

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

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**INTERNATIONAL CO-PROSECUTOR'S APPEAL OF THE ORDER DISMISSING
THE CASE AGAINST AO AN (D359)**

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I. INTRODUCTION

1. On 16 August 2018, the International Co-Investigating Judge (“ICIJ”) issued a closing order (“Indictment”) indicting Ao An for genocide, crimes against humanity, and violations of the 1956 Cambodian Penal Code and committing him for trial.¹ On the same day, the National Co-Investigating Judge (“NCIJ”) issued a closing order (“Dismissal Order”) dismissing all charges against Ao An on the grounds that he does not fall within the personal jurisdiction of the ECCC.² This appeal addresses the Dismissal Order.
2. The Dismissal Order was based on the finding that Ao An was not among “those who were most responsible” for Khmer Rouge crimes. While the determination as to whether an individual fits within the category of those “most responsible” for crimes of the Democratic Kampuchea (“DK”) regime falls within the discretion of the Co-Investigating Judges (“CIJs”), the Dismissal Order’s finding was premised on factual and legal errors that invalidate the finding. As detailed below, the Dismissal Order’s reasoning was marred by errors, including: (1) failing to make any findings as to whether crimes within the jurisdiction of the ECCC were committed and as to whether Ao An bears any responsibility for such crimes (an error of law); (2) giving improper weight in its analysis of personal jurisdiction to sometimes erroneous or incomplete findings regarding the extent to which Ao An was following superior orders and/or acting under coercion or duress (an error of fact and law); (3) erroneously interpreting the ECCC Law by holding that the category of “those who were most responsible” for DK crimes can refer only to Kaing Guek Eav (“Duch”) (an error of law); (4) erroneously assessing the reliability of evidence on the Case File (errors of fact); (5) a number of unreasonable factual findings having a critical impact on the determination of personal jurisdiction; and (6) failing to adequately consider the impact of Ao An’s willing and very significant participation in the crime of genocide as a factor that should be considered in assessing whether Ao An falls into the jurisdictional category of those “most responsible” for DK crimes.

¹ **D360** Closing Order (Indictment), 16 August 2018, EN 01580615-21.

² **D359** Order Dismissing the Case Against Ao An, 16 August 2018 (“Dismissal Order”), paras 554-555.

3. Individually and cumulatively, these legal and factual errors in the reasoning of the Dismissal Order require the Pre-Trial Chamber (“PTC”) to reverse that decision. Given that even the limited factual findings in the Dismissal Order establish to the requisite standard that Ao An used his very significant authority to further massive crimes in the areas he controlled, including ordering the execution of thousands with genocidal intent, the only reasonable finding is that Ao An falls within the personal jurisdiction of the ECCC as he is among those most responsible for the crimes of the DK regime.
4. The International Co-Prosecutor (“ICP”) now appeals the Dismissal Order pursuant to Rules³ 67(5) and 74(2) and respectfully requests that the Pre-Trial Chamber find that Ao An was among those most responsible for Khmer Rouge crimes and therefore falls within the personal jurisdiction of the ECCC. The ICP further requests that the PTC order that the case against Ao An proceed to trial on the basis of the Indictment issued by the ICIJ.⁴

II. PROCEDURAL HISTORY

5. The relevant procedural history is set out in Annex I.

III. APPLICABLE LAW

A. ADMISSIBILITY OF THE APPEAL

6. Rule 74(2) provides that the Co-Prosecutors “may appeal against all orders by the Co-Investigating Judges” and Rule 67(5) provides that a closing order is “subject to appeal as provided in Rule 74.”

³ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Internal Rules” or “Rules”).

⁴ This request for relief follows from the novel situation of two conflicting closing orders, one an indictment and one a dismissal, in a single case, which inherently will have to be considered together. The Pre-Trial Chamber has recognised the possibility of multiple possible cross-appeals and the interrelationship of the closing orders in its decision granting the parties additional time and pages to prepare appeals of the closing orders. *See D360/7 Decision on Request for Extension of Time and Page Limit for Ao An’s Appeal against the Closing Order (Indictment)*, 8 November 2018 (“Extension Decision”), para. 3. This request for relief is premised on the assumption that any appeals against the Indictment are not granted. In that situation, where there is a valid indictment, Rule 77(13)(b) requires that the PTC seize the Trial Chamber on the basis of the indictment.

B. STANDARD OF REVIEW FOR DECISIONS ON PERSONAL JURISDICTION

7. While the CIJs may exercise their own discretion in determining whether a Charged Person falls within the category of those “most responsible” for DK crimes, this discretion is not unlimited and “does not permit arbitrary action”.⁵ The NCIJ’s decision in this regard is reviewable by the PTC.⁶
8. Further, it is well-established in international law that discretionary decisions that are premised on erroneous legal reasoning or factual findings cannot stand.⁷ As this PTC has recently unanimously held:

A discretionary decision may be reversed where it was: (1) based on an incorrect interpretation of the governing law (*i.e.* an error of law) invalidating the decision; (2) based on a patently incorrect conclusion of fact (*i.e.* an error of fact) occasioning a miscarriage of justice; and/or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges’ discretion and to force the conclusion that they failed to exercise their discretion judiciously. In other words, it must be established that there was an error or abuse which was fundamentally determinative of the Co-Investigating Judges’ exercise of discretion.⁸

9. The PTC has found it to be established international jurisprudence that, on appeal, “alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct and

⁵ Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018 (“Im Chaem PTC Closing Order Considerations”), para. 20 (unanimous holding).

⁶ Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 20 (unanimous holding).

⁷ *Slobodan Milošević v. Prosecutor*, IT 02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004, para. 10 *cited in* Case 002-**D164/3/6** Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, para. 25; *Prosecutor v. Slobodan Milošević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, paras 5-6; *Prosecutor v. Šešelj*, IT-03-67-AR73.5, Decision on Vojislav Šešelj’s Interlocutory Appeal against the Trial Chamber’s Decision on Form of Disclosure, 17 April 2007, para. 14; *Prosecutor v. Halilović*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, paras 5, 64; *The Prosecutor v. Karemera et al.*, ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 5; *Uwinkindi v. The Prosecutor*, ICTR-01-75-AR72(C), Decision on Defence Appeal against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, para. 6; *The Prosecutor v. Katanga & Ngudjolo Chui*, ICC-01/04-01/07, Judgment on the Appeal of the Prosecutor against the “Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre”, 9 December 2009, paras 1, 41-43.

⁸ Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 21 (unanimous holding).

alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue.”⁹

C. REQUIREMENT FOR FINDINGS REGARDING CRIMES COMMITTED AND THE SUSPECT’S LIKELY CRIMINAL LIABILITY

10. In any closing order, the CIJs are to “make their final determinations with respect of the legal characterisation of the acts alleged by the Co-Prosecutors and determine whether they amount to crimes within the jurisdiction of the ECCC”.¹⁰ These findings are required: the PTC has unanimously held that, in order to properly exercise its power to review decisions on personal jurisdiction, it “*must* be able to review the findings that led to it, including those regarding the existence of crimes or the likelihood of [a suspect’s] criminal responsibility.”¹¹ This obligation to make necessary findings follows from the requirement of Rule 67(4) and relevant jurisprudence that both indictments and dismissals be reasoned.¹²

D. STANDARD FOR IDENTIFICATION OF THOSE “MOST RESPONSIBLE” FOR KHMER ROUGE CRIMES

11. Identification of those “most responsible” for crimes falling within the ECCC’s jurisdiction requires an assessment of both the gravity of the crimes charged and the level of responsibility of the suspect.¹³ This assessment must be made “based entirely on the individual merits of each case” and, as the CIJs recently acknowledged, “there is no merit in any historical-political contention that the negotiations around the establishment of the

⁹ Case 002-D427/1/30 Decision on Ieng Sary’s Appeal Against the Closing Order, 11 April 2011 (“Ieng Sary Closing Order Appeal Decision”), para. 113.

¹⁰ Case 002-D427/3/15 Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, para. 79. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, paras 321-340. Every closing order issued so far at the ECCC except for the Dismissal Order has contained these findings. Even the Case 004/1 Closing Order, which found no personal jurisdiction over Im Chaem, contained findings on the crimes proven and Im Chaem’s liability for those crimes. These findings were central to the CIJs’ analysis of the personal jurisdiction issue with respect to Im Chaem. *See* Case 004/1-D308/3 Closing Order (Reasons), 10 July 2017, paras 281-325, fn. 735. The ICP notes that he has not yet had an opportunity to review the NCIJ’s closing order in Case 003, as it has not yet been translated into English, and is therefore unaware of whether it contains legal conclusions regarding crimes or modes of liability.

¹¹ Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, para. 26 (unanimous holding) (emphasis added).

¹² Case 001-D99/3/42 Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias “Duch”, 5 December 2008 (“Case 001 PTC Decision on Closing Order Appeal”), paras 37-38; Internal Rule 67(4).

¹³ Case 001-E188 Judgement, 26 July 2010, para. 22 (“*Duch* Trial Judgement”). *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, para. 321; D359 Dismissal Order, para. 424 [acknowledging this to be the applicable standard].

ECCC led to a joint and binding understanding that only a certain finite number of (named) individuals were to be under the Court’s jurisdiction”.¹⁴

E. STANDARD OF EVIDENCE FOR INDICTMENT

12. Under Internal Rule 67, there must be “sufficient evidence [...] of the charges” to issue an indictment against a Charged Person. The CIJs and PTC have clarified that this requires a “probability” of guilt, which is incrementally more than a “mere possibility” but less than the “beyond a reasonable doubt” standard used at trial.¹⁵ Moreover, “the evidentiary material on the Case File must be sufficiently serious and corroborative to provide a certain level of probative force.”¹⁶

IV. APPEAL SUBMISSIONS

13. The NCIJ erred in law and fact in finding that Ao An is not subject to the personal jurisdiction of the ECCC. This error was based on numerous factors, discussed below.

A. LEGAL ERROR OF FAILURE TO MAKE FINDINGS ON CRIMES COMMITTED AND AO AN’S CRIMINAL LIABILITY FOR THOSE CRIMES

1. Lack of findings regarding whether crimes within the jurisdiction of the ECCC were committed and whether Ao An is responsible for any such crimes

14. The assessment of who is “most responsible” for crimes within the jurisdiction of the ECCC requires an evaluation of both the gravity of the crimes charged and the level of responsibility of the suspect.¹⁷ The national and international judges of the PTC have unanimously held that to properly exercise their appellate review function with respect to the issue of personal jurisdiction, they “must be able to review the findings that led to it, including those regarding the existence of crimes or the likelihood of [a suspect’s] criminal responsibility.”¹⁸ Internal Rule 67 also requires that the CIJs decide on all facts with which they are seised, as such

¹⁴ Case 004/1-D308/3 Closing Order (Reasons), paras 37-38.

¹⁵ Case 002-D427 Closing Order, 15 September 2010, para. 1323; Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, paras 60-62.

¹⁶ Case 002-D427 Closing Order, para. 1323.

¹⁷ Case 001-E188 *Duch* Trial Judgement, para. 22. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, para. 321; D359 Dismissal Order, para. 424 [acknowledging this to be the applicable standard].

¹⁸ Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, para. 26 (emphasis added).

findings are required for a reasoned decision.¹⁹ Despite this, the Dismissal Order explicitly states that it “will neither characterise the crimes nor classify the modes of liability.”²⁰ This approach renders the Dismissal Order unreasoned and legally deficient.

15. This defect is not trivial, nor is it cured by the Dismissal Order’s general (and incomplete) discussion of a portion of the evidence on the Case File. For example, the Dismissal Order made findings that the DK regime had a central policy to destroy its Cham population;²¹ that Ao An issued orders to his subordinates to kill all the Cham in areas under their control;²² and that many Cham were killed in response to these orders, including most of the Cham in Kampong Siem and Kang Meas districts.²³ It does *not*, however, contain any legal conclusions as to whether these facts amount to the crime of genocide, and if so, whether the evidence shows that Ao An is likely responsible for this crime. These findings self-evidently would have a tremendous impact on personal jurisdiction: if the NCIJ concluded that Ao An was individually criminally responsible for genocide, a detailed, reasoned explanation would be required as to why, despite this conclusion, Ao An was nevertheless not among those “most responsible” for DK crimes. If, on the other hand, the NCIJ was of the view that these facts do not show that genocide was committed, or do not show that Ao An was responsible, a detailed, reasoned explanation as to why that is the case is equally required—as is a discussion as to whether these facts amount to any of the other relevant charged crimes, such as murder, extermination, or persecution. A closing order cannot simply survey a portion of the evidence relevant to a particular topic, fail to reach any reasoned conclusions, and then move on to the next topic for similarly superficial treatment.
16. In the Dismissal Order, the NCIJ himself acknowledges that identification of those “most responsible” for crimes falling within the ECCC’s jurisdiction requires an assessment of both

¹⁹ Case 001-D99/3/42 Case 001 PTC Decision on Closing Order Appeal, paras 37-38; Internal Rule 67(4).

