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The level of proof required to indict a person and send them to trial at the extraordinary chambers in the courts of Cambodia specifically addressing the levels of proof to indict a person of France and other international criminal courts, also analysing the statutes, documents and jurispurdiction of the ECCC to draw a conclusion

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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: THE LEVEL OF PROOF REQUIRED TO INDICT A PERSON AND SEND THEM TO TRIAL AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

SPECIFICALLY ADDRESSING THE LEVELS OF PROOF TO INDICT A PERSON OF FRANCE AND OTHER INTERNATIONAL CRIMINAL COURTS, ALSO ANALYSING THE STATUTES, DOCUMENTS AND JURISPURDICTION OF THE ECCC TO DRAW A CONCLUSION

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I. Introduction

A. Scope

This memorandum discussed the level of proof required to indict a person and send them to trial at the Extraordinary Chambers in the Courts of Cambodia ("ECCC"). Firstly, this memorandum introduced the levels of proof to indict a person of French and other International criminal courts through statues, jurisprudences and academic writings. Then, this memorandum analyzed the statutes and documents of the ECCC, as well as Case 001, to find a standard of proof to indict a person at the ECCC. Finally, this memorandum came to a conclusion about the standard by combining the introduction and analysis.

B. Summary of conclusions

a. The Co-Investigating Judges shall follow in a common approach of France and other international criminal courts to the level of proof to indict a person.

As there was no jurisprudence available from the Cambodian national courts[1] and no clear regulation in Cambodian law about the level of proof to indict a person, it is a good idea for the ECCC to follow in a common approach of France (since Cambodian

1 "*Closing Order* indicting NUON Chea, IENG Sary, KHIEU Samphan, IENG Thirith", Case file 002/19-09-2007-ECCC-OCIJ, 1321

law is derived directly from French law) and other international criminal courts to this matter.

b. The "standard of proof" required to indict a person and send them to trial is "sufficient charges."

The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.[2] The "standard of proof" required to indict a person and send them to trial is "sufficient charges", which is referred in the ECCC Internal Rules and the Cambodian law[3].

c. The "standard of proof" should be higher than "reasonable grounds to believe that the person has committed a crime"[4] in order to reach "sufficient charges."

The Co-Investigating Judges investigate the facts set out in an Introductory Submission or a Supplementary Submission[5]. Because the "reasonable grounds" shall be faced by the Co-Prosecutors, the Co-Investigating Judges' investigating power is

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[2] Internal Rule 67(1)

[3] Internal Rule 67(3)(c); Cambodian Criminal Procedure Law of 8 February 1993 Article 90; Code of Criminal Procedure of the Kingdom of Cambodia [2007] Article 247

[4] Art. 58(2)(d) ICC Statute

strong[6] and the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to undertake investigative action as they consider useful for the conduct of the investigation at any time during an investigation[7], the proof level passed by the Co-Investigating Judges should be higher than "reasonable grounds to believe that the person has committed a crime"[8]

d. "Sufficient charges" do not require the evidence "beyond reasonable doubt to convince of the guilt of the accused."[9]

After Co-Investigating Judges submit the Closing Order, with evidence including in it, the facts will be questioned and agreed by the accused, witnesses, civil parties and experts until the evidence beyond reasonable doubt to convince of the guilt of the accused. So, it is not necessary to require the evidence "beyond reasonable doubt" while indicting a person and sending them to trial.

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[6] Internal Rule 55(5)

[7] Internal Rule 55(10)

[8] Art. 58(2)(d) ICC Statute

II Legal Discussion

A. Discussion concerning French and other international criminal courts

The ECCC Internal Rules and Cambodian law refer to the concept of "sufficient charges" in terms of proof level to indict a person, however, they did not offer a clear definition of its content. As there was no jurisprudence available from the Cambodian national courts concerning the question of sufficient charges, the Co-Investigating Judges were led to refer to French jurisprudence (since Cambodian law is derived directly from French law), the jurisprudence of the other international criminal courts and distinguished academic writings[10], in accordance with the Internal Rule 2, Article 23 of the ECCC Law and Article 12 of the ECCC Agreement.

a. French

In Article 177 of ***French Code of Criminal Procedure***, it stipulates that:

> "If the investigating judge considers that the facts do not constitute a felony, a misdemeanor, or a petty offence, or if the perpetrator has remained unidentified, or if there are no sufficient charges against the person under judicial examination, he makes an order ruling that there is no cause to prosecute".

