

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**YIM TITH'S COMBINED RESPONSE TO BRIEFS SUBMITTED BY *AMICI CURIAE* PURSUANT TO D306**

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Mr YIM Tith, through his Co-Lawyers ('the Defence'), files the following combined response to the briefs submitted by the *amici curiae* ('Briefs') pursuant to the *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs* ('Request')<sup>1</sup> and Rule 33(2) of the Internal Rules ('Rules') of the Extraordinary Chambers in the Courts of Cambodia ('ECCC'). The Defence requests to file this response in English with the Khmer translation to follow in order to comply with the timeline for response set in the Request.<sup>2</sup>

## I. PROCEDURAL HISTORY

1. On 19 April 2016, the International Co-Investigating Judge filed the Request, asking for submissions and *amicus curiae* briefs addressing the issue of whether, under customary international law applicable between 1975 and 1979 ('Relevant Period'), an attack by a State or organisation against members of *its own* armed forces may amount to an attack directed against a civilian population for the purpose of Article 5 of the Establishment Law ('Issue').<sup>3</sup> In the Request, the International Co-Investigating Judge informed the parties to Case 003 and Case 004 of their right to file a combined response to the briefs submitted by *amici curiae*.<sup>4</sup> The International Co-Investigating Judge made it clear that he would not allow responses to the filings of other parties.<sup>5</sup>
2. On 19 May 2016, the Defence filed *Yim Tith's Submission on the Interpretation on the Term 'Civilian Population' for the Purposes of Article 5 of the Establishment Law* ('Submission').<sup>6</sup>
3. On 19 May 2016, submissions were filed also in response to the Request by the International Co-Prosecutor,<sup>7</sup> the Co-Lawyers for Mr MEAS Muth<sup>8</sup> and the Co-Lawyers for Mr AO An.<sup>9</sup>

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<sup>1</sup> *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs*, 19 April 2016, D306, para 13.

<sup>2</sup> Request, para 13. See Email from Interpretation and Translation Unit to the Defence, 'Re: Translation of Motion', 5 July 2016.

<sup>3</sup> Request, para. 3.

<sup>4</sup> Request, para 13.

<sup>5</sup> Request, para 14.

<sup>6</sup> *Yim Tith's Submission on the Interpretation on the Term 'Civilian Population' for the Purposes of Article 5 of the Establishment Law*, 19 May 2016, D306/1.

4. A further total of eleven *amicus curiae* briefs ('Briefs') were submitted by academics, representatives of law schools, legal experts and other interested parties: Ben Saul ('D306/4');<sup>10</sup> Catherine Drummond, Philippa Webb, Dapo Akande ('D306/5');<sup>11</sup> Track Impunity Always ('D306/6');<sup>12</sup> Darryl Robinson ('D306/7');<sup>13</sup> Ido Rosenzweig ('D306/8');<sup>14</sup> Joanna Nicholson ('D306/9');<sup>15</sup> Nicholas Tsagourias ('D306/10')<sup>16</sup>; Oliver Windridge ('D306/11');<sup>17</sup> Sarah Williams and Rosemary Grey ('D306/12');<sup>18</sup> Center for International and Comparative Law, University of Baltimore School of law ('D306/13');<sup>19</sup> and Queen's University Belfast Human Rights Centre ('D306/14').<sup>20</sup>
5. On 26 May 2015, the parties in Case 003 and Case 004 received clarification from the Office of the Co-Investigating Judges that the parties had 15 days to file a combined response to the *amicus curiae* briefs received, from the date of the notification of the Khmer version.<sup>21</sup>

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<sup>7</sup> *International Co-Prosecutor's Response to the International Co-Investigating Judge's Call for Submissions Regarding Crimes Against Humanity*, 19 May 2016, D306/2.

