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

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INTERNATIONAL CO-PROSECUTOR'S REPLY REGARDING APPEAL OF CLOSING ORDER (REASONS)

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REPLY

1. The International Co-Prosecutor ("Co-Prosecutor") hereby replies to Im Chaem's response[1] ("Response") to the Co-Prosecutor's appeal[2] ("Appeal") of the Co-Investigating Judges' ("CIJs") Closing Order (Reasons).[3]

2. As explained below, the Response is premised on inaccurate factual assertions and unsound legal principles. Im Chaem's Response raises no argument that refutes the errors of law, fact, and mixed law and fact raised in the Appeal. These errors can only be remedied either by remittance of the decision on personal jurisdiction to the CIJs for reconsideration or by the Pre-Trial Chamber itself reconsidering the personal jurisdiction decision.

I. THE CO-PROSECUTOR'S APPEAL RELIED ON THE CORRECT STANDARD FOR APPELLATE REVIEW

3. The Co-Prosecutor's Appeal identified several errors of law, fact and mixed errors of law and fact in the Closing Order (Reasons). Im Chaem's Response claims that the Co-Prosecutor's Appeal is deficient in that it "fails to argue the correct appellate standard of review"[4] applicable to discretionary decisions.

4. The Supreme Court Chamber in the Case 001 Appeal Judgment held that the determination of whether a person was among those "most responsible" for the crimes committed by the Democratic Kampuchea regime was a discretionary decision largely for the judgment of the Co-Prosecutors and CIJs.[5] The Co-Prosecutor's Appeal does not ask the Pre-Trial Chamber to substitute the Co-Prosecutor's judgment as to whether Im Chaem is among those most responsible for that of the CIJs. Rather, the Co-Prosecutor's Appeal focuses entirely on errors in how the CIJs interpreted the law and facts – errors which the CIJs then used in applying their judgment as to whether Im Chaem was among those "most responsible". While appellate chambers should grant lower court judges latitude in exercising their own judgment in discretionary decisions, a discretionary

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1 **D308/3/1/11** Im Chaem's Response to the International Co-Prosecutor's Appeal of Closing Order (Reasons), 22 September 2017 ("Im Chaem Response").
2 **D308/3/1/1** International Co-Prosecutor's Appeal of Closing Order (Reasons), 9 August 2017 ("Co-Prosecutor's Appeal").
3 **D308/3** Closing Order (Reasons), 10 July 2017 ("Closing Order (Reasons)").
4 **D308/3/1/11** Im Chaem Response, para 8.
5 Case 001-**F28** Appeal Judgement, 3 February 2012, para. 79.

decision that is based on a mistaken interpretation of the law or which ignores relevant facts cannot stand.

(i) Im Chaem Misinterprets the Standard of Appellate Review of Discretionary Decisions

5. The Pre-Trial Chamber has previously set out three limbs under which a discretionary decision can be subject to appeal: (i) on the basis of an error of law; (ii) on the basis of an error of fact; and (iii) where there is an abuse of discretion.[6] Im Chaem erroneously introduces a double requirement to appeal a discretionary decision, however. Im Chaem incorrectly claims that there must be proof of an error of law or fact *and additionally*, that the error of law or fact occasioned an abuse of discretion.[7]

6. This is a clear misreading of the applicable law, which Im Chaem cites,[8] and finds no support in jurisprudence. There is no requirement that a legal or factual error once established must simultaneously "amount to an abuse of discretion" in order to be reviewable.[9] Im Chaem is effectively arguing that judges have discretion to get the law and the facts wrong. Following Im Chaem's logic, no matter how unsound the legal basis of a decision – there would be no possibility for a party to appeal or the Pre-Trial Chamber to review unless it was also shown that the decision was an abuse of discretion. If a discretionary decision is premised on a mistaken interpretation of the law or wholly erroneous factual findings, there is no way for the appellate chamber to know how the error affected the exercise of judgment and it would require pure speculation for the appellate chamber to guess how the exercise of discretionary judgment was affected by the error. Im Chaem relies on this improvised and incorrect review standard throughout the Response.[10]

(ii) Im Chaem Mischaracterises the Scope of the Pre-Trial Chamber's Authority to Review

7. Contrary to Im Chaem's assertion,[11] the Co-Prosecutor's Appeal demonstrated the impact and effects of each of the errors alleged – namely to vitiate the CIJs' assessment of

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6 Case 002-**A371/2/12** [REDACTED] 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, para. 22.

7 **D308/3/1/11** Im Chaem Response, para. 7.

8 **D308/3/1/11** Im Chaem Response, paras 13, 14.

9 **D308/3/1/11** Im Chaem Response, para. 9.

10 *See,* e.g., **D308/3/1/11** Im Chaem Response, paras 3, 7, 9, 15, 41, 45, 46, 51, 55, 61, 72, 73, 76, 85, 87, 90, 93, 96, 99, 102, 104, 105, 125.

11 **D308/3/1/11** Im Chaem Response, para. 15.

personal jurisdiction.[12] As the Co-Prosecutor argued, the legal and factual errors and mixed errors of law and fact detailed in the Appeal necessitate a fresh assessment of personal jurisdiction based on the correct law and facts.[13]

8. Im Chaem's position disregards the relevant jurisprudence of the ECCC. First, the Pre-Trial Chamber may conduct such a review itself. The Pre-Trial Chamber has noted that Rule 79(1) of the Internal Rules:[14]

> suggests that the Pre-Trial Chamber has the power to issue a new or revised Closing Order that will serve as a basis for the trial: "The Trial Chamber shall be seized by an indictment from the Co-Investigating Judges or the Pre-Trial Chamber". In the Glossary of the Internal Rules, the word "Indictment" is defined as "a Closing Order by the Co-Investigating Judges, or the Pre-Trial Chamber, committing a Charged Person for trial".[15]

9. The Pre-Trial Chamber has equated its position in the ECCC to the role of the Cambodian Investigation Chamber and that, in line with Articles 277 and 281(3) of the Cambodian Code of Criminal Procedure, "[w]hen seized of a dismissal order as a consequence of an appeal lodged by the Prosecution or a civil party, the Investigation Chamber shall 'investigate the case by itself'".[16] This comports with international practice, whereby in situations involving a discretionary decision based on errors of law or fact, the appellate chamber "may substitute the exercise of its own discretion for that of the Trial Chamber if it considers it appropriate to do so".[17]

10. Alternatively, the Pre-Trial Chamber has the inherent power to remit the Closing Order back to the CIJs to make an assessment based on the correct law and facts.[18] The Pre-Trial Chamber has held that a decision based on "an incorrect interpretation of governing law"; "a patently incorrect conclusion of fact"; or, "an abuse of the CIJs' discretion" are

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12 **D308/3/1/1** Co-Prosecutor's Appeal.

13 **D308/3/1/1** Co-Prosecutor's Appeal.

14 Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015.

15 Case 001-**D99/3/42** Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias "Duch", 5 December 2008, para. 40 ("PTC Decision on Appeal Against Closing Order").

16 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, para. 42.

17 *Prosecutor v. Sefer Halilović*, IT-01-48-AR73.2, ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 64.

18 Case 002-**D300/1/7** Decision on Nuon Chea's Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 28 July 2010, paras 19, 26 *referring* to Case 002-**D300/1/2** Decision on Nuon Chea's Appeal Against OCIJ Order on Requests D153, D172, D173, D174, D178 & D284 (Nuon Chea's Twelfth Request for Investigative Action), 15 June 2010; Case 002-**D365/2/17** Public Decision on Reconsideration of Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons' Knowledge of the Crimes, 27 September 2010, paras 67, 81.

the "three grounds [...] upon which the Pre-Trial Chamber can remit a decision back to the CIJs for re-consideration."[19] Such has been the practice at the ECCC.[20] Even in situations in which the Pre-Trial Chamber has failed to unanimously decide on appeals against discretionary decisions, Pre-Trial Chamber Judges have stated that they would "remit the matter back to the Co-Investigating Judges to decide on the merits [...] taking into account our considerations on the international standards", while noting "that it remains possible for the Co-Investigating Judges to use their discretion to reconsider" in such situations.[21]

11. Again, this power is in line with that exercised in international jurisprudence.[22] For example, in the *Ngudjolo* case at the International Criminal Court ("ICC"), the Appeals Chamber overturned a Trial Chamber decision denying the Prosecutor access to passive recordings of the Accused's phone conversations from the ICC detention facility despite finding that whether monitored information be withheld or disclosed was a matter for the Trial Chamber's discretion.[23] The ICC Appeals Chamber found that "the Trial Chamber's rejection of the Prosecutor's request for access was based on an erroneous determination

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19 Case 002-**D310/1/3** [REDACTED] Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Names in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, paras 15-16.

