs 223 and 225 of the Final Submission. The only reference relevant to the treatment of Vietnamese in these paragraphs is cited at footnote 1132 of the Final Submission. Footnote 1132 of the Final Submission refers to Written Record of Interview of MAK Vonny, 9 May 2014, **D119/125**, A18.

[143] Written Record of Interview of MAK Vonny, 9 May 2014, **D119/125**, A18.

eminently reasonable in finding that MAK Vonny's statement was unreliable and bore very little probative value.

68. Finally, the ICP asserts that the CIJs erred through failing to consider the allegation that Ms. IM Chaem personally ordered the killing of two Vietnamese women at an unknown location.[144] On the contrary, the CIJs considered the allegation and reasonably concluded that there was "insufficient evidence on the alleged killing and rape, its location and timing, the identity of the direct perpetrators, and which mobile unit may have been involved in it."[145] The ICP fails to advance any reasoned argument concerning how the CIJs' findings concerning the sufficiency of this evidence was unreasonable or otherwise in error.

69. In sum, the CIJs were well within their discretion to accord little or no probative value to the evidence implicating Ms. IM Chaem in the persecution of Vietnamese in the Northwest Zone.

- ***"Several other crimes" of which the CIJs were seised***

70. The ICP submits that the CIJs failed to take into consideration Ms. "IM Chaem's involvement in the persecution against various political and ethnic groups"[146] including against the Cham, Chinese, and Laotians at Chamkar Khnor[147] and against the Khmer Leu at Wat Ang Srei Mealy.[148] Whilst accepting that that the CIJs made a "cursory finding that persecution took place at crime sites not charged",[149] the ICP contends that the CIJs erred by failing to indicate which group of groups of people were victims of the crime; failing to assess the gravity of these crimes and failing to address Ms. IM Chaem's responsibility in them.[150]

71. However, as an accurate reading of the Closing Order shows, the CIJs found that there was no clear evidence of Ms. IM Chaem's involvement at the crime sites mentioned in the Appeal in regards to the alleged persecution.[151] Therefore, it was unnecessary to engage in a detailed

144 Appeal, para. 31, *referring to* Final Submission, **D304/2**, para. 192.
145 Closing Order, **D308/3**, para. 280. *See also*, Closing Order, **D308/3**, para. 279.
146 Appeal, para. 35.
147 Appeal, para. 35, fn. 77-79,*referring to* Final Submission, **D304/2**, para. 240.
148 Appeal, para. 35, fn. 80, *referring to* Final Submission, **D304/2**, para. 168.
149 Appeal, para. 36.
150 Appeal, para. 36.
151 *See*, Closing Order, **D308/3**, paras. 152 ["Contrary to the allegations made by the ICP, there is no evidence that [Ms.] IM Chaem held a position in relation to the operations at Wat Ang Srei Mealy or Prey Sokhon, that she visited these sites, or that she issued any orders directly pertaining to these sites."], 247 ["Chamkar Knol and Trapeang Thma Dam were located in the Sisophon and Phnom Srok districts of Sector 5. We have found in Section 4.4 above that [Ms.] IM Chaem sat on the Sector 5 Committee after the removal of its Northwest Zone

assessment of this evidence, which was incapable of impacting the determination of personal jurisdiction. This finding was not addressed by the ICP.

72. In addition, the ICP further claims that the CIJs erred by failing to assess allegations of torture at PTSC[152] and Chamkar Khnol;[153] imprisonment and enforced disappearance at Wat Ang Srei Mealy;[154] and inhumane living conditions at Phnum Chakrey.[155] However, this complaint is defective and should be summarily dismissed. The ICP merely lists the allegations untroubled by any explanation of how any error invalidates any aspect of the Closing Order or otherwise amounts to an abuse of discretion.

73. In sum, under Ground 2, the Defence submits that the ICP has failed to demonstrate how, individually or cumulatively, the alleged failure "to address numerous allegations set out in the [ICP]'s Final Submission"[156] lead to a conclusion that the CIJs overall abused their discretion in deciding that the ECCC lacks jurisdiction over Ms. IM Chaem.

C. GROUND 3 – THE CIJS DID NOT ERR IN LAW WHEN DEFINING THE CRIME OF EXTERMINATION AND APPLYING IT TO THEIR FINDINGS IN THE CLOSING ORDER

74. The ICP submits that the CIJs erred by failing to hold Ms. IM Chaem responsible for the alleged crime against humanity of extermination committed at Phnom Trayoung Security Centre ("PTSC").[157] Specifically, the ICP contends that the CIJs erred in law in requiring the *mens rea* for the crime of extermination to be formed *ex ante*, and erred in fact in failing to find Ms. IM Chaem possessed the requisite *mens rea*.[158]

75. As detailed at paragraphs 17-19 above, the Defence submits that Ground 3 is inadmissible and should be dismissed. The Closing Order does not encompass reasoned consideration of Ms. IM Chaem's alleged criminal responsibility. As a consequence of the CIJs' conclusion that the ECCC lacked personal jurisdiction, the question of Ms. IM Chaem's *mens rea* did not arise for

members, and that there are indications that her authority went beyond the administrative boundaries of the Preah Net Preah District. However, we have also found that the extent and contours of this authority have not been clearly established by the investigation."].

152 Appeal, para. 37, *referring to* Final Submission, **D304/2**, paras. 208-11.
153 Appeal, para. 37, *referring to* Final Submission, **D304/2**, para. 238.
154 Appeal, para. 37, *referring to* Final Submission, **D304/2**, para. 168.
155 Appeal, para. 37, *referring to* Final Submission, **D304/2**, para. 224.
156 Appeal, para. 23.
157 Appeal, para. 38.
158 Appeal, para. 38.

consideration and was not assessed. Additionally, as argued at paragraphs 20-23, Ground 3 impermissibly requests a re-examination of the CIJs' approach to the contours of the crime against humanity of extermination.

76. Further, even if Ground 3 was admissible, it should be dismissed on its merits. The Defence submits that: i) the CIJs did not err in law in defining the *mens rea* of extermination; and ii) even if an error of law is established, the ICP fails to argue or establish that it led to an abuse of discretion in relation to the Impugned Decision.

i. The CIJs did not err in law in defining the mens rea *of extermination*

77. Should the CIJs' approach to the crime of extermination be held to fall within the PTC's power of review, the Defence submits that the CIJs did not err in defining the required *mens rea*.