<sup>8</sup> *Case 003, Meas Muth's Submission on the Question of Whether Under Customary International Law in 1975-1979 An Attack by a State or Organization Against Its Own Armed Forces Could Amount to an Attack Directed Against a Civilian Population for Purposes of Article 5 of the Establishment Law*, 19 May 2016, D191/2.

<sup>9</sup> *Ao An's Submission on Whether an Attack by a State or Organisation Against Members of its Own Armed Forces Could Qualify as a Crime Against Humanity Under Customary International Law in 1975-1979*, 19 May 2016, D306/3.

<sup>10</sup> *Amicus Curiae Brief in Cases 003 and 004 – Professor Ben Saul*, 19 May 2016, D306/4.

<sup>11</sup> *Amicus Curiae Brief for Cases 003 and 004*, 19 May 2016, D306/5.

<sup>12</sup> *Amicus Curiae Brief*, 19 May 2016, D306/6.

<sup>13</sup> *Amicus Curiae Brief of Professors Robinson, deGuzman, Jalloh and Cryer on Crimes Against Humanity (Cases 003 and 004)*, 17 May 2016, D306/7.

<sup>14</sup> *Brief of Ido Rosenzweig, Amicus Curiae on the question whether under customary international law applicable between 1975 and 1979, an attack by a state or organization against members of its own armed forces may amount to an attack directed against a civilian population for the purposes of Article 5 of the ECCC Law (crimes against humanity)*, undated, D306/8.

<sup>15</sup> *Brief of Dr. Joanna Nicholson as Amicus Curiae in Support of Neither Party*, 15 May 2016, D306/9.

<sup>16</sup> *Amicus Curiae for International Co-Investigating Judge*, 17 May 2016, D306/10.

<sup>17</sup> *Amicus Curiae Brief in Response to Call for Submissions by the Parties in the Cases 003 and 004 and Call for Amicus Curiae Briefs*, undated, D306/11.

<sup>18</sup> *Amicus Curiae Brief Filed by Drs Williams and Grey in Response to Call for Amicus Curiae Briefs in Cases 003 and 004 dated 19 April 2016*, 19 April 2016, D306/12.

<sup>19</sup> *Amicus Brief filed by the Center for International and Comparative Law, University of Baltimore School of Law on the Legality of Targeting Members of One's Own Military*, 18 May 2016, D306/13.

<sup>20</sup> *Queen's University Belfast Human Rights Centre Response to the ECCC Office of the Co-Investigating Judges' 'Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs'*, 12 May 2016, D306/14.

<sup>21</sup> See Email from Chanlyda Chhay, on behalf of the International Co-Investigating Judge, 'Clarification on D191 in Case File 003 and D306 in Case File 004', 26 May 2016.

6. On 24 June 2016, the parties received notification of the Khmer version of the total number of *amicus curiae* briefs.<sup>22</sup>

## II. RESPONSE

### **a. The Co-Investigating Judges must not interpret Crimes Against Humanity ('CAH') in order to achieve a purported moral or ideological aim**

7. Several Briefs argue that CAH must be interpreted to fulfil a moral or ideological aim.<sup>23</sup> These Briefs err by defining the term 'any civilian population' in order to reflect this aim, rather than the state of customary international law during the Relevant Period.
8. D306/10 asserts that the aim of CAH is to protect human dignity and protect people from massive violations of human rights.<sup>24</sup> D306/11 argues that members of the armed forces should be included as potential victims of CAH if they are 'targeted by a regime as a part of a widespread and systematic attack based on, *inter alia*, ethnicity or religion (crimes against humanity)' as this is 'in line with both the spirit of the creation of crimes against humanity and its application up to 1975'.<sup>25</sup>
9. Similarly, D306/8 accepts that 'there is no precedent in jurisprudence for using the "crimes against humanity" framework to investigate or prosecute the commission of crimes against one's own combatants' but argues that 'the absence of such practice should not automatically lead to a conclusion that this type of population is excluded from the protection of that framework'.<sup>26</sup> The brief goes on to make a 'moral' and 'merit' based argument for including a State's own combatants as potential victims of CAH.