20 Case 002-**D300/1/7** [REDACTED] Decision on Nuon Chea's Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 28 July 2010, paras 19, 26 *referring* to **D300/1/2** Decision on Nuon Chea's Appeal Against OCIJ Order on Requests D153, D172, D173, D174, D178 & D284 (Nuon Chea's Twelfth Request for Investigative Action), 15 June 2010; Case 002-**D310/1/3** Public [REDACTED] Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Names in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, paras 15-16; Case 002-**D365/2/17** Public Decision on Reconsideration of Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons' Knowledge of the Crimes, 27 September 2010, paras 67, 81.

21 Case 003-**D26/1/3** [REDACTED] Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal Against the Decision on Re-Filing of Three Investigative Requests, 15 November 2011, Opinion of Judges Lahuis and Downing, para. 20. *See* also, Case 003-**D11/3/4/2** Public [REDACTED] Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant [REDACTED], 13 February 2013, Opinion of Judges Chung and Downing, para. 38.

22 *See*, e.g., *Prosecutor v. Sefer Halilović*, IT-01-48-AR73.2, ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 64; *Jean Uwinkindi v. The Prosecutor*, ICTR-01-75-AR72(C), ICTR, Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, para. 55; *The Prosecutor v. Karemera et al.*, ICTR-98-44-AR73, ICTR, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 32.

23 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 9, ICC, Judgment on the Appeal of the Prosecutor against the "Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre", 9 December 2009 ("*Ngudjolo* Decision"), para. 41.

as to the inadmissibility of the information as evidence and the Trial Chamber's decision was therefore materially affected by an error of law."[24] Given that the Trial Chamber's denial of the Prosecutor's request for access to the information was based on the mistaken legal premise that such information was *per se* inadmissible, the Appeals Chamber found that the appropriate remedy was to reverse the decision and remand the matter back to the Trial Chamber to make a new decision that properly balanced the Prosecutor's rights with those of the Accused.[25]

II. GROUND 1: THE CIJS ERRED IN LAW BY FINDING THAT ALLEGATIONS IN THE CO-PROSECUTOR'S INTRODUCTORY SUBMISSIONS MUST BE CHARGED IN ORDER TO BE PART OF A CLOSING ORDER

12. Despite asserting that the CIJs followed the "prevailing law" by finding that only facts formally "charged" may lead to indictment,[26] Im Chaem does not cite a single case or any source whatsoever that supports the CIJs' position on allegations that may be the basis of indictment.[27]

13. Indeed, Im Chaem's claim is at odds with ECCC jurisprudence. In Case 001, the Pre-Trial Chamber in the Co-Prosecutors' Closing Order Appeal – a decision previously relied on by Im Chaem[28] and by the CIJs in the Closing Order (Reasons)[29] – made the following findings:

> The crimes of torture and premeditated murder under the 1956 Penal Code were not amongst the legal offences which were mentioned by the Co-Investigating Judges to the Charged Person at the initial appearance or later.
>
> The facts supporting the constitutive elements specific to the domestic crimes were included in the scope of the judicial investigation conducted by the Co-Investigating Judges as they were alleged in the Introductory Submission. [...]
>
> The Pre-Trial Chamber therefore finds that the domestic crimes of torture and premeditated murder can be added to the Closing Order in accordance with the reasoning above.[30]

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24 *Ngudjolo* Decision, paras 1, 44.
25 *Ngudjolo* Decision, para. 52.
26 **D308/3/1/11** Im Chaem Response, paras 26-30.
27 **D308/3/1/11** Im Chaem Response, paras 26-30.
28 **D293** Im Chaem's Request for Clarification on the Law Should There be a Disagreement Between the Co-Investigating Judges When Issuing the Closing Order, 26 January 2016, fn. 37.
29 **D308/3** Closing Order (Reasons), paras 44, 45, 49, 50.
30 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, paras 104-105, 107.

14. Though dealing with recharacterisation, the Pre-Trial Chamber found that crimes not formally "charged" and not included in the Closing Order – could be added to the Closing Order on appeal because the underlying factual allegations were included in the Co-Prosecutor's Introductory Submission. The Pre-Trial Chamber did not find that absence of formal "charging" restricted the inclusion of crimes in the Closing Order, provided the CIJs were properly seised of the supporting facts.

15. Im Chaem has previously cited the portion of the Pre-Trial Chamber's decision[31] which describes the Closing Order as "the decision that concludes *the whole investigation*".[32] That same Pre-Trial Chamber decision declared that the Closing Order "contains various conclusions of fact and law with regard to *all the acts that were subject to investigation*."[33] The Pre-Trial Chamber further held that "[t]he Closing Order is the decision by which the Co-Investigating Judges conclude their judicial investigation. Pursuant to Internal Rule 67(3) and (4) they *shall decide on the acts they were requested to investigate*."[34]

16. The Pre-Trial Chamber in Case 001 assessed the standard of review of a Closing Order.[35] When detailing the parameters of an investigation and the contents of a Closing Order, the Pre-Trial Chamber made no reference to the process of formal "charging" and gave no indication that it viewed it as permissible for the Closing Order to ignore facts about crimes in the initial or supplementary submissions not "charged".[36] Rather, the Pre-Trial Chamber made reference to the Co-Prosecutor's Introductory Submissions and the obligations of the CIJs to (i) investigate the allegations contained therein and (ii) make a determination on all such factual allegations in the Closing Order.[37]

17. The Pre-Trial Chamber was unequivocal, holding that a Closing Order must contain determinations on all facts of which the CIJs are validly seised:

> Internal Rule 67 directs that when issuing a Closing Order, the Co-Investigating Judges *shall decide on all, but only, the facts that were part of their investigation*, either dismissing them for one of the reasons expressed in

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31 **D293** Im Chaem's Request for Clarification on the Law Should There be a Disagreement Between the Co-Investigating Judges When Issuing The Closing Order, 26 January 2016, para. 31.
32 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, para. 29 (emphasis added).
33 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, para. 29 (emphasis added).
34 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, para. 33 (emphasis added).
35 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, paras 32-39.
36 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, paras 32-39.
37 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, paras 32-39.

> paragraph 3 of this Rule or sending the Charged Person to trial on the basis of these acts.[38]

18. Contrary to Im Chaem's assertion, there is no indication in the Notice of Closure of the Investigation 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."[39] Indeed, the Notice of Closure of the Investigation noted that as of July 2015 – when submissions from the Parties on whether Im Chaem met the jurisdictional threshold of the ECCC were requested – "the establishment of Im Chaem's role in relation to *the crimes alleged by the ICP* was nearing completion."[40] Contained in that request for submissions from the Parties on jurisdiction, International Co-Investigating Judge Harmon stated that "the question of whether a Charged Person qualifies as among 'those who were most responsible' is to be determined at the end of the investigation in light of *all the evidence* gathered."[41] Additionally, International Co-Investigating Judge Harmon held, in a separate case, that making a decision on personal jurisdiction prior to the closure of the investigation:

> would not afford the Co-Prosecutors the opportunity to review *the complete investigation results on the issue of personal jurisdiction* thereby depriving them of an opportunity to assess the personal jurisdiction evidence in the case file in order to formulate a request to the CIJs pursuant to Internal Rule 66(5) either to indict the Charged Person or dismiss the case.[42]

19. There was clearly no intention in this case to limit the factual allegations on which the ultimate determination in the Closing Order would be based merely to allegations that had been "charged".[43]

(i) Im Chaem's Flawed Characterisation of what a Closing Order Must Contain

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38 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, para. 37 (emphasis added).

39 **D308/3/1/11** Im Chaem Response, para. 31.

40 **D285** Notice of Conclusion of Judicial Investigation Against Im Chaem, 18 December 2015, para. 3 (emphasis added).

41 **D251** Request for Submissions on Whether Im Chaem Should be Considered a "Senior Leader" or Among "Those Who Were Most Responsible", 24 July 2015, para. 5.

42 **D185/1** Decision on Ta An's Motion for Annulment of Investigative Action Pursuant to Internal Rule 76, 22 April 2014, para. 28.

43 *Contra* **D308/3/1/1** Im Chaem Response, paras 24-39.