78. The ICP alleges that the CIJs "erred in law by finding that the intent for the crime of extermination … must be formed '*ex ante*'."[159] The ICP asserts that the CIJs held that the definition of the crime requires "that the accused possess the specific intent for extermination … prior to any killings taking place."[160]

79. However, neither a literal nor purposive reading of the Closing Order supports this claim: when defining the *mens rea* of the crime against humanity of extermination, the CIJs did not import an *ex ante* requirement into the *mens rea* of the crime. Instead, they set out the mental element in the following terms: "the intent to kill persons on a massive scale, or to inflict serious bodily injury or create living conditions calculated to bring about the destruction of a numerically significant part of the population."[161] Thus, the CIJs correctly adopted the law as determined by the SCC.[162]

80. The CIJs' overall approach does not suggest that the CIJs intended to depart from this definition.[163] As outlined below, the CIJs' conclusion, requiring that the evidence establish an *ex ante* intent in the specific certain circumstances of an aspect of the case, was not intended to

[159] Appeal, para. 38, *citing* Closing Order, **D308/3**, para. 288.
[160] Appeal, para. 40.
[161] Closing Order, **D308/3**, para. 68(b).
[162] Case 002/1 Appeal Judgement, **F36**, paras. 520, 522 ["[D]irect intent to kill on a large scale must established [for the *mens rea* of the crime against humanity of extermination]"].
[163] Closing Order, **D308/3**, paras. 287-88.

introduce a new legal element into the SCC's enunciation of the law. On the contrary, it was a reasonable approach to the evidence in the factual circumstances found established at the specific location, that is, PTSC. In sum, the CIJs reasonably concluded that in that location *only* the requisite intent for extermination as elaborated by the SCC, could not be sufficiently satisfied without the establishment of an *ex ante* intent.[164]

81. As is plain the CIJs did not require the intent required for extermination to crystallise "prior to *any* killings taking place"[165] in each location under consideration. Rather, the CIJs' factual observations were limited to the specific factual circumstances found in existence at the PTSC; of concern was the fact that the "killings [in this location] were carried out during a longer period of time and possibly by different physical perpetrators."[166] As a consequence of the disparate nature of the known physical perpetrators and the fragmented nature of the killings, the CIJs determined that they could not be satisfied that the *mens rea* for extermination had been established without evidence of an *ex ante* intent to kill on a massive scale and this was lacking in the specific circumstances of the killings at PTSC.[167]

82. This was an eminently reasonable approach to the evidence in the circumstances of the relevant allegations and consistent with standard international approaches to the crime.[168] Extermination concerns the destruction of a "numerically significant portion of the population" that must have been "calculated" and "assumes a substantial degree of preparation".[169] The

[164] Closing Order, **D308/3**, paras. 287-88.
[165] Appeal, para. 40 (emphasis added).
[166] Closing Order, **D308/3**, para. 288.
[167] Closing Order, **D308/3**, para. 288.
[168] *Prosecutor v. Milan Lukić and Sredoje Lukić* (IT-98-32/1-A), AC, Judgement, 4 December 2012, para. 538 ["Relevant factors [to establishing the crime of extermination] include, *inter alia*, the time ... of the killings"] **[Authority 16]**; *Prosecutor v. Vujadin Popović et al.* (IT-05-88-T), TC II, Judgement, 10 June 2010, para. 805 [In finding that the crime of extermination occurred the Trial Chamber took into account "the temporal ... proximity of the killings"] **[Authority 14]**; *Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse* (ICTR-98-44-A), AC, Judgement, 29 September 2014, para. 661 [The Appeals Chamber held that the crime of extermination could not be established "by a collective consideration of distinct events committed ... by different perpetrators, and over an extended period of time."] **[Authority 19]**; *Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva* (ICTR-98-41-A), AC, Judgement, 14 December 2011, para. 396 [The Appeals Chamber held that the crime of extermination could not be established "on a collective consideration of events committed ... by different perpetrators, and over a period of two months."] **[Authority 18]**.
[169] Case 002/1 Appeal Judgement, **F36**, para. 521, *citing Prosecutor v. Radislav Krstić* (IT-98-33-T), TC, Judgement, 2 August 2001, para. 503. *See also*, *Prosecutor v. Radislav Krstić* (IT-98-33-T), TC, Judgement, 2 August 2001, para. 501 **[Authority 3]**; *TProsecutor v. Clément Kayishema and Obed Ruzindana* (ICTR-95-1-T), TC, Judgement, 21 May 1999, para. 146 ["Extermination includes not only the implementation of mass killing ... but also the planning thereof. In this event, the Prosecutor must prove a nexus between the planning and the actual killing."] **[Authority 17]**.

accused must have "intended this result".[170] In circumstances where there was a degree of uncertainty concerning the identity of (varying) physical perpetrators and the nexus between different killing events, sufficient proof of an *ex ante* intent to kill encompassing the entirety of the (incremental or fragmented) killing events was a reasonable evidential requirement consistent with the burden and standard of proof and the principle of culpability.[171]

83. Accordingly, the hypothetical scenario of the commander who orders the execution of many small civilian groups ultimately killing thousands is inapposite and does not advance the ICP's argument.[172] The CIJs' approach does not begin to suggest that intent to kill on a mass scale could not be established merely because "the first groups of victims to fall under the control of his forces was not itself a massive number."[173] Instead, the CIJs merely observed that in these circumstances and on this evidence the requisite intent could not be inferred without proof of an *ex ante* intent.

84. It would make no sense and would violate the principle of culpability to hold the hypothetical commander responsible for extermination without determining that the killing of the "small groups of civilian nationals" amounted to mass killing and that his intent sufficiently encompassed those events. Depending on the evidential nexus between those killing events, the requirement of proof of *ex ante* intent may be the only one way of being satisfied of the intent required for extermination.

[170] Case 002/1 Appeal Judgement, **F36**, para. 521, *citing Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana* (ICTR-96-10-A and ICTR-96-17-A), AC, Judgement, 13 December 2004, para. 522. *See also*, *Prosecutor v. Milomir Stakić* (IT-97-24-A), AC, Judgement, 22 March 2006, para. 260 ["The *mens rea* of extermination clearly requires the intention to kill on a large scale"] **[Authority 8]**.

[171] Case 002/1 Appeal Judgement, **F36**, paras. 520, 522. *See also*, *Prosecutor v. Milomir Stakić* (IT-97-24-A), AC, Judgement, 22 March 2006, paras. 258-59 [Holding that previous jurisprudence of the ICTY Trial Chamber in noting the existence of a "vast scheme of collective murder" when applying the crime against humanity of extermination did not constitute the existence of an additional legal element required for extermination, due in part to the fact "that the *Vasiljević* Trial Judgement did not include 'knowledge of a vast scheme of collective murder' in its summation of the elements of the crime of extermination." (reference omitted)] **[Authority 8]**; *Prosecutor v. Radoslav Brđanin* (IT-99-36-T), TC, Judgement, 1 September 2004, para. 394 ["[T]he Trial Chamber makes it clear that the *Vasiljević* 'knowledge that his action is part of a vast murderous enterprise in which a larger number of individuals are systematically marked for killing or killed', if proven, will be considered as evidence tending to prove the accused's knowledge that his act was part of a widespread or systematic attack against a civilian population, and not beyond that." (reference omitted)] **[Authority 4]**; *Prosecutor v. Vidoje Blagojević and Dragan Jokić* (IT-02-60-T), TC, Judgement, 17 January 2005, para. 576 ["The Trial Chamber endorses this view and does not consider the existence of a 'vast murderous enterprise' as a separate element of the crime nor as an additional layer of the *mens rea* required for the commission of the crime."] **[Authority 5]**.

[172] Appeal, para. 41.

[173] Appeal, para. 41.

ii. In any event, even if an error of law is established, the ICP fails to argue or establish that it led to an abuse of discretion in relation to the Closing Order

85. In any event, even if the arguments in relation to Ground 3 of the Appeal had any merits, the Ground has been defectively pleaded. The ICP has failed to argue or show that any error of law led to an abuse of discretion.

