



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Royaume du Cambodge
Nation Religion Roi

Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction

Case File No.: 003/07-09-2009-ECCC-OCIJ

Before: **YOU Bunleng**
Laurent KASPER-ANSERMET
Date: **02 May 2012**
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**DECISION ON PERSONAL JURISDICTION AND INVESTIGATIVE
POLICY REGARDING SUSPECT [REDACTED]**

Co Prosecutors

Mrs. CHEA Leang
Mr. Andrew CAYLEY

Lawyers for the Civil Parties

Ms. NGUYEN Lyma
Mr. SOKONG Sam

We, Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge at the Extraordinary Chambers in the Courts of Cambodia,

Noting the Agreement signed on 6 June 2003 between the United Nations and the Royal Government of Cambodia for the purpose of bringing to trial senior leaders of Democratic Kampuchea and those who were the most responsible for the crimes and serious violations of Cambodian and international law committed during the period of Democratic Kampuchea from 17 April 1975 to 6 January 1979 (“the ECCC Agreement”), in particular articles 1, 5(3) and 6(3);

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (“the ECCC Law”), in particular articles 1, 2 (new), 23 (new) and 29 (new);

Noting the Preamble to the Internal Rules of the ECCC, as well as articles 21, 53, 55 and 56 of the Internal Rules;

Noting the judicial investigation against Suspect [REDACTED] relating to charges of crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949, torture and murder, offences defined and punishable under Articles 3, 5, 6, 29 (new) and 39 (new) of the ECCC Law, and 500, 501, 503, 504, 505, 506, 507 and 508 of the 1956 Penal Code of Cambodia;

Noting the Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, dated 20 November 2008;¹

Noting the International Co-Prosecutor’s Request that the Co-Investigating Judge’s Criteria for Determination of Personal Jurisdiction be placed onto the Case File, dated 2 September 2011²;

Noting the Notification of Rights done by us to the Suspect [REDACTED] regarding his rights throughout the judicial investigation in Case File 003;³

1. The present decision is issued in reference to the International Co-Prosecutor’s request that the Co-Investigating Judges’ criteria for determination of personal jurisdiction be placed onto Case File 004⁴. This request was submitted in response to a rejection by the Co-Investigating Judges of investigative requests into Case 003⁵. In order to allow proper review of the investigative decisions of the Co-Investigating Judges and to ensure

¹ **D1** [CF003] Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008 (hereinafter “the Second Introductory Submission”).

² **D104** [CF004] International Co-Prosecutor’s Request that the Co-Investigating Judge’s Criteria for Determination of Personal Jurisdiction be placed onto the Case File, 2 September 2011.

³ **D31** [CF003] Notification of Suspect’s Rights [Rule 21(1)(d)], 24 February 2012.

⁴ **D104** [CF004] International Co-Prosecutor’s Request that the Co-Investigating Judge’s Criteria for Determination of Personal Jurisdiction be placed onto the Case File, 2 September 2011.

⁵ **D26** [CF003] Decision on International Co-Prosecutor’s Re-Filing of Three Investigative Requests in Case 003, 27 July 2011.

due process and transparency of proceedings in Case 003, the International Reserve Co-Investigating Judge hereby details the criteria developed as to the interpretation of “those who were most responsible” and its application to Suspect [REDACTED]

2. The Co-Prosecutors’ Second Introductory Submission alleges that the Suspect is responsible for planning, instigating, ordering, aiding and abetting or committing, individually or by participating in a joint criminal enterprise, the following crimes under the jurisdiction of the ECCC:
 - a. Murder, extermination, enslavement, imprisonment, torture, persecutions on political, racial and religious grounds, which constitute crimes against humanity, punishable under Article 5, 29 (new) and 39 (new) of the ECCC Law;
 - b. Unlawful detention of civilians, willful deprivation of prisoners of war and civilians of their rights of fair a regular trial, inhuman treatment, willfully causing great suffering or serious injury to body or health, torture and murder, which constitute grave breaches of the 12 August 1949 Geneva Conventions, punishable under articles 6, 29 (new) and 39 (new) of the ECCC Law;
 - c. Homicide, torture, which constitute violations of the 1956 Penal Code (articles 500, 501, 503, 504, 505, 506, 507 and 508), punishable under articles 3 (new), 29 (new) and 93 (new) of the ECCC Law;

Based on offences committed from 17 April 1975 to 6 January 1979 on the Cambodian territory as a senior leader of the Democratic Kampuchea and/or a person most responsible for the above-mentioned crimes, having held the positions of Secretary of Division 502 of the Revolutionary Army of Kampuchea from June 1975 to January 1979 and that of member of the Assisting Committee of the Central Committee of the Communist Party of Kampuchea.

3. The Second Introductory Submission was first submitted on 20 November 2008 by the International Co-Prosecutor acting individually.⁶ The National Co-Prosecutor expressed her disapproval of this submission and a record of disagreement was filed⁷ in accordance with Internal Rule 71, and the Pre-Trial Chamber was seized of the matter. One of the grounds raised by the National Co-Prosecutor against the filing of the Introductory Submission was the lack of personal jurisdiction of the ECCC over the Suspects named therein: “the National Co-Prosecutor is of the view that the suspects identified in the new Introductory Submissions are not senior leaders or those most responsible because of their comparatively lower rank in the Democratic Kampuchea regime, and thus they do

⁶ **D1** [CF003] Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008.