20. In her Response, Im Chaem acknowledges that "[t]he Closing Order does not encompass reasoned consideration of Ms. IM Chaem's alleged criminal responsibility."[44] This, however, constitutes an error of law, as the Pre-Trial Chamber has clearly ruled that the Closing Order must contain the reasons for the CIJs decision to either indict or dismiss facts of which they are seized by the Co-Prosecutors:

> "The Co-Investigating Judges' decision to either dismiss acts or indict the Charged Person shall be reasoned as specifically provided by Internal Rule 67(4). The Pre-Trial Chamber also recalls that it is an international standard that all decisions of judicial bodies are required to be reasoned."[45]

21. Im Chaem's claim that the CIJs' "obligation" to make a determination in the Closing Order "with respect to each of the facts of which they have been validly seised"[46] only "arises once jurisdiction has been determined"[47] is plainly incorrect. A proper and credible assessment of jurisdiction can *only* be made once all of the facts relevant to the determination of the question of jurisdiction have been assessed. Im Chaem's flawed logic suggests that the decision on jurisdiction can be made without determining the relevant facts that must necessarily underpin such determination. Under Im Chaem's flawed interpretation of ECCC procedure, the CIJs may dismiss facts of which they have been seised without ever issuing a reasoned decision, simply by not "charging" crimes related to those facts. This violates the most basic principles of legality and contradicts Im Chaem's own previous submissions.[48] Most recently, when opposing the reclassification of the Closing Order (Reasons) as public, Im Chaem cited jurisprudence for the proposition that "[i]f the judge does not grant the request of the person concerned he must provide a reasoned decision, which may be subject to appeal before the investigating chamber" and "[i]f the investigating chamber does not grant the person concerned's request, it must render a reasoned judgment."[49]

22. Im Chaem further erroneously claims that "a finding that the ECCC lacks jurisdiction over Ms. IM Chaem *precluded any findings* concerning the likelihood of her

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44 **D308/3/1/11** Im Chaem Response, para. 75.
45 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, para. 38.
46 Case 002-**D198/1** Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, para. 10.
47 **D308/3/1/11** Im Chaem Response, para. 29.
48 *See*, **D204** Im Chaem's Motion Requesting Clarification Regarding Disagreements Between the Co-Investigating Judges, 25 July 2014, para. 14, fn. 32.
49 **D309/2/1/3** Response to the International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, Alternatively, Request for Reclassification of Closing Order (Reasons), 4 September 2017, fn. 48.

responsibility for crimes"[50] and "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'"[51] Following Im Chaem's logic, the CIJs are not required to make a single factual finding on any allegation if the conclusion of the case is that the threshold for personal jurisdiction is not met. The CIJs' Closing Order (Disposition)[52] would, therefore, have been sufficient of itself as the culmination to this case. As a result, no appeal could effectively be made of a decision to dismiss a case on the basis of personal jurisdiction. This is a legally repugnant position – seeking to deny an affected party the opportunity to appeal a decision in one's own favour.

23. Moreover, Im Chaem's position is belied by the Pre-Trial Chamber's jurisprudence, which has previously overturned CIJs' findings in a Closing Order on the basis "that the Co-Investigating Judges failed to 'state the reasons for the decision' and therefore did not comply with the requirements of Internal Rule 67(4) and international standards."[53] Even the Supreme Court Chamber, in its discussion of the discretionary nature of personal jurisdiction decisions stated that such decisions could be overturned on a showing of bad faith or unsound professional judgement[54] – but such a challenge would never be possible if the CIJs could dismiss facts without providing any reasoning. Im Chaem's argument also falls foul of international practice. For example, when deciding *not* to confirm charges against several suspects, the ICC's Pre-Trial Chamber considered in detail each suspect's individual criminal responsibility for all facts alleged.[55]

24. It is noteworthy that Im Chaem relies on the erroneous assertion that crimes not charged cannot be considered in the Closing Order while making no attempt to justify the CIJ's failure to charge crimes based on these facts.[56] This enables Im Chaem to avoid the obvious conclusion that it is impossible to determine how the CIJs' assessment of

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50 **D308/3/1/11** Im Chaem Response, para. 19 (emphasis added).
51 **D308/3/1/11** Im Chaem Response, para. 30.
52 **D308** Closing Order (Disposition), 22 February 2017.
53 Case 001-**D99/3/42** PTC Decision on Appeal Against Closing Order, para. 57. *See* also, para. 115.
54 Case 001-**F28** Appeal Judgment, 3 February 2012, para 80.
55 *See*, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11, ICC, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, paras 22, 113-160, 224-302; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, ICC, Decision on the Confirmation of Charges, 16 December 2011, paras 6-8, 108-239, 291-240; *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09, ICC, 8 February 2010, paras 21-24, 97-236.
56 **D308/3/1/11** Im Chaem Response, para. 104

personal jurisdiction would have changed had all allegations with which the CIJs were seised been considered.

(ii) Im Chaem's Response Contradicts her Previous Submissions

25. Contrary to Im Chaem's claim,[57] the Notification of Charges is a procedural requirement at a certain stage of an ECCC investigation that in no way relieves the CIJs of their duty to assess all facts of which they are seised. As International Co-Investigating Judge Harmon told Im Chaem's lawyers – who had requested access to the Case File on the basis that Im Chaem should have been considered a Charged Person based on the Co-Prosecutor's Introductory Submission[58] – "you can only be granted access to the Case File in the event that your client is *formally charged*".[59] Im Chaem's position that she had no reason to be concerned regarding facts in the Initial or Supplementary Submission unless and until she was charged contradicts her earlier submissions regarding the process of "charging". When seeking access to the Case File before the Notification of Charges, Im Chaem claimed that "she is a Charged Person as 'she is subject to prosecution in … [Case 004] during the period between the Introductory Submission and Indictment or dismissal of the case.'"[60] Im Chaem relied on French jurisprudence to the effect that "a person named in an introductory submission was automatically considered as charged."[61]

26. Im Chaem also mischaracterises her request to place Case 002 transcripts regarding Trapeang Thma Dam Worksite on the Case File.[62] The Co-Prosecutor's Introductory Submission made a number of allegations of Im Chaem's responsibility at this crime site but the CIJs never included the site in the Notification of Charges. Im Chaem now claims the request was not a request for investigative action.[63] However, the Pre-Trial Chamber – as noted by the CIJs – 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

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57 **D308/3/1/11** Im Chaem Response, para. 31.
58 **D201** Im Chaem's Motion Requesting Order for Access to the Case File, 21 May 2014, paras 11-13, 15 ("Im Chaem Request for Case File Access").
59 **D201/1** Decision on Im Chaem's Motion Requesting Order for Access to the Case File, 26 June 2014, EN 00997338 (emphasis added).
60 **D201** Im Chaem Request for Case File Access, para. 12.
61 **D201** Im Chaem Request for Case File Access, para. 14.
62 **D308/3/1/11** Im Chaem Response, para. 32.
63 **D308/3/1/11** Im Chaem Response, para. 32.

establishment of the truth."[64] Rule 55(10) provides, in relevant part, that "[a]t any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation."

27. Additionally, Im Chaem asserts that "following the conclusion of the investigation on 18 December 2015, 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" and "[a]ny 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*."[65] However, this is contradicted by Im Chaem's previous submissions, which show that her defence team was well aware of the possibility that she could be indicted for facts not included in the ICJ's "charges" and took steps to defend her interests in regards to these crimes. On 16 February 2016, two months after the conclusion of the investigation, Im Chaem filed a request to the CIJs seeking annulment of interviews relating,[66] *inter alia*, to Trapeang Thma Dam Worksite[67] and Wat Chamkar Khnol Security Office.[68] Neither of these crime sites was formally charged by the CIJs in the Notification of Charges. Therefore, contrary to Im Chaem's current claim that her defence only prepared for possible indictment on crimes and crimes sites "charged" at the time of the closure of the investigation, Im Chaem sought annulment of interviews relating to crime sites not "charged" but which she understood she could be indicted for, as they were included in the Introductory Submission.

28. Im Chaem subsequently went further, making additional submissions on how the case should proceed pending resolution of her annulment request, noting that if the interviews were annulled, they would be "removed from case file and any inference drawn therein

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64 **D300/2** Decision on the International Co-Prosecutor's Request for Placement of Documents on Case File 004/1, 4 March 2016, para. 9, *citing* Case 002-**D365/2/17** Decision on Reconsideration of Co-Prosecutor's Appeal Against the Co-Investigating Judges' Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charges Person's Knowledge of the Crimes, 27 September 2010, paras 45-46.

65 **D308/3/1/11** Im Chaem Response, para. 33 (emphasis added).

66 **D298** Im Chaem's Application to Seise the Pre-Trial Chamber with a View to Annulling Transcripts and Written Records of Witnesses' Interviews, 16 February 2016.