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<sup>22</sup> Email from Case File Officer Notification, '*Translations: Case File No. 004*', 24 June 2016.

<sup>23</sup> See D306/8, D306/10 and D306/11.

<sup>24</sup> D306/10, para 20.

<sup>25</sup> D306/11, para 21.

<sup>26</sup> D306/8, p. 5.

10. CAH cannot be correctly defined by reference to moral, ideological or ‘spirit’ based aims. The effect of attributing such aims to a criminal offence is to blur its definition and offend the principle of legal certainty. This is because the definition of ‘any civilian population’ would adapt in order to meet the moral or ideological aims that are being attributed to the offence of CAH. D306/10 demonstrates this by asserting that ‘any civilian population’ includes both ‘citizens’ and all ‘people’.<sup>27</sup> While this may achieve the purpose of protecting human dignity, it is not an accurate reflection of definition of the term ‘any civilian population’ during the Relevant Period.
11. This method of purposive interpretation also offends the principle of legality. This is because it defines CAH with reference to current moral and ideological mores. An example of this error arises in D306/10, which suggests that CAH were codified in order to achieve the moral aim of protecting all *people* from the actions of states.<sup>28</sup> As Cassese notes, the states that participated in defining CAH were overwhelmingly concerned with ensuring the new crimes did not interfere with their state sovereignty.<sup>29</sup> The expansive interpretation of CAH proposed by D306/10 does not accord with the legal mores of the Relevant Period and thus offends the principle of legality.
12. The Co-Investigating Judges (‘CIJs’) must not look to the purported moral or ideological aims of CAH define the term ‘any civilian population’. Instead the CIJs must define this term in accordance with customary international law (‘CIL’) applicable during the Relevant Period.

**b. The Co-Investigating Judges must not adopt a purposive approach to the definition of CAH**

13. A number of Briefs adopt a purposive approach to interpreting CAH, by looking to the purported ‘purpose’ behind the development of CAH. For example, D306/11 argues that CAH ‘plugged the gaps and completed the quiver of international crimes

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<sup>27</sup> D306/10, para 20.

<sup>28</sup> *Ibid.*

<sup>29</sup> Antonio Cassese and Paola Gaeta, *Cassese’s International Criminal Law*, Oxford University Press, 2013, p. 86.

in the international communities' possession to stop regimes and their leaders avoiding criminal responsibility for attacks on *any person*'.<sup>30</sup>

14. Article 5 of the ECCC Law defines the potential victims of CAH as 'any civilian population'. This is sufficiently clear and unambiguous and does not require recourse to an investigation of the purported 'purpose' of CAH. Furthermore, such an approach is premised on the idea that CAH was developed by a unified international community within the context of a wider International Criminal Law ('ICL') project. This does not reflect how CAH developed after the Second World War, nor does it accurately portray the state of CIL in 1975.<sup>31</sup>
15. As set out in the Submission, while the CIJs may look to the *context* in which CAH was codified in order to assist in ascertaining its definition under CIL during the Relevant Period, they should not seek to identify the 'purpose' of codifying CAH.<sup>32</sup>

**c. The Co-Investigating Judges must not look to other legal regimes to define the term 'civilian population' in Crimes Against Humanity**

16. A number of Briefs look to International Human Rights Law ('IHRL') and International Humanitarian Law ('IHL') in order to define the term 'any civilian population'. CAH falls within the ambit of International Criminal Law and should not be interpreted by reference to other legal regimes.
17. Several Briefs rely on IHRL to argue for a wide definition of the term 'any civilian population'. D306/6 notes that, unlike IHL, IHRL applies the relationship between an individual and the state. It suggests that 'any civilian population' must be interpreted to include members of a State's own military, as this is in line with IHRL's mandate to protect individuals from the state.<sup>33</sup> Whereas D306/10 casts

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<sup>30</sup> D306/11, para 8.