²⁰ **D359** Dismissal Order, para. 2.

²¹ **D359** Dismissal Order, paras 142-146.

²² **D359** Dismissal Order, paras 410-418. To the extent that the Dismissal Order’s speculative and unreasoned discussion of Prak Yut’s credibility later in the Dismissal Order is intended to contradict or weaken these findings, the matter is dealt with in Section IV.D.1 below. In any event, the fact that a careful reading of the Dismissal Order leaves a degree of ambiguity as to what findings have actually been made highlights the need for the reasoned legal conclusions sought by this appeal.

²³ **D359** Dismissal Order, paras 307, 414.

the gravity of the crimes charged and the level of responsibility of the charged person,²⁴ an assessment that he did not undertake and that necessarily requires the legal conclusions he did not reach. Notably, all closing orders issued at the ECCC to date, including the CIJs' dismissal order in Case 004/1, have contained findings regarding crimes committed and the suspects' liability for them.²⁵

2. Lack of legal conclusions necessarily following from the Dismissal Order's own factual findings

17. While the Dismissal Order did not comprehensively review the evidence on the Case File and did not reach the factual findings that would follow from a thorough evidentiary review, in some situations, the Dismissal Order does contain a partial review of the evidence and limited factual findings, as detailed in this section. Even in these situations, though, the Dismissal Order did not reach the legal conclusions regarding the commission of crimes and Ao An's responsibility that would necessarily follow from its own factual findings.
18. *Ao An's Positions and Authority*: For example, the Dismissal Order found that Ao An occupied a series of increasingly important posts throughout the DK regime, culminating in his roles as Sector 41 Secretary and Deputy Secretary of the Central Zone.²⁶ It found that Ao An provided policy training to cadres in Sector 41; that he was "in charge of" Sector 41; and that he "was always present" in Sector 41.²⁷ It found that Ao An received orders from Ke Pauk to "arrest all enemies quickly in the Sector" and acknowledged evidence that thousands of people were arrested and killed pursuant to these orders.²⁸ It recognised that Ao An's

²⁴ **D359** Dismissal Order, para. 424; Case 004/1-**D308/3** Closing Order (Reasons), fn. 735. *See also* Case 001-E188 *Duch* Trial Judgement, para. 22; Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 321.

²⁵ The ICP notes that he has not yet had an opportunity to review the NCIJ's closing order in Case 003, as it has not yet been translated into English, and is therefore unaware of whether it contains legal conclusions regarding crimes or modes of liability.

²⁶ **D359** Dismissal Order, paras 189-193, 199, 242.

²⁷ **D359** Dismissal Order, paras 251-252.

²⁸ **D359** Dismissal Order, para. 262. One of the recurring problems with the Dismissal Order is its tendency to quote evidence on a point without clearly stating whether the evidence is accepted or rejected. Where these citations and quotations appear in overall context to amount to factual findings, they are treated as such. The ambiguity inherent in this approach, however, highlights the need for the formal legal characterisations sought by this appeal.

policy was that “anyone who complained was arrested” and that those in Sector 41 perceived the plan to eliminate enemies as “Ta An’s plan”.²⁹

19. Wat Phnom Pros Execution Site:³⁰ The Dismissal Order found that the Wat Phnom Pros Execution Site was a zone-level facility located near the Kampong Siem District Office,³¹ that prisoners taken to Phnom Pros were executed immediately, with virtually no period of detention prior to their execution,³² and that as many as 10,000 victims may have been killed there.³³ The Dismissal Order found that the site was under the control of Ke Pauk, who sometimes visited the site,³⁴ but also acknowledged evidence from Ke Pauk’s son that Ao An gave orders for killings at Phnom Pros³⁵ (though the Dismissal Order later questioned Ke Pich Vannak’s reliability on this point³⁶).
20. Wat Au Trakuon Security Centre: The Dismissal Order found that prisoners at Wat Au Trakuon Security Centre were detained in temple buildings,³⁷ that male prisoners were shackled,³⁸ that prisoners were divided into light and serious offenders,³⁹ that serious offence prisoners were never released and “had to be killed”;⁴⁰ that prisoners were “excruciatingly

²⁹ D359 Dismissal Order, paras 259-260.

³⁰ The Dismissal Order states that the ICIJ removed Wat Phnom Pros from the Case File, ceased investigation there, and the ICP did not contest (*see* D359 Dismissal Order, para. 505). This is inaccurate. The ICIJ informed the parties that allegations regarding two of the charges at Wat Phnom Pros – imprisonment and persecution – would not be investigated further, as they appeared to be subject to Rule 66bis (*see* D307/3 Notice of Provisional Discontinuance Regarding Individual Allegations, 25 August 2016, paras 1 (Fact 5), 13(d), 22, 23). The ICP did not object to the provisional reduction of charges, as the remaining facts were sufficiently representative (*see* D307/4/1 International Co-Prosecutor’s Response to the International Co-Investigating Judge’s Notification Pursuant to Internal Rule 66bis(2), 18 November 2016, para. 2), and when the CIJs concluded the investigation, the ICIJ utilised Rule 66bis to formally reduce the charges, excluding the facts that had been provisionally discontinued (*see* D337 Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66bis, 16 December 2016, paras 4, 13). However, the charges for murder, extermination, and premeditated homicide remained for Wat Phnom Pros; the site was not “removed” from the Case File (*see* D303 Written Record of Further Appearance, 14 March 2016, EN 01213487-89).

³¹ D359 Dismissal Order, para. 289.

³² D359 Dismissal Order, para. 290.

³³ D359 Dismissal Order, para. 297.

³⁴ D359 Dismissal Order, paras 293-296.

³⁵ D359 Dismissal Order, para. 292.

³⁶ D359 Dismissal Order, para. 505.

³⁷ D359 Dismissal Order, para. 300.

³⁸ D359 Dismissal Order, para. 300.

³⁹ D359 Dismissal Order, para. 303.

⁴⁰ D359 Dismissal Order, para. 303.

tortured” to elicit confessions;⁴¹ that prisoners were generally killed in groups of 10;⁴² that in at least one case, growing one’s own food was a serious enough offence to result in execution;⁴³ that most killings occurred in 1977, with Cham in particular killed in September-October 1977;⁴⁴ and that the total number of people killed at the security centre may have exceeded the death toll at S-21 and may even have exceeded 30,000.⁴⁵

21. Cham at Wat Au Trakuon Security Centre: With respect to the Cham victims at Wat Au Trakuon Security Centre, the Dismissal Order found that there was a plan to kill “all Cham people”;⁴⁶ that almost all of the Cham in Kang Meas District were in fact killed;⁴⁷ and that September-October 1977 (when the Dismissal Order concedes Ao An was already serving as Sector 41 Secretary⁴⁸) was an intense period for the killing of Cham at Wat Au Trakuon.⁴⁹
22. Wat Batheay Security Centre: The Dismissal Order found that a large portion of a two-hectare site was used to bury corpses at Wat Batheay Security Centre,⁵⁰ indicating the scale of killings there; that the total number of people killed was estimated “in the thousands or around 10,000”;⁵¹ that the scale of the arrests was such that prisoners could only be kept one night and had to be killed the next day to avoid overcrowding;⁵² that prisoners were shackled and brutally tortured;⁵³ that in 1978, there was a wave of killing of Cham (including children) and East Zone people;⁵⁴ that prisoners sent to Wat Batheay were almost always killed (“rarely did they survive”);⁵⁵ that some prisoners’ organs were harvested after killing;⁵⁶ that

⁴¹ D359 Dismissal Order, para. 303.

⁴² D359 Dismissal Order, para. 304.

⁴³ D359 Dismissal Order, para. 304.

⁴⁴ D359 Dismissal Order, para. 305. The Dismissal Order acknowledges that Ao An was the Sector 41 Secretary at this time. See D359 Dismissal Order, paras 203, 242.

⁴⁵ D359 Dismissal Order, para. 311.

⁴⁶ D359 Dismissal Order, para. 307.

⁴⁷ D359 Dismissal Order, para. 307.

⁴⁸ D359 Dismissal Order, paras 203, 242.

⁴⁹ D359 Dismissal Order, para. 305.

⁵⁰ D359 Dismissal Order, para. 313.

⁵¹ D359 Dismissal Order, para. 322.

⁵² D359 Dismissal Order, para. 315.

⁵³ D359 Dismissal Order, paras 316, 318.

⁵⁴ D359 Dismissal Order, para. 317.

⁵⁵ D359 Dismissal Order, para. 318.

⁵⁶ D359 Dismissal Order, para. 320.

Batheay District Secretary Phim was “always seen coming in and out” of the security centre;⁵⁷ and that approximately 10 percent of the total victims were Cham.⁵⁸

23. Met Sop/Kor Security Centre: The Dismissal Order found that prisoners at the Met Sop/Kor Security Centre were shackled and handcuffed in groups and “were always tortured” during interrogations;⁵⁹ that most prisoners there were killed with wooden or steel clubs, while some also died of disease;⁶⁰ that the killings were carried out pursuant to orders given by Ao An to Ta Ngov, the chief of the security centre and a subordinate of Ao An;⁶¹ that Ao An visited the security centre (which was a sector-level facility) “many times”;⁶² and that approximately 2,000 prisoners in total were killed or died of disease there.⁶³
24. Kok Pring Execution Site: The Dismissal Order found that killings at Kok Pring Execution Site began in 1970 and continued after the arrival of the Southwest Zone group in 1977;⁶⁴ that the “intensive” period of disappearances at Kok Pring began in late 1976 or early 1977 with 20 to 50 people killed there every night;⁶⁵ and that estimates of the total number of people killed at Kok Pring ranged from 1,000 to 7,000.⁶⁶
25. Wat Angkuonh Dei Security Centre and Tuol Beng Execution Site: The Dismissal Order found that the Wat Angkuonh Dei Security Centre was used to detain both ethnic Khmer and Cham people from Kampong Siem District;⁶⁷ that prisoners were shackled and “always tortured” during interrogations;⁶⁸ that prisoners were generally detained briefly before being taken elsewhere for execution, often to Tuol Beng, but some were killed at Wat Angkuonh Dei;⁶⁹ and that the Security Centre was a Kampong Siem District-level facility under the

⁵⁷ D359 Dismissal Order, para. 321.

⁵⁸ D359 Dismissal Order, para. 321.

⁵⁹ D359 Dismissal Order, para. 327.

⁶⁰ D359 Dismissal Order, paras 330-331.

⁶¹ D359 Dismissal Order, paras 328-330.

⁶² D359 Dismissal Order, paras 323, 328.

⁶³ D359 Dismissal Order, para. 331.

⁶⁴ D359 Dismissal Order, para. 332.

⁶⁵ D359 Dismissal Order, para. 333.

⁶⁶ D359 Dismissal Order, para. 336.

⁶⁷ D359 Dismissal Order, para. 390.

⁶⁸ D359 Dismissal Order, para. 388.

⁶⁹ D359 Dismissal Order, para. 387.

authority of Prak Yut.⁷⁰ The Dismissal Order found that the Tuol Beng execution site was a Kampong Siem District facility under the control of Prak Yut⁷¹ that had the capacity to house approximately 200 detainees at a time, and those brought to Tuol Beng for execution were held there briefly prior to being killed.⁷² The killings at Tuol Beng increased dramatically in 1978 and the victims included “many Cham.”⁷³ Several thousand people in total may have been killed at Tuol Beng.⁷⁴

26. Wat Ta Meak Security Centre: The Dismissal Order found that Wat Ta Meak was a sector-level security centre managed by Ao An’s subordinate, Aun, who also carried out arrest orders and transported prisoners to the centre,⁷⁵ that prisoners were arrested and transported to Wat Ta Meak every day;⁷⁶ that prisoners there were “excruciatingly tortured” and shackled, chained or tied during detention;⁷⁷ that prisoners were gathered and killed in a field at Wat Ta Meak;⁷⁸ and that Ao An regularly received information about Wat Ta Meak and personally attended meetings there.⁷⁹
27. Anlong Chrey Dam Worksite: The Dismissal Order found that Anlong Chrey Dam was a sector-level worksite and that Ao An inspected it and accused the workers there of spying for the CIA and Vietnamese.⁸⁰ The Dismissal Order contained no findings at all about the conditions at the site or crimes committed there.
28. Findings related to Genocide of the Cham: The Dismissal Order found that Ao An ordered Prak Yut and all of the other Sector 41 district secretaries to arrest all the Cham in areas under their control;⁸¹ that Ao An ordered Prak Yut to kill all the Cham in her district;⁸² that

⁷⁰ D359 Dismissal Order, paras 387, 389.

⁷¹ D359 Dismissal Order, paras 392, 396.

⁷² D359 Dismissal Order, para. 394.

⁷³ D359 Dismissal Order, para. 395.

⁷⁴ D359 Dismissal Order, para. 395.

⁷⁵ D359 Dismissal Order, para. 342.

⁷⁶ D359 Dismissal Order, para. 349.

⁷⁷ D359 Dismissal Order, para. 345.