⁷ International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2) [Disagreement n°001/18-11-2008-ECCC/PTC], 20 November 2008, PTC Doc. No 1.

not fall within the jurisdiction of the ECCC.”⁸ The Pre-Trial Chamber was unable to reach the required majority, therefore, pursuant to Internal Rule 74(1), the action of the International Co-Prosecutor was ordered to be executed, and the Second Introductory Submission was duly filed on 7 September 2009.⁹

4. Despite the decision of the Pre-Trial Chamber, on 11 May 2011 the National Co-Prosecutor once again manifested her opposition to the pursuit of the judicial investigation in Case File 003, maintaining “that the suspects mentioned in the Case File 003 were not either senior leaders or those who were most responsible during the period of Democratic Kampuchea.”¹⁰
5. On 2 December 2011, considering that the investigations led thus far in Case 003 were not complete and the Co-Investigating Judges were not in a position to decide on a number of judicial matters, the International Reserve Co-Investigating Judge ordered the resumption of the judicial investigation. Following this Order, further investigative acts were completed by the OCIJ, leading to the collection of additional evidence, both inculpatory and exculpatory. In light of these considerations it appears possible and necessary, at this stage of the procedure, to assess whether the Suspect under investigation falls within the scope of the Extraordinary Chambers’ personal jurisdiction.
6. According to the Internal Rules, the Co-Prosecutors’ Introductory or Supplementary Submission seizes the Co-Investigating Judges of the facts set out therein, which fall within the jurisdiction of the ECCC, *ratione materiae*, *ratione temporis* as well as *ratione loci*, and only these facts. If new facts are uncovered during the course of the judicial investigation, the Co-Investigating Judges must refer these to the Co-Prosecutors, who may then issue a Supplementary Submission in order to initiate a judicial investigation on these facts. The Co-Investigating Judges do not have the power to investigate new facts *proprio motu*. However, they “have the power to charge any Suspects named in the Introductory Submission. They may also charge any other persons against whom there is clear and consistent evidence indicating that such a person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission.”¹¹ As part of their responsibilities, the Co-Investigating Judges must decide on the dual issue of investigative policy regarding suspects and of personal jurisdiction. Though related, these issues are not identical, and must be examined successively.

A. Personal jurisdiction of the ECCC

7. The Law and the Agreement on the ECCC declare that the purpose of the Extraordinary Chambers is “to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related

⁸ Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71 [Disagreement n°001/18-11-2008-ECCC/PTC], 18 August 2009.

⁹ D1/1 [CF003], Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009.

¹⁰ Press Release, Statement by the National Co-Prosecutor regarding Case File 003.

¹¹ Internal Rule 55(4): General Provisions Concerning Investigations.

to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”¹² They also clearly and exhaustively define the material, geographical and temporal scope of the ECCC’s jurisdiction. Neither the Law nor the Agreement set out the matter of personal jurisdiction in as clear a manner, however.

8. Where the Law and the Agreement do not unequivocally define the scope of the ECCC’s personal jurisdiction, the records of the negotiations leading to the adoption of the Agreement between the United Nations and the Royal Government of Cambodia provide the necessary elements for a decision. In light of statements made by the then-Secretary-General of the United Nations¹³ and Members of the Cambodian National Assembly,¹⁴ of the wording of a General Assembly Resolution,¹⁵ and of the Report of the Group of Experts mandated by the Secretary-General to assess the “feasibility of bringing Khmer Rouge leaders to justice”,¹⁶ the ECCC’s Supreme Court Chamber has found that, “at a minimum, the term ‘senior leaders of Democratic Kampuchea and those who were most responsible’, reflects the intention of the United Nations and the Royal Government of Cambodia to focus finite resources on the criminal prosecution of certain surviving officials of the Khmer Rouge. The Supreme Court Chambers also finds that the term excludes persons who are not officials of the Khmer Rouge.”¹⁷
9. The Chamber further stated that “Each suspect before the ECCC must be a Khmer Rouge official. This term involves a question of historical fact that is intelligible, precise, and leaves little or no room for the discretion of the Trial Chamber. While an accused might contest that s/he was a Khmer Rouge official, the Trial Chamber is well suited to decide this factual issue. Thus, the Supreme Court Chamber finds that the personal jurisdiction of the ECCC covers Khmer Rouge officials, and the question of whether an accused was a Khmer Rouge official is justiciable before the Trial Chamber.”¹⁸
10. The Co-Prosecutors’ Second Introductory Submission alleges that Suspect █████ held, within the temporal frame of the ECCC’s jurisdiction, the position of Secretary of Division 502 of the Revolutionary Army of Kampuchea from at least January 1976 until at least April 1978, and was a member of the Assisting Committee of the Central Committee of the Communist Party of Kampuchea. In light of the evidence made available to the Co-Investigating Judges during the judicial investigation, the personal

¹² Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, as promulgated on 27 October 2004, article 1.

¹³ Kofi A. Annan, Human Rights Questions: Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, 53rd Sess., Agenda Item 110(b), U.N. Doc A/53/850-S/1999/231 (16 March 1999), p. 3.

¹⁴ First Session of the Third Term of the Cambodian National Assembly, 4-5 October 2004, “Debate and Approval of the Agreement between the United Nations and the Royal Government of Cambodia and Debate and Approval of Amendments to the Law on Trying Khmer Rouge Leaders”.

¹⁵ Situation of human rights in Cambodia, G.A. Res 52/135, U.N. Doc. A/Res/52/135 (27 February 1998).

¹⁶ UN Doc. A/53/850-S/1999/231, Annex, “Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, 18 February 1999.