86. On the contrary, had the crime of extermination been a crime that was relevant and probative in determining personal jurisdiction, it would not have materially impacted the Closing Order. As reasonably concluded by the CIJs:

> *Multiple possible legal characterisations of the same facts* (including, for example, as persecution or other inhumane acts, or homicide offences under national law) allow for multiple charging and possibly eventual conviction, but they *do not significantly enhance the gravity of the actions of [Ms. IM] Chaem* either.[174]

87. The facts concerning killings at PTSC, which in the ICP's submission amount to the crime of extermination, were taken into account in determining jurisdiction as crimes against humanity of murder.[175] Therefore, the legal categorisation of the crimes as extermination as a crime against humanity would have introduced new legal elements, but would not have introduced new victims or more than marginally aggravated the crimes. It could not have materially impacted the overall decision or have given rise to an abuse of discretion.

88. As found by the CIJs, a principal criterion for considering personal jurisdiction in Ms. IM Chaem's case was a consideration of scale and gravity seen through the assessment of the numbers of victims of the alleged crimes. In sum, the CIJs reasonably concluded that in the context of Democratic Kampuchea as a whole, the amount of victims militated against a finding of personal jurisdiction.[176] In this regard, the CIJs considered the impact of findings concerning an estimated 2,000 victims at PTSC[177] "against the background of the entirety of the suffering caused by the implementation of the regime's policies, and ... the total number of deaths ... during the period of the [Democratic Kampuchea]".[178] In other words, the CIJs took

[174] Closing Order, **D308/3**, para. 323 (emphasis added).
[175] Closing Order, **D308/3**, paras. 285-88.
[176] Closing Order, **D308/3**, paras. 319-20.
[177] Closing Order, **D308/3**, para. 189.
[178] Closing Order, **D308/3**, para. 317.

into account the most relevant aspects of the evidence. It cannot be reasonably argued that a legal re-categorisation of extermination (that does not alter these considerations or assessments) is capable of materially impacting the assessment of whether the threshold of personal jurisdiction has been satisfied.

89. Moreover, as regards to the remaining criteria applied by the CIJs in the overall determination of personal jurisdiction, the alleged crime of extermination at PTSC would not extend the geographical scope of the charges against Ms. IM Chaem,[179] nor elevate her formal positions in the Khmer Rouge hierarchy,[180] nor alter the fact that over one hundred other cadres of equivalent rank to her existed at the relevant time.[181]

90. In sum, the ICP has failed to address these essential issues in a fair or reasoned manner. Moreover, the ICP has failed to argue, let alone establish, how any error led to an abuse of discretion. Accordingly, this Ground should be dismissed.

D. GROUND 4 – THE CIJS DID NOT ERR IN LAW WHEN DEFINING THE CRIME OF ENFORCED DISAPPEARANCES AND APPLYING IT TO THEIR FINDINGS IN THE CLOSING ORDER

91. The ICP submits that the CIJs erred by failing to hold Ms. IM Chaem responsible for the alleged crime against humanity of enforced disappearances as an other inhumane act committed at SSWS.[182] Specifically, the ICP contends that the CIJs erred by applying the modern definition of enforced disappearances and not the elements of other inhumane acts;[183] and by requiring an additional element, namely that persons should have sought information about the whereabouts of a detained individual.[184]

92. As detailed at paragraphs 17-19 above, the Defence submits that Ground 4 is inadmissible and should be dismissed. As a consequence of the CIJs' conclusion that the ECCC lacked personal jurisdiction, the question of Ms. IM Chaem's criminal responsibility for enforced disappearances did not arise for consideration. Additionally, as argued at paragraphs 20-23

[179] Closing Order, **D308/3**, para. 313.
[180] Closing Order, **D308/3**, para. 315.
[181] Closing Order, **D308/3**, para. 316.
[182] Appeal, para. 47.
[183] Appeal, paras. 47-51.
[184] Appeal, paras. 47, 52-57.

above, Ground 4 is a request to re-examine the CIJs' approach to the specific contours of the crime against humanity of enforced disappearances as an other inhumane act and thus falls outside the scope of the PTC's power of review.

93. In any event, even if Ground 4 is admissible, it should be dismissed on its merits. The Defence argues that i) the ICP misinterprets the CIJs' approach to the definition of the crime of enforced disappearances; and ii) even if an error of law and/or fact is established, the ICP fails to argue or establish any abuse of discretion in relation to the Impugned Decision.

i. The ICP misinterprets the CIJs' approach to the definition of the crime of enforced disappearances

94. There is little support for the ICP's proposition that the CIJs departed from the definition of enforced disappearance as an other inhumane act under crimes against humanity.[185] The CIJs correctly stated the law and adopted the SCC's definition of other inhumane acts under crimes against humanity[186] and found that enforced disappearances "may qualify as other inhumane acts".[187]

ii. The ICP failed to argue or establish any abuse of discretion in relation to enforced disappearances at SSWS

95. The ICP asserts that had the CIJs applied the correct legal definition to the facts, Ms. IM Chaem would have been found responsible for enforced disappearances at SSWS.[188] More specifically, the ICP argues that the CIJs erred in law and fact by requiring that it be established that family or friends had made inquiries about the fate or whereabouts of the disappeared persons.[189] The ICP claims that within the prevailing circumstances of the Khmer Rouge regime obliging an individual to seek information from Angkar is "totally unrealistic."[190] However, as argued below, the ICP's approach to the Impugned Decision is misconceived.

96. At a minimum, the ICP had to show that any consequential failure to consider enforced

[185] Appeal, para. 48. *See* also, Appeal, paras. 48-51.
[186] Closing Order, **D308/3**, para. 74, *referring to* Case 002/1 Appeal Judgement, **F36**, para. 580.
[187] Closing Order, **D308/3**, para. 75.
[188] Appeal, para. 51.
[189] Appeal, para. 52.
[190] Appeal, para. 57.

disappearances invalidated the Impugned Decision. Therefore, even if the ICP had correctly identified an error in the CIJs' approach, the ICP fails to take the next steps: to make a convincing showing of enforced disappearances, to establish a sufficient nexus between Ms. IM Chaem and the alleged enforced disappearances at SSWS and demonstrate that the crimes enlarged the scope of her responsibility for relevant crimes to the extent that any consequential finding of a lack of jurisdiction amounted to an abuse of discretion. As paragraphs 52 to 57 of the ICP's appeal shows, the ICP sidesteps these vital issues. Ground 4 should be dismissed as defective.

97. Moreover, the ICP's reliance on the case law from the Inter-American Court of Human Rights ("IACHR") fails to provide any additional support for the assertion that a reasonable trier of facts should have found Ms. IM Chaem criminally responsible for enforced disappearances.[191] The IACHR is a human rights court with a distinct approach to the standard and burden of proof that is irreconcilable with those pertaining to a criminal process or with the due process standards that are relevant to this particular case.[192]

98. First, the finding that "[a]rrests and disappearances of workers were common occurrences at Spean Sreng Canal Worksite"[193] is not sufficient to demonstrate the *actus reus* and *mens rea* elements of the crime of enforced disappearances. It cannot be assumed that arrests and disappearances automatically satisfy the elements of the crime, namely that any intentional acts or omissions caused serious mental or physical suffering or injury.[194] The ICP's assertion that the "mental anguish and suffering for those at Spean Spreng was no different" than that found within the scope of Case 002/1[195] is an insufficient basis upon which to demonstrate the commission of these crimes.