⁷⁸ D359 Dismissal Order, para. 346.

⁷⁹ D359 Dismissal Order, para. 348.

⁸⁰ D359 Dismissal Order, paras 337-338.

⁸¹ D359 Dismissal Order, para. 410.

⁸² D359 Dismissal Order, paras 410-412, 415. To the extent that the speculative and unreasoned critique of Prak Yut’s credibility later in the Dismissal Order is intended to weaken or contradict these apparent findings, the matter is dealt with in Section IV.D.1.

most of the Cham in Kampong Siem District were in fact killed pursuant to these orders;⁸³ that following these killings Prak Yut reported back to Ao An;⁸⁴ that most of the Cham in Kang Meas District were also killed pursuant to an organised program;⁸⁵ that approximately 10 percent of the thousands of victims killed at Wat Batheay Security Centre were Cham;⁸⁶ and that “many Cham” were among the thousands of victims killed at Tuol Beng execution site.⁸⁷

29. *Findings related to Forced Marriage:* The Dismissal Order found that “Angkar” regularly arranged marriages in Kampong Siem District both before and after the arrival of the Southwest Zone cadres;⁸⁸ that mobile unit members in Prey Chhor District were forced to marry and no one dared to resist these instructions for fear of being killed;⁸⁹ that no one dared to refuse a wedding arranged by Angkar because “they were afraid they would be taken away and killed”;⁹⁰ and that Ao An ordered newlyweds to consummate their marriages and those who did not would be re-educated, starved, or killed.⁹¹
30. All of the crimes described above occurred in Sector 41, where Ao An served as sector secretary—the highest authority leading the Khmer Rouge in the area. At a minimum, these findings show that the investigation established the probability that Ao An is individually criminally responsible for the crime of genocide and the crimes against humanity of murder, extermination, persecution, imprisonment, torture, and forced marriage and rape as other inhumane acts. The ICP submits that these findings alone establish that Ao An was among those “most responsible” for the crimes of the DK regime.
31. To be clear, the ICP maintains his view that the evidence on the Case File shows that Ao An is responsible for all of the crimes described in the ICP’s Final Submission and not just those

⁸³ D359 Dismissal Order, paras 413-415.

⁸⁴ D359 Dismissal Order, paras 415-416.

⁸⁵ D359 Dismissal Order, para. 307.

⁸⁶ D359 Dismissal Order, paras 321-322.

⁸⁷ D359 Dismissal Order, para. 395.

⁸⁸ D359 Dismissal Order, paras 397, 406-408.

⁸⁹ D359 Dismissal Order, para. 406.

⁹⁰ D359 Dismissal Order, para. 406.

⁹¹ D359 Dismissal Order, para. 404.

reflected in these limited factual findings. The Disclosure Order errs in law by often failing to including findings on Ao An's participation in and liability for these crimes.⁹²

B. LEGAL AND FACTUAL ERRORS OF GIVING EXCESSIVE WEIGHT TO COERCION, DURESS, AND SUPERIOR ORDERS

1. The Dismissal Order accorded excessive weight to superior orders, duress, and coercion in the analysis of personal jurisdiction

32. The Dismissal Order's finding that Ao An was not within the category of those most responsible for the crimes of the DK regime places primary emphasis on the fact that Ao An: (i) was subject to superior orders, (ii) was tasked with implementing Communist Party of Kampuchea ("CPK") policy, and (iii) functioned within the coercive system created by the CPK and DK regime. This theme recurs frequently in the Dismissal Order⁹³ and appears most prominently in the two paragraphs in which the Dismissal Order gives its conclusion on personal jurisdiction. There, the Dismissal Order emphasises that there is no personal jurisdiction over Ao An because "[h]e acted upon orders from and instructions of Ke Pauk, who led the Central Zone" and "[h]ad [he] denied, [he] would not have escaped death."⁹⁴ It also emphasised that "Ao An did not participate in making CPK policies."⁹⁵

⁹² These findings regarding crimes in Sector 41 contain significant detail but often fail to include findings on Ao An's participation and liability. One prominent example of this relates to Wat Au Trakuon Security Centre and Wat Batheay Security Centre. At Wat Au Trakuon, the Dismissal Order found that orders to kill were given by the security centre chief, an indirect subordinate of Ao An. Coupled with the Dismissal Order's findings that orders to kill had to originate at the zone level or above and that DK orders and instructions were passed down through "mostly vertical lines of communication in the chain of command", the only reasonable inference is that the orders to commit the killings at Wat Au Trakuon Security Centre were passed down by Ao An to the Kang Meas District Secretary and then on to the Wat Au Trakuon Security Chief. But despite the fact that this is the only reasonable conclusion on the Dismissal Order's own findings, the Dismissal Order fails to find that Ao An issued these orders. *See* **D359** Dismissal Order, paras 105-106, 214-216, 261, 310, 466. Similarly, with respect to the Wat Batheay Security Centre, the Dismissal Order found that Wat Batheay District Secretary Phim, who was Ao An's direct subordinate, had (at the very least) a prominent supervisory role there and that thousands of people were killed there. Again, on the same logic, the only reasonable inference on the Dismissal Order's other findings would be that the orders for the killings at Wat Batheay Security Centre were passed down from Ao An to Phim (and then onto the staff at the security centre). Yet the Dismissal Order fails to reach these only available conclusions. *See* **D359** Dismissal Order, paras 105-106, 214-216, 261, 321, 466. The failure to find Ao An criminally liable for these killings is indisputably critical to an analysis of personal jurisdiction, as the Dismissal Order found that up to 40,000 victims may have been killed there. *See* **D359** Dismissal Order, paras 311, 322.

⁹³ **D359** Dismissal Order, paras 496, 499-501, 510-511, 519, 528, 533, 535, 546-547, 552-553.

⁹⁴ **D359** Dismissal Order, paras 552-553.

⁹⁵ **D359** Dismissal Order, para. 553.

33. A number of the accused persons sent to trial at the ECCC have claimed that they were only following orders and feared for their safety if they did not obey. Khieu Samphan claimed that he disagreed with certain aspects of CPK policy but said, “I would not have survived if I dared to reveal any disagreement or objection to anything.”⁹⁶ Duch, as set out below, expressed his fears in stark terms.⁹⁷ Even Nuon Chea told his biographers that he feared being called an enemy after so many leading cadres had disappeared.⁹⁸ If following orders excluded a person from being among those most responsible for DK crimes, no one would have been prosecuted because all could claim Pol Pot was above them and tolerated no dissent.
34. It is of course a fundamental principle that those following superior orders that are manifestly unlawful remain criminally responsible for any crimes they have committed. This principle is well-established in customary international law,⁹⁹ and the ECCC Law provides that “[t]he

⁹⁶ **D6.1.1036** Khieu Samphan WRI, EN 00156757.

⁹⁷ See Section IV.B.4, *infra*.

⁹⁸ **D219/370.1.7** Gina Chon & Thet Sambath, *Behind the Killing Fields*, EN 00757519.

⁹⁹ See, e.g. Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”), London, 82 UNTS 279, 8 August 1945 (“Nuremberg Charter”), art. 8 [“The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”]; Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945 (“Control Council Law No. 10”), art. II(4)(b); Charter of the International Military Tribunal for the Far East, 19 January 1946 (“Tokyo Charter”), art. 6; *Trials of the War Criminals before the International Military Tribunals under Control Council Law No. 10*, Vol. XI, “The Hostage Case”, October 1946-April 1949, p. 1236; Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 as updated September 2009 (“ICTY Statute”), art. 7(4); Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 as amended 26 March 2004 (“ICTR Statute”), art. 6(4); Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone, Freetown, 15 January 2002, art. 6(4); Security Council Resolution 1757, Attachment, Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757, 30 May 2007, art. 3(3); Case 001-**E188** Duch Trial Judgement, para. 527 [“Liability for ordering a crime may ensue where an accused issues, *passes down*, or otherwise transmits the order” (emphasis added)]; Case 002-**E313** Case 002/01 Judgement, 7 August 2014, para. 702 [“Responsibility may ensue where an accused issues, passes down or otherwise transmits an order, including through intermediaries.”]; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, Trial Chamber, 18 May 2012, para. 476 [“an intermediary lower in the chain of command who passes the order on to the perpetrator may also be held responsible for ordering the underlying offence as long as he has the requisite state of mind.”] upheld in *Prosecutor v. Taylor*, SCSL-03-01-A, Judgment, Appeals Chamber, 26 September 2013, para. 589; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Judgement, Volume 1 of 4, Trial Chamber, 26 February 2009, para. 87 [“an intermediary lower down [...] on the chain of command who passes the order on to the physical perpetrator may also be held responsible as an orderer for the perpetrated crime or underlying offence, as long as he has the requisite state of mind.”]; *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, Trial Chamber, 14 January 2000, para. 862 [“[Šantić] also passed on orders from his superiors to his subordinates, which amounted to the reissuing of the orders that were illegal in the circumstances.”]; Antonio Cassese *et al.*, *Cassese’s International Criminal Law*, Third Edition, 2013, pp. 228-240, particularly at p. 237 [“if the superior

fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.”¹⁰⁰

35. More fundamentally, the Dismissal Order fails to appreciate that Ao An was not simply another Cambodian forced to take action against his will by the coercive environment of the DK regime. Rather, Ao An was one of those who helped create the system, exercised considerable autonomy in enforcing its tyranny, and benefited from his criminal acts as he steadily rose in the ranks of the Khmer Rouge regime. The coercive DK system could never have been built without the help of loyal cadres like Ao An who willingly maintained the machinery of terror. The Dismissal Order highlights the fact that the CPK monitored “every single activity every time and everywhere” in “every unit”¹⁰¹ throughout the entire country, but ignores the reality that the seven men on the Standing Committee could not by themselves monitor “every single activity every time and everywhere” without the help of many loyal subordinates. The Dismissal Order suggests that Ao An was helpless and had no choice but to obey because otherwise “Angkar with the eyes of pineapples would find fault” and punish him,¹⁰² ignoring the fact that Ao An *himself* was one of the many eyes of Angkar. Similarly, the Dismissal Order suggests that Ao An had less responsibility because “Every second people lived in fear and were on the edge of death.”¹⁰³ But in fact, Ao An was the person that people in Sector 41 lived in fear of, and if death came, it was usually at the hands of those acting under Ao An’s orders. Ao An was *Angkar*, at least in Sector 41.
36. In Case 001, the Trial Chamber held that “Duress cannot [...] be invoked when the perceived threat results from the implementation of a policy of terror in which [an accused] himself has willingly and actively participated.”¹⁰⁴ This precisely describes Ao An’s situation: by

order involves the commission of an international crime (or [...] is manifestly illegal under international law), the subordinate is under a duty to refuse to obey the order.”]

¹⁰⁰ 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 amended 27 October 2004 (NS/RKM/1004/2006) (“ECCC Law”), art. 29.

¹⁰¹ **D359** Dismissal Order, para. 528.

¹⁰² **D359** Dismissal Order, para. 528.

¹⁰³ **D359** Dismissal Order, para. 528.

¹⁰⁴ Case 001-**E188** *Duch* Trial Judgement, para. 557. Although the law and jurisprudence relied on in this section relate to individual criminal responsibility rather than the jurisdictional concept of “most responsible,” there is no principled reason not to apply the same standards to jurisdictional analysis. It would be an incongruous and unprincipled result if those who bore the most individual criminal responsibility for the crimes of the DK regime were held somehow not to be among those most responsible for the crimes of the DK regime. The NCIJ himself

accepting his many positions in the CPK, Ao An profited handsomely in obtaining power and enjoyed material benefits and relative security. As a reliable cadre promoted to ever greater positions of power and trust, he willingly and actively participated in the creation of the DK's system of criminal coercion. To the extent that, having participated in the creation of the machinery of terror, Ao An also found himself to some extent subject to it, this cannot in any way be taken to lessen his responsibility for the crimes he committed. His situation certainly cannot be compared to that of most of his victims, who were subjected to the DK's arbitrary power of life and death through no fault or act of their own.

37. In suggesting that Ao An had no choice but to participate in the crimes of the DK regime, the Dismissal Order also ignores the fact that others fled or resisted the regime. The Dismissal Order does not consider the fact that Ao An had the advantage of being based far from the CPK's Phnom Penh headquarters and closer to the border with Vietnam (unlike others such as Duch, who nevertheless was found among those most responsible). Although it was not without risk, some CPK cadres did exactly what the Dismissal Order assumes was impossible: they stopped contributing to the criminal activity of the CPK and fled to the forest or across the border. Limited numbers of cadres and ordinary citizens also engaged in armed resistance in some areas. To say that Ao An had no choice but to kill thousands of his fellow Cambodians in order to save his own life ignores these other possible courses of action.