¹⁷ F28 [CF001], Appeal Judgement, 3 February 2012, para. 52.

¹⁸ *Ibid.*, para. 61.

jurisdiction of the ECCC over Suspect [REDACTED] a “Khmer Rouge official”, is established in a sufficient and reliable manner.¹⁹

B. Investigative policy regarding Suspect

11. The question of whether a suspect falls within the category of people designated in the Law and the Agreement on the ECCC – that is, “senior leaders of Democratic Kampuchea or those who were most responsible for the commission of the crimes falling within the jurisdiction of the Extraordinary Chambers” – is one that must first be decided upon by the Co-Prosecutor, but will also at a later stage be assessed by the Co-Investigating Judges during the course of their judicial investigation. The Co-Investigating Judges may decide to charge the Suspects named in the Introductory or Supplementary Submission, but they may also decide not to charge these persons, or to charge any other person, as they are not bound by the Co-Prosecutors’ Submissions. The decision is not one of jurisdiction, but of criminal policy for the judicial investigation.
12. In its Appeal Judgment in Case 001,²⁰ the Supreme Court Chamber has confirmed the non-jurisdictional nature of the decision of the Co-Investigating Judges in this matter:

“the term ‘most responsible’ cannot be a jurisdictional requirement for many reasons, including: the notion of comparative responsibility is inconsistent with the ECCC Law’s prohibition of a defence of superior orders; and the determination of whether an accused is ‘most responsible’ requires a large amount of discretion. The Supreme Court Chamber therefore finds that the term ‘most responsible’ should be interpreted as a non-justiciable, policy guide for the Co-Investigating Judges and the Co-Prosecutors in the exercise of their discretion as to the scope of investigations and prosecutions. Regarding the term ‘senior leaders’, the Supreme Court Chamber finds that it, too, is a non-justiciable, policy guide, rather than a jurisdictional requirement, due, among other reasons, to the flexibility in the term’s definition. In the absence of bad faith, or a

¹⁹ **D1.3.12.1** DK Military Report entitled “Rice Consumption Plan for 1976 by Unit”, 04 Jan 1976 ; **D1.3.8.1** DK Military Meeting Minutes entitled Meeting on 3 March 1976 regarding Airforce Recruitment, 03 Mar 1976; **D1.3.12.6** DK Military Report entitled “Report on the confession of a person named [REDACTED] after having deserted 4 times”, 01 Aug 1976; **D1.3.12.9** DK Military Report entitled “Situation adjacent to the south side of the airport”, 01 Sep 1976; **D1.3.12.10** DK Military Report entitled “Report on the answers of Hem Phi about his arrest after he had tried to escape three times”, 01 Sep 1976; **D1.3.23.3** DK Military Letter entitled “Dear Beloved Comrade Duch”, 01 Apr 1977; **D1.3.28.35** DK Military Report entitled “Dear Beloved Brother Duch”, 30 May 1977; **D1.3.30.16** DK Military Letter by SOUS Met entitled “Dear Beloved Comrade Duch”, 01 Jun 1977; **D1.3.30.17** DK Military Report entitled “Dear Beloved Comrade Duch”, 1 June 1977; **D1.3.23.4** DK Military Letter entitled “Dear Beloved Brother Duch”, 28 Jul 1977; **D1.3.30.18** DK Military Letter by [REDACTED] entitled “Dear Beloved Comrade Duch”, 02 Jun 1977; **D1.3.30.22** DK Military Letter entitled “Dear Beloved Brother Duch”, 4 October 1977; **D1.3.32.34** POV Son DC-Cam Statement, 18 June 2002; **D1.3.32.31** [REDACTED] DC-Cam Statement, 12 November 2002; **D1.3.32.35** [REDACTED] DC-Cam Statement, 24 February 2003; **D1.3.32.47** [REDACTED] DC-Cam Statement, 24 October 2003; **D1.3.32.51** [REDACTED] DC-Cam Statement, 26 November 2003; **D1.3.14.4** DK Government Telegram entitled “Telegram 32: To Missed committee 870 about arresting 2 soldiers”, 29 March 1978; **D1.3.33.13** KAING Guek Eav alias DUCH OCIJ Statement , 4 December 2007; **D1.3.33.10** KAING Guek Eav alias DUCH OCIJ Statement , 2 June 2008; **D12** KAING Guek Eav alias DUCH OCIJ Statement, 27 April 2011.

²⁰ Supreme Court Chamber, Judgment Summary, 3 February 2012.

showing of unsound professional judgement, the Trial Chamber has no power to review the alleged abuse of the Co-Investigating Judges' or Co-Prosecutor's discretion under Articles 5(3) and 6(3) of the UN-RGC Agreement regarding the scope of investigations and prosecutions. Whether an accused is a senior leader or one of those most responsible are exclusively policy decisions for which the Co-Investigating Judges and Co-Prosecutors, and not the Chambers, are accountable."²¹