It means that, sufficient charges under judicial examination are required to indict a person and send them to trial. However, there is no further definition about "sufficient

charges" in ***French Code of Criminal Procedure***. We still can not identify the specific standard of proof to indict a person and send them to trial.

In accordance with the principles underpinning French criminal law (***Cass. Crim, 17 novembre 1826***[11]), by no means can an indictment produce proof of the defendant's guilt, but at the most, it can form grounds for sending him or her before the court, which must examine the charges or the prosecution case; also, by no means may proof of guilt derive only from oral, public proceedings before the court charged with deciding the case on the merits, examining chambers only have the right and the power to assess the charges and the indicia contained in the indictment; they are not empowered to decide whether proof of guilt exists.

According to ***Droit et Pratique de l'Instruction Préparatoire***[12], it is not for examining chambers to ascertain whether the defendant is guilty, but only whether the defendant may be guilty. Probability is the threshold for such assessment. It is not evidence, but rather indicia that should be sought in the indictment. Sufficient charges must derive from objective elements drawn from

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11 Cass. Crim, 17 novembre 1826: « D'après les principes qui sont une des bases de la législation criminelle, l'instruction écrite ne pe ut en aucun cas produire la conviction des inculpés, mais tout au plus motiver leur renvoi devant le tribunal qui doit procéder à l'examen de la prévention ou de l'accusation et les preuves de la culpabilité n e peuvent jama is résu lter qu e d 'un d ébat oral et p ublic qu i a lieu d evant le trib unal ch argé de statuer au f ond sur l'ob jet de la po ursuite ; la lo i ne confère aux c hambres d'instr uction qu e le droit et le pouvoir d'a pprécier les charg es et les i ndices qu e peu t présenter l'instru ction écrite ; ils ne sa uraient leur appartenir d e d écider qu 'il existe o u n on d es preuves d e cu lpabilité »

12 Droit et Pratique de l'Instruction Préparatoire Dalloz 2007 Six.Ed. para.213.11: « Les juridictions d'instruction n'ont point à rechercher si le prévenu est coupable, mais seulement s'il est p robable qu 'il le soit. La proba bilité

the proceedings, since mere vague, imprecise indicia, or analogies and coincidences are not sufficient.

In short, the evidentiary material in the Case File to indict a person and send them to trial in France is obviously not required to ascertain the guilt of the Charged Person, but must be sufficiently serious and corroborative to provide a certain level of probative force[13].

b. ICC

In Article 61(7) of ICC Statute, it stipulates that:

"The Pre-Trial Chamber (PTC) shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall: (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed; (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence; (c) Adjourn the hearing and request the Prosecutor to consider: (i) Providing further evidence or conducting further investigation with respect to a particular charge; or (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court."

The standard can be separated into two different elements: sufficient evidence and substantial grounds. The Chamber clarifies each[14] as ". . . **limited to committing for trial only those persons against whom sufficiently compelling charges going**

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13 Droit et Pratique de l'Instruction Préparatoire Dalloz 2007 Sixth.Ed. para.213.12: «[Les c harges suffisantes] doivent résulter d'éléments objectifs tirés de la procédure, de simples indices vagues et imprécis, de simples a nalogies ou c oïncidences ne suf firaient p as. »

14 For the Prosecutor's position on this issue see Prosecution's Document Addressing matters that were Discussed at the Confirmation Hearing, Situation in the Democratic Republic of Congo in the case of the Prosecutor v.

beyond mere theory or suspicion have been brought"[15]. Before considering the two mentioned 'elements' of the standard of proof, the Chamber seems to be removing any doubt: the existence of sufficient evidence to find reasonable grounds has nothing to do with the purpose of the trial or with the existence of a sufficient basis for conviction by this definition.