67 **D298.4** Annex C to Im Chaem's Application to Seise the Pre-Trial Chamber with a View to Annulling Transcripts and Written Records of Witnesses' Interviews, 16 February 2016, EN 01204928.

68 **D298.4** Annex C to Im Chaem's Application to Seise the Pre-Trial Chamber with a View to Annulling Transcripts and Written Records of Witnesses' Interviews, 16 February 2016, EN 01204935-01204936.

is prohibited";[69] and that the Co-Prosecutor's Final Submission "should it mention any of the parts annulled – becomes void."[70] Im Chaem thus clearly envisaged, after the Closure of the Investigation, that allegations relating to crimes not formally "charged" but contained in the Introductory Submissions were part of the Case File for the purposes of the Co-Prosecutor's Final Submission and the Closing Order.[71]

(iii) Im Chaem Misconstrues the Co-Prosecutor's Right to be Heard

29. Im Chaem asserts that it is "consistent with the equality of arms" for the Co-Prosecutors to never be heard on the factual allegations not included in the Notification of Charges even under her interpretation that any allegations not included operates as an effective dismissal.[72]

30. Im Chaem curiously asserts that the Co-Prosecutor's rights are protected by a "specific procedural safeguard" in the form of a "stand-alone submission to argue for modification of the charges, including the evidential basis for the addition of charges."[73] Im Chaem's argument misses two elementary points. First, the Notification of Charges is not a reasoned decision. It contains no assessment or determination of why any factual allegations contained in an Introductory Submission or any Supplementary Submission may be excluded therefrom. Im Chaem's trite suggestion of filing an evidential submission to seek to modify a decision in which there is no evidential assessment or reasoning is consequently meritless. The ICJ's charging decision never purported to dismiss facts from the investigation so there was no decision and no reasoning from which the ICP could appeal.[74] Second, the Co-Prosecutor did not file any such 'request for modification' as he did not consider it necessary, given that the law – as shown above and in the Appeal – does not require a factual allegation to be formally "charged" in order to be subject to possible indictment in the Closing Order. Moreover, at the time Im Chaem

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69 **D298/2/1/2** Im Chaem's Reply to the International Co-Prosecutor's Response to Her Application for Annulment of Records of Interviews, 13 June 2016, para. 11.

70 **D298/2/1/2** Im Chaem's Reply to the International Co-Prosecutor's Response to Her Application for Annulment of Records of Interviews, 13 June 2016, para. 11.

71 *See* also **D296/2** Im Chaem's Request for Confirmation on the Scope of the Ao An's Annulment Application Regarding all Unrecorded Interviews, 26 August 2016, para. 14.

72 *See* **D308/3/1/11** Im Chaem Response, para. 34.

73 **D308/3/1/11** Im Chaem Response, para. 35.

74 *See also*, Case 003-**D174/1/4** Considerations on [REDACTED] Appeal Against the International Co-Investigating Judge's Decision to Charge [REDACTED] with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, Opinion of Judges Beauvallet and Baik Regarding the Admissibility of the Appeal, paras 14-17.

was "charged", the International Co-Investigating Judge specifically stated that additional charges could subsequently be added.[75] No facts were dismissed by the Notification of Charges.

(iv) Im Chaem Misconstrues the Co-Prosecutor's Right to Appeal

31. Im Chaem's claim that the Co-Prosecutor could have appealed the Notification of Charges[76] is equally lacking in regard for basic legal requirements. The Notification of Charges merely – per the requirements of Rule 57 – "shall record the identity of the Charged Person and inform him or her of the charges". For Im Chaem to suggest that the Co-Prosecutor could have appealed a decision containing no reasoning is therefore without merit.[77] Likewise, Im Chaem's claim that her appeal of the Notification of Charges shows that there were no impediments to the Co-Prosecutor "presenting any reasoned view concerning the evidence", the applicable threshold for charging, or the "appropriateness of additional charges"[78] is disingenuous. Im Chaem's appeal of the Notification of Charges had *nothing* to do with the substance of the "charges" and related solely to whether the International Co-Investigating Judge had the power to charge her *in absentia*[79] (a decision prompted by Im Chaem's unwillingness to cooperate with the Court[80]).

32. At no point in the investigation did the CIJs say that there was insufficient evidence in relation to the factual allegations in the Co-Prosecutor's Introductory Submission that were not contained in the Notification of Charges. There was no explanation or reasoning in the Notification of Charges regarding why any factual allegations contained in the Introductory Submission were not included.[81] The Closing Order (Reasons) followed this by failing to properly consider those allegations on the basis that they were not formally

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75 **D239.1** Notification of Charges against Im Chaem, 3 March 2015, para. 19.

76 **D308/3/1/11** Im Chaem Response, para. 38.

77 *See also*, Case 003-**D174/1/4** Considerations on [REDACTED] Appeal Against the International Co-Investigating Judge's Decision to Charge [REDACTED] with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, Opinion of Judges Beauvallet and Baik Regarding the Admissibility of the Appeal, paras. 14-17.

78 **D308/3/1/11** Im Chaem Response, para. 38.

79 **D239/1/2** Im Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge Her *In Absentia*, 2 April 2015.

80 *See*, e.g., **A150** Summons of Im Chaem for Initial Appearance, 29 July 2014; **A151/2** Letter in Response to ICIJ Summons, 1 August 2014; **A122/6.1/3** Decision on Im Chaem's Urgent Request to Stay the Execution of her Summons to an Initial Appearance, 15 August 2014; **C1** Arrest Warrant of Im Chaem, 14 August 2014.

81 **D239.1** Notification of Charges against Im Chaem, 3 March 2015.

"charged".[82] Contrary to Im Chaem's claim, this amounts to a *de facto* reduction in the scope of the judicial investigation by the CIJs as it excludes facts set out in the Co-Prosecutor's Introductory Submission prior to the issuance of the Closing Order.[83] As the Co-Prosecutor argued,[84] Rule 66*bis* – which regulates the reduction in the scope of the judicial investigation – mandates that the parties are informed of the facts from the Introductory Submission or Supplementary Submission that are to be excluded and provides the parties an opportunity to make submissions on the reduction, recognising the fundamental unfairness of dismissing any charges without providing the parties an opportunity to be heard.

III. GROUND 2: THE CIJS ERRED IN LAW BY FAILING TO ADDRESS FACTS OF WHICH THEY WERE SEISED

33. Im Chaem asserts that there was no requirement for the CIJs to "make an express determination concerning each of the ICP's allegations" as long as "there is no indication that the CIJs completely disregarded any particular piece of evidence."[85] As the Co-Prosecutor's Appeal makes clear – the CIJs omitted not just particular pieces of evidence but whole allegations and their accompanying supporting evidence.[86]

34. Despite Im Chaem's assertion that "the main Issue in Case 004/1 was that of personal jurisdiction",[87] she sidesteps how the assessment of personal jurisdiction was actually made. Im Chaem's "plain reasoning"[88] as to what is required when assessing and considering facts amounts to there being no requirement for any reasoning, let alone a mention of alleged crimes. Im Chaem's flawed approach to the evidence relevant to determining personal jurisdiction is encapsulated in her repeated claim that "over one hundred other cadres of equivalent rank to her existed at the relevant time".[89] This statement should be disregarded for a number of reasons. First, Im Chaem misrepresents the quote, omitting that it relates only to the apparent number of district secretaries during the time of the DK.[90] Second, this misleading characterisation does not take account of:

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82 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 1, paras 11-22.
83 **D308/3/1/11** Im Chaem Response, para. 39.
84 **D308/3/1/1** Co-Prosecutor's Appeal, para. 17.
85 **D308/3/1/11** Im Chaem Response, para. 42.
86 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 2, paras 23-37.
87 **D308/3/1/11** Im Chaem Response, para. 43.
88 **D308/3/1/11** Im Chaem Response, para. 46 *referring* to paras 42-44.
89 **D308/3/1/11** Im Chaem Response, paras 5, 89
90 **D308/3** Closing Order (Reasons), para. 316.

(i) Im Chaem's role and authority in Sector 13 of the Southwest Zone;[91] (ii) Im Chaem's role leading and participating in the purge of the Northwest Zone by Southwest Zone cadres;[92] (iii) Im Chaem's position as a member of the Sector 5 Committee;[93] and, (iv) Im Chaem's subsequent elevation to the position of Sector 5 Deputy Secretary.[94]

(i) Im Chaem Mischaracterises Evidence Relating to Forced Marriages

35. Im Chaem notes that "the CIJs were well within their discretion to accord little or no probative value to the evidence implicating Im Chaem in forced marriages".[95] However, the CIJs made no such finding as to the probative value of evidence of Im Chaem's role in forced marriages. Im Chaem invents such a finding in order to avoid the point of the Co-Prosecutor's Appeal – it is the failure of the CIJs to *consider* the evidence of which they were validly seised that is at issue in this ground.