13. The interpretation of the terms "senior leader" and "person most responsible" rests with the Co-Investigating Judges in the discharge of their duty to conduct a full and impartial judicial investigation under the Internal Rule 55. They must assess whether the persons under investigation are, *prima facie*, either "senior leaders" or "persons most responsible" for the crimes in order to justify the pursuit of the investigation *in personam*. These requirements non-cumulative. While the Report of the Group of Experts for Cambodia did not define either of the terms, it did specify that a Suspect needed to meet only one of the criteria to fall within the scope of the ECCC's jurisdiction. It concluded by recommending that "any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of DK. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities."²²
14. Notwithstanding the non-jurisdictional nature of the assessment, the criteria established by the Office of the Co-Investigating Judges in the previous cases²³ remain valid for the purposes of the judicial investigation in Case File 003, *mutatis mutandis*. Whilst the notion of "senior leader" may be understood as a more formal assessment of hierarchical position and authority, that of "person most responsible" allows for a wider evaluation, taking into account a number of informal elements, including the *de facto* as well as the *de jure* situation of the Suspects during the time and within the location under the jurisdiction of the court.
15. None of the texts directly applicable to the ECCC provide guidance on how these requirements should be applied. However, the Co-Investigating Judges may seek guidance in the "procedural rules established at the international level."²⁴ In the ICTY, Rule 28 of the Rules of Procedure and Evidence sets out guidelines for the Prosecutor in establishing his prosecutorial strategy: "On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for the review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return

²¹ *Ibid.*, para. 10.

²² UN Doc. A/53/850-S/1999/231, Annex, "Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, 18 February 1999, para. 110.

²³ **D99** [CF001] Closing Order Indicting Kaing Guek Eav alias Duch, 8 August 2008; **D427** [CF002] Closing Order, 16 September 2010.

²⁴ Law on the ECCC, article 23.

the indictment to the Registrar to communicate this finding to the Prosecutor.”²⁵ Although it is not a jurisdictional matter, rather one of policy for the Office of the Prosecutor, the Chambers of the ICTY have on numerous occasions examined the question of the definition of the terms “the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal”. The words “most responsible” encompass a large number of possible situations in which a Suspect, Charged Person or Accused may have found himself at the time of the commission of the crimes alleged, and the assessment of this responsibility must take into account factual as well as legal elements. Two criteria have been developed by international jurisprudence and retained by the Co-Investigating Judges: the gravity of the crimes alleged or charged, and the level of responsibility of the Suspect, Charged Person or Accused.²⁶

A. Gravity of the crimes alleged against the Suspect

16. With regard to the gravity of the crimes alleged, relevant factors include but are not limited to: (a) the number of victims; (b) the geographic and temporal scope of the crimes; and (c) the manner in which the crimes were committed and the number of separate incidents.
17. The Co-Prosecutors’ Second Introductory Submission alleges that Suspect ██████ was responsible for the crimes committed during the events related to the purge in Division 502:
 - a. The events that occurred at Security Centre S-21;
 - b. The events that occurred at Security Centre S-22 operated by Division 502

²⁵ Similarly, Article 1(1) of the Statute of the Special Court for Sierra Leone gives the Court “the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.” This article has also been understood by the Trial Chamber 2 and the Appeal Chamber as a policy guide for the Prosecutors, and not as a rule on jurisdictional matters. See *Prosecutor v. Brima*, SCSL-04-16-T [20 June 2007] Judgment, TC 2, and *Prosecutor v. Brima*, SCSL-2004-16-A [22 February 2008] Judgment, AC.

²⁶ E188 [CF001], Judgment, 26 July 2010 para. 22; ICTY, *Prosecutor v. Lukic et al.* (IT-98-32/1-PT) [5 April 2007] Decision on Referral of Case Pursuant to Rule 11bis, Referral Bench, paras 26-30; *Prosecutor v. Lukic et al.* (IT-98-32/1-AR11bis.1) [11 July 2007] Decision on Milan Lukic’s Appeal Regarding Referral, AC, para. 19-22; *Prosecutor v. Rasevic and Todovic* IT-97-258/1-AR11bis.1 and IT-97-258/1-AR11bis.2 [4 September 2006], Appeal Judgment, AC, para.14-26; *Prosecutor v. Ljubcic* (IT- 00-41-PT) [12 April 2006] Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11bis, Referral Bench, paras 18-19; *Prosecutor v. Kovacevic*, (IT-01-42/2-1) [17 November 2006] Decision on Referral of Case Pursuant to Rule 11bis, Referral Bench, para. 20; *Prosecutor v. D. Milošević*, (IT-98-29/1-PT) [8 July 2005] Decision on Referral of Case Pursuant to Rule 11bis, Referral Bench, paras 23-24; *Prosecutor v. Jankovic*, (IT-96-23/2-PT) [22 July 2005] Decision on Referral of Case Pursuant to Rule 11bis, Referral Bench, para. 19; *Prosecutor v. Ademi et al.*, (IT-04-78-PT) [14 September 2005] Decision on Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, Referral Bench, paras 28-29; See as well for similar criteria applied by the ICC: Situation in the DRC, *Prosecutor v. Ntaganda*, (ICC-01/04-02/06-20-Anx2) [10 February 2006] Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, ICC Pre-Trial Chamber I, para. 51-89.