<sup>31</sup> Submission, para 3.

<sup>32</sup> Submission, paras 3-5.

<sup>33</sup> D306/6, paras 8-9.

CAH as a method of protecting human rights: ‘crimes against humanity protect human dignity; they protect people from massive violations of their human rights.’<sup>34</sup>

18. IHRL is a separate and distinct legal regime to ICL. The ECCC, like most international criminal courts and tribunals, does not have jurisdiction over breaches of IHRL. IHRL may be applied in international criminal courts and tribunals, in so far as it applies to protect fundamental rights.<sup>35</sup> This does not extend to the interpretation of offences, unless the interpretation would breach an accused’s fair trial rights. Therefore IHRL cannot be used to interpret ‘any civilian population’ to include members of a State’s own military.

19. Similarly, IHL and ICL are distinct but related legal regimes. Grave breaches of IHL can fall under the ambit of ICL. Indeed the ECCC has jurisdiction over grave breaches of the 1949 Geneva Conventions.<sup>36</sup> Yet while IHL has long governed the conduct of hostilities during an international or non-international armed conflict, CAH emerged as a new category of crime following the end of the Second World War. As Cassese states:

It seems indisputable that the London Agreement of 1945 establishing the Nuremberg Tribunal provided for two categories of crime that are new: crimes against peace and crimes against humanity’.<sup>37</sup>

20. Therefore IHL cannot be used to define or supplement the definition of CAH in ICL. Consequently while D306/13 notes that ‘under international humanitarian law, the attack by a state or organization against members of its own armed forces could be illegal’, this does not assist with the correct interpretation of the term ‘any civilian population’ under CAH.<sup>38</sup>

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<sup>34</sup> D306/10, para 20.

<sup>35</sup> For example, the statutes of the ICC, ICTY, ICTR and STL do not contain provisions for prosecuting breaches of IHRL.

<sup>36</sup> Article 6 ECCC Establishment Law.

<sup>37</sup> Antonio Cassese and Paola Gaeta, *Cassese’s International Criminal Law*, Oxford University Press, 2013, p. 30.

<sup>38</sup> D306/13, p. 3.

**d. Members of a State's own military are not civilians**

21. D306/11 argues that members of a State's own military should not be excluded from the 'civilian population' simply because of their profession: '[t]here is no reason why the "civilian population" cannot include those within the armed forces as it does teachers, or doctors?'.<sup>39</sup> This accords with the Request, which states that:

[I]t would a) seem beyond dispute that a regime which in peace times tried to cleanse its own armed forces of, for example, all soldiers holding a particular ethnicity or faith, would under international customary law be engaging in a variety of crimes against humanity, because the victims' combatant quality merely because they are soldiers would be entirely irrelevant in this context....<sup>40</sup>

22. Members of the military are treated differently to civilians in both peacetime and during an armed conflict. A clear example of this is that, unlike teachers and doctors, members of the military are subject to their own legal regime. Therefore their actions are governed by military law, which will often differ to domestic criminal law.

23. Furthermore, members of the military will not automatically lose their status in times of peace, unless they are released from service. This is how states are able to maintain a standing army in times of peace. Members of the army who leave service before completing their service obligations and being released are generally committing an offence. Offences concerning absence from duty are not limited to armed conflicts and can be committed in times of war and peace. This is clear from 1954 Cambodian Code of Military Justice, which includes the offences of 'Illegal Absence' (Article 162) and 'Desertion' (Article 167). The offences can both be committed in peacetime, with their commission during wartime simply acting as an aggravating feature.<sup>41</sup>

24. D306/6 suggests that a State's own military will have a lack of effective protection against their own State and should therefore be considered a) civilians<sup>42</sup> or b) *hors de combat*.<sup>43</sup> These arguments misapply IHL concepts in order to define CAH.

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<sup>39</sup> D306/11, para. 16.

<sup>40</sup> Request, para. 5.