In order to confirm of charges, The PTC has to check the suitability and seriousness of persons to be brought to trial. The person will be held with different rules, with different kind of evidence and different purposes[16] before a different Chamber. The purpose of the confirmation process is also ". . . to protect the rights of the Defense against *wrongful* and *wholly unfounded* charges.[17]"

For the purpose of defining the 'substantial grounds', the PTC references the human rights case law, including the ECHR decisions. In that way, "substantial" means "**strong."**

Then it goes into more details as far as the concept of "sufficient evidence" is concerned: proof offered by the Prosecutor must be **'concrete and tangible' and sufficient to demonstrate 'a clear line of reasoning underpinning its specific**

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[15] Decision on the Confirmation of Charges, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, at 13.

[16] On this last point see Marchesiello, On the topic of confirmation of the charges at the ICC see M. Marchesiello 'Proceedings before the Pre-Trial Chambers', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), The Rome Statute of the International Criminal Court: A Commentary (Oxford: Oxford University Press, 2002) 1231, at 1245.

[17] Decision on the Confirmation of Charges, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, at 13.

allegations'[18]. Furthermore, evidence must be considered "as a whole"[19]. And this is the best help that the PTC gives to the interpreter in understanding its reasoning and the meaning of the applied standard of proof.

Since the confirmation hearing at the ICC is adversary in nature, and since the Defense is allowed to participate by objecting to the charges, challenging the evidence presented by the Prosecutor and, moreover, presenting its own evidence, the PTC's analysis must also consider the Defense's allegations, their weight and whether they successfully contradicted the Prosecutor's line of reasoning thereby making it insufficiently persuasive.[20]

Therefore, at the end of the hearing, the PTC must decide whether the charges are strong enough (i.e. not wrongful and unfounded), basing its reasoning on the Prosecutor's admitted evidence related to each element of the crime contained in the 'charging document', evaluating not only the 'numeric consistency' of the elements and the seriousness of each one, but also assessing all the evidence as a whole, comparing each piece to the rest, looking for corroboration and interlinking among them[21].

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[18] Decision on the Confirmation of Charges, Decision on the Confirmation of Charges, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, at 13.

[19] Decision on the Confirmation of Charges, Decision on the Confirmation of Charges, Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, at 14.

[20] Michela Miraglia, Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga, Journal of International Criminal Justice 6 (2008), 489-503

[21] It seems that PTC I evaluated the credibility and reliability of the presented evidence, referring to each admitted material and to all the materials as a whole, and that this kind of evaluation was deeper than the one proposed by the Prosecutor (see Prosecution's Document, supra note 14, at 10, 11).

In short, the proof to indict a person and send them to trial in ICC should be able to assessed as a whole and strong enough to demonstrate a clear line of reasoning underpinning its specific allegations[22].

c. ICTY

In Article 19 of **Statute of The International Tribunal For The Former Yugoslavia**, it stipulates that:

"The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed."

In Rule 47 (B) of **Rules of Procedure and Evidence,** it states that:

"The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material."

According to the rules of ICTY, the Prosecutor shall investigate sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime and then help to indict them.

When we look up jurisprudence, we found that in ***Kordic et al. ICTY [1995] Review of the Indictment,*** it states that:

"The above is a summary of the crimes alleged in the indictment and of the way in which it is alleged that the accused was connected to them; and, having reviewed the indictment, I have to consider whether a *prima facie* case has been established by the Prosecutor. As noted, Article 19 of the Statute requires the reviewing Judge to be