2. Ao An committed crimes willingly and enthusiastically with no need for coercion

38. The Dismissal Order's treatment of superior orders, coercion, and duress is also based on the flawed factual premise that, because those who disobeyed the DK regime were subject to punishment, a fear of punishment must necessarily have been the reason that Ao An committed crimes.¹⁰⁵ It therefore concludes that the threat of punishment reduces Ao An's responsibility for the crimes he committed so as to make him not among the "most responsible".¹⁰⁶

has acknowledged that "the considerations to be employed for the question of personal jurisdiction are not entirely dissimilar to those one would use for sentencing purposes." See **D359** Dismissal Order, para. 462.

¹⁰⁵ **D359** Dismissal Order, paras 521-535.

¹⁰⁶ **D359** Dismissal Order, paras 553-554.

39. This argument is logically flawed. The fact that an individual may be subject to punishment for failure to commit a crime does not mean that his actions must necessarily have been motivated only by fear of punishment. Other motivations, such as a desire to gain power, or belief in a cause, are also possible. To the extent that such an individual is *not* motivated by a fear of punishment, the theoretical possibility of punishment does not operate to reduce his moral or criminal responsibility for crimes committed, because, simply put, the threat has nothing to do with the crime. As the Trial Chamber set out in Case 001, “A subordinate who establishes the existence of superior orders may be subject to a less severe sentence *only* in cases where the order of the superior effectively reduces the degree of his guilt. If the order had no influence on the unlawful behaviour because *the accused was already prepared to carry it out*, no such mitigating circumstances can be said to exist.”¹⁰⁷
40. The evidence in Case 004/2 clearly shows that Ao An was prepared to commit crimes without any coercion. He carried out his duties with evident relish for the power he held over the people under his control. For example, he used cruel language in his speeches about enemies, dehumanising them as “cars whose old tires had to be removed and cut up to make shoes” and threatening that there would be “more casualties than those killed by the B-52 bombardment”.¹⁰⁸ He callously ordered his subordinates to kill and cut open the stomach of a pregnant woman who repeatedly came to the sector office to ask about her husband who had been arrested,¹⁰⁹ and executions continued in Ao An’s areas of control until the end of the DK period despite the Party’s 1978 directive that purported to moderate the purge policy.¹¹⁰ Even after the directive was in place, Ao An instructed his subordinates to “go to the villages directly” to compile more thorough lists of Cham than what the village chiefs

¹⁰⁷ Case 001-E188 *Duch* Trial Judgement, para. 607 (internal quotation marks and citation omitted) (emphasis added).

¹⁰⁸ **D219/504** Sat Pheap WRI, A24-25; **D219/226** Penh Va WRI, A6.

¹⁰⁹ **D219/837** So [Sau] Saren WRI, A75-77.

¹¹⁰ See, e.g. regarding the directive: **D179/1.2.27** Sao Sarun, T. 12 June 2012, 10.01.37-10.03.56; **D6.1.141** Sao Sarun WRI, EN 00278694, 97; **D118/259** Pech Chim WRI, A188-191; **D219/80** Thou Leang WRI, A33; **D219/405** Chhim Bunserey WRI, A13, 18; **D219/504** Sat Pheap WRI, A36. Yet despite the directive, killings in Sector 41 continued. For example, the remaining prisoners at the Sector 41 Security Centre (Met Sop/Kor) were killed just before the arrival of the Vietnamese (see **D3/15** Duong Sim WRI, A9; **D219/24** Preap Sokhoeurn WRI, A60; **D117/67** Kao Khorn WRI, A12). Arrests and killings also continued at Wat Batheay until the Vietnamese liberated the prisoners (see **D97** Seng Run WRI, EN 00746830-31), at Wat Au Trakuon (see **D6.1.192** Seng Srun WRI, EN 00242087; **D6.1.400** Samrit Muy WRI, EN 00235508), and Wat Ta Meak (see **D219/504** Sat Pheap WRI, A152).

had provided, but the Vietnamese arrived before further purges could take place.¹¹¹ As for forced labour, Ao An and his direct subordinate, Aun, frequently visited the Anlong Chrey Dam worksite, where they personally inspected the progress of the work and held meetings in which they told workers to meet their quotas or they would be considered enemies.¹¹² On one occasion near the end of the regime, Ao An went to the site at night and walked for an hour through the hall where the mobile workers slept, accusing them of being CIA agents and Vietnamese spies.¹¹³ One worker described Ao An's power as "dictatorial" and said that when Ao An was at the site, "none of the workers dared to rest", fearing that they would be deemed lazy and killed.¹¹⁴

41. Ao An's regular promotions throughout the DK period further demonstrate his enthusiastic embrace of his duties as a CPK cadre.¹¹⁵ Even after the fall of the DK regime, Ao An fled to Khmer Rouge-controlled areas, showing his continued loyalty to the Khmer Rouge and its policies.¹¹⁶ As late as 2011, more than 30 years after the end of the DK regime, Ao An stated that he was "satisfied with the Democratic Kampuchea" and felt its leaders "did their best to build and restore[] the country."¹¹⁷ He expressed no regrets and made no apology to the tens of thousands who suffered under his rule.

3. The unfounded requirement that Ao An's participation in crimes go beyond his official authority

42. In reaching its conclusion that Ao An is not among those "most responsible," the Dismissal Order relies heavily on a finding that Ao An's criminal activity did not exceed the scope of his official authority,¹¹⁸ but it fails to cite any authority for the proposition that committing

¹¹¹ **D219/702.1.87** You Vann, T. 14 January 2016, 15.25.57-15.28.23; **D219/138** You Vann WRI, A102.

¹¹² **D117/50** Im Pon WRI, A35-37; **D219/800** So [Sau] Saren WRI, A69-70, 72, 91-92; **D219/331** Phan Sophal WRI, A24-28, 36, 38-42, 47; **D219/17** Pin Dan WRI, A4 ["Ta An came to the dam almost every day in his jeep."]; **D78** Chin Sinal WRI, A1-2, 9; **D3/4.1** Chin Sinal OCP Statement, EN 00210442; **D1.3.11.4** Bao Troab OCP Statement, EN 00210428; **D219/285** Ho Hoeun WRI, A18 ["I remember [Ao An] saying that we had to work hard to finish the work we were assigned. Otherwise we would be considered the enemies. He also told us about the number of people joining in the construction of the dam in this sector. He said there were 20,000 people working on the dam construction."]; **D219/870** Ry [Ri] Nha WRI, A34; **D219/286** Men At WRI, A25, 28; **D117/52** Bum Se WRI, A16-17; **D219/582** Toy Meach WRI, A157; **D219/324** Chin Tip WRI, A5-6.

¹¹³ **D219/331** Phan Sophal WRI, A39-42.

¹¹⁴ **D219/582** Toy Meach WRI, A155, 157, 160.

¹¹⁵ **D359** Dismissal Order, paras 191-192, 199-200, 242.

¹¹⁶ **D359** Dismissal Order, para. 284. *See also* **D191.2** Ao An DC-Cam Statement, EN 01025331-35.

¹¹⁷ **D191.2** Ao An DC-Cam Statement, EN 01025335.

¹¹⁸ **D359** Dismissal Order, paras 494-510.

crimes within the scope of one's authority (in an obviously criminal regime) makes one less responsible for those crimes, and no such authority is readily apparent. Indeed, it is a well-settled principle of customary international law that official capacity does not relieve an individual of criminal responsibility.¹¹⁹ Nor is there any logical argument for such a principle: most large-scale criminal enterprises rely on a division of tasks and authority among a group of co-operating individuals with each acting within the scope of his authority to make his contribution to the larger plan; in these situations, the commission of crimes is facilitated by each participant acting within his own authority.

4. Arbitrarily different treatment of superior orders, coercion, and duress in Case 001 and Case 004/2

43. Indeed, the NCIJ's own findings in the Case 001 Closing Order provide a stark rebuttal of the Case 004/2 "principle" that acting pursuant to superior orders and within one's official capacity removes an individual from the category of the "most responsible". In Case 001, the CIJs—including the current NCIJ—found that Duch received specific orders from his superiors in a host of areas, including: (i) the extraction and content of specific confessions;¹²⁰ (ii) the rations that were to be provided to prisoners;¹²¹ (iii) medical

¹¹⁹ See, e.g. Nuremberg Charter, art. 7; Tokyo Charter, art. 6; Control Council Law No. 10, art. II(4)(a); Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948 ("Genocide Convention"), 78 UNTS 277, art. IV ["Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."]; International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, A/RES/3068(XXVIII), art. III; ICTY Statute, art. 7(2); ICTR Statute, art. 6(2); Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, art. 27; *Prosecutor v. Blagojević & Jokić*, IT-02-60-A, Judgement, Appeals Chamber, 9 May 2007, para. 189 [in the context of aiding and abetting liability: "where the accused knowingly participated in the commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her 'routine duties' will not exculpate the accused"]; *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, Appeals Chamber, 30 January 2015, para. 1615; Antonio Cassese *et al.*, *Cassese's International Criminal Law*, Third Edition, 2013, pp. 240-246.

¹²⁰ Case 001-D99 Closing Order indicting Kaing Guek Eav alias Duch, 8 August 2008 ("Closing Order"), para. 44 ["Duch stated that in many cases, he was given instructions concerning the extraction and content of specific confessions."]

¹²¹ Case 001-D99 Closing Order, para. 68 ["Duch declared that the food regime was decided by the 'superiors' and that he could not modify rations. He believed that starving the prisoners was a deliberate policy of the CPK."]

experimentation carried out on prisoners;¹²² (iv) the use of torture on specific prisoners;¹²³ (v) the specific administrative procedures to be followed when executing prisoners;¹²⁴ and (vi) the manner of killing and disposal of the remains of certain important prisoners.¹²⁵ They further found that Duch had limited influence over who was arrested.¹²⁶ He could not refuse to receive a prisoner who was sent to him, nor was he free to conclude after investigation that anyone was innocent.¹²⁷ He could not release prisoners,¹²⁸ and he had no discretion not to execute any prisoner sent to him; the greatest leeway his superiors granted him was the authority to keep some skilled prisoners alive for a certain period of time to work.¹²⁹ The CIJs explicitly found that “[t]he primary role of S21 was to implement ‘[t]he Party’s political line regarding the enemy’”¹³⁰ and Duch himself made clear that he was acting within the scope of his orders and official authority when he said “the internal Party’s purges and the purges among the people [...] was the task of all of us. Each of us had to inevitably fulfil it according to our roles and responsibilities”—evidence that the Dismissal Order explicitly acknowledges.¹³¹ In Case 001, in short, the CIJs, including the current NCIJ, unequivocally found that Duch was operating exclusively within the field of his official authority and engaged solely in the implementation of CPK policy pursuant to superior orders, yet none of these factors operated to remove him from the category of those “most responsible”.

44. A fair review of the Case 001 Closing Order and the evidence on Case File 004/2 shows that Ao An had *more* discretion in how he carried out his instructions than did Duch. While Ao

¹²² Case 001-D99 Closing Order, para. 70 [“Evidence suggests that S21 personnel performed medical experimentation on prisoners. Duch explained that ‘research for poisons was carried out upon the orders of the Central Committee, more precisely upon those of Nuon Chea’.”]

¹²³ Case 001-D99 Closing Order, paras 85, 99 [“Duch explained, ‘[...] For important prisoners such as Ya, Son Sen gave me his orders and decided on the use of torture’. [...] In the final instance, Duch acknowledged that when Chairman of S21, he wrote to his subordinate, interrogator Pon, instructing him to use torture [...] Duch stated that, on this occasion, he received instructions from Son Sen by telephone”.]

¹²⁴ Case 001-D99 Closing Order, para. 107 [“following an incident where a prisoner was killed before the completion of his interrogation, Son Sen required Duch to sign off on every execution.”]

¹²⁵ Case 001-D99 Closing Order, para. 122 [“In 1978, four foreigners were burned to ashes using vehicle tires between Mao Tse Tong Boulevard and Boeng Tumpun. Nuon Chea allegedly ordered Duch to make sure the bodies could not be found.”]

¹²⁶ Case 001-D99 Closing Order, paras 33, 51-52.

¹²⁷ Case 001-D99 Closing Order, paras 44, 53.

¹²⁸ Case 001-D99 Closing Order, para. 31.

¹²⁹ Case 001-D99 Closing Order, paras 31, 111.

¹³⁰ Case 001-D99 Closing Order, para. 31 (emphasis added).

¹³¹ **D359** Dismissal Order, para. 156, citing **D6.1.1073** Submission of Kaing Guek-Eav’s Response to the Co-Investigating Judges’ Written Questions, EN 00251378 (emphasis added).

An was clearly tasked with implementing the CPK's enemies policy, there is little or no evidence of his receiving orders to arrest and execute specific individuals. Unlike Duch, who had limited or no authority to release the prisoners he had been ordered to interrogate and murder, Ao An clearly had the power to make decisions over the fates of specific individuals under his power—as is demonstrated by his decision to spare Prak Yut's charge, Pheap.¹³² There is little to no evidence that Ao An, unlike Duch, was “subjected to constant surveillance”¹³³ by his superiors. While both Duch and Ao An were tasked with implementing CPK policy and subject to superior orders, Ao An had wider latitude in how he carried out his orders and was less subject to micromanagement.