36. Im Chaem attempts to diminish the evidence regarding her involvement in forced marriages at Spean Spreng as merely the evidence of "a single civil party applicant".[96] The evidence in question is Sen Sophon's trial testimony in Case 002/2 and her WRI in Case 004/1 concerning Im Chaem's responsibility for forced marriages.[97] Sen Sophon's evidence is clear: she was a mobile unit worker at Spean Spreng and witnessed a forced marriage ceremony take place.[98] This forced marriage ceremony "happened under Yeay Chaem".[99]

37. Likewise, Im Chaem disparages the evidence of forced marriage victim Thang Thoeuy, suggesting that "[n]o reasonable tribunal could have relied upon it in the manner suggested by the ICP."[100] The "manner suggested" by the Co-Prosecutor was simply to consider the evidence of an individual who was forced to get married, on threat of being killed, in a ceremony supervised by Im Chaem.[101] The ceremony was followed by Im Chaem ordering her subordinates to ensure that the marriages were consummated and to

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91 **D308/3** Closing Order (Reasons), paras 143-150.
92 **D308/3** Closing Order (Reasons), paras 152, 155-158, 160, 173-176, 178-179, 181-185, 308-311.
93 **D308/3** Closing Order (Reasons), para. 166.
94 **D308/3** Closing Order (Reasons), para. 163.
95 **D308/3/1/11** Im Chaem Response, para. 61.
96 **D308/3/1/11** Im Chaem Response, para. 58.
97 *See*, **D308/3/1/1** Co-Prosecutor's Appeal, para. 27.
98 *See*, **D219/494.1.1** Sen Sophon T. 27 July 2015, 15.49.35-15.51.40.
99 **D219/506** Sen Sophon WRI, 15 September 2015, A51-53.
100 **D308/3/1/11** Im Chaem Response, para. 60.
101 **D308/3/1/1** Co-Prosecutor's Appeal, para. 27, *referring* to **D304/2** International Co-Prosecutor's Rule 66 Final Submission Against Im Chaem, 27 October 2016, para. 132.

kill those who refused to have sex.[102] The Closing Order (Reasons) makes no reference to this extremely incriminating evidence concerning Im Chaem's responsibility for the very serious crimes related to forced marriage and rape and the only reasonable interpretation of this omission is that the CIJs failed to take it into account when making their personal jurisdiction decision.

38. Im Chaem asserts that "[l]ogic dictates", and states that "[b]y definition", this evidence was not "sufficiently serious, consistent, or corroborated [...] to provide more than nominal probative support" for the allegations against her.[103] However, Thang Thoeuy's evidence is entirely consistent and patently "serious". Im Chaem's implication that the testimony of victims of such crimes must be corroborated by other witnesses to be worthy of belief is at odds with international jurisprudence, wherein even a conviction at trial can be based on the evidence of a single witness.[104] The sworn evidence of eye-witnesses and victims is patently more than capable of meeting the standard of "probability" applicable to the indictment stage of proceedings.

(ii) Im Chaem Mischaracterises Evidence Relating to Treatment of the Vietnamese

39. Im Cham mischaracterises the CIJs' finding with regard to Wat Preah Net Preah.[105] Im Chaem's claim that the CIJs' finding that the "contours of [Im Chaem's] authority over sector-related matters" was not defined meant that her authority over Wat Preah Net Preah was unclear, is incorrect.[106] Wat Preah Net Preah was located in Preah Net Preah District and the CIJs made clear findings regarding Im Chaem's authority as District Secretary.[107] The CIJs' lack of findings on Im Chaem's role on the Sector 5 Committee does not alter the assessment of Im Chaem's responsibility for Wat Preah Net Preah.[108]

40. Im Chaem's claims regarding Mak Vonny's evidence are also inaccurate. The CIJs did not find that Mak Vonny's statement on crimes against the Vietnamese in Prey Ta Ruth

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102 **D308/3/1/1** Co-Prosecutor's Appeal, para. 27, *referring* to **D304/2** International Co-Prosecutor's Rule 66 Final Submission Against Im Chaem, 27 October 2016, para. 132.

103 **D308/3/1/11** Im Chaem Response, para. 60.

104 *See,* e.g., *Prosecutor v. Duško Tadić,* IT-94-1-A, ICTY, Appeal Judgment, 15 July 1999, paras 57, 65-66; *Prosecutor v. Zlatko Aleksovski,* IT-95-14/1-A, ICTY, Appeal Judgment, 24 March 2000, paras 57, 62, 63; *Prosecutor v. Kordić & Čerkez,* IT-95-14/2-A, ICTY, Appeal Judgment, 17 December 2004, paras 274-275, 293.

105 **D308/3/1/11** Im Chaem Response, paras 63-64.

106 *Contra,* **D308/3/1/11** Im Chaem Response, paras 63-64.

107 **D308/3** Closing Order (Reasons), paras 167-188.

108 **D308/3** Closing Order (Reasons), paras 158-160, 166, 173-175, 177-188, 259.

Execution Site was "unreliable and bore very little probative value".[109] The CIJs made that finding in relation to reports prepared by DC-Cam and other entities,[110] not Mak Vonny's WRI.

(iii) Im Chaem Mischaracterises Evidence Relating to the Purge of the Northwest Zone

41. Im Chaem's assertions that the Closing Order (Reasons) merely found "that she led the transfer of Southwest Zone cadres to the Northwest Zone"[111] and "dismissed the claim that she played a key role in the crimes" committed during the purge of the Northwest Zone[112] is contradicted by reading the Closing Order. The CIJs found, *inter alia*:

> "The second wave was in 1977 and early 1978, when Ta Mok sent Southwest Zone cadres, together with their families, to arrest and replace Northwest Zone cadres at the commune, cooperative, and district levels, and was led by Im Chaem";[113]
>
> "Ta Mok sent 500 to 600 families by train from Takeo, in the Southwest Zone, to the Northwest Zone. Im Chaem led the group during the transfer. The group, which also included between 300 and 500 soldiers, stopped for one or two nights in Phnom Penh before reaching the Northwest Zone. In Phnom Penh, they were addressed by Pol Pot, with Im Chaem sitting in the front seats";[114]
>
> "After the Southwest Zone cadres and Im Chaem took control of Sector 5 in mid-1977, they carried out a systematic campaign of arrests targeting Northwest cadres at the cooperative, commune, district, and sector levels";[115]
>
> "After the arrival of the Southwest Zone cadres, Northwest Zone military and civilian cadres were arrested and detained in security centres throughout the Northwest Zone and in S-21 in Phnom Penh, assigned to various worksites in the Northwest Zone for 're-fashioning', or killed";[116]
>
> "Ta Mok's purge included Sector 5 of the Northwest Zone, where local leaders and lower-ranking cadres were arrested and killed, starting in mid-1977, by the Southwest Zone cadres [...] Im Chaem relocated to Sector 5 of the Northwest Zone in mid-1977, and replaced former Northwest cadres both at the district and sector levels";[117]

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109 **D308/3/1/11** Im Chaem Response, para. 67.
110 **D308/3** Closing Order (Reasons), para. 135.
111 **D308/3/1/11** Im Chaem Response, para. 55.
112 **D308/3/1/11** Im Chaem Response, para. 56.
113 **D308/3** Closing Order (Reasons), para. 152.
114 **D308/3** Closing Order (Reasons), para. 156.
115 **D308/3** Closing Order (Reasons), para. 185.
116 **D308/3** Closing Order (Reasons), para. 153.
117 **D308/3** Closing Order (Reasons), para. 154.

> "Ta Mok, Im Chaem, and other Southwest Zone cadres shared the plan to replace the Northwest Zone cadres in the administration of the Northwest Zone and to successfully implement the CPK's policies. They did so by arresting and killing local cadres at all level of the administration, from the zone to the cooperative level".[118]

42. Im Chaem defends the failure of the CIJs to weigh Im Chaem's role in the purge – in terms of considering the resulting crimes – of Northwest cadre by arguing that "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."[119] Im Chaem does not explain why she considers that the CIJs' failure to consider the killing of a minimum of 1,200 people[120] is only a "detail" and of "marginal relevance" to assessing Im Chaem's responsibility. A Charged Person's contribution to crimes of such gravity is clearly a necessary step in any consideration of whether a suspect is among those "most responsible" and within the ECCC's personal jurisdiction.