- c. The events that occurred at the Kampong Chhnang Airport Construction Site under the command of Division 502;

18. With regard to the S-21 Security Centre, the evidence establishes that Suspect [REDACTED] had a full authority over the members of Division 502, including the right to decide their transfer to S-21. Suspect [REDACTED] was directly involved in the selection, arrest, and transfer of members of Divisions 502 to S-21. There are a number of DK reports sent by Suspect to KAING Guek Eav alias DUCH, the Chairman of S-21.²⁷ In these communications Suspect [REDACTED] informs DUCH that according to information received from S-21 confessions, confessions obtained from prisoners at Division 502, or from his personal interview of the prisoners, the people being sent were found to be enemies or traitors. As a result, Suspect [REDACTED] sent them directly to DUCH, requesting that they be detained and interrogated. When the confessions were obtained, they were to be sent back to Suspect to enable the identification of further enemies.²⁸ Evidence establishes that at least 341 members of Division 502 were sent to S-21 and subsequently executed.
19. With regard to the Security Centre S-22, evidence establishes the existence of a security centre which was operated by Division 502. The Security Centre S-22 was under the control of Division 502, which was under the command of Suspect [REDACTED].²⁹ There were reportedly around 300 prisoners imprisoned at this Security Centre, all of whom were members of Division 502. Some prisoners were identified as having committed "light offense[s]" whilst others were implicated as having a connection in the "enemy string". The prisoners were provided only one meal a day. Their ankles were shackled and they were made to work digging earth and clearing grass within the compound. They were also made to do work outside the compound, building a dam and dike, along with rice

²⁷ **D1.3.23.3** DK Military Letter entitled "Dear Beloved Comrade Duch", 01 April 1977; **D1.3.23.4** DK Military Letter entitled "Dear Beloved Brother Duch", 28 Jul 1977; **D1.3.23.5** DK Military Report entitled "Dear Beloved Brother Duch", 04 Oct 1977; **D1.3.28.35** DK Military Report entitled "Dear Beloved Brother Duch", 30 May 1977; **D1.3.30.16** DK Military Letter by [REDACTED] entitled "Dear Beloved Comrade Duch", 01 Jun 1977; **D1.3.30.17**, DK Military Report entitled "Dear Beloved Comrade Duch", 01 Jun 1977; **D1.3.30.18** DK Military Letter by [REDACTED] entitled "Dear Beloved Comrade Duch", 02 Jun 1977, **D1.3.30.22** DK Military Letter entitled "Dear Beloved Brother Duch", 10 Aug 1977; **D1.3.30.23** DK Military Report entitled "Dear Beloved Brother Duch", 03 Oct 1977; **D10.1.72** DK Military Report entitled "Dear Beloved Brother Duch", 04 Oct 1977; **D10.1.31** Met's letter to Duch about sending [REDACTED], 01 Jun 1977; **D4.1.395** Communication from [REDACTED] to Duch handing over 2 prisoners, 03 Oct 1977; **D4.1.391** Communication from [REDACTED] and San to Duch handing over prisoners, 02 Jun 1977

²⁸ **D1.3.23.3** DK Military Letter entitled "Dear Beloved Comrade Duch", 01/Apr/1977; **D1.3.28.35** DK Military Report entitled "Dear Beloved Brother Duch", 30/May/1977; **D1.3.30.18** DK Military Letter by [REDACTED] entitled "Dear Beloved Comrade Duch", 02/Jun/1977; **D1.3.30.16** DK Military Letter by [REDACTED] entitled "Dear Beloved Comrade Duch", 01 Jun 1977; **D1.3.30.17**, DK Military Report entitled "Dear Beloved Comrade Duch", 01 Jun 1977; **D1.3.23.4** DK Military Letter entitled "Dear Beloved Brother Duch", 28 July 1977; **D1.3.30.22** DK Military Letter entitled "Dear Beloved Brother Duch", 4 October 1977; **D1.3.23.5** DK report from [REDACTED] entitled "Dear Brother DUCH", 4 October 1977; **D1.3.1.10** S21 Confession of [REDACTED] 19 Oct 1977; **D1.3.1.12** Confession of [REDACTED] Member of Battalion 503, Division 502, 24 Sep 1977; **D1.3.1.5** Confession of [REDACTED], 27 August 1977; **D1.3.1.11** Confession of [REDACTED] Deputy Secretary of Battalion 511, Division 502, 29 August 1977.

²⁹ **D2/18** Written Record of Interview of [REDACTED] 1 December 2010.

farming.³⁰ Interrogations were carried out in S-22. The prisoners were tortured during interrogations.³¹ A number of prisoners died due to lack of food and medication.³²

20. As the Secretary of Division 502 and the commander of RAK Air Force, Suspect was also responsible for the construction of a military airport near Krang Leav commune, Rolea P'ier district, Kampong Chhnang in the West Zone (Kampong Chhnang Airport Construction Site)³³. Kampong Chhnang Airport Construction Site was run by cadres from Division 502, who reported directly to Suspect [REDACTED]³⁴. It was a military construction site and almost all the workers, men and women,³⁵ had been RAK members.³⁶ The total number of workers varied over time from a few hundred in early 1976 to more than 10,000 workers by 1977.³⁷ Kampong Chhnang Airport Construction Site functioned as one of the means of implementation of the purge of RAK members and was used as a tempering site for RAK members considered to be "bad elements", from Division 502 itself or from other divisions or military units.³⁸ The working conditions were harsh and workers were regularly injured or killed while constructing the runway, working in a quarry or drilling a tunnel.³⁹ A number of workers

³⁰ D2/18 Written Record of Interview of [REDACTED] 1 December 2010.

³¹ D2/18 Written Record of Interview of [REDACTED] 1 December 2010.

³² D2/18 Written Record of Interview of [REDACTED] 1 December 2010.

³³ D1.3.32.46 [REDACTED] DC-Cam Statement, 23 Aug 03.

³⁴ D1.3.32.27 DC-Cam Statement of [REDACTED], 09 Jul 02; D4.1.556 Written Record of Interview of Witness [REDACTED] 09 Sep 09; D1.3.32.38 [REDACTED] DC-Cam Statement, 24 Oct 03;

D1.3.32.23 [REDACTED] DC-Cam Statement, 27 May 04; D1.3.13.7 SOAS Statement of [REDACTED] 27 July 05.