45. The Dismissal Order also treats Ao An's and Duch's purported subjective fear in an arbitrarily different manner. The Dismissal Order found that “Ao An asserted that he had to comply absolutely [with all orders] and feared for his life if he did not”,¹³⁴ suggesting that this is a reason to find Ao An was not “most responsible.”¹³⁵ But in Case 001, the CIJs acknowledged Duch's evidence that the CPK purge left him “paralysed by fear for his life”, “terrified to the point he slept day and night”,¹³⁶ and in fear for the lives of his family members.¹³⁷ Any fear felt by Duch would have been reinforced by experience, since he would have been aware that many senior members of the CPK far above him in the Party hierarchy were imprisoned, tortured, and killed at S-21.
46. Given that superior orders, coercion, and duress did not remove Duch from the category of those who were “most responsible,” they cannot do so with respect to Ao An. To hold otherwise would be to embrace an arbitrarily different application of the law to similarly situated persons.

C. LEGAL ERROR OF HOLDING THAT DUCH IS “THE ONLY MOST RESPONSIBLE PERSON”

¹³² **D351/5** International Co-Prosecutor's Rule 66 Final Submission, 21 August 2017 (“ICP's Final Submission”), paras 59, 69-70; **D359** Dismissal Order, paras 390 [“Witness Nhem [Nhim] Kol said that, ‘No Cham people were spared, except for Phea who was defended by Yut.’”], 414.

¹³³ Case 001-**D99** Closing Order, para. 170.

¹³⁴ **D359** Dismissal Order, para. 533.

¹³⁵ **D359** Dismissal Order, paras 496, 521-535, 552.

¹³⁶ Case 001-**D99** Closing Order, para. 169.

¹³⁷ Case 001-**D99** Closing Order, para. 170.

47. The Dismissal Order itself suggests a reason for this arbitrarily different treatment of Ao An and Duch: it shows that the NCIJ believed that—*ex ante* and as a matter of law—the category of “those who were most responsible” could only ever apply to Duch. In its survey of the negotiating history of the ECCC, the Dismissal Order emphasises that “the phrase ‘those who were most responsible’ was specifically included in reference to [...] Kaing Guek-Eav *alias* Duch”.¹³⁸ It goes on to assert that it was the intent that “the prosecution of these senior leaders *shall not extend to low-level cadres besides Duch* whose name had already been considered by the legislature.”¹³⁹ Finally, the Dismissal Order unambiguously states that the ECCC’s “target persons were senior leaders and Duch, *the only most responsible person*.”¹⁴⁰
48. The conclusion that Duch is “the only most responsible person” and that “prosecution shall not extend to low-level cadres besides Duch” is incorrect for at least five reasons: (i) it directly contradicts statements regarding personal jurisdiction made to the Cambodian Parliament by Deputy Prime Minister Sok An at the time that body was considering the ECCC Law and thus fails to respect the intent of the Royal Government of Cambodia (“RGC”) in establishing the ECCC; (ii) it is inconsistent with the United Nations’ (“UN’s”) expressed understanding of the meaning of the category of “those who were most responsible” at the time of negotiations; (iii) it contradicts the NCIJ’s own statement that there is no merit to the argument that personal jurisdiction was intended to be limited to a specific number of named individuals; (iv) it is inconsistent with the plain language of the ECCC Law and Internal Rules; and (v) it violates international human rights norms and protections guaranteed by the Constitution of Cambodia. Each of these factors will be addressed in turn.

¹³⁸ **D359** Dismissal Order, para. 473.

¹³⁹ **D359** Dismissal Order, para. 478.

¹⁴⁰ **D359** Dismissal Order, para. 542 (emphasis added).

1. The holding that Duch is “the only most responsible person” contradicts statements made by the chief RGC negotiator at the time of negotiations and thus fails to respect the RGC’s expressed intent when the ECCC was established

49. During the Cambodian National Assembly Debate on amending the ECCC Law to comply with the terms of the UN-RGC Agreement¹⁴¹ (“ECCC Agreement”), several lawmakers asked who would be subject to the court’s personal jurisdiction.¹⁴² Deputy Prime Minister Sok An, the RGC’s chief negotiator in the talks with the UN, responded unambiguously that there was no set number of people who might fall within the jurisdiction of the ECCC and no list of names of potential targets of investigation. He also made it clear that the category of those who were “most responsible” referred to multiple potential targets. Specifically, Sok An said:

If we ask the question ‘who shall be indicted?’, neither the United Nations nor the Task Force of the Royal Government of Cambodia are able to give a response. Because this is the task of the courts: the Extraordinary Chambers. If we list the names of people for the prosecution instead of the courts, we violate the power of the courts. Therefore, we cannot identify A, B, C, or D as the ones to be indicted. As a solution, we have identified two targets: *senior leaders* and *those most responsible*. Considering *senior leaders*, we refer to no more than 10 people, but we don’t clearly state that they are the members of the Standing Committee. That is the task of the Co-Prosecutors to decide who are the senior leaders. [...] However, there is still the second target. They are not the leaders, but they committed atrocious crimes. That’s why we use the term *those most responsible*. There is no specific amount of people in the second group to be indicted.¹⁴³ (Emphasis added)

¹⁴¹ Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Phnom Penh, 6 June 2003 (“ECCC Agreement”).

¹⁴² Transcript translated by DC-Cam of The First Session of the Third Term of Cambodian National Assembly, 4-5 October 2004 (“National Assembly Transcript”), p. 9 [H.E. Ly Thuch: “[O]ur people and civil society want to ask H.E. to make it clear that who are the senior leaders and those most responsible? Do they include also chairmen of units of organization?”], p. 14 [H.E. Keo Remy: “Who are the senior leaders? [...] Will the zone chiefs be prosecuted? Or [is] this law only [being] made to try 4 or 5 leaders. Who else will be prosecuted? It is unfair if we try only 3 or 4 people.”], p. 27 [H.E. Eng Chhay Eang: “I am also not clear about those most responsible. For how much will those people have to be responsible? [...] I want the representative of the government to clarify for how much greatest responsibility those people must hold. [...] I would like to remind people not to be vague. If we emphasize only the highest class, we meant Pol Pot, who died already.”].

¹⁴³ National Assembly Transcript, pp. 30-31 (emphasis added).

2. The holding that Duch is “the only most responsible person” is inconsistent with the UN’s expressed understanding of personal jurisdiction and intent when the ECCC was established

50. It is clear that the UN, the second party to the negotiations creating the ECCC, shared the understanding that the ECCC’s personal jurisdiction had no specific numerical limit but rather was subject to the determination of the Co-Prosecutors and Co-Investigating Judges. In 1999, the UN Group of Experts assigned by the Secretary-General to explore options that would best bring about justice stated:

[T]he Group recommends that any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. 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. We do not wish to offer a numerical limit on the number of such persons who could be targets of investigation. It is, nonetheless, the sense of the Group from its consultations and research that the number of persons to be tried might well be in the range of some 20 to 30.¹⁴⁴

51. Ambassador David Scheffer recalled that “having been part of the negotiations for years, [he knew] of no concession by U.N. negotiators to interpret the personal jurisdiction language so as to limit the suspect pool to only five specific individuals.”¹⁴⁵ It is clear that neither party intended the interpretation adopted by the Dismissal Order.

3. The holding that Duch is “the only most responsible person” contradicts the NCIJ’s own holdings in the Dismissal Order and the Case 004/1 Closing Order

52. The Dismissal Order’s assertion that Duch is “the only most responsible person” also contradicts the NCIJ’s own holding elsewhere in the Dismissal Order, which acknowledges that in Case 001, the Supreme Court Chamber (“SCC”) implicitly held that “there is no merit in any historical-political contention that the negotiations around the establishment of the ECCC led to a joint and binding understanding that only a certain finite number of (named) individuals were to be under the court’s jurisdiction: The selection of persons to be

¹⁴⁴ Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, UN Doc. No. A/53/850, S/1999/231, 16 March 1999, para. 110 (emphasis added).

¹⁴⁵ David Scheffer, “The Negotiating History of the ECCC’s Personal Jurisdiction”, *Cambodia Tribunal Monitor*, 22 May 2011, p. 10.

investigated and indicted was and is purely a matter for the discretion of the OCP and OCIJ, and based entirely on the merits of each individual case.”¹⁴⁶ This same language appeared in the Case 004/1 Closing Order, signed by both the NCIJ and ICIJ.¹⁴⁷

53. In light of Deputy Prime Minister Sok An’s statement quoted above, this holding is obviously correct. It is clear that neither the Royal Government nor the United Nations believed that the Agreement or the Law meant that “only a certain finite number of (named) individuals were to be under the court’s jurisdiction”. The Dismissal Order’s contention otherwise is a clear error of law that affected the NCIJ’s ultimate determination that Ao An was not within the category of those who were “most responsible” for the crimes of the DK regime.

4. The holding that Duch is “the only most responsible person” contradicts the plain language of the ECCC Law and Internal Rules

54. The Dismissal Order’s holding also contradicts the plain language of the ECCC Law, which is written in the plural (“*those* who were most responsible”) and clearly refers to a category of people rather than an individual.¹⁴⁸
55. The Internal Rules also contemplate more than one individual being included in the category of the “most responsible.” Rule 53 provides: “If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons *or against unknown persons*.”¹⁴⁹ It is highly unlikely that anyone falling into the category of “senior leader” would be an “unknown person”, and it is clear that Duch was a known potential suspect (as well as being in custody) by the time the Internal Rules were promulgated. Rule 53 therefore indicates that the category of those considered “most responsible” was not intended to be limited solely to Duch.

¹⁴⁶ D359 Dismissal Order, para. 461.

¹⁴⁷ Case 004/1-D308/3 Closing Order (Reasons), para. 37.

¹⁴⁸ ECCC Law, arts 1-2.

¹⁴⁹ Internal Rule 53.

5. The holding that Duch is “the only most responsible person” violates international human rights norms and protections accorded by the Cambodian Constitution

56. It is a basic human rights norm, reflected in the Universal Declaration of Human Rights,¹⁵⁰ the International Covenant on Civil and Political Rights,¹⁵¹ and regional human rights instruments,¹⁵² that all persons are equal before the law. Significantly, this principle was recently reaffirmed by Prime Minister Hun Sen on behalf of Cambodia in the promulgation of the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration.¹⁵³ This principle is also reflected in Article 31 of the Constitution of the Kingdom of Cambodia.¹⁵⁴
57. Clearly, a holding that the category of “those who were most responsible” could, *ex ante* and as a matter of law, refer only to Duch (regardless of what evidence showed about the relative responsibility of other persons) does not treat Duch and other persons equally. It therefore violates these principles and protections.

D. FACTUAL ERRORS RELATED TO THE ASSESSMENT OF THE CREDIBILITY OF EVIDENCE

1. Prak Yut’s evidence is corroborated and reliable

58. The Dismissal Order’s position regarding Prak Yut’s evidence is somewhat unclear. It relies on her evidence in the early crime base sections,¹⁵⁵ but, in an unreasoned two-paragraph discussion near the end of the order, suggests that her evidence may be “unreliable”.¹⁵⁶ The reasons given for this ostensible lack of reliability are that (i) Prak Yut’s evidence became more inculpatory of Ao An in her later Written Records of Interview (“WRIs”) and (ii) Prak

¹⁵⁰ Universal Declaration of Human Rights, 10 December 1948, GA res. 217A (III), UN Doc A/810, art. 7.

¹⁵¹ International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 UNTS 171, art. 14(1).

¹⁵² *See, e.g.* American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogota, 1948, art. II; African (Banjul) Charter on Human and Peoples’ Rights, adopted 27 June 1981, entered into force 21 October 1986, art. 3(1).

¹⁵³ ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD) and its Translations, 18 November 2012, General Principle #3 [“Every person is equal before the law.”], signed by Prime Minister Hun Sen (*see* p. 10).

¹⁵⁴ The Constitution of the Kingdom of Cambodia, adopted 21 September 1993, art. 31 [“Every Khmer [citizen] shall be equal before the law”].

¹⁵⁵ *See, e.g.* **D359** Dismissal Order, paras 91, 142, 333, 410-411, 413, 415-417.

¹⁵⁶ **D359** Dismissal Order, paras 503-504.