99. Further, it is an insufficient basis to conclude Ms. IM Chaem's criminal responsibility. Even if the CIJs erred in requiring an additional element,[196] the ICP's failure to argue a sufficient

[191] Appeal, paras. 53-55.
[192] *See, e.g., Case of Godínez Cruz v. Honduras*, 1989, Inter. Am. Ct. H. R. (ser. C), Judgment, 20 January 1989, paras. 140, 141 ["In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation."] **[Authority 30]**.
[193] Appeal, para. 51 *referring to* Closing Order, **D308/3**, para. 238.
[194] Closing Order, **D308/3**, para. 74.
[195] Appeal, para. 51.
[196] Closing Order, **D308/3** para. 302.

nexus between Ms. IM Chaem and the alleged enforced disappearances at SSWS and how, in light of the totality of the crimes (including the totality of the crimes against humanity of murder and imprisonment that were correctly defined and weighed[197]), the correct legal characterisation of enforced disappearances would have altered the overall assessment of personal jurisdiction[198] is fatal. In sum, the ICP has failed to argue, let alone establish, how any error led to an abuse of discretion. Accordingly, Ground 4 should be dismissed.

E. GROUNDS 5 AND 6 – THE ICP MISINTERPRETS THE ROLE THAT FACTUAL FINDINGS REGARDING MS. IM CHAEM'S POSITION IN THE SOUTHWEST ZONE PLAY IN THE ASSESSMENT OF PERSONAL JURISDICTION

100. The ICP claims that "[n]o reasonable trier of fact could have found that Ms. IM Chaem was not the Koh Andet District Secretary" and "the Sector 13 Committee Member" based on a proper review of the evidence.[199] In relation to both Grounds 5 and 6, the ICP claims that the CIJs' failure to find that Ms. IM Chaem held these two formal positions "appears to be the reason that the Closing Order does not address the Co-Prosecutor's allegations that [she] participated in the Southwest Zone JCE".[200]

101. Grounds 5 and 6 should be summarily dismissed. The PTC has held 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 immediately and need not be considered on the merits.[201] The ICTY Appeal Chamber has found that this includes when arguments are irrelevant,[202] do not elaborate on how the alleged error of fact had any impact on the challenged findings,[203] or merely assert that relevant evidence was not properly assessed,[204] not given sufficient weight or not interpreted in a particular manner.[205]

197 Closing Order, **D308/3**, paras. 67 (murder), 70 (imprisonment).
198 *See*, Closing Order, **D308/3**, para. 323; *See* also, Closing Order, **D308/3**, paras. 313, 315316, 319-20.
199 Appeal, paras. 58 (Ground 5), 70 (Ground 6).
200 Appeal, para. 81.
201 *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 47 & 48), 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**, para. 22.
202 *See*, *Prosecutor v. Momčilo Krajišnik* (IT-00-39-A), AC, Judgement, 17 March 2009, para. 20 **[Authority 11]**.
203 *See*, *Prosecutor v. Momčilo Krajišnik* (IT-00-39-A), AC, Judgement, 17 March 2009, para. 23 **[Authority 11]**.
204 *See*, *Prosecutor v. Momčilo Krajišnik* (IT-00-39-A), AC, Judgement, 17 March 2009, para. 19 **[Authority 11]**.
205 *See*, *Prosecutor v. Momčilo Krajišnik* (IT-00-39-A), AC, Judgement, 17 March 2009, para. 27 **[Authority 11]**.

102. Moreover, in order to raise an arguable ground of appeal in either Ground 5 or 6, the ICP is required to approach the Closing Order in its entirety and make a showing: i) that it does not address the ICP's allegations that Ms. IM Chaem participated in the Southwest Zone; and ii) that any findings that Ms. IM Chaem was not a District Secretary and a Sector Committee Member in the Southwest Zone were made in error and led to an abuse of discretion in reaching the conclusion that the ECCC lacks jurisdiction.

103. Instead, the ICP's approach to the Appeal amounts to an attempt to persuade the PTC to re-litigate the facts and replace the CIJs' view with its own.[206] Moreover, even this attempt further disregards the most essential assessment standards and urges an incomplete and fragmented reading of the underlying reasoning and the Closing Order. As a whole, it fails to identify relevant errors of fact and abandons any attempt to address the appellate standard of review.

104. In summary, there is no merit to Grounds 5 and 6. Ms. IM Chaem was not charged with crimes allegedly committed in the Southwest Zone.[207] The CIJs were not entitled to indict for crimes allegedly committed in that location.[208] However, the CIJs did consider the ICP's allegations contained in his Final Submission (concerning Ms. IM Chaem's authority in the Southwest Zone) and concluded that the inclusion of those charges would not have impacted the conclusion that she fell outside the ECCC's personal jurisdiction.[209] Accordingly, the ICP fails to show how the CIJs erred in finding that Ms. IM Chaem was not a District Secretary and a Sector Committee Member in the Southwest Zone and how such findings would have been relevant or probative of any assessment of personal jurisdiction and that the Closing Order resulted from an abuse of discretion. Therefore, Grounds 5 and 6 should be dismissed.

105. As further argued below, they are incapable of establishing any relevant error of fact or any abuse of discretion.

[206] *See*, *Case of NUON Chea et al.*, 002/19-09-2007/OCIJ (PTC25), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, **D164/3/6**, para. 26.
[207] Notification of Charges against IM Chaem, 3 March 2015, **D239.1**.
[208] Closing Order, **D308/3**, para. 245.
[209] Closing Order, **D308/3**, para. 246.

i. Ground 5 – The CIJs reasonably concluded that Ms. IM Chaem was not Koh Andet District Secretary

106. The ICP claims that "[n]o reasonable trier of fact could have found that [Ms.] IM Chaem was not Koh Andet District Secretary based on a proper review of the evidence."[210] The ICP claims that the CIJs failed to properly assess Ms. IM Chaem's interviews,[211] alleging that alongside the corroborative evidence[212] they show "her position as Secretary of Koh Andet".[213] As a proper review of the Closing Order and the evidence outlined shows, the CIJs' approach to the evidence was reasonable.[214] Moreover, as discussed below, no reasonable Chamber could have adopted the approach now urged by the ICP.