³⁵ D4.1.513 Written Record of Interview of Witness [REDACTED] 06 Apr 09; D1.3.32.19 Written Record of Interview of Witness [REDACTED] 09 Mar 03; D4.1.503 Written Record of Interview of Witness [REDACTED] 11 Feb 09; D4.1.507 Written Record of Interview of Witness [REDACTED] 03 Mar 09; D4.1.823 Written Record of Interview of Witness [REDACTED] 11 Dec 09; D4.1.827 Written Record of Interview of Witness [REDACTED] 18 Dec 09; D4.1.511 2nd Written Record of Interview of Witness [REDACTED] 10 Mar 09.

³⁶ D4.1.513 Written Record of Interview of Witness [REDACTED], 06 Apr 09; D4.1.503 Written Record of Interview of Witness [REDACTED] 11 Feb 09; D4.1.507 Written Record of Interview of Witness [REDACTED] 03 Mar 09; D4.1.565 Written Interview of Witness [REDACTED] 13 Jan 09; D1.3.13.4 Written Record of Interview of Witness [REDACTED] D4.1.823 Written Record of Interview of Witness [REDACTED] 11 Dec 09; D4.1.822 Written Record of Interview of Witness [REDACTED] 10 Dec 09; D4.1.1049 Written Record of Interview of Witness [REDACTED] 02 Apr 10.

³⁷ D1.3.32.19 Written Record of Interview of Witness [REDACTED] 09 Mar 03; D4.1.556 Written Record of Interview of Witness [REDACTED] 09 Jan 09; D4.1.503 Written Record of Interview of Witness [REDACTED] 11 Feb 09; D4.1.505 Written Record of Interview of Witness [REDACTED] 13 Feb 09; D4.1.826 Written Record of Interview of Witness [REDACTED] 19 Dec 09; D4.1.827 Written Record of Interview of Witness [REDACTED] 18 Dec 09; D4.1.773 Written Record of Interview of Witness [REDACTED] 19 Jun 09; D4.1.823 Written Record of Interview of Witness [REDACTED] 11 Dec 09; D4.1.822 Written Record of Interview of Witness [REDACTED] 10 Dec 09.

³⁸ D4.1.841 Written Record of Interview of Witness [REDACTED] 27 Oct 09; D2/18 Written Record of Interview of Witness [REDACTED] 01 Dec 10.

³⁹ D4.1.504 Written Record of Interview of Witness [REDACTED] 12 Feb 09; D4.1.511 2nd Written Record of Interview of Witness [REDACTED] 10 Mar 09; D4.1.827 Written Record of Interview of Witness [REDACTED] 18 Dec 09; D4.1.454 Written Record of Interview of Witness [REDACTED] 29 May 08; D4.1.773 Written Record of Interview of Witness [REDACTED] 19 Jun 09; D4.1.1054 Site Identification Report of Tunnel at Ta Reach Hill, Kampong Chhnang Airport, 08 Apr 10; D4.1.508 Written Record of Interview of Witness [REDACTED] 04 Mar 09; D4.1.827 Written Record of Interview of Witness [REDACTED] 18 Dec 09; D4.1.1147 Written Record of Interview of Witness [REDACTED]

died due to starvation, illness, overwork and exhaustion; suicide of workers occurred on a on a weekly basis.

B. Level of responsibility of the Suspect

21. In relation to the level of responsibility of the Suspect, the Co-Investigating Judges must take into account the Suspect's *de facto* authority as well as his *de jure* authority. Relevant factors include, but are not limited to : (a) the Suspect's position in the hierarchical structure;⁴⁰ (b) the procedure followed for his appointment to said position;⁴¹ (c) the permanency of his position;⁴² (d) the number of subordinates;⁴³ (e) the Suspect's capacity to issue orders;⁴⁴ (f) whether the orders were in fact followed by his subordinates;⁴⁵ (g) the Suspect's actual knowledge that his subordinates were committing crimes, including knowledge of the number, type and scope of the crimes, the time during which they were committed, their geographic location, as well as the eventual widespread nature of the acts;⁴⁶ (h) the Suspect's authority to negotiate, sign or

██████████ 06 Mar 08; **D4.1.513** Written Record of Interview of Witness ██████████ 06 Apr 09; **D4.1.509** Written Record of Interview of Witness ██████████ 06 Mar 09; **D1.3.32.27** Written Record of Interview of Witness ██████████ 09 Jul 02; **D4.1.626** Written Record of Interview of Witness ██████████ 17 Jul 09; **D4.1.511** 2nd Written Record of Interview of Witness ██████████ 10 Mar 09; **D4.1.506** Written Record of Interview of Witness ██████████ 17 Feb 09; **D4.1.1155** Written Record of Interview of Witness ██████████ 06 Mar 08; **D4.1.510** 2nd Written Record of Interview of Witness ██████████ 07 Mar 09; **D4.1.505** Written Record of Interview of Witness ██████████ 13 Feb 09; **D4.1.504** Written Record of Interview of Witness ██████████ 12 Feb 09; **D4.1.853** Written Record of Interview of Witness ██████████ 21 Jul 09; **D4.1.826** Written Record of Interview of Witness ██████████ 19 Dec 09; **D4.1.823** Written Record of Interview of Witness ██████████ 11 Dec 09; **D4.1.822** Written Record of Interview of Witness ██████████ 10 Dec 09; **D4.1.508** Written Record of Interview of Witness ██████████ 04 Mar 09.