[22] Lubanga ICC [2007] Decision on Confirmation of Charges paras.38-39; see also Katanga and Ngudjulo ICC [2008] Decision on Confirmation of Charges para.63; ICC Bemba Gombo Decision on Confirmation of Charges [2009] para.29; Abu Garda ICC [2010] Decision on Confirmation of Charges paras.26-27

satisfied that a *prima facie* case has been established by the Prosecutor before confirming it. The test to be applied in determining whether a *prima facie* case has been established has been the subject of decisions by reviewing Judges of the International Tribunal. For instance, in the leading case on this topic in 1995, when reviewing the indictment in Kordic et al,3 Judge Kirk McDonald adopted the test formulated by the International Law Commission in its Draft Statute for an International Criminal Court: 'a *prima facie* case for this purpose is understood to be a credible case which would (if not contradicted by the Defense) be a sufficient basis to convict the accused on the charge.'"[23]

From jurisprudence, a *prima facie* case has been established by the Prosecutor before indicting the suspect and a *prima facie* case is understood to be a credible case. So, the evidence required to indict a person shall be more credible and the level shall be higher than reasonable ground.

In short, from the rules and jurisprudence, we can come to a conclusion that the proof to indict a person and send them to trial in ICTY should a sufficient basis to convict the accused on the charge.

d. ICTR

In Article 18 of Statute of The International Tribunal For Rwanda, it also stipulates that: "The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed." The rule is the same as the rule in ICTY Statute, which requires the

[23] see also: ***Milosevic et al***. ICTY [1999] Decision on review of Indictment and Application for Consequential Orders; and ***Rajic*** ICTY [1995] Review of the Indictment; J.R.W.D Jones and S. Powles ***International Criminal Practice*** 3rd Edition Oxford University Press pp 509-510 paras 8.2.14 and 8.2.15

reviewing Judge to be satisfied that a *prima facie* case has been established by the Prosecutor before indicting a person.

When we look up jurisprudence, we found that in Ntakirutimana ICTR [1998] TC Decision on a Preliminary Motion Filed by Defence Counsel for an Order to Quash Counts 1,2,3, and 6 of the Indictment, Article 17(4) of the Statute of the Tribunal ("the Statute") states ‘Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of facts and of the crime or crimes with which the accused is charged under the Statute.’ (emphasis added.) The Tribunal notes that neither the Statute nor the Rules define the term ‘*prima facie*’, however Rule 47(A) of the Rules provides some guidance in defining the term as applicable to such situations. Rule 47(A) states that if the Prosecutor is satisfied that there is sufficient evidence to **provide reasonable grounds for believing that a suspect has committed a crime she shall prepare and forward an indictment for confirmation.**

“The Tribunal is of the view that the word "reasonable" is to be associated with fairness, moderation, sensibility and sound judgment. The term ‘reasonable grounds"’ can be interpreted as facts and circumstances which could justify a reasonable or ordinarily prudent person in believing that a suspect has committed a crime. There must be facts which raise a clear suspicion that the suspect is guilty of committing the offence, for reasonable grounds to exist. These facts must address the essential elements of the offence with which the suspect is charged.”

“Furthermore, the Tribunal deems that the Prosecutor must possess ‘sufficient evidence’ to legally justify her actions in preparing and forwarding an indictment, to a judge or Trial Chamber, for confirmation. It is clear that the term "sufficient evidence" in Rule 47(A) of the Rules could not be deemed to require conclusive evidence or evidence beyond a reasonable doubt for the presentation of an indictment. A conviction could only result from essential facts, supported by conclusive evidence.”

“Consequently, the Tribunal reaffirms Trial Chamber's interpretation of the term ‘*prima facie*’ in Article 17(4) of the Statute to signify a sufficient amount of evidence, justifying a reasonable suspicion that the indict did in fact commit the crime for which he is charged.”

In short, from the rules and analysis of the jurisprudence, we can draw a conclusion that the proof to indict a person and send them to trial in ICTR should raise a clear suspicion that the suspect is guilty of committing the offence, for reasonable grounds to exist[24].

e. Conclusion

All above are the introductions about the levels of proof to indict a person in French and other International criminal courts by analyzing French law, jurisprudence and statutes of other international criminal courts as well as authority writings. The Co-

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[24] [illegible]

Investigating Judges shall follow in a common approach to this matter, determining whether sufficient charges exist against the Charged Person[25].