107. The CIJs' approach to Ms. IM Chaem's interviews with DC-Cam was consonant with the underlying principles governing proceedings of the ECCC overall, including those of the Trial Chamber and the SCC.[215] The CIJs reasonably accepted that DC-Cam's "statements were generated without the judicial guarantees and formality that characterise WRIs"[216] and must "given less weight than interviews conducted by the OCIJ".[217] They correctly concluded that they may be "relied on only when corroborated by other sources."[218]

108. In light of these well-established principles, no reasonable Chamber could have found Ms. IM Chaem's interviews to be sufficiently unequivocal to establish her authority over Koh Andet District. The ICP's claim that Ms. IM Chaem's "statement is clear"[219] disregards these core legal principles that provide the basis for fair evidential assessments and adherence to the requirement that the evidence must satisfy the burden and standard of proof. The ICP's

[210] Appeal, para. 58.
[211] Appeal, paras. 59-62, *citing* DC-Cam Interview of IM Chaem, 20 June 2008, **D123/1/5.1b**; DC-Cam Interview of IM Chaem, 6 April 2012, **D123/1/5.1c**.
[212] Appeal, para. 63.
[213] Appeal, para. 59.
[214] Closing Order, **D308/3**, paras. 143-50.
[215] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Case 002/01 Judgement, 7 August 2014, paras. 501-03; Case 002/01 Appeal Judgment, **F36**, paras. 358-59.
[216] Closing Order, **D308/3**, para. 104.
[217] Closing Order, **D308/3**, para. 139 ["Two statements given by Im Chaem to DC-Cam, one statement to Youth for Peace and one statement to Smiling Toad Productions have been considered in this Closing Order (Reasons). Consistent with the approach taken in Case 002 and with the general rules of evaluation of evidence explained in this section, these statements have been given less weight than interviews conducted by the OCIJ. Their credibility and probative value have been assessed in light of all the other evidence on the Case File." (references and emphasis omitted)].
[218] Closing Order, **D308/3**, para. 108.
[219] Appeal, para. 61.

attempt to cherry pick aspects of Ms. IM Chaem's statements (that she was transferred to Koh Andet District "[b]ecause [she] could fulfil the plan";[220] that she was assigned by the "'provincial authority ... to take charge of organi[s]ing people' in Koh Andet";[221] and that "at the places under [her] control [she] helped them in general"[222]) and treat those remarks as dispositive evidence of her *de jure* and *de facto* position and role contradicts those aims and risks undermining due process.

109. Moreover, even if DC-Cam statements were not taken in violation of the protection against self-incrimination or could alone reasonably provide demonstration of any facts, as correctly noted by the CIJs, none of Ms. IM Chaem's remarks amounted to an unequivocal statement that she held the position of Koh Andet District Secretary.[223] The ICP's approach disregards the fact that Ms. IM Chaem also stated that she "was not the secretary of the district" and instead "was in charge of women".[224] As the CIJs reasonably concluded, at best, the totality of Ms. IM Chaem's statements provide only ambiguous evidence and, in light of the standard and burden of proof, are incapable of bearing the weight claimed by the ICP. The CIJs were correct in concluding that they had to be "assessed in light of all the other evidence on the Case File".[225]

110. The ICP's claim that the CIJs ought to have found that Ms. IM Chaem's "admissions regarding her position are corroborated by witness evidence"[226] is equally devoid of merit. Putting aside the attempt to reargue facts without reference to the required appellate thresholds, in making this assertion, the ICP declines to even attempt to demonstrate how the CIJs erred in weighing the *totality* of the evidence in concluding that she was not the Koh Andet District Secretary. In particular, the ICP studiously avoids addressing the CIJs' reliance on the evidence of PECH Chim (who stated that Ms. IM Chaem *did not* hold a position on the District Committee[227]), and BUN Thoeun (who stated that Ms. IM Chaem did not attend

220 Appeal, para. 60, *citing* DC-Cam Interview of IM Chaem, 6 April 2012, **D123/1/5.1c**, EN ERN 00951845.
221 Appeal, para. 59, *citing* DC-Cam Interview of IM Chaem, 20 June 2008, **D123/1/5.1b**, EN ERN 00951795.
222 Appeal, para. 59, *citing* DC-Cam Interview of IM Chaem, 20 June 2008, **D123/1/5.1b**, EN ERN 00951819.
223 Closing Order, **D308/3**, paras. 145-46.
224 DC-Cam Interview of IM Chaem, 20 June 2008, **D123/1/5.1b**, EN ERN 00951795.
225 Closing Order, **D308/3**, para. 139.
226 Appeal, para. 63.
227 Closing Order, **D308/3**, para. 146, *citing* Written Record of Interview of PECH Chim, 19 June 2014, **D118/259**, A41-43.

meetings in Angkor Chey as a district secretary[228]). These statements, the CIJs' reasonable reliance upon them, and the ICP's current disregard of them, are instructive.

111. Plainly, absent any attempt to address the reasonableness of the totality of the CIJs' findings concerning Ms. IM Chaem's position in the Southwest Zone, assertions that the CIJs failed to properly consider this evidence do not amount to a satisfactory basis for revisiting the Closing Order.[229] In place of this basis, the ICP merely reprises a partisan view of the evidence by selectively referring to the statements of five witnesses (UL Hoeun,[230] NEANG Ouch,[231] KAO Chheng,[232] SOK Rum,[233] and RIEL Son[234]).

112. In this regard, the ICP takes issue with the CIJs' approach to the evidence of UL Hoeun,[235] NEANG Ouch,[236] and KAO Chheng,[237] but merely asserts that the relevant evidence was not properly assessed. In relation to UL Hoeun, the CIJs reasonably assessed that the evidence was isolated; lacked foundation and was contradicted.[238] The ICP fails to show otherwise, instead speculating that discrepancies in the witness' statement may "be explained by his confusion as to the parameters of the district or its association to [Ms. IM] Chaem through her husband's position".[239] It ought to go without saying that the PTC's function is not to replace its own view of the evidence with that of the CIJs[240] and a reasonable Chamber is entitled to regard the confusion of a witness as cogent evidence of unreliability across a range of testimony, including those asserted to support the ICP's case.

228 Closing Order, **D308/3**, para. 149, *citing* Written Record of Interview of BUN Thoeun, 26 August 2014, **D119/149**, A32-34.

229 *Prosecutor v. Ramush Haradinaj et al.* (IT-04-84-A), AC, Judgement, 19 July 2010, para. 13 **[Authority 15]**; *Prosecutor v. Ljube Boškoski v. Johnan Tarčulovski* (IT-04-82-A), AC, Judgement, 19 May 2010, para. 18 **[Authority 13]**; *Prosecutor v. Dragomir Milošević* (IT-98-29/1-A), AC, Judgement, 12 November 2009, para. 17 **[Authority 12]**; *Prosecutor v. Pavle Strugar* (IT-01-42-A), AC, Judgement, 17 July 2008, para. 23 **[Authority 10]**; *Prosecutor v. Radoslav Brđanin* (IT-99-36-A), AC, Judgement, 3 April 2007, paras. 27-28 **[Authority 9]**.

230 Appeal, para. 64.

231 Appeal, para. 65.

232 Appeal, para. 66.

233 Appeal, para. 67.

234 Appeal, para. 68.

235 Appeal, para. 64, *citing* Closing Order, **D308/3**, para. 149 *citing* Written Record of Interview of UL Hoeun, 4 March 2014, **D118/208**, A62-64; Written Record of Interview of UL Hoeun, 19 March 2014, **D118/209**, A128-29.

236 Appeal, para. 65.

237 Appeal, para. 66.

238 Closing Order, **D308/3**, para. 149.

239 Appeal, para. 64.

240 *See*, *Case of NUON Chea et al.*, 002/19-09-2007/OCIJ (PTC25), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, **D164/3/6**, para. 26.

113. In relation to witness NEANG Ouch, the ICP fails to establish that the view taken by the CIJs was not available to a reasonable trier of fact. The ICP asserts, "the evidence is overwhelming that [NEANG Ouch's] denials [that he was a member of the Koh Andet District Committee] were merely fabrications in an attempt to distance himself from crimes committed in these areas."[241] However, these arguments are neither accurate nor indeed relevant.