(iv) Im Chaem Misinterprets Evidence Relating to the Various Other Allegations

43. Im Chaem does not contest the Co-Prosecutor's submission that the Closing Order failed to consider facts of which the CIJs were seised regarding torture at Phnom Trayoung Security Centre and Chamkar Khnol Security Office, imprisonment and enforced disappearance at Wat Ang Srei Mealy, and inhumane living conditions at Chamkar Khnol Security Office.[121] Im Chaem's sole submission on this point is that the Appeal does not provide "any explanation of how any error invalidates any aspect of the Closing Order or otherwise amounts to an abuse of discretion".[122] Clearly, the details of crimes committed are integrally relevant to the determination of Im Chaem's responsibility for, and the gravity of, those crimes. The failure of the CIJs to assess the evidence on facts of which they were seised and make a proper determination of Im Chaem's responsibility for the purposes of determining personal jurisdiction lies at the heart of the Appeal.

IV. GROUND 3: THE CIJS ERRED IN LAW AND FACT WHEN DEFINING THE CRIME OF EXTERMINATION AND APPLYING THE DEFINITION TO THE FINDINGS

118 **D308/3** Closing Order (Reasons), para. 308.
119 **D308/3/1/11** Im Chaem Response, para. 56 (original emphasis).
120 **D308/3/1/1** Co-Prosecutor's Appeal, para. 26.
121 **D308/3/1/11** Im Chaem Response, para. 72.
122 **D308/3/1/11** Im Chaem Response, para. 72.

44. Contrary to Im Chaem's erroneous suggestion that the Co-Prosecutor is challenging the "specific contours of a substantive crime",[123] the Co-Prosecutor is challenging the incorrect application of the law regarding the crime of extermination.[124] The same is true for the crime of enforced disappearance as an other inhumane act in Ground 4.[125] Im Chaem's misrepresentation of the Co-Prosecutor's Appeal is an attempt to categorise the Co-Prosecutor's grounds as beyond the scope of appellate review. A cursory reading of the Co-Prosecutor's Appeal demonstrates the error of Im Chaem's arguments, however.[126] The CIJs did not apply the well-settled and defined law as it relates to the crimes of extermination and enforced disappearance as an other inhumane act.[127] The Co-Prosecutor's argument is not one of definitions, but of the misapplication of the existing law.[128] Im Chaem advocates a position that would effectively prevent rectification of clear legal error and provide no recourse for appeal. This is at odds with basic legal principles. Moreover, Im Chaem disregards the Pre-Trial Chamber's jurisprudence, wherein the Pre-Trial Chamber has expressly reviewed the definition of domestic Cambodian and international crimes, including specifically reviewing the *mens rea* thereof, on appeal.[129]

45. Im Chaem argues that because the CIJs concluded that the Court had no personal jurisdiction "the question of Ms. IM Chaem's *mens rea* did not arise for consideration and was not assessed."[130] This peculiar legal construction suggests that the evidence upon which the determination of personal jurisdiction had to be made was not assessed – and in Im Chaem's view, need not have been assessed.[131]

46. Im Chaem's arguments regarding the *mens rea* standard applied for the crime of extermination in the Closing Order are inherently contradictory. Im Chaem asserts that "the CIJs did not import an *ex ante* requirement into the *mens rea* of the crime [of extermination]"[132] and that the Co-Prosecutor's argument that the CIJs did so is supported

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123 **D308/3/1/11** Im Chaem Response, para. 22.
124 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 3, paras 38-46.
125 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 4, paras 47-57.
126 **D308/3/1/1** Co-Prosecutor's Appeal, paras 38-57.
127 **D308/3/1/1** Co-Prosecutor's Appeal, paras 38-57.
128 *Contra*, **D308/3/1/1** Im Chaem Response, para. 23.
129 **D99/3/42** PTC Decision on Appeal Against Closing Order, paras 59-81.
130 **D308/3/1/11** Im Chaem Response, para. 75.
131 **D308/3/1/11** Im Chaem Response, para. 75.
132 **D308/3/1/11** Im Chaem Response, para. 79.

by "neither a literal nor purposive reading of the Closing Order".[133] In the same breath, however, Im Chaem states that the "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 introduce a new legal element".[134]

47. Im Chaem characterises the novel requirement of an *ex ante mens rea* as merely a "reasonable evidential requirement"[135] for establishing the requisite *mens rea* in relation to killings committed at Phnom Trayoung Security Centre. Im Chaem's claims are factually and legally wrong. First, contrary to Im Chaem's description of killings at Phnom Trayoung Security Centre "as fragmented" and committed by "disparate" perpetrators,[136] the CIJs estimated that "more than 2,000 prisoners were executed by the prison guards between mid-1977 and January 1979"[137] and "hundreds of people died of starvation".[138] These were not random or unconnected incidents.[139] Detainees "were routinely executed"[140] and "[g]uards boasted about executing prisoners and bragged among themselves as to who had killed more people."[141] Further, Im Chaem's involvement and intent is clearly proven by the facts found in the Closing Order (Reasons). Im Chaem had "overall authority" over Phnom Trayoung Security Centre and "oversaw its operation".[142] Im Chaem appointed Tum Soeun to be in charge of Phnom Trayoung.[143] Im Chaem was his "direct superior" – Tum Soeun "reported directly to her" and he "received orders from Im Chaem either personally or through her messengers."[144] Im Chaem "held monthly or bi-monthly meetings with the cooperative chiefs and Tum Soeun to determine who had to be sent to the security centre."[145] Prisoners were arrested "on the basis of letters either signed by Im Chaem or signed by other sector-level cadres

133 **D308/3/1/11** Im Chaem Response, paras 78-79.
134 **D308/3/1/11** Im Chaem Response, para. 80.
135 **D308/3/1/11** Im Chaem Response, para. 82.
136 **D308/3/1/11** Im Chaem Response, para. 81.
137 **D308/3** Closing Order (Reasons), para. 189.
138 **D308/3** Closing Order (Reasons), para. 220.
139 *Contra* **D308/3/1/11** Im Chaem Response, paras 81-82.
140 **D308/3** Closing Order (Reasons), para. 208.
141 **D308/3** Closing Order (Reasons), para. 209.
142 **D308/3** Closing Order (Reasons), para. 195.
143 **D308/3** Closing Order (Reasons), para. 192.
144 **D308/3** Closing Order (Reasons), para. 195.
145 **D308/3** Closing Order (Reasons), para. 200.

and forwarded to him by Im Chaem."[146] Tum Soeun admitted executing prisoners "on the orders of Im Chaem."[147]

48. Second, Im Chaem argues that the crime of extermination requires an additional element to be proven *depending on the circumstances of the case*.[148] Im Chaem's claim that leaving out the requirement of an *ex ante* intent risks violating the principle of culpability[149] fails to justify the introduction of a new element to the crime of extermination. Plainly, and contrary to Im Chaem's suggestion, this is not "consistent with standard international approaches to the crime [of extermination]".[150] The massiveness requirement of exterminations can be met through a series of killings or a course of conduct,[151] and there is no legal basis to require that the perpetrator forms the intent to kill a "massive" number at the beginning of the series of killings as opposed to at any point during the killings.[152]

V. GROUND 4: THE CIJS ERRED IN LAW AND FACT WHEN DEFINING THE CRIME OF ENFORCED DISAPPEARANCE AND APPLYING THE DEFINITION TO THE FINDINGS

49. Im Chaem repeats the legally incongruous position regarding the assessment of evidence of responsibility, stating that "[a]s 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*."[153] Review of the Closing Order shows a different reality. The CIJs held that there was no evidence that families of the disappeared made inquiries about the fate or whereabouts of the disappeared and that "*[f]or this reason alone*, the evidence does not allow us to conclude that the crime against humanity of other inhumane acts by enforced disappearance was committed".[154]

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146 **D308/3** Closing Order (Reasons), para. 200.
147 **D308/3** Closing Order (Reasons), paras 201, 212.
148 **D308/3/1/11** Im Chaem Response, paras 80-84.
149 **D308/3/1/11** Im Chaem Response, para. 84.
150 **D308/3/1/11** Im Chaem Response, para. 82.
151 *See* e.g., **F36** Case 002/1 Appeal Judgment, paras 551-552; *Prosecutor v. Stanišić & Župljanin,* IT-08-91-A, ICTY, Appeal Judgement, 30 June 2016, para. 1022; *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-A, ICTY, Appeal Judgement, 8 April 2015, para. 147; *The Prosecutor v. Pauline Nyiramasuhuko et al.,* ICTR-98-42-A, ICTR, Appeal Judgement, 14 December 2015, paras 2125-2126.
152 **D308/3/1/1** Co-Prosecutor's Appeal, paras 38-45.
153 **D308/3/1/11** Im Chaem Response, para. 92 (emphasis added).
154 **D308/3** Closing Order (Reasons), para. 302 (emphasis added).