B. Discussion concerning ECCC

a. The "standard of proof" required to indict a person and send them to trial is "sufficient charges."

In **Internal Rule 67(1)**, it stipulates that:

"The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case".

In **Internal Rule 67(3)**, it stipulates that:

"The Co-Investigating Judges shall issue a Dismissal Order in the following circumstances:
a) The acts in question do not amount to crimes within the jurisdiction of the ECCC;
b) The perpetrators of the acts have not been identified;
or c) There is not sufficient evidence against the Charged Person or persons of the charges".

In Article 90 of **Cambodian Criminal Procedure Law of 8 February 1993**, it stipulates that:

"If the investigating judge thinks that the act does not constitute a felony, a misdemeanor, or a minor offense, or the charge on the accused offender is not sufficiently substantiated by evidence, the investigating judge has the right to issue a nonsuit order. In principle, the order of the investigating judge shall be well motivated. This order and the file shall be immediately forwarded to the public prosecutor in order to allow him/her to file an opposition to the Appeal Court within 24 hours. If there is an opposition from the public prosecutor, the detained accused person shall remain in temporary detention. On the contrary, if there is no opposition from the public prosecutor and the accused person does not have other causes to be detained, the investigating judge issues an order to release him/her".

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25 "Closing Order indicting NUON Chea, IENG Sary, KHIEU Samphan, IENG Thirith" Case file 002/19-09-

In Article 247 of **Code of Criminal Procedure of the Kingdom of Cambodia [2007]**, it stipulates that:

"An investigating judge shall close the investigation by a settlement warrant. This warrant can be a warrant to forward the case for trial or a non-suit order. The investigating judge decides to send the accused person to appear before the court for hearing, if he/she finds that the offense is a felony, a misdemeanor or a petty offense. The warrant shall describe the acts being charged and the type of the offense according to the law".

According to the statutes mentioned above, we can find out that the "standard of proof" required to indict a person and send them to trial is "sufficient charges" at the ECCC.

b. The "standard of proof" should be higher than "reasonable grounds to believe that the person has committed a crime"[26] in order to reach "sufficient charges."

1. Rule analysis

From Internal Rule 55(2), we know that the Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.

In Internal Rule 55(5), it stipulates that:

"In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory. To that end, the Co-Investigating Judges may:

a) Summon and question Suspects and Charged Persons, interview Victims and witnesses and record their statements, seize exhibits, seek expert opinions and conduct on-site investigations;
b) Take any appropriate measures to provide for the safety and support of potential witnesses and other sources;
c) Seek information and assistance from any State, the United Nations or any other intergovernmental or non-governmental organization, or other sources that they deem appropriate;
and d) Issue such orders as may be necessary to conduct the investigation, including summonses, Arrest Warrants, Detention Orders and Arrest and Detention Orders".

As we can see from the rule above, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. It is obvious that the investigating power of the Co-Investigating Judges is so great that they can survey the evidence as much as they want until they figure out the whole facts. Therefore, it is very likely for the Co-Investigating Judges to find out evidence in a pretty high level to hold the facts.

In Internal Rule 55(10), it stipulates that:

"At 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. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal."

From the clause above we can know that the Co-Prosecutors, a Charged Person or a Civil Party, all of them can involve in the process of investigation. In this way, all of the people involving in the case can provide more help to Co-Investigating Judges to manage the investigation. As the Co-Prosecutors, a Charged Person or a Civil Party all can undertake investigative actions, the evidence should be more objective and comprehensive.

As we already know that the Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission, which are submitted by the Co-Prosecutors. The Co-Prosecutor has to support his request by a 'summary of the evidence and any other information which establish **reasonable grounds to believe that the person committed those crimes**'. Because the Co-Prosecutor had to face and pass the objections of the Defense at this first level, and because the Defense does not take part in the procedure and has no voice, the basis for the issuance is the Co-Prosecutor's view only, it is obviously that the proof level required to Co-Investigating Judges is higher than that of Co-Prosecutors, namely the proof level shall be higher than **reasonable grounds to believe that the person committed those crimes.**

Therefore, considering the investigating power of Co-Investigating Judges and the involvement of the Co-Prosecutors, a Charged Person and a Civil Party, and in contrast with the addition of Co-Prosecutors, we can draw a conclusion that the level of proof to indict a person and send them to trial should be higher than "reasonable grounds to believe that the person has committed a crime".