114. First, the ICP only relies on a transcript of the witness' testimony in the Case 002/02 trial proceedings involving questioning over NEANG Ouch's position in Tram Kok District[242] (that is, not the Koh Andet District). Second, whether or not NEANG Ouch was attempting to distance himself from crimes committed in Koh Andet District,[243] this is not relevant to any issue capable of providing evidence of Ms. IM Chaem's alleged role in that location. The only evidence connecting the witness to Ms. IM Chaem is a DC-Cam interview,[244] which, as detailed above at paragraph 107, requires corroboration in amount to evidence bearing more than minimal probative value.

115. The ICP's argument in relation to the evidence of KAO Chheng[245] is similarly irrelevant and unreasonable. The ICP avers that the witness' statement concerning Ms. IM Chaem's alleged control "'of district military' in Koh Andet ... [when] viewed in context and in addition to the other evidence ... corroborates [her] position as Koh Andet District Secretary."[246] However, this is incapable of substantiating the ICP's argument; the district *military* and district *committee* were distinct entities.[247] The ICP's attempt to conflate the two organisations is unhelpful. In any event, the ICP has not demonstrated that the CIJs were unreasonable in dismissing this evidence on the basis that it was isolated hearsay.[248] Self-evidently, the combination of isolation and hearsay provides a cogent basis for a finding that the evidence as a whole possesses little or no probative value.[249]

241 Appeal, para. 65.
242 Appeal, para. 65, *citing Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Transcript of Trial Proceedings (NEANG Ouch), 9 March 2015, **E1/273.1**, pp. 81-85.
243 Appeal, para. 65.
244 Appeal, para. 65, *citing* DC-Cam Interview of IM Chaem, 6 April 2012, **D123/1/5.1c**, EN ERN 00951847.
245 Appeal, para. 66.
246 Appeal, para. 66, *citing* Written Record of Interview of KAO Chheng, 28 February 2013, **D119/16**, A24.
247 *See*, Written Record of Interview of CHUM Kan, 26-27 March 2014, **D119/110**, A23.
248 Closing Order, **D308/3**, para. 148, fn. 275.
249 Case 002/01 Appeal Judgment, **F36**, para. 302; *Prosecutor v. Alex Tamba Brima et al.* (SCSL-04-16-T), TC, Judgement, 20 June 2007, para. 109 **[Authority 21]**; *Prosecutor v. Fatmir Limaj et al.* (IT-03-66-T), TC,

116. The remainder of the Ground is equally selective, speculative, and irrelevant. The ICP's claim that the CIJs erroneously failed to rely on the evidence on RIEL Son (according to which Ms. IM Chaem "was Commune Committee and later was appointed District Committee"[250]) ignores the obvious – that the evidence was so flawed that no reasonable Chamber could have disregarded those frailties and attached weight to it. First, the quote relied upon by the ICP provides only support for the proposition that Ms. IM Chaem was a member of a "District Committee" and not a district *secretary*.[251] Second, the ICP's claim that the evidence of RIEL Son (who himself operated at the district level in Sector 13[252]) corroborates his argument, disregards the witness' admission that he was not aware of the district in which Ms. IM Chaem worked.[253] Contrary to the ICP's logic, a person with inside knowledge of the Sector 13 structure would be expected to recall such a crucial and illustrative detail. In any event, in light of this obvious frailty, it was open to a reasonable Chamber to attach little or no probative value to the evidence.

117. Finally, the ICP's allegation that the CIJs failed "to refer to the evidence of SOK Rum"[254] lacks merit. It was not necessary for the CIJs "to refer to the testimony of every witness and to every piece of evidence on the record and failure to do so does not necessarily indicate lack of consideration."[255] As the CIJs were aware, the evidence of SOK Rum[256] provided no meaningful support for the allegation that Ms. IM Chaem was the Koh Andet District Secretary. The ICP fails to explain how the witness' evidence (that Ms. IM Chaem held large meetings[257]) was so critical to any finding of her *de jure* or *de facto* position that the CIJs were duty bound to expressly dismiss its relevance and probative value.

118. For these reasons, the ICP's claim that no reasonable Chamber could have found the allegation that Ms. IM Chaem was the Koh Andet District Secretary unproven[258] is wholly misconceived. As the ICP's piecemeal and highly selective approach to the evidence shows,

Judgement, 30 November 2005, para. 21 **[Authority 6]**; *Prosecutor v. Radoslav Brđanin* (IT-99-36-T), TC, Judgement, 1 September 2004, para. 27 **[Authority 4]**.

250 Appeal, para. 68, *citing* Written Record of Interview of RIEL Son, 18 February 2014, **D118/181**, A224.

251 Appeal, para. 68, *citing* Written Record of Interview of RIEL Son, 18 February 2014, **D118/181**, A224.

252 Appeal, para. 68.

253 Appeal, para. 68, *citing* Written Record of Interview of RIEL Son, 18 February 2014, **D118/181**, A224.

254 Appeal, para. 67.

255 *Prosecutor v. Momčilo Krajišnik* (IT-00-39-A), AC, Judgement, 17 March 2009, para. 19 **[Authority 11]**.

256 Appeal, para. 67, *citing* Written Record of Interview of SOK Rum, 19 March 2014, **D119/108**, A48, A105.

257 Appeal, para. 67, *citing* Written Record of Interview of SOK Rum, 19 March 2014, **D119/108**, A48.

258 Appeal, para. 58.

far from reaching a conclusion that no reasonable trier of fact could have reached, the CIJs' approach was the most reasonable in the circumstances. Ground 5 should be dismissed.

ii. Ground 6 – The CIJs reasonably concluded that Ms. IM Chaem was not the Sector 13 Committee Member

119. The ICP claims that "[n]o reasonable trier of fact could have failed to find that [Ms. IM] Chaem was the Sector 13 Committee Member based on a proper review of the evidence"[259] and that the CIJs' erroneous conclusion in this regard "appears to be the reason that the Closing Order does not address [his] allegations that [Ms.] IM Chaem participated in the Southwest Zone JCE."[260] Similar to Ground 5, the ICP claims that the CIJs disregarded Ms. IM Chaem's interview with DC-Cam in which she allegedly admits to being promoted to be the Member of the Sector 13 Committee[261] and failed to properly assess corroborating evidence.[262] To the contrary, as outlined below, the CIJs' approach to the evidence was eminently reasonable.[263] No reasonable Chamber could have adopted the ICP's approach to the evidence.