Yut harboured “discontent” with the DK regime (and, by implication, wanted to inculcate Ao An for that reason).¹⁵⁷

59. These reasons are illogical and fly in the face of extensive corroborating evidence and the Dismissal Order’s own findings. First, had Prak Yut wished to inculcate Ao An because of her “discontent” with the DK regime (and his role in it), she would have begun to do so immediately—in her first WRI—rather than waiting several years for subsequent interviews (which she could not be sure would happen) to do so. A far more reasonable conclusion is that Prak Yut realised that she could not tell the truth without implicating herself as well as Ao An, and it took some time for her to reconcile herself to doing this.
60. Second, this unreasoned assessment of Prak Yut’s credibility fails to take into account the extensive corroborating evidence of witnesses who said that Prak Yut and Ao An were doing exactly what Prak Yut said they were doing. For example, Prak Yut gave evidence that Ao An ordered her to remove and replace incumbent commune and village chiefs, and You Vann, Nhim Kol, and Pov Sarom corroborate her on this point.¹⁵⁸ Prak Yut gave evidence that Ao An instructed her to root out and kill any of the ordinary citizens suspected of disloyalty to the regime or revolution, and Nhim Kol, So Saren, Put Kol, and Nhem Chen corroborate her on this point.¹⁵⁹ Prak Yut gave evidence that Ao An ordered her to kill all the Cham in her district, Muok Sengly and You Vann corroborate her on this point,¹⁶⁰ as does evidence that Cham were killed throughout Sector 41 while it was under Ao An’s authority.¹⁶¹ Rejecting Prak Yut’s well-corroborated evidence simply on speculation that her “discontent” with the DK regime caused her to falsely implicate Ao An was manifestly unreasonable.
61. In addition, this assessment of Prak Yut’s credibility flies in the face of the Dismissal Order’s own factual findings, which also strongly corroborate Prak Yut’s evidence. Independent of Prak Yut’s evidence, the Dismissal Order found that there was a DK policy to “smash” all

¹⁵⁷ **D359** Dismissal Order, paras 503-504.

¹⁵⁸ **D351/5** ICP’s Final Submission, paras 19-20, fns 47-58.

¹⁵⁹ **D351/5** ICP’s Final Submission, paras 27-32, fns 77-92.

¹⁶⁰ **D351/5** ICP’s Final Submission, paras 57-62, fns 176-199.

¹⁶¹ **D351/5** ICP’s Final Submission, para. 59, fns 185-191; **D359** Dismissal Order, paras 307, 414; **D360** Indictment, paras 647, 651, 653, 655.

the Cham by 1980, that detailed records were created and maintained of the Cham population, and that Ke Pauk followed up to be sure that the plan to destroy the Cham was progressing on schedule.¹⁶² The Dismissal Order also found that most of the Cham in Kampong Siem District and Kang Meas District were, in fact, killed.¹⁶³ Finally, the Dismissal Order found that orders and instructions in DK were passed down through “mostly vertical lines of communication in the chain of command.”¹⁶⁴ Given evidence of a central policy to kill the Cham, evidence that that policy was in fact implemented on the ground in Sector 41, and evidence that policies were passed down from higher echelons to lower echelons through “mostly vertical lines of communication,” the only thing one could expect Prak Yut to say is exactly what she did say—that she received orders to kill the Cham from her superior, Ao An, and that she passed them on to her subordinates, who carried them out.¹⁶⁵ For the Dismissal Order to call this evidence “unreliable” when it is precisely the evidence that one would expect based on the other findings in the Dismissal Order is clearly unreasonable.

2. The effect of DK policies and the passage of time on witnesses’ evidence must be assessed on a case-by-case basis

62. The Dismissal Order holds that “[t]o believe in *any* witness statement, either inculcating or exculpating Ao An requires balancing several considerations, including the strict context of the Khmer Rouge regime, this is *mind your own business* and the fact that the events took place nearly 40 (forty) years ago, which may give rise to questions of memory.”¹⁶⁶ It then concludes that these factors “[cast] doubt on evidence concerning the participation and role of Ao An in the alleged crimes”.¹⁶⁷ This conclusion is not limited to identified pieces of potentially problematic evidence—it asserts that these two factors render *all* evidence of Ao An’s participation in crimes categorically unreliable.

¹⁶² D359 Dismissal Order, paras 142-146.

¹⁶³ D359 Dismissal Order, paras 307, 414.

¹⁶⁴ D359 Dismissal Order, para. 466.

¹⁶⁵ This argument applies *mutatis mutandis* to Prak Yut’s evidence about the arrest and replacement of commune and village chiefs and her evidence about the identification and removal of “enemies” among the ordinary citizens.

¹⁶⁶ D359 Dismissal Order, para. 506 (first emphasis added; second emphasis in original).

¹⁶⁷ D359 Dismissal Order, para. 506 (first emphasis added; second emphasis in original).

63. This is a manifestly unreasonable holding. While the compartmentalisation of information by the Khmer Rouge affected how much people knew, and the passage of time can obviously affect memory, it is manifestly unreasonable to simply label all proof of Ao An's criminal conduct unreliable because of these factors. When Ao An's subordinates, bodyguards, and drivers gave evidence of what Ao An said and did, nothing in the Khmer Rouge policy of "mind your own business" weakens this evidence—knowing what Ao An said and did *was* the "business" of these witnesses. Similarly, while the passage of time clearly can have an effect on a witness's powers of recall, a reasonable trier of fact cannot simply assume that witnesses cannot reliably remember dramatic and life-changing events that happened 40 years ago without analysing factors such as the details of witness accounts, expressions of doubt or certainty, and corroboration among witnesses.
64. Indeed, if these contentions were correct, there would have been no point in establishing the ECCC at all, as the factors cited in the Dismissal Order to discredit evidence would apply equally to all ECCC investigations. The fallacy of the argument is proven by the final convictions in Cases 001 and 002/01 which demonstrate that despite the passage of time and the DK's emphasis on secrecy, criminal responsibility was proven *beyond a reasonable doubt*. In Case 004/2, the evidence shows that a large number of independent witnesses described Ao An's acts and conduct in a highly consistent way, as set out in the ICP's Final Submission¹⁶⁸ and below in the section on factual errors.

E. ERRONEOUS FACTUAL FINDINGS WITH A DETERMINATIVE IMPACT ON THE ISSUE OF PERSONAL JURISDICTION

65. In addition to the systematic issues identified above, the Dismissal Order also contains a number of unreasonable factual findings on specific points. These factual errors played a key role in the Dismissal Order's assessment of personal jurisdiction.
66. In most cases, the factual errors resulted from the Dismissal Order's failure to thoroughly review the evidence on the Case File and its approach of relying on just a few pieces of evidence instead.¹⁶⁹ In a few cases, the erroneous findings are summary factual conclusions

¹⁶⁸ **D351/5** ICP's Final Submission, paras 9-75, 78-88.

¹⁶⁹ While a judge has discretion to find some pieces of evidence more persuasive than others, there is no discretion to simply ignore a large body of contradictory evidence with no explanation as to why the selected evidence

that are contradicted not just by the bulk of the evidence on the Case File but also by specific factual findings made elsewhere in the Dismissal Order.

1. There is overwhelming evidence that Ao An ordered a large number of arrests and killings

67. In the section analysing the ECCC’s personal jurisdiction over Ao An, the Dismissal Order finds that Ao An was engaged mostly in attending meetings, disseminating policy, and playing a “coordinating role” while “[o]n the contrary, there is *least evidence* that shows orders to arrest and execute people were given by Ao An.”¹⁷⁰ In the same vein, it also states, “Evidence shows that Ao An might also have been involved in giving orders to arrest and execute a *small number* of people.”¹⁷¹ These summary findings are contradicted by a vast body of evidence on the Case File, and also to some extent by factual findings made elsewhere in the Dismissal Order.
68. With respect to factual findings in the Dismissal Order itself, the proposition that there is “least evidence” that Ao An ordered arrests and executions is contradicted by the finding that Ao An issued orders for the killing of prisoners at Met Sop/Kor Security Centre and for the arrest and killing of Cham throughout Sector 41.¹⁷²
69. More significantly, this conclusion is contradicted by a tremendous volume of evidence on the Case File, most of which the Dismissal Order does not engage with. The evidence regarding Ao An’s orders to arrest includes evidence that:
- a. Ao An ordered his district secretaries to identify anyone who “opposed the revolution, [...] wanted to topple the revolution, [...] [or] were not satisfied with their living conditions, and to arrest those people to be smashed”;¹⁷³

was preferred. *See, e.g.* Internal Rule 67(4) [“The Closing Order shall state the reasons for the decision.”]; *Muvunyi v. The Prosecutor*, ICTR-2000-55A-A, Judgement, Appeals Chamber, 29 August 2008, paras 144, 147; *Prosecutor v. Gotovina & Markač*, IT-06-90-A, Judgement, Appeals Chamber, 16 November 2012, para. 61; *Prosecutor v. Perišić*, IT-04-81-A, Judgement, Appeals Chamber, 28 February 2013, para. 92.

¹⁷⁰ **D359** Dismissal Order, para. 549 (emphasis added).

¹⁷¹ **D359** Dismissal Order, para. 497 (emphasis added).

¹⁷² **D359** Dismissal Order, paras 306-307, 310-311, 317, 321-322, 328-331, 395-396, 414-418.

¹⁷³ **D219/120** Prak Yut WRI, A19-20 [“Grandfather An gave an order to me to identify those who opposed the revolution, those who wanted to topple the revolution and those who were not satisfied with their living conditions, and to arrest those people to be smashed. [...] This order was carried out not only in other communes

- b. Ao An personally summoned a total of approximately 50 cadres to his house for meetings and ordered soldiers under his command to arrest them when they arrived.¹⁷⁴
- c. Ao An ordered Prak Yut to “collect” the commune chiefs in Kampong Siem District. He then “led their arrest and organized their replacement”.¹⁷⁵ Ao An

in Kampong Siem District but also in other four districts.”]; **D219/855** Nhem Chen WRI, A31 [“Q: During the meeting in Kampong Cham, did they talk about the arrests of civilians? A: At the meeting I attended, they only talked about the arrests of cadres. For civilians, he gave orders to the districts instead.”].

¹⁷⁴ **D219/582** Toy Meach WRI, A92-99 [“[Ao An] summoned those people to the meetings and arrested them straight away. He did not need to go down to their houses to arrest them one at a time. [...] He summoned the people to meetings at his house and then arrested them. Those remaining were arrested by his soldiers. [...] The meetings were held at his house. [...] The meetings were held on a daily basis, and the arrests were made on a daily basis. The cadres were called for meetings, and the arrests were made at once. [...] Q: How many people were arrested? A: Approximately 50 persons from all sections. Q: What sections? A: From agriculture, industry, handicrafts, textiles, commerce, and logistics. They were then replaced by Southwest Zone cadres.”]; **D219/837** So [Sau] Saren WRI, A106-107 [“The way they did arrest was that they called in district- and commune-level cadres for a meeting, and then arrested and sent them away somewhere to which they disappeared. Whenever they arrested cadres, they consistently called them in for a meeting at the sector. I was there at such an event, when they arrested the former sector military chairperson was arrested. I do not remember his name, but I was in that event when he was arrested. Q: Do you know whether or not Ta An knew about the arrests of these guys when they were arrested? Did Ta An know about the place in Krouch Kor? A: Yes. He knew about the arrests because it was Ta An who was the one who called them in for meetings. When there were arrests, he put in place five or six persons of the defence unit outside. And once the meeting was over, if he had to arrest a cadre, he would simply have the defence unit arrest at gunpoint. How could he not know, given that he was sector chairperson and given that Krouch Kor was a location belonging to the sector?”].

¹⁷⁵ **D117/71** Prak Yut WRI, A38-40 [“I recall that I arrived in Kampong Siem District in January 1977. Approximately in February 1977, the Southwest Zone sent their cadres to replace the old cadres in Kampong Siem district. [...] First, I made a report about activities of the old cadres and made a request to replace them with the Southwest cadres. After consulting with Ke Pauk, Grandfather An requested me to replace all those old cadres. [...] I did not [join] in making arrest of those old commune chiefs. Grandfather An led their arrest and organized their replacement with the Southwest cadres. The arrest and the replacement were organized by the sector level.”]; **D117/70** Prak Yut WRI, A36 [“In fact, during the meetings in the sector, I reported about inactiveness of the commune chiefs, and the sector gave an instruction to collect them to be re-educated in the sector, but I did not know what happened to them.”]; **D219/120** Prak Yut WRI, A51 [“As I said in my previous interview in June 2013, I made a report and sent it to Grandfather An. After Grandfather An consulted with Ke Pauk, they arranged to remove all the remaining commune chiefs.”]; **D219/138** You Vann WRI, A45, 47 [“Q: Did Prak Yut have the right to change those commune chiefs? Or did she have to ask permission of Ta An? A: The order must have come from Ta An because he was Sector Chairperson. Khom took Prak Yut to meet Ta An at the Sector level. When they returned, Khom told me they would arrange to have new commune chiefs. [...] As I told you yesterday, some former commune chiefs disappeared. That was the responsibility of District Military. I think the order came from the district and the district received the order from the Sector level. I did not hear it directly from Prak Yut, but some former commune chiefs disappeared two days after she attended a Sector meeting with Ta An. Four days later, new commune chiefs were appointed to replace the old ones.”]. Prak Yut suggests that Ao An may have given orders directly to her deputy Sy to carry out these arrests: **D117/70** Prak Yut WRI, A39 [“I would like to clarify that Grandfather An did not order me to arrest those people, but I am not sure if Grandfather An [gave] direct orders to Grandfather Sy, my deputy, to do this work.”].

carried out the same process to arrest and replace incumbent chiefs in the other districts of Sector 41,¹⁷⁶

- d. Ao An ordered that high-ranking Lon Nol officials be arrested and sent to the sectors,¹⁷⁷
- e. Ao An sometimes ordered the arrest of specifically identified individuals whose names appeared on lists he provided to his subordinates,¹⁷⁸
- f. In carrying out the purge, Ao An ordered his security services to “dig up the grass roots and all”, an order which resulted in the arrest of “everyone as long as they were networks of [former Sector 41 Secretary] Ta Taing”;¹⁷⁹ and

¹⁷⁶ **D117/71** Prak Yut WRI, A43 [“The appointment of the new commune chiefs was done the same in each commune in all the districts in Sector 41.”].