2. Jurisprudence (case 001) analysis

From **Introductory Submission** and **Final Submission** to **Closing Order**, we can see that the standards of proof are becoming higher and stricter, which means that the

standard of proof required to Co-Investigating Judges shall place in the midst, not as strict as that required to Judges, or not as loose as that required to Co-Prosecutors.

In **Final Submission,** it states that:

"After receiving several witness complaints, the Co-Prosecutors conducted a series of witness interviews and field investigations and collected extensive documentary evidence. The results of these preliminary investigations were incorporated into an **Introductory Submission**, which requested the Co-Investigating Judges to open a judicial investigation into a number of criminal facts and to arrest and provisionally detain five suspects".
"During the judicial investigation investigators from the Co-Investigating Judges Office have interviewed at least 63 witnesses and collected further documentary evidence."

We can know from the statement that after the Co-Prosecutors do some preliminary investigations, the Co-Investigating Judges will do more surveys to find out the evidence to proof the facts. As the level of proof required to Co-Prosecutors is "reasonable grounds to believe that the person has committed a crime", the level of proof required to Co-Investigating Judges to indict a person and send them to trial will be higher.

c. "Sufficient charges" do not require the evidence "beyond reasonable doubt to convince of the guilt of the accused."[27]

1. Rule analysis

In Internal Rule 87(1), it states that:

"Unless provided otherwise in these IRs, all evidence is admissible. The onus is on the Co-Prosecutors to prove the guilt of the accused. In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt"

It means that the level of proof required to Co-Investigating Judges and Co-Prosecutors should be lower than that required to Judges, namely lower than "beyond reasonable doubt".

After Co-Investigating Judges submit the Closing Order, with evidence including in it, and before the Chamber, the facts will be questioned and agreed by the accused, witnesses, civil parties and experts.

In Internal Rule 87(3), it states that:

"The Chamber bases its decision on evidence from the case file provided it has been put before it by a party or if the Chamber itself has put it before the parties. Evidence from the case file is considered put before the Chamber or the parties if its content has been summarized, read out, or appropriately identified in court. The Chamber may reject a request for evidence where it finds that it is:
a. irrelevant or repetitious;
b. impossible to obtain within a reasonable time;
c. unsuitable to prove the facts it purports to prove;
d. not allowed under the law;
or e. intended to prolong proceedings or is frivolous"

It means that the evidence provided by the Co-Prosecutors (Co-Investigating Judges) will be testified again in the Chamber. If the evidence doesn't satisfy the requirements of rule, it will be rejected. Therefore, we can know that the standard of proof in Chamber is higher than that in the process of investigation.

In Internal Rule 87(4) and (6), it states that:

"During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial."

"Where the Co-Prosecutors and the Accused agree that alleged facts contained in the Indictment are not contested, the Chamber may consider such facts as proven."

It means that more effective evidence can be added in the Chamber to prove the facts in a deeper extent. It is obvious that the evidence will be more comprehensive and convinced than that before the Chamber.

In short, considering the actions taken on the evidence provided by the Co-Prosecutors (Co-Investigating Judges) after Closing Order submitted, the level of proof required to Judges could be more comprehensive and convinced, which means that "beyond reasonable doubt" level is higher than that required to indict a person and send them to trial.

2. Jurisprudence (case 001) analysis

In **Judgment (43),** it states that:

"In its practice, the Chamber ultimately had recourse to the fundamental fair trial principles enshrined in Internal Rule 21 and Article 33 (new) of the ECCC Law, as well as to the jurisprudence of international criminal tribunals. In light of this jurisprudence, the Chamber has considered hearsay and circumstantial evidence to be admissible where sufficiently relevant and probative."