120. The Defence's submission at paragraph 107 above concerning a reasonable approach to the evidentiary value of Ms. IM Chaem's statements to DC-Cam in relation to Ground 5 applies equally to Ground 6. The CIJs' treatment of the statement is consonant with the ECCC's approach to DC-Cam statements that may be "relied on only when corroborated by other sources."[264]

121. Under Ground 6, the ICP claims that 15 witnesses and civil party applicants corroborate Ms. IM Chaem's DC-Cam statement and the allegation that she had a role on the Sector 13 Committee.[265] Rather than approaching the Closing Order holistically and comprehensively, the ICP's claim rests upon a highly selective approach to the CIJs' assessment. The ICP fails to take into account or challenge the plethora of evidence assessed by the CIJs that was pivotal

[259] Appeal, para. 70.
[260] Appeal, para. 81.
[261] Appeal, paras. 71-73, *citing* DC-Cam Interview of IM Chaem, 6 April 2012, **D123/1/5.1c**, EN ERN 00951849.
[262] Appeal, paras. 74-80.
[263] Closing Order, **D308/3**, paras. 143-50.
[264] Closing Order, **D308/3**, para. 108.
[265] Appeal, paras. 70-81, *citing* SUON Mot, UL Hoeun, ON Sopheap, MOUL Eng, MOENG Vet, PECH Chim, BUN Thoeun, CHHOENG Choeun, KHOEM Boeun, KHOEM Vai, SOK Rum, TEM Chrorn, KONG Samy, PHLEY Ly and THORN Phoun.

to the finding that the evidence did not establish that Ms. IM Chaem was a Member of the Sector 13 Committee.[266] As is plain from the ICP's analysis of the Closing Order, and in light of the totality of the evidence on the case file, the CIJs' approach to Ms. IM Chaem's statement and allegedly corroborative evidence relevant to Ms. IM Chaem's alleged position in Sector 13 was reasonable.[267]

122. First, the ICP misstates the probative value that may be attached to civil party applications. Consistent with ECCC case law, the CIJs noted that civil party applications "representing a '*common narrative*' as opposed to personal experiences have been treated as insufficient to establish relevant facts."[268] Three of the four civil party applicants cited by the ICP fell within this category.[269] It was plainly within the reasonable exercise of discretion for the CIJs to place little or no weight on responses to the question "Who do you believe is responsible for these crime(s) and why do you believe this?", especially when those responses consisted of one line statements alleging that Ms. IM Chaem held a position in the Sector 13 Committee.[270] Moreover, whilst civil party applications detailing personal experiences have a greater value than those presenting general conclusions, this cannot detract from the SCC's admonishments that those detailing what appear to be personal experiences may only corroborate other evidence.[271] As found by the CIJs, and ignored by the ICP, the relevance and probative value of civil party applications had to rest on the existence of other reliable evidence.[272]

123. As will be demonstrated below, any cursory examination of the totality of the evidence shows that the application did not have this firm footing. CIJs were well within their

266 *See*, Closing Order, **D308/3**, para. 148 ["However, a high number of witnesses provide more specific evidence on this issue, stating that [Ms. IM] Chaem's role in Sector 13 was that of chief of the Women's Association", *referring to* Written Record of Interview of MOENG Vet, 10 February 2014, **D119/83**, A18-19; Written Record of Interview of MOENG Vet, 11 February 2014, **D119/84**, A19-20, A29-31; Written Record of Interview of PECH Chim, 26 June 2013, **D118/79**, A6; Written Record of Interview of BUN Thien, 17 August 2009, **D6.1.688**, EN ERN 00384405; Written Record of Interview of SAO Van, 27 February 2013, **D119/15**, A12; Written Record of Interview of BUN Thien, 10 July 2014, **D118/274**, A28; Written Record of Interview of TOEB Phy, 14 September 2015, **D219/521**, A63; Written Record of Interview of PECH Chim, 19 June 2014, **D118/259**, A40-41, A40-45; Written Record of Interview of BUN Thoeun, 26 August 2014, **D119/149**, A32-34].

267 Closing Order, **D308/3**, paras. 136-39.

268 Closing Order, **D308/3**, para. 107, *referring to* Case 002/1 Appeal Judgement, **F36**, para. 457.

269 Appeal, para. 79, fn. 196.

270 Civil Party Application of TEM Chrorn, 1 October 2012, **D5/1133**, EN ERN 01144435; Civil Party Application of KONG Samy, 8 November 2013, **D5/1303**, EN ERN 01191036; Civil Party Application of PHLEU Ly, 13 August 2013, **D5/1615**, EN ERN 01168228.

271 Case 002/1 Appeal Judgement, **F36**, para. 457.

272 *Cf*, Closing Order, **D308/3**, para. 108; Case 002/1 Appeal Judgement, **F36**, para. 457.

discretion in concluding that Ms. IM Chaem was not a Member of the Sector 13 Committee. Putting aside the ICP's attempt to reargue the Prosecution case, rather than address the appellate threshold, the volume of witnesses relied upon under Ground 6 provides little or no real support for the ICP's contrary assertions. In particular, of the 11 witnesses cited in support of Ground 6, seven provide indirect evidence that on its face is speculative and inconsistent and amount to little more than unreliable hearsay. As discussed briefly below, the ICP's claim that these witnesses were both "specific and unequivocal" as to Ms. IM Chaem's position in the Southwest Zone is unsubstantiated and incorrect.

124. For example, the ICP takes issue with the CIJs' assessment of the statements of UL Hoeun, ON Sopheap, and SUON Mot, which were "discounted ... on the basis that [the] witnesses gave evidence 'with different degrees of certainty and specificity'".[273] The ICP claims that, contrary to the CIJs' assessment, they were "specific and unequivocal that [Ms.] IM Chaem had a role on the Sector 13 Committee".[274] No reasonable Chamber could have adopted this view of the evidence. UL Hoeun provided no basis for his assertion of Ms. IM Chaem's position at the sector level and accepted that that he was "not sure" even about Ms. IM Chaem holding a position at the district level.[275] Moreover, the CIJs dismissed other evidence provided by UL Hoeun concerning Ms. IM Chaem's role in the Southwest Zone because "its foundation [was] unclear";[276] a finding that was not challenged by the ICP in the Appeal.

125. Similarly, ON Sopheap confirmed that he "never met [Ms.] IM Chaem during the Khmer Rouge regime"[277] and was "not well aware" of the organisational structure of Sector 13.[278] Lastly, the evidence of SUON Mot[279] was based on the witness' observation that Ms. IM Chaem "came to chair meetings and work where I lived."[280] Plainly, this evidence had nominal probative value in relation to the claim that Ms. IM Chaem was a member of the Sector 13 Committee. In sum, no reasonable Chamber would conclude that the CIJs erred or abused their discretion when declining to rely upon this body of evidence.

273 Appeal, para. 74, *citing* Closing Order, **D308/3**, para. 148.
274 Appeal, para. 74.
275 Written Record of Interview of UL Hoeun, 13 October 2014, **D193/8.2**, A13.
276 Closing Order, para. 149, *citing* Written Record of Interview of UL Hoeun, 4 March 2014, **D118/208**, A62-64; Written Record of Interview of UL Hoeun, 19 March 2014, **D118/209**, A128-29.
277 Written Record of Interview of ON Sopheap, 25 June 2013, **D118/78**, A8.
278 Written Record of Interview of ON Sopheap, 25 June 2013, **D118/78**, Q-A10.
279 Appeal, para. 74, *citing* Written Record of Interview of SUN Mot, 16 October 2014, **D219/37**, A17-18, A25.
280 Written Record of Interview of SUN Mot, 16 October 2014, **D219/37**, A18.