¹⁷⁷ **D219/702.1.95** Prak Yut, T. 19 January 2016, 10.59.08-11.01.20 [“Once again, Ta An instructed me to send those who had high ranks to the sector for re-education since they could not socialize with villagers, with people in the commune and they were ordered to send up to the sector. And concerning the order from Ta An to deal with some particular group of people at Kouk Pring, I was not aware of that.”].

¹⁷⁸ **D219/120** Prak Yut WRI, A32, 76, 94 [“Q: Did Grandfather An ever give you lists of people for you to arrest? A: Yes, I received name lists of people to be arrested. I did not know their roles or positions of those people because I was not interested, but I think that perhaps the Zone sent the lists to him and he forwarded the lists to me because people whose names in the lists were in my district. [...] If the Sector sent name lists of people to be arrested to me, I wrote annotations about the arrests. I had to keep the list they first sent to me. After that, I collected prisoners to be sent to the Sector, based on the name list. Then a person who came to transport prisoners to the Sector gave me a new list with the names of all the prisoners in order for me to inscribe the phrase ‘Sent’, and the name Grandfather An was written on that list. [...] It was a matter of life or death, so we had to deal with it carefully. [...] After I received the name lists of people to be arrested, from the Sector, I had to check their backgrounds to make sure that the names in the list were correct as indicated by the Sector, so I gave the lists to the commune chiefs to follow up, and the commune chiefs gave orders to the village chiefs to follow up. After the follow-up, the village chiefs reported to the commune chiefs and the commune chiefs reported to me. I examined and made an analysis based on the reports of the commune chiefs. Then I made a new list and inscribed reasons to decide who to be re-educated and who to be sent to the Sector, and I enclosed it with the list brought by the driver from the Sector when he came to transport the prisoners to the sector, to be sent to the Sector.”].

¹⁷⁹ **D219/731** Nhem Chen WRI, A90-91 [“Q: Did you know who was in charge the killings of cadres? A: It seemed there were orders from above. Ke Pork called the sectors, and Ta An ordered the security office to dig up the grass roots and all. [...] They arrested everyone as long as they were networks of Ta Taing. Like my cousin who was arrested from the commune, they arrested the district chiefs, everyone. The slightest thing, and we were all traitors.”].

- g. Ao An ordered his commune chiefs to trick those who had formerly worked for the Lon Nol regime into revealing themselves by promising to restore them to their former positions if they revealed themselves.¹⁸⁰

70. With respect to orders to kill, this includes evidence of:

- a. Ao An's order to Prak Yut and the other Sector 41 district secretaries "to identify those who opposed the revolution, those who wanted to topple the revolution and those who were not satisfied with their living conditions, and to arrest those people to be smashed";¹⁸¹
- b. Ao An's order to Prak Yut and the other Sector 41 district secretaries to kill all of the Cham in Sector 41;¹⁸²

¹⁸⁰ **D219/855** Nhem Chen WRI, A166-172 ["The meetings were held once a year. During the meeting they talked about the arrests of the enemies. When the enemies were all arrested from the provinces and sectors, they started to search for anyone who had affiliation with the previous regime in the communes and villages. Q: We would like you to describe how they worked. For example, how did they identify and find out about an enemy following the village level meetings at Wat Tameak Pagoda? A: He ordered us to do politics. Anyone who had been a colonel would be told that they would be re-promoted to colonel rank. Former teachers and officers would get back their positions. They searched for educated people. When they did their politics, they got true answers. Those people were cheated and sent to be killed. [...] [The] cooperative chiefs were instructed to conduct the inquiries. They were to find out what positions the people would hold before. They were told to trick them to believe that they would not be mistreated when they told the truth and that they would be offered the same positions. [...] Q: Did Ta An attend that meeting? A: Yes, he did. He chaired the meeting. He also gave speech in that meeting. Q: Were you there also? A: Yes, I was. I went to give him protection."]

¹⁸¹ **D219/120** Prak Yut WRI, A19-20 ["Grandfather An gave an order to me to identify those who opposed the revolution, those who wanted to topple the revolution and those who were not satisfied with their living conditions, and to arrest those people to be smashed. [...] This order was carried out not only in other communes in Kampong Siem District but also in other four districts."]

¹⁸² **D117/73** Prak Yut WRI, A4, 12, 15 ["One day, Ta An came to meet me, and gossiped to me that the Centre Committee had begun to arrest Cham people, and he ordered me to list the names of all Cham people in my district. I did not at all know why I was ordered to list the names and seek to arrest Cham people. I delegated this task to my deputy named Nan. [...] In fact, I received orders from the Sector Committee to identify, for example, former Lon Nol soldiers and Cham people in my district. Then, I delegated this task to my deputies, namely, Nan and Sy. After they listed the names of those people, I sent the names to the Sector level. [...] Actually, I received orders from Ta An, but I am not sure if Ta An initiated the orders or he received the orders from the upper level, or what."]; **D117/72** Prak Yut WRI, A6 ["Grandfather An did not tell me any reason. He just told me to target Cham people and former Lon Nol soldiers and arrested them."]; **D117/71** Prak Yut WRI, A48 ["During a monthly meeting, Grandfather An ordered me to identify Cham people and Lon Nol soldiers in each commune."]; **D219/484** Prak Yut WRI, A8-9 ["I would like to clarify that I received orders from the sector level to arrest and kill all of those Cham. The orders I received were very clear about killing those Cham. [...] After the killings of the Cham people were completed, I received a report from my or the militia chief about the number of Cham they had killed. Then I sent that report to Ta An, who was at the sector level. [...] I would like to clarify once again that the orders I received were very clear: they stated that we must kill all the Cham."]; **D117/70** Prak Yut WRI, A44 ["Q: Besides the arrests of those commune chiefs, do you recall if

- c. Ao An's order to kill East Zone cadres at Phnom Pros;¹⁸³
- d. Ao An's order to kill 10 military trucksful of people at Phnom Pros;¹⁸⁴
- e. Ao An's order to kill prisoners at Wat Ta Meak;¹⁸⁵
- f. Ao An's order to kill prisoners at Met Sop/Kor Security Centre,¹⁸⁶ and
- g. Ao An's order that a pregnant woman be killed and her stomach cut open as punishment for asking about the fate of her husband.¹⁸⁷

Grandfather An ordered the arrests of other people? A: Yes, I received an order from Grandfather An to collect Cham people and Lon Nol soldiers. I did not know what happened to them eventually.”]; **D219/138** You Vann WRI, A100 [“Usually the orders were from Sector Military to District Military, but if Phen needed arrests and could not find those people, he would request assistance from Sector Military, and that was when Ta An ordered Prak Yut directly. Sometimes Ta An took a vehicle to meet Prak Yut personally, and sometimes he sent her a letter. Regarding the arrests of the Cham, former Lon Nol soldiers, and former village and commune chiefs, that was a special case. That was why Ta An gave a direct order to Prak Yut.”]. *See also* **D351/5** ICP's Final Submission, paras 55-62, fns 175-199.

¹⁸³ **D219/855** Nhem Chen WRI, A42 [“Q: What did Ta An say about Wat Phnom Pros Pagoda? A: He said that when further letters were issued by our comrades to arrest the East Zone people, the arrestees could be placed at his place where they would be given some good food to eat as parts of the political ploy and manipulation. After that they would be loaded onto the trucks and sent for execution at Phnom Pros Phnom Srei.”].

¹⁸⁴ **D6.1.379** Ke Pich Vannak WRI, EN 00346157 [Ke Pauk's son also told investigators: “I remembered that [it was] not until later that my father received news about people in truck loads were killed at Phnom Pros Phnom Srey.”].

¹⁸⁵ **D219/582** Toy Meach WRI, A83-87 [“Q: You have mentioned that after the congress, there was killing. How many people were killed? A: About five persons were killed. That site was able to hold four or five persons. They probably did not want to take them to a higher-level location. Therefore, they them and buried them close by. Q: What do you mean when you said that ‘they did not take them to a higher-level place’? A: In this case there were only four or persons, so they did not want to take them to be killed at Kor Security Office. For this reason they killed those people and buried them close by. Q: What does ‘higher-level’ mean? A: Higher level, meaning Kor Security Office. Q: Did you know who gave the orders to kill those people? A: Ta An, the Sector Chairman. The Sector Office was there, and the soldiers were his.”].

¹⁸⁶ **D219/732** Nhem Chen WRI, A33-37 [“Q: Who ordered the killings of those [prisoners transferred to Kor Security Centre]? A: The orders came from Sector Chairman. Q: What was the name of the Sector Chairman? A: His name was Ta An. Q: As for you personally, were you present when Ta An issued the orders to kill those prisoners? A.35: I was there personally when Ta An ordered the military to tell security. Q: Was Ta An at the security office when he ordered the killings? A: He was in the Inner Office. He ordered the military to go to security. Q: When Ta An gave orders through the military, where were you? A: I was in the Inner Office with him.”].

¹⁸⁷ **D219/837** So [Sau] Saren WRI, A75-77 [“I did see one event involving the pregnant wife of someone in the sector military, her husband, was arrested. The wife of this person in the military kept coming often to ask Ta An about her husband. Ta An ordered his military to take [her] to be killed and to cut her stomach open. Q: Was this event at Wat Ta Meak Pagoda or somewhere else? A: At the sector office, but in the paddy fields out back. Q: So the person who killed that lady was Run. Is that correct? A: I do not know who the killer was. Someone came to tell me about this. I only knew that she had already been taken to be killed.”].

71. The facts above relate only to those situations in which Ao An personally issued explicit orders to kill. In addition, there is also overwhelming circumstantial evidence of Ao An issuing orders to kill, such as:
- a. His announcement that a “soundless war” against enemies was about to begin, and that “more people will die [...] than those who were killed by the B-52s”;¹⁸⁸
 - b. His explicit statement to Ke Pauk—which Ao An himself acknowledged making—that he ordered the killing of Lon Nol soldiers;¹⁸⁹
 - c. The fact that prisoners were brutally tortured and killed by Ao An’s defence unit in the Sector 41 compound, which contained Ao An’s home and office;¹⁹⁰

¹⁸⁸ **D219/226** Penh Va WRI, A6 [“I first saw [Ao An] when he arrived in March 1977. He called upon approximately 300 cadres from the sector level to attend a meeting at a pagoda that was situated in Chrey Vien Commune. Then he made an announcement that he was the new Secretary of Sector 41. [...] During the meeting, he stated, ‘Those who fought against Lon Nol now ride Lon Nol’s horse. This meant that after the victory, those who hated the LON Nol regime were now following the path of that regime. He added, ‘From now on, there will be more casualties than those killed by the B-52 bombardment.’”]; **D219/498** Penh Va WRI, A5, 7 [“At the meeting, Ta An said, ‘From now on, more people will die than were killed by the B-52s.’ [...] Ta An stood up before people and said, ‘From now on, more people will die by a soundless war than those who were killed by the B-52s.’ What he meant was that the B-52s made a loud sound yet killed few people, but the war he mentioned was a soundless war that would kill more people.”].

¹⁸⁹ **D103.1.39** Ao An VOA Khmer Interview, *Atrocities Suspect Says He’s ‘Not Fearful’ of Tribunal, Hell*, 11 August 2011, EN 00750163 [“He said even though he had been ordered by Khmer Rouge military commander Ke Pauk to kill supporters of Lon Nol’s regime, he hid them in the fields of the collectives. [...] He told his superior he had ‘cleaned,’ or killed, them, ‘but they were on the farm.’”].