⁴⁰ *Prosecutor v. Kordic et al.* (IT-95-14/2-T) [26 February 2001] Trial Judgement, TC, para 418; *Prosecutor v. Halilovic* (IT-01-48-A) [16 October 2007], Appeal Judgement, AC, para 204; *Prosecutor v. Blaskic* (IT-95-14-A) [29 July 2004] Appeal Judgement, AC, para 256; *Prosecutor v. Strugar* (IT-01-42-T) [31 January 2005] Trial Judgement, TC, paras 394-397; *Prosecutor v. Dragomir Milosevic* (IT-98-29/1-PT) [8 July 2005] Decision on Referral of case pursuant to Rule 11bis, Referral Bench, para 23; *Prosecutor v. Ademi* (IT-04-78-PT) [14 September 2005] Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11bis, para 29; *Prosecutor v. Kovacevic* (IT-01-42/2-I) [17 November 2006] Decision on Referral of case pursuant to Rule 11bis, para 20; *Prosecutor v. Lukic* (IT-98-32/1-AR11bis.1) [11 July 2007] Decision on Milan Lukic's Appeal regarding Referral, para. 28.

⁴¹ *Prosecutor v. Kordic* Trial Judgement, para 418; *Prosecutor v. Halilovic* Appeal Judgement, para 204; *Prosecutor v. Blaskic* Appeal Judgement, para 256; *Prosecutor v. Strugar* Trial Judgement, paras 394-397.

⁴² *Prosecutor v. Dragomir Milosevic*, Decision on Referral of case pursuant to Rule 11bis, para 23.

⁴³ *Idem.*

⁴⁴ *Prosecutor v. Kordic* Trial Judgement, para 418; *Prosecutor v. Halilovic* Appeal Judgement, para 204; *Prosecutor v. Blaskic* Appeal Judgement, para 256; *Prosecutor v. Strugar* Trial Judgement, paras 394-397.

⁴⁵ *Prosecutor v. Strugar* (IT-01-42-A) [17 July 2008] Appeal Judgement, AC, para. 256; *Prosecutor v. Strugar* Trial Judgement, paras 394-397.

⁴⁶ *Prosecutor v. Delalic et al.* (IT-96-21-T) [16 November 1998] Trial Judgement, TC, para 386; *Prosecutor v. Blaskic* Trial Judgement, para 307; *Kordic* Trial Judgement, para 427; *Prosecutor v. Strugar* Trial Judgement, para 368; *Prosecutor v. Mrksic* (IT-95-13/1-T) [27 September 2007] Trial Judgement, TC, para 563.

implement agreements;⁴⁷ (i) the temporal scope of the Suspect's control;⁴⁸ (j) control of access to territory;⁴⁹ (k) the actual role of the Suspect in the commission of the crimes;⁵⁰ (l) whether those more senior in rank than the Suspect have already been convicted.⁵¹

22. Suspect ██████ was the Secretary of Division 502 of the Revolutionary Army of Kampuchea (RAK) from at least January 1976 until at least April 1978.⁵² He was reportedly a member of the Assisting Committee of the Central Committee of the CPK and thus a member of one of the four "superior echelons" of the CPK⁵³. In this position, Suspect ██████ had political responsibilities such as implementing the Party line throughout the country, instructing the zone and the sector committee to carry out activities in accordance with the Party line, or acting in the name of the Party in contacts with other Marxist-Leninist parties⁵⁴.
23. Division 502 was one of the ten RAK Centre Divisions and answered directly to the RAK General Staff⁵⁵, commanded by Son Sen, for whom Suspect ██████ was said to have become *de facto* Number 2⁵⁶. Suspect ██████ commanded, directed and otherwise exercised control over various units within Division 502 which had approximately over 5,500 personnel in total⁵⁷. Suspect ██████ was responsible for the RAK air force⁵⁸, involving radar and anti-aircraft installations⁵⁹, the security in parts of Phnom Penh⁶⁰ and

⁴⁷ *Prosecutor v. Dragomir Milosevic*, Decision on Referral of case pursuant to Rule 11bis, para 23; *Prosecutor v. Ademi*, Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11bis, para 29.

⁴⁸ *Prosecutor v. Dragomir Milosevic*, Decision on Referral of case pursuant to Rule 11bis, para 23.

⁴⁹ *Idem*.

⁵⁰ *Prosecutor v. Ademi*, Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11bis, para 29; *Prosecutor v. Lukic*, Decision on Milan Lukic's Appeal regarding Referral, para 28.

⁵¹ *Prosecutor v. Kovacevic*, Decision on Referral of case pursuant to Rule 11bis, para 20.

⁵² **D1.3.12.1** Rice Consumption Plan for 1976 by Unit, 04 Jan 1976; **D1.3.5.20** Cambodia Revolution Soldiers, 04 Jan 1976; **D1.3.14.4** Telegram 32: To Missed committee 870 about arresting 2 soldiers, 29 Mar 1978.

⁵³ **D1.3.33.13** Written Record of Interview of Charged Person KAING Guek Eav alias DUCH on 04 December 2007; **D1.3.33.10** Written Record of interview of charged person KAING Guek Eav on 2 June 2008; **D12** Written Record of Interview of Witness Kaing Guek Eav Duch on 27 Apr 11.