126. The ICP also argues that evidence supporting the claim that Ms. IM Chaem was a Member of the Sector 13 Secretary was not properly assessed by the CIJs.[281] In particular, he seeks to rely on the statements of SOK Rum,[282] MOUL Eng,[283] PECH Chim,[284] BUN Thoeun,[285] and CHHOENG Cheng.[286] However, far from supporting the ICP's allegations, the witnesses' knowledge of Ms. IM Chaem's positions was transparently fragile, and constituted from unsourced and uncorroborated hearsay. A case on point concerns the statement of SOK Rum. Despite being considered by the ICP as "clearly support[ing]" the Prosecution's case,[287] the witness testified that he had merely "heard" of Ms. IM Chaem's name[288] and that she could "not remember the names of those who were [members of the] Sector 13 Committee".[289]

127. The remaining evidence provided no further support. MOUL Eng testified that his "belief" that Ms. IM Chaem was a member of the Sector 13 Committee was based on "common knowledge".[290] PECH Chim provided hearsay evidence based on what "[s]ome people said"[291] that "people thought [Ms.] IM Chaem was on the sector committee and in charge of women".[292] The ICP disregarded the fact that in a subsequent interview, PECH Chim also stated that Ms. IM Chaem "was not a Sector Secretary."[293] BUN Thoeun admitted that he did "not recall well" information concerning Ms. IM Chaem's formal position and only "heard" that Ms. IM Chaem "*perhaps* became the Member of Sector 14", not Sector 13.[294] CHHOENG Choeun declared on two occasions that he "did not know" Ms. IM Chaem's position clearly.[295]

128. Ultimately, of the 11 allegedly corroborating witnesses (and four civil party applicants addressed at paragraph 122 above) relied upon by the ICP to support Ground 6, only three provided direct evidence concerning Ms. IM Chaem's position in the Southwest Zone.

281 Appeal, paras. 75-78.
282 Appeal, para. 78.
283 Appeal, paras. 75, 78.
284 Appeal, para. 75.
285 Appeal, para. 76.
286 Appeal, para. 77.
287 Appeal, para, 78.
288 Written Record of Interview of SOK Rum, 19-20 March 2014, **D119/108**, Q-A45.
289 Written Record of Interview of SOK Rum, 19-20 March 2014, **D119/108**, Q-A12.
290 Written Record of Interview of MUOL Eng, 4-5 May 2015, **D219/294**, A140.
291 Written Record of Interview of PECH Chim, 19 June 2014, **D118/259**, A40.
292 Appeal, para. 75, *citing* Written Record of Interview of PECH Chim, 19 June 2014, **D118/259**, A40.
293 Written Record of Interview of PECH Chim, 26 June 2013, **D118/79**, Q-A6.
294 Written Record of Interview of BUN Thoeun, 10 July 2014, **D118/274**, Q-A28-29 (emphasis added).
295 Written Record of Interview of CHHOENG Choeun, 4 September 2014, **D119/156**, A15, Q-A16.

However, only one, KHOEM Vai,[296] lent any meaningful support for the allegation concerning Ms. IM Chaem's position in Sector 13. The ICP's critique of the CIJs' approach to the remaining two (KHOEM Boeun and MOENG Vet) is inaccurate and unfortunate. The CIJs were undoubtedly correct to dismiss them as incapable of providing support for the ICP's case.

129. In relation to the evidence of KHOEM Boeun, the ICP misstates the evidence, claiming that the witness' statement that Ms. IM Chaem "talked about 'issues of security, arrests, enemies, traitors [and] purges' ... [is] entirely at odds with the CIJs conclusion that [Ms. IM] Chaem would have attended meetings on the basis of being chief of the Sector 13 Women's Association".[297] The witness actually stated that participants to sector-level meetings, such as Ms. IM Chaem or the witness herself (who was a Commune chief[298]), were allowed to give their impressions at the end of the meetings,[299] based on the topics that had been raised by the Sector Chairman.[300] In this context, KHOEM Boeun does not suggest that Ms. IM Chaem was endowed with any enhanced authority to control Sector 13 meetings, characteristic of a Sector Committee Member. Similarly, the evidence provided by MOENG Vet, according to which Ms. IM Chaem was "a deputy in the Sector 13 Committee and was in charge of the women in the Sector",[301] does not unambiguously support the proposition that Ms. IM Chaem was a member of the Sector 13 Committee. MOENG Vet's statements actually suggest that Ms. IM Chaem held a secondary status in the Sector 13 administration, rather than full membership of the Committee, and this was through her admitted role in the Women's Association.[302]

130. In conclusion, the CIJs were provided with one witness, KHOEM Vai, who provided direct evidence capable of bearing any real probative value.[303] Contrary to the ICP's claims, in light of the burden and standard of proof, this was an inadequate basis for drawing any conclusions concerning Ms. IM Chaem's *de jure* or *de facto* role or function, especially when this was alleged to found the basis for authority over the crimes against humanity of persecution,

296 *See* Appeal, para. 78 *citing* Written Record of Interview of KHOEM Vai, 21 December 2015**, D219/636**, A38.
297 Appeal, para. 77 ["Khoem Boeurn ... told the CIJs that Im Chaem talked about 'issues of security, arrests, enemies, traitors [and] purges' at Sector 13 meetings"], *citing* Written Record of Interview of KHOEM Boeurn, 21-23 May 2014, **D118/242**, A99.
298 *See*, Written Record of Interview of KHOEM Boeun, 21-23 May 2014, **D118/242**, A17.
299 Written Record of Interview of KHOEM Boeun, 21-23 May 2014, **D118/242**, A91, A98.
300 Written Record of Interview of KHOEM Boeun, 21-23 May 2014, **D118/242**, Q-A98, A99.
301 Appeal, para. 75, *citing* Written Record of MOENG Vet, 10 February 2014, **D119/83**, A18.
302 Written Record of Interview of MOENG Vet, 10 February 2014, **D119/83**, Q-A18-19; Written Record of Interview of MOENG Vet, 1 September 2015, **D219/488**, A36, A109.
303 Written Record of KHOEM Vai, 21 December 2015, **D219/636**, A38.

murder, extermination, torture, imprisonment, and other inhumane acts in the Southwest Zone.[304] Taken in the context of the totality of the evidence,[305] it is clear that the CIJs' conclusion that the evidence did not establish Ms. IM Chaem as a Member of the Sector 13 Committee was reasonable. No other conclusion was open to a reasonable Chamber. As is plain, rather than assessments that no reasonable Chamber could make, the CIJs were duty bound to find the ICP's arguments wanting. The evidence presented was seriously flawed and incapable of demonstrating that Ms. IM Chaem was a Member of the Sector 13 Committee and, ultimately, how the CIJs erred in finding Ms. IM Chaem not to be most responsible. Ground 6 should be dismissed.

VI. RELIEF REQUESTED

For the reasons above, the Defence respectfully requests the PTC to dismiss the Appeal in its entirety and uphold the Closing Order's finding that Ms. IM Chaem falls outside the ECCC's personal jurisdiction.

Respectfully submitted,

BIT Seanglim

Wayne JORDASH, QC

Co-Lawyers for Ms. IM Chaem
Signed on this 22nd day of September, 2017

[304] ICP's Final Submission, **D304/2**, paras. 157-72.
[305] Closing Order, **D308/3**, para. 148, fn. 271 (citing ten statements in support of their finding that Ms. IM Chaem's role in Sector 13 was that of chief of the Women's Association).