<sup>41</sup> Article 162, Article 164 and Article 167 of the 1954 Cambodian Code of Military Justice.

<sup>42</sup> D306/6, paras 14-17.



25. The first argument seeks to rely on the IHL concept of targeting. It states that ‘civilians enjoy protection as long as they take no active part in hostilities’ and references Article 4 of IV Geneva Convention.<sup>44</sup>

26. Targeting is a customary international humanitarian rule, which concerns the selection of legal targets when launching attacks.<sup>45</sup> Whereas Article 4 of the IV Geneva Convention defines the concept of ‘protected persons’ and states that this protection does not apply to citizens of one’s own state:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.<sup>46</sup>

27. The argument therefore conflates two distinct IHL principles. Neither principle assists in setting out why members of a State’s own military should be considered civilians.

28. The second argument in D306/6 suggests that a lack of effective protection renders members of a State’s own military *hors de combat*.<sup>47</sup> This term has a precise meaning and *hors de combat* combatants are not civilians for the purposes of IHL.<sup>48</sup> Accordingly this principle does also not assist in asserting that members of a State’s own military can or should be considered civilians for the purposes of CAH.

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<sup>43</sup> D306/6, paras 18-20.

<sup>44</sup> D306/6, para. 14.

<sup>45</sup> ICRC, Customary IHL Database, Rule 21, 29 June 2016, available at [https://www.icrc.org/customary-ihl/cng/docs/v1\\_rul\\_rule21](https://www.icrc.org/customary-ihl/cng/docs/v1_rul_rule21).

<sup>46</sup> Article 4 IV Geneva Convention (emphasis added).

<sup>47</sup> D306/6, para. 16.

<sup>48</sup> ICTY, *Prosecutor v Matić*, Trial Chamber, Judgment, 12 June 2007, IT-95-11-T, para. 56. As affirmed in ICTY, *Prosecutor v Matić*, Appeal Chamber, Judgment, 8 October 2008, IT-95-11-A, para. 302.

29. D306/7 similarly suggests that an attack against a State's own military can qualify as an attack against any civilian population but does so by making a distinction between a 'legitimate target' approach and a 'status based' approach.<sup>49</sup> It argues that 'under the correct, "legitimate target" approach, "civilian" is interpreted in accordance with the principle of distinction'.<sup>50</sup>

30. The principle of distinction has generally been codified in these terms:

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.<sup>51</sup>

31. This principle relates to the selection of lawful targets during an attack. It does not assist in ascertaining the correct definition 'any civilian population' in CAH during the Relevant Period.

**e. The distinction between 'murder type' and 'persecution type' offences was not part of customary international law during the Relevant Period**

32. Several Briefs argue that there is a distinction between 'murder type' and 'persecution type' CAH.<sup>52</sup> This argument is most prominently championed by Cassese<sup>53</sup> and relies on the construction of Article 6(c) of the Charter of the International Military Tribunal:

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>54</sup>

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<sup>49</sup> D306/7, para. 3.

<sup>50</sup> *Ibid.*

<sup>51</sup> ICRC, Customary IHL Database, Rule 1, 29 June 2016, available at [https://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter1\\_rule1](https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1).

<sup>52</sup> See for example D306/5, para 13.

<sup>53</sup> Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*, Oxford University Press, 2013, p. 94.

<sup>54</sup> Article 6(c) of the Charter of the International Military Tribunal (emphasis added).