50. Im Chaem incorrectly asserts that the Co-Prosecutor's Appeal "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."[155] This mischaracterises the Appeal. Instead, the Co-Prosecutor requested that the Pre-Trial Chamber correct the CIJs' clear error of applying the definition of enforced disappearance as a standalone crime rather than enforced disappearance as an other inhumane act, which resulted in a deficient evaluation of Im Chaem's personal responsibility. The Appeal requests that the Pre-Trial Chamber apply the correct law as set down by the Supreme Court Chamber in the Case 002/1 Appeal Judgment[156] and reassess, or send the case file back to the CIJs to reassess, the personal jurisdiction decision.

51. Im Chaem offers that "[t]here 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."[157] However, reading the Supreme Court Chamber's Appeal Judgment in Case 002/01 regarding the crime of enforced disappearance as an other inhumane act and comparing it to the definition of the crime of enforced disappearance applied to the facts in the Closing Order demonstrates the legal error.[158] The Supreme Court Chamber described the Trial Chamber's approach – which was adopted by the CIJs in the Closing Order – as "anachronistic and legally incorrect".[159] The only issue "of relevance" was whether "the specific circumstances of the case at hand, actually fulfilled the definition of other inhumane acts."[160] Yet the CIJs chose to follow the Trial Chamber in not applying the definition of other inhumane acts to the facts, but a definition of the crime of enforced disappearance, which the Supreme Court Chamber held was not a recognised crime under customary international law in 1975.[161]

52. Im Chaem further claims that it "cannot be assumed" that the disappearances caused serious mental or physical suffering.[162] No such assumptions are necessary, however. The

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155 **D308/3/1/11** Im Chaem Response, para. 92.
156 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 4, paras 47-57.
157 **D308/3/1/11** Im Chaem Response, para. 94.
158 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 4, paras 47-57.
159 Case 002/01-**F36** Appeal Judgment, 23 November 2016, para. 589 ("Case 002/1 Appeal Judgment").
160 **F36** Case 002/1 Appeal Judgment, para. 589.
161 **F36** Case 002/1 Appeal Judgment, para. 589.
162 **D308/3/1/11** Im Chaem Response, para. 98.

Supreme Court Chamber in Case 002/1, when addressing the threshold of other inhumane acts, held that the evacuation of Phnom Penh:

> violated the right to liberty, the right to security of person and the right to freedom of movement and residence. In its physical circumstances, it infringed the freedom from cruel, inhuman or degrading treatment. As such, it caused serious mental and physical suffering and injury and constituted a serious attack against human dignity.[163]

53. The CIJs found, *inter alia*, that at Spean Spreng: "armed and unarmed guards watched over the workers to prevent their escape and arrested those who committed mistakes",[164] there was "a general climate of fear at the worksite",[165] that "[a]rrests and disappearances of workers were common occurrences",[166] and, that "[r]easons for arrests varied. People were arrested for failing to meet their required work quotas [...] [o]ther reasons included family ties, for instance with persons of Vietnamese origin, or attempts to escape or leave the site to visit family members".[167] Given these findings, it is clear that the fiercely oppressive and fearful conditions at Spean Spreng and the frequent unexplained disappearances created and caused severe mental suffering for those taken away as well as those connected to them who were left behind.

VI. GROUND 5: THE CIJS ERRED IN FACT WHEN FINDING THAT IM CHAEM WAS NOT KOH ANDET DISTRICT SECRETARY

54. Im Chaem incorrectly claims that the Co-Prosecutor failed to adhere to the requirement that evidence must satisfy the correct standard of proof when discussing her DC-Cam statements.[168] Im Chaem fails to explain what she considers to be the correct standard of proof to assess evidence at this stage of proceedings. However, as the CIJs noted, the threshold for factual findings at the Closing Order stage is "a probability standard [...] and not [...] the 'beyond reasonable doubt' standard required for a conviction following a trial."[169] As the Co-Prosecutor's Appeal demonstrates, Im Chaem's admission regarding her position coupled with corroborating WRIs readily surpasses this standard

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163 **F36** Case 002/1 Appeal Judgment, para. 656.
164 **D308/3** Closing Order (Reasons), para. 231.
165 **D308/3** Closing Order (Reasons), para. 234.
166 **D308/3** Closing Order (Reasons), para. 238.
167 **D308/3** Closing Order (Reasons), para. 238.
168 **D308/3/1/11** Im Chaem Response, para. 108.
169 **D308/3** Closing Order (Reasons), 10 July 2017, para. 2. *See* also, Case 001-**D99** Closing Order indicting Kaing Guek Eav alias Duch, 18 August 2008, para. 130; Case 002-**D427** [REDACTED] Closing Order, 15 SeptD219ember 2010, paras 1321, 1323.

of proof.[170] However, the CIJs did not properly assess and in some instances omitted relevant witness evidence.[171] No reasonable fact finder could fail to conclude that Im Chaem held these positions.

55. Further, Im Chaem's suggestion that her interviews with DC-Cam were "taken in violation of the protection against self-incrimination"[172] is absurd. The right against self-incrimination applies in a judicial setting to prevent an individual from being compelled to make any statements against their own interests. Im Chaem's choice to volunteer information regarding her roles, positions and responsibilities within the Khmer Rouge to DC-Cam and other organisations is not a basis for any claim against self-incrimination. The Supreme Court Chamber in Case 002/1 endorsed the Trial Chamber's use of Nuon Chea's out of court statements – both in terms of relying on inculpatory segments supported by other evidence and its decision to reject certain self-serving exculpatory portions.[173] Im Chaem's admissions regarding her position as Koh Andet District Secretary[174] and Sector 13 Committee Member[175] are corroborated by WRIs.[176]

56. Im Chaem's treatment of that corroborative evidence is also erroneous. Im Chaem's arguments betray a lack of understanding of the facts. For example, Im Chaem erroneously suggests that the Co-Prosecutor conflates "the district *military* and district *committee* [which] were distinct entities".[177] First, the CPK Statute makes the District Committee responsible for armed forces in the district, mandating the District Committee to, *inter alia*,

> tightly grasp the popular masses in the unions and cooperatives and in the Revolutionary Army within its District framework politically, ideologically, and organizationally by constantly arming them politically, ideologically, and organizationally in the tasks of national defense and the construction of Democratic Kampuchea.[178]

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170 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 5, paras 58-69.

171 *See* also e.g., *Prosecutor v. Momčilo Perišić,* IT-04-81-A, ICTY, Appeal Judgement, 28 February 2013, paras 92-96; *Protais Zigiranyirazo v. The Prosecutor*, ICTR-01-73-A, ICTR, Appeal Judgement, 16 November 2009, para. 45; *Prosecutor v. Sefer Halilović*, IT-01-48-A, ICTY, Appeal Judgement, 16 October 2007, para. 121; *Prosecutor v. Kvočka et al.,* IT-98-30/1-A, ICTY, Appeal Judgement, 28 February 2005, para. 23.

172 **D308/3/1/11** Im Chaem Response, para. 109. *See* also, para. 107.

173 **F36** Case 002/1 Appeal Judgment, paras 358-359.

174 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 5, paras 58-69.

175 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 6, paras 70-81.

176 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 5, paras 58-69; Ground 6, paras 70-81.

177 **D308/3/1/11** Im Chaem Response, para. 115.

178 **D1.3.20.1** CPK Statute, January 1976, Art. 13(2), EN 00184041.