"With regard to hearsay statements, the Chamber gave particular consideration to whether the Accused was able to confront the source of such statements. In keeping with international jurisprudence, the Chamber has also found that the testimony of a single witness can establish a fact at issue where such evidence is sufficiently relevant and probative.[28]"

It means that the level of proof also keeps with that in international jurisprudence.

In **Judgment (46), (47), (54) and (55),** it states that:

"the Chamber directed the Co-Prosecutors and the Defense to submit filings indicating their joint agreement, if any, with facts in the Amended Closing Order[29].

28 See e.g., Prosecutor v. Nahimana et al., Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007, para. 509; Čelebići Appeal Judgement, para. 458.

29 Direction Requesting Additional Information from the Parties and Co-Investigating Judges in Preparation of the

These submissions were filed on 11 February 2009 and 1 April 2009, respectively[30]. During the hearing of 1 April 2009, the Chamber instructed the Co-Prosecutors and the Defense to publicly read out facts that were jointly agreed to or that were not disputed[31]."

"Broadly speaking, the Accused agreed with or did not dispute a significant number of facts contained in the Amended Closing Order.[32]"

"A total of 24 witnesses testified under oath before the Chamber during the proceedings[33]. Protective measures were afforded in a limited number of cases[34]."

"22 Civil Parties provided evidence before the Chamber. Expert testimony is designed to provide specialized knowledge, be it a skill, or knowledge acquired through training or research, which assists the Chamber in understanding the evidence presented. The Chamber retains its exclusive responsibility to decide any issue within its competence. A total of nine experts appeared before, or made submissions to, the Chamber over the course of the trial"

It means that the facts will be questioned and agreed by the accused, witnesses, civil parties and experts.

According to the **Judgment,** we can know that there are still a lot of work to do on the evidence provided by the Co-Prosecutors (Co-Investigating Judges) to reach the standard "beyond reasonable doubt." Therefore, the proof level to indict a person and send them to trial should be lower than that obviously.

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30 "Response of the Co-Prosecutors Regarding Agreement on Facts", E5/11/2; "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, which is attached as Annex 1 to the "Defence's explanation concerning the document entitled 'Defence's Position on the facts contained in the Closing Order'", E5/11/6; see also "Annex 2: Part III Character Information", E5/11/6.2 , 30 April 2009.

31 T., 1 April 2009, pp. 17, 51-100. Several opportunities were provided to the Accused during hearings to further clarify his position with regard to particular facts in the Amended Closing Order (see e.g., T., 30 April 2009, pp. 57-78; 18 May 2009, pp. 5-59; 16 June 2009, pp. 78-81, 86-87; 17 June 2009, pp. 37-39).

32 See e.g., "Defence Position on the Facts Contained in the Closing Order", E5/11/6.1, paras 3, 7, 35, 39, 58-60, 169, 203, 213.

33 Internal Rule 24(2) excludes a number of witnesses, including the father, mother and ascendants of the Accused or the Civil Parties, from taking an oath prior to their statements before the Trial Chamber.

34 See Decision on Protective Measures for Civil Parties E2/62 and E2/89 and for Witnesses KW-10 and KW-24, E135, 7 August 2009.

III Conclusion

There is no clear definition about the “standard of proof to indict a person and send them to trial” at the ECCC, France and other international criminal tribunals. According to the statutes, the jurisprudence and academic writings of France, ICC, ICTY, ICTR, we can draw a conclusion that each of them has a level. Although the statements of level are not the same, they are in a similar meaning. As for the ECCC, there are no many jurisprudence and the Cambodian law is derived directly from French law, so it is a good idea for the ECCC to follow in a common approach of France and other international criminal tribunals to this matter, determining whether sufficient charges exist against the Charged Person. In addition, as there are some specific rules about the proof in Inter Rules of the ECCC, combining with the analysis on case 001, we can come to an conclusion that the “standard of proof” required to indict a person and send them to trial is “sufficient charges”, which has to be placed somewhere in between “reasonable grounds to believe that the person has committed a crime” and “beyond reasonable doubt to convince of the guilt of the accused”.