⁵⁴ **D1.3.33.13** Written Record of Interview of Charged Person KAING Guek Eav alias DUCH on 04 December 2007; **D1.3.33.10** Written Record of interview of charged person KAING Guek Eav on 2 June 2008.

⁵⁵ **D1.3.32.27** ██████ DC-Cam Statement, 09 Jul 02; **D1.3.32.35** ██████ DC-Cam Statement, 24 Feb 03; **D1.3.32.47** ██████ DC-Cam Statement, 24 Oct 03; **D4.1.553** Written Record of Interview of Witness ██████ 06 Jan 09; **D1.3.32.51** ██████ DC-Cam Statement, 26 Nov 03; **D1.3.27.1** CPK Standing Committee Meeting Minutes entitled Meeting of the Standing Committee, 9 October 75.

⁵⁶ **D1.3.13.7** SOAS/HRW Interview of ██████ 27 July 2005.

⁵⁷ **D1.3.5.20** DK Military List dated 4 January 1976; **D1.3.30.9** DK Military Report entitled Joint Statistics of Armed Forces, March 1977; **D1.3.30.10** DK Military Report entitled Statistics of Collective Eating Forces, March 1977; **D1.3.5.19** DK Military List dated 17 September 1976; **D1.3.5.18** DK Military List dated 8 June 1976; **D1.3.5.17** DK Military List dated 27 May 1976; **D1.3.12.1** DK Military List entitled Rice Consumption Plan, 1976, dated 4 January 1976.

⁵⁸ **D1.3.33.13** KAING Guek Eav alias DUCH OCIJ Statement, 4 December 2007; **D1.3.8.1** DK Military Meeting Minutes entitled Meeting on 3 March 1976 regarding Airforce Recruitment; **D1.3.32.47** ██████ DC-Cam Statement, 24 Oct 03; **D4.1.553** Written Record of Interview of Witness ██████ 06 Jan 09; **D1.3.27.1** CPK Standing Committee Meeting Minutes entitled Meeting of the Standing Committee, 9 October 75.

⁵⁹ **D1.3.32.34** ██████ DC-Cam Statement, 18 June 02; **D1.3.34.21** DK Military Telegram entitled To respected brother 89, capture of airplanes' activities by the radars in Bokor and Potchentong, 17 Jun

the construction of a military airport in Kampong Chhnang⁶¹. Moreover, his position as commander of Division 502's "Special Forces" meant that he was responsible for security and for arresting the personnel of Division 502, for the operation of the division's prison called S-22, and for purging the division of undesirable elements as part of a broader purge of the entire RAK⁶².

24. The judicial investigation conducted by the Office of the Co-Investigating Judges has thus established that Suspect [REDACTED] may be considered as one of the persons most responsible for the crimes enumerated in the Co-Prosecutors' Second Introductory Submission. This does not establish that the Suspect is guilty, nor is it a finding of the commission of the crimes alleged in the Second Introductory Submission, which are matters left to the jurisdiction of the Trial Chamber and have yet to be established. The Co-Investigating Judges consider that the present Decision settles an issue of criminal policy and the findings herein entitle them to continue the judicial investigation in Case 003 pursuant to their duty to conduct a full and impartial investigation.
25. The criteria of "senior leaders" and persons "most responsible" being non-cumulative, it is at present unnecessary to examine whether the Suspect was also a senior leader of the Democratic Kampuchea between 17 April 1975 and 6 January 1979.

FOR THE REASONS STATED ABOVE, WE, THE UNDERSIGNED,

Decide that Suspect [REDACTED] was a Khmer Rouge official between 17 April 1975 and 6 January 1979 and that the Extraordinary Chambers in the Courts of Cambodia have jurisdiction to bring this Suspect to justice;

Decide that, for the purposes of the judicial investigation of Case File 003, and notwithstanding his right to be presumed innocent as long as his guilt has not been established, the Suspect [REDACTED] is to be considered as one of those most responsible for crimes committed during the period from 17 April 1975 to 6 January 1979;

Decide that there is no need to consider the issue of whether the Suspect was a senior leader of the Democratic Kampuchea.

1977; **D1.3.12.12** DK Military Report entitled Radar Contacts received at Potchentong, dated 24 Sep 1976; **D1.3.27.1** CPK Standing Committee Meeting Minutes entitled Meeting of the Standing Committee, 9 Oct 1975.

⁶⁰ **D1.3.27.9** CPK Standing Committee Meeting Minutes entitled Minutes of the Standing Committee Meeting, 30 May 1976; **D1.3.32.45** [REDACTED] DC-Cam Statement, 25 Jun 2002; **D1.3.27.21** DK Military Meeting Minutes, 11 Nov 1976.

⁶¹ **D1.3.32.46** [REDACTED] DC-Cam Statement, 23 Aug 03.

⁶² **D1.3.13.7** SOAS Statement of [REDACTED] alias Ri, 27 July 05; **D1.3.12.4** DK Military Report from Division 502, 18 Mar 1976; **D1.3.12.8** DK Government Report from Division 502 entitled To the Committee of S-21.

Decide that, in accordance with Internal Rule 56(2)(a), the present decision shall be made public in view of the victims' right to information under Internal Rule 21(1)(c) and given that the Suspect has been notified of the charges against him in under Internal Rule 21(1)(d).

Done in Phnom Penh, on 02 May 2012

សហចៅក្រមស៊ើបអង្កេតប្រចលនាអន្តរជាតិ

International Reserve Co-Investigating Judge

Judge Laurent KASPER-ANSERMET
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