57. Second, the evidence – including Im Chaem's admission that she arrived in Preah Net Preah District with 500 armed militiamen and proceeded to disarm existing militia in the district[179] – demonstrates that Im Chaem, as District Secretary in the Northwest Zone, controlled the armed forces in the district.[180]

58. Im Chaem also erroneously seeks to undermine witness Riel Son based on a lack of understanding of the evidence. Im Chaem claims that Riel Son's evidence that Im Chaem "was Commune Committee and later was appointed District Committee"[181] "provides only support for the proposition that Ms. IM Chaem was a member of a 'District Committee' and not a district *secretary*."[182] As the Case File repeatedly shows, witnesses and OCIJ investigators frequently used the term "committee" when referring to an individual to denote that the person was a "secretary".[183]

VII. GROUND 6: THE CIJS ERRED IN FACT WHEN FINDING THAT IM CHAEM WAS NOT THE SECTOR 13 COMMITTEE MEMBER

59. Im Chaem's claims with respect to her admissions regarding her positions on the Sector 13 Committee rely on the same arguments as she advanced regarding Ground 5 above and are equally flawed. Additionally, Im Chaem misrepresents the Closing Order to suggest that DC-Cam interviews "may be 'relied on only when corroborated by other sources'".[184] In fact, the Closing Order made no such unequivocal determination, merely noting with regard to "statements prepared by other entities"[185] (and therefore not referring to DC-Cam interviews in particular nor Im Chaem's interviews containing admissions specifically) that "a more cautious approach has been adopted in their assessment, and the information contained therein has been relied on only when

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179 **D1.3.12.1** Im Chaem Interview, 26 April 2007, EN 00217519 ["I brought in five hundreds (military) forces from the Southwest (Zone) in Takeo province to join movement forces (in my district). These five hundreds (military) forces were then mobilized/placed at (every) old construction sites and including five hundred families of civilians from three provinces were deployed in every villages of the district."].

180 *See*, **D304/2** International Co-Prosecutor's Rule 66 Final Submission Against Im Chaem, 27 October 2016, fn. 696. *See* also, **D119/144** Lat Suoy WRI, 18 August 2014, A53; **D118/242** Khoem Boeurn WRI, 21 May 2014, A28.

181 **D118/181** Riel Son WRI, 18 February, A224.

182 **D308/3/1/11** Im Chaem Response, para. 116 (original emphasis).

183 *See*, e.g., **D219/23** Pum Koh WRI, 6 October 2014, A42, A50, Q55, Q109; **D119/82** Neang Ouch WRI, 28 January 2014, A23, Q27, Q40, Q93, Q94, Q95, Q103, A103; **D119/110** Chum Kan, WRI, 26 March 2014, A41; **D119/94** Bou Mao WRI, 21 February 2014, A42; **D219/588** Kuy Yin WRI, 5 November 2015, A32; **D118/278** Nam Im WRI, 21 July 2014, A27; **D219/4.1** Suon Mot DC-Cam Statement, 8 August 2014, EN 01056790, EN 01056816, 01056819.

184 **D308/3/1/11** Im Chaem Response, para. 120.

185 **D308/3** Closing Order (Reasons), para. 108.

corroborated by other sources."[186] In making her arguments that the DC-Cam reports of her interviews are not reliable, Im Chaem fails to note that the interviews were recorded.[187] These interviews contain Im Chaem's own words and her Response offers no reason why her own statements should not be considered reliable.

60. Further, contrary to Im Chaem's assertion, the Co-Prosecutor only referred to civil party applications as *corroborative* of other evidence showing that Im Chaem was on the Sector 13 Committee.[188] Her allegations in this regard are therefore misplaced and easily rectified by reviewing the Co-Prosecutor's Appeal.[189]

61. Im Chaem makes a series of unsupported assertions regarding the relevance and probity of the witnesses who gave the CIJs evidence demonstrating her position on the Sector 13 Committee.[190] For example, Im Chaem asserts that the Co-Prosecutor "disregarded" Pech Chim's evidence that Im Chaem "was not a Sector Secretary".[191] However, the Appeal never claimed that Im Chaem was a Sector Secretary.[192] Instead, the Co-Prosecutor's Appeal quoted Pech Chim's evidence that Im Chaem "was on the sector committee and in charge of women [affairs]" in Sector 13.[193] There is nothing inconsistent about Pech Chim's statements that Im Chaem was on the Sector 13 Committee but not Sector 13 Sector Secretary.

62. While the Co-Prosecutor's Appeal quoted witness Bun Thoeun that he heard that Im Chaem was on the Sector 13 Committee[194] instead of the "Sector 14 Committee" as in his WRI,[195] Im Chaem disregards the fact that there was no Sector 14 during the DK regime and that it is clear from the totality of the WRI that both the CIJs' investigator asking the questions and witness Bun Thoeun were referring to Sector 13.[196]

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186 **D308/3** Closing Order (Reasons), para. 108.
187 *See* e.g., **D123/1/5.1cR** CD Recording of interview of Im Chaem 2012, 6 April 2012; **D123/1/5.1bR** CD Recording of interview of Im Chaem 2008, 20 January 2008; **D123/1/5.1aR** CD Interview of Im Chaem 2007, 4 March 2007.
188 **D308/3/1/11** Im Chaem Response, para. 122.
189 **D308/3/1/1** Co-Prosecutor's Appeal, para. 79.
190 **D308/3/1/11** Im Chaem Response, paras 124-130.
191 **D308/3/1/11** Im Chaem Response, para. 127.
192 **D308/3/1/1** Co-Prosecutor's Appeal, Ground 6, paras 70-81.
193 **D308/3/1/1** Co-Prosecutor's Appeal, para. 75.
194 **D308/3/1/1** Co-Prosecutor's Appeal, para. 76.
195 **D308/3/1/11** Im Chaem Response, para. 127.
196 *See*, **D118/274** Bun Thoeun WRI, 10 July 2014, A2, A20, A21, A23, A58, A64, A78.

63. Additionally, and contrary to Im Chaem's claim, the Co-Prosecutor did not misstate Khoem Boeun's evidence regarding whether Im Chaem spoke about "security, arrests, enemies, traitors [and] purges".[197] When asked: "Did IM Chaem ever talk about the issues of security, arrests, enemies, traitors, or purges",[198] Khoem Boeun replied "If the meeting chairman talked about those issues, IM Chaem would comment on those problems too."[199]

64. Im Chaem concludes that the 11 witnesses and four corroborating civil parties cited in the Co-Prosecutor's Appeal,[200] coupled with her own admissions, "was an inadequate basis for drawing any conclusions" "in light of the burden and standard of proof".[201] Clearly however, Im Chaem's corroborated admissions that she held a position on the Sector 13 Committee readily surpass the "probability standard" set down by the CIJs.[202]

VIII. CONCLUSION

65. Im Chaem appears to acknowledge responsibility for the more than 2,000 victims at Phnom Trayoung Security Centre (alone), stating that the CIJs had taken "into account the most relevant aspects of the evidence"[203] and "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."[204]

66. Im Chaem's sole submission on these (conservative[205]) figures of deaths at a single crime site under her authority is that classifying the 2,000 deaths as extermination instead of murder is not "capable of materially impacting the assessment of whether the threshold of personal jurisdiction has been satisfied."[206]

67. The core tenet of Im Chaem's Response advocates for cursory, unreasoned and summary conclusions when a case is dismissed – to restrict as much as possible the factual findings required by the CIJs when determining lack of personal jurisdiction. This mirrors Im Chaem's attempts to limit public access to the CIJs findings on the years' long

197 **D308/3/1/11** Im Chaem Response, para. 129.
198 **D118/242** Khoem Boeun WRI, 21 May 2014, Q99.
199 **D118/242** Khoem Boeun WRI, 21 May 2014, A99.
200 **D308/3/1/11** Im Chaem Response, para. 128.
201 **D308/3/1/11** Im Chaem Response, para. 130.
202 **D308/3** Closing Order (Reasons), para. 2.
203 **D308/3/1/11** Im Chaem Response, para. 88.
204 **D308/3/1/11** Im Chaem Response, para. 88.
205 **D308/3** Closing Order (Reasons), paras 208-221.
206 **D308/3/1/11** Im Chaem Response, para. 88.

investigation by redacting the Closing Order (Reasons) to the point of obscurity.[207] Such burying of the facts and the results of legal adjudication damages the judicial process; the rights of the victims and the public; and, serves no valid judicial or public interests.

IX. RELIEF REQUESTED

68. For the foregoing reasons, the Co-Prosecutor requests the Pre-Trial Chamber to correct the legal and factual errors enumerated in the Appeal and either:

(1) send the Case File back to the CIJs with instructions for them to re-evaluate whether Im Chaem falls within the personal jurisdiction of the Court; or in the alternative,

(2) that the Pre-Trial Chamber itself re-evaluates the case in light of the legal and factual errors set out in the Appeal.

Respectfully submitted,

Date	Name	Place	Signature
16 October 2017	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh	

[207] **D309/2/1/3** Response to the International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redactions or, Alternatively, Request for Reclassification of Closing Order (Reasons), 4 September 2017; **D309/1** Im Chaem's Response to the International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be made Public (D309), 20 March 2017. *See* also, **D306** 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.