33. This interpretation of the inclusion of the word 'or' in the definition of CAH is not supported by State practice during Relevant Period, nor is it recognised by other prominent academics. As Schwelb notes:

In interpreting the text, doubts may arise as to whether this restriction to the civilian population applies also to such acts constituting crimes against humanity as do not fall under any of these enumerated categories of the murder type. On the face of it, it would appear that 'persecutions on political, racial, or religious grounds' are such acts. It could therefore be maintained that persecutions, as distinguished from crimes of the murder type, may be committed by acts directed against members of the armed forces. It is, however, doubtful whether this division of crimes against humanity into crimes of the murder type on the one hand, and mere persecutions on political, racial, or religious grounds on the other, can be maintained in view of the Berlin Protocol of 6 October 1945.<sup>55</sup>

34. Furthermore, this does not reflect the construction of Article 5 of the ECCC Law. Article 5 does not make a distinction between 'murder' and 'persecution'. Instead they are simply listed as underlying offences of CAH. It also does not include a provision stating that the offences must be carried out 'in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.

**f. The ICTY jurisprudence which includes *hors de combat* combatants as possible victims of CAH is not reflective of customary international law during the Relevant Period**

35. A number of Briefs rely upon jurisprudence of the ICTY to make the argument that a predominantly civilian population may include *hors de combat* combatants for the purposes of CAH.<sup>56</sup>
36. As has been argued in the Submission, the CIJs must exercise caution when considering the jurisprudence of the ICTY.<sup>57</sup> The decisions of the ICTY postdate the Relevant Period by two decades and are accordingly unlikely to accurately reflect the state of CIL during the Relevant Period.

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<sup>55</sup> Egon Schwelb, 'Crimes Against Humanity', (1946) 23 *British Yearbook of International Law*, p. 190.

<sup>56</sup> See D306/8, D306/9, D306/11.

<sup>57</sup> Submission, para 30.

37. Furthermore, if there are any doubts regarding the correct interpretation of ‘any civilian population’, in accordance with the principle of *in dubio pro reo*, these must be interpreted in favour of the Charged Person in Case 003 and Case 004.<sup>58</sup>

**g. The *amici curiae* err by making submissions regarding the purported facts of Case 003 or Case 004.**

38. The ambit of the Request is clear and confines *amici curiae* to making legal submissions on CAH.<sup>59</sup> Despite this, several Briefs make submission regarding the purported facts of Case 003 and Case 004.<sup>60</sup> D306/13 suggests:

[S]oldiers killed by the Khmer Rouge may not have traditional *hors de combat* status, but exhibit many similarities. These soldiers were not hostile against their own regime to warrant such killings nor did they attempt to combat or set mutiny against the Khmer Rouge; they were subordinates at the mercy of the regime, such as prisoners of war are at the mercy of their captors. Further, the soldiers who were executed were different racial composition. They had become part of the Khmer Rouge’s armed forces after the civil war, when the regime won control of the State and, thus, “inherited” the army, and therefore rendering the soldiers more like prisoners of war.<sup>61</sup>

39. The *amici curiae* should not make assumptions regarding the facts of a case that are still under investigation. Furthermore such arguments result in a definition of CAH that is adapted to suit the alleged facts of Case 003 and Case 004. This is exemplified in D306/11, which frames the possible exclusion of a State’s own military personnel as the victims of CAH as a problem, stating that ‘the solution, based on customary international law in 1975 to 1979, is to consider members of armed forces as civilians under crimes against humanity, apart from when they are directly involved in conflicts’.<sup>62</sup> Casting the definition of ‘any civilian population’ as a solution to a specific factual problem in such way will lead to a distorted and inaccurate definition of CAH.

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<sup>58</sup> Case 002, *Decision on Immediate Appeal by KHIEU Samphan on Application for Release*, 6 June 2011, E50/3/1/4, para. 31. The principle of *in dubio pro reo* is also enshrined in Article 38 of the Constitution of the Kingdom of Cambodia.


<sup>59</sup> Request, paras 12 and 14.


<sup>60</sup> See D306/11, D306/12 and D306/13.

<sup>61</sup> D306/13, p. 5.

<sup>62</sup> D306/11, para 21.

Respectfully submitted,

  
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Co-Lawyers for Mr. YIM Tith

Signed in Phnom Penh, Kingdom of Cambodia on this 11<sup>th</sup> day of July, 2016