¹⁹⁰ **D219/800** So [Sau] Saren WRI, A133-137, 210-211, 220-221, 223, 233 [“Q: Where did they interrogate the prisoners? A: There was a school there. There was only that one place. It was behind Ta Aun’s house. They did interrogation there. Q: Did you participate in or see with your own eyes the prisoners being interrogated? A: That place was close to my place, in other words, close to Ta Aun’s house. I saw it. Q: How did they do interrogation? A: It seemed like they asked about nothing more than whose links they were. But the prisoners never came back with answers. Even if they were suspended upside down, they did not answer. Even if they were suffocated with bags, they did not answer either. Q: Is it really true that those prisoners were tortured? A: Yes. Q: What kind of torture did you see inflicted on the prisoners? A: Sometimes, they were given electric shock with wires. Sometimes, they were suspended upside down. [...] A: I do. They were Pin and Phin. Pin was the district governor and Phin was the deputy. There was another person, a Military Chairperson chief of army, but he was given electric shock during interrogation and died in the Sector Office. I do not know his name. Q: Did you participate in his interrogation, or not? A: That place was exactly the place where I slept, because the questioning was there Ta Aun’s house. Therefore, I sat and watched them. [...] Because [Ao An] never come to concern himself about such things. Interrogation was conducted only his defence unit. Two or three of his defence unit came connect electrical wire to shock prisoners there in the place where I slept. [...] It was not Ta An from whom the order came. But Ta An’s defence unit came to do interrogation and applied electric shock. [...] Q: Do you remember the names of those in Ta An’s defence unit who interrogated and tortured the three prisoners? A: I remember clearly only one, named Run. [...] When I first went to work in the sector office, I guarded at the defence post location., and the interrogation place was maybe 50 meters from there. I was not used to such a situation, and it was precisely at this time that I heard those sounds of screaming

- d. The fact that Ao An went to the Met Sop/Kor Security Centre to ensure that orders to kill prisoners there were carried out;¹⁹¹
- e. Ao An's request and receipt of reports about the progress of killings in Sector 41;¹⁹²

and groaning. At dawn, it occurred to me to take two or three of us to go look, and we saw one corpse and broken bottle pieces there. I heard the screams of those being beaten once every three or four nights.”]; **D219/776.1.1** So [Sau] Saren DC-Cam Statement, EN 01309880-92 [“At night I heard them beating people being interrogated, who were screaming ‘Owh! Owh! Owh!’ calling for their mother and father. That was if they were stabbed with piece of broken glass. [...] Early in the morning, I went to take a look. Once I saw the dead people in that longhouse, and the bottles used to beat and stab them, I felt pity for those who screamed. [...] Another one, the District Military Chairperson, was also brought to the sector location to be questioned. He was shocked with electrical wiring until he went limp. Another one, the guy who was District Vice Chairperson was also shocked with electrical wiring until he went limp, and I had to take him to the rice fields to dispose of him, but I did not take him. I did not dare to go as I knew that if I went I would be told to beat him to death and dispose of him.”], EN 01309895-97 [“When questioning, they sometimes tied their feet and hung them upside down. They banged their heads against the table. [...] Sometimes the prisoners’ heads were immersed in big jars of water. [...] Sometimes, they used plastic bags to suffocate [the prisoners]. I became familiar with all this. Q: [...] Regarding the questioning, did they train the interrogators in interrogation techniques? A: At that time, I did not do questioning, but I was there. Q: You saw this? A: Yes, I did. I was at the Sector, so I was right there, went there. But I didn’t know what the interrogators were told about how to question. I did not know. [...] Q: So at the Sector Office, one form of torture was of immersing a person’s head in a big jar of water? A: In fact, the big jars [...] were not set up. It having been a school, the water and so on were already there. Then people were suspended upside down, their heads were immersed in water and their heads were banged against each other. Q: Did you see this? A: I saw it. Two female siblings were arrested and tied up but not shackled. They were tied up, trussed up, right in front of the longhouse and left there. The following morning, they had vanished. Having been [un]able to find them anywhere, we peered down into the well. They were down the well but still alive. Both of them had jumped into the well. Then that guy Hum, who somehow knew what to do, used a bamboo pole to hook them up out of the well. He placed a hook between the joints and lifted them up all by himself. Q: Could he lift them? A: Yes. Q: Did he hook them up out of the well? A: Yes. He brought them up out of the well. The well was pretty deep, about 4-5 metres deep. Q: Where was this? A: There at Prey Totueng.”]. See also **D351/5** ICP’s Final Submission, paras 47-50, fns 139-156.

¹⁹¹ **D219/732** Nhem Chen WRI, A30-40 [“Q: When they were transported from the Sector Office to Kor Security Office did the transported people walk freely? A: They were called and placed in trucks and told that they would go to study or to attend meetings, like that. Upon arriving at Kor Security Office, they were called one by one to go inside room and then tied up. [...] shortly afterwards they were taken to be executed right away that night or the following night. Q: Who ordered the killings of those people? A: The orders came from Sector Chairman. Q: What was the name of the Sector Chairman? A: His name was Ta An. Q: As for you personally, were you present when Ta An issued the orders to kill those prisoners? A: I was there personally when Ta An ordered the military to tell security. [...] Q: Did Ta An ever go to that Security Office? A: He did. Q: Did you go with him? A: Yes. I went. Q: What did Ta An go there for? A: He wanted to know whether his orders were fully implemented or not. That was all he wanted to know.”].

¹⁹² **D219/120** Prak Yut WRI, A14, 27 [“After I delegated the work to Si, my deputy chairman, I was not interested and did not follow up to look at where at Tuol Beng those Cham people were taken to be killed. Si just reported to me that the orders had been carried out, and I reported to the Sector level accordingly. [...] In the report I sent to Grandfather An, I listed names of people arrested and reasons for their arrest, for their detention, or their release, and for their execution.”]; **D219/855** Nhem Chen WRI, A58-59 [“Q: Did you know if Ta An or Ta Aun received a report from all those security offices about the process of the killings at those offices? A: I went to collect those reports. He ordered me, ‘Son, you go to Kor to collect the documents.’ I brought the documents to [Ao An]. He said, ‘Messenger, you go to Kor Security Office.’ Then I rode on the motorbike with him. The documents [were] sealed in the envelope. Q: Did you know what information was in that envelope? A: I only knew that it was about security. I did not know what information it was. However, it was nothing but the report

- f. Ao An's meetings with Prak Yut to "decide the fates" of individual prisoners;¹⁹³
and
- g. The fact that Ao An personally escorted a truck full of East Zone prisoners who were subsequently killed.¹⁹⁴

72. In light of this large body of consistent evidence, the Dismissal Order's findings that there is little evidence of Ao An ordering arrests or killings are manifestly unreasonable.

2. There is strong evidence that Ao An arrived in the Central Zone in early 1977 and served as Sector 41 Secretary for almost two years

73. The Dismissal Order erroneously found that Ao An was sent to the Central Zone in mid-1977 at a time when the "purges in the Central Zone [...] were about to end."¹⁹⁵ It also found that Ao An served as the Sector 41 Secretary for "about one year."¹⁹⁶ These findings informed the Dismissal Order's conclusion that Ao An served as sector secretary for "a short period" and thus was not among those "most responsible" for DK crimes.¹⁹⁷
74. The Dismissal Order appears to have reached this conclusion regarding the timing of Ao An's arrival based primarily on an incomplete portion of a "biography" that appeared in the

of the killings. I was with him, next to him whilst he was eating rice. He said, 'Several people have already been taken to attend the study sessions. Soon our plan would be achieved.'"]

¹⁹³ **D219/120** Prak Yut WRI, A31 ["sometimes [Ao An] came to discuss with me specific issues related to people whose names they had identified to be arrested to decide their fates."].

¹⁹⁴ **D219/226** Penh Va WRI, A24 ["In April 1978, and after the purge of the Eastern Zone cadres, I saw Comrade May, Ta An's right-hand man who was responsible for arresting people, riding a motorbike in front of two trucks. The first one was a Jeep A2, which Ta An was in, and the second truck was a Chinese truck which had about 20 Eastern Zone prisoners in it."]; **D219/498** Penh Va WRI, A14-16 ["I remember that when I walked to eat porridge at Pongro Village, I saw May riding a motorcycle ahead of Ta An's vehicle, which was an A-2 Jeep, and another Chinese 4x4 lorry that was transporting prisoners. Those prisoners were East Zone cadres. Maybe there was another motorcycle riding behind that Chinese 4x4 lorry. At that time, that road was not paved with asphalt as it is presently. It was just a normal dirt road. As I saw, there were less than 20 prisoners in that Chinese lorry, and all of them were cadres. They were in new black uniforms, and they were in restraints. [...] Q: With whom did Ta An ride in that jeep? A: There was one driver and some bodyguards in that jeep with Ta An. Behind Ta An's jeep, there was a Chinese 4x4 lorry, transporting less than 20 prisoners, all of whom were the East Zone cadres. Q: Do you remember those prisoners? A: No, I just know that they were the East Zone cadres, and my younger brother-in-law saw the Khmer Rouge killing the East Zone cadres. My younger brother-in-law is the husband of Penh Chantha. He saw them marching those East Zone cadres in queues to be killed at Wat Roka Koy Pagoda in Kang Meas District."].

¹⁹⁵ **D359** Dismissal Order, paras 494, 508.

¹⁹⁶ **D359** Dismissal Order, para. 510.

¹⁹⁷ **D359** Dismissal Order, paras 553-554.

March 2002 issue of the DC-Cam magazine, *Searching for the Truth*, in which Ke Pauk stated:

In June 1977, the first stage of capturing was over. By that time, only me remained and the Central Zone had no cadres left. The upper brothers decided to transfer cadres from Southwestern Zone to fill the unoccupied positions. They sent about 200 cadres from that zone. The first personnel was Kang Chab, who had worked in the stadium. The higher level decided to make Region 35 of Central Zone as a new Northern Zone where I served as secretary, Kang Chab as my deputy and Ta An as member.¹⁹⁸

75. As can be seen, Ke Pauk does not unambiguously state when Ao An arrived in the Central Zone; rather, he simply states that the first wave of arrests of Central Zone cadres was completed by June 1977 and that the central authorities filled the vacant positions with cadres from the Southwest Zone. The Dismissal Order assumes that Ke Pauk meant that no Southwest cadre arrived until after the “first wave” of arrests was completed, but the paragraph is ambiguous and could be understood as saying that the vacancies were filled during the purge rather than only after the last of the arrests of cadres was completed. In his autobiography, Ke Pauk was primarily concerned with justifying his own actions in the DK regime and his passing reference to the date of the arrival of cadres from the Southwest Zone was not a critical point in that narrative.
76. The Dismissal Order then attempts to bolster the assertion that the Southwest cadres arrived in the Central Zone in June 1977 by stating that Ke Pauk’s evidence is consistent with numerous witness statements.¹⁹⁹ However, many of the statements cited in support either do not specify a month in 1977 when the cadres arrived,²⁰⁰ do not support the mid-1977

¹⁹⁸ **D359** Dismissal Order, para. 494; **D1.3.16.1** Ke Pauk’s Autobiography from 1949-1985, EN 00089713-14. Note that the English translation on the Case File differs slightly from the official English version of the magazine that is available at <http://www.dccam.org/Projects/Magazines/Previous%20Englis/Issue27.pdf>.

¹⁹⁹ **D359** Dismissal Order, paras 202, 203, fns 576, 577.

²⁰⁰ **D117/34** Prak Ny WRI, A1 [Pech Chim ordered the witness to go to the Central Zone with him in 1977; they travelled in a convoy with many other people]; **D6.1.690** Pech Chim WRI, A9 [the witness became the chairman of the Chamkar Andaung Rubber Plantation in Kampong Cham in 1977; he brought 40 persons with him from the Southwest Zone] (*but see* the evidence cited in fn. 204 below where he consistently recalled that he left for the Central Zone in February 1977); **D117/27** Deu Raun WRI, A1 [“I was still working in the sewing section until 1977, when Prak Yut was transferred to work in the Central Zone. She took me along with her. I cannot remember exactly, but it was in 1977.”]; **D117/50** Im Pon WRI, A5-7 [the witness was sent to Sector 41 in the dry season of 1977]; **D191.2** Ao An DC-Cam Statement, EN 01025311, 20 [moved to Kampong Cham in the dry season of 1977].

assertion at all,²⁰¹ or come from witnesses who stated that they did not remember clearly when the cadres arrived, yet they estimated a time nonetheless.²⁰²

77. In contrast, the majority of the cited statements actually support a finding that the Southwest cadres, including Ao An, arrived in the Central Zone in 1976 or early 1977.²⁰³ Most notable

²⁰¹ **D117/42** Khoem Neary WRI, A4 [“I remember that the Southwest cadres arrived in 1977 after Sao Phim [...] of the East Zone was known to have been arrested.”] (*Note* that Sao Phim was not arrested until mid-1978. *See, e.g.* Case 002-E313 Case 002/01 Judgement, fn. 693); **D6.1.423** Heng Nea WRI, EN 00275915-16 [discussing the Southwest Zone people coming to her birth village in Svay Rieng Province, not the Central Zone, in mid-1977]; **D78** Chin Sinal WRI, A9 [An came to see the witness’s mobile work brigade in the dry season in 1978 but the witness did not know from when An was in the Sector’s committee].

²⁰² **D219/232** Van Chhunseng WRI, A5 [“Q: Do you remember in which year cadres from the Southwest Zone came to replace cadres in the villages, communes and districts? A: No, I don’t. But I remember from 1977 to 1979, cadres from the Southwest Zone came to replace all the base cadres of the commune and district level.”]; **D219/26** Prak Ny WRI, A10 [“I do not remember well which year it was, but I think I went there in 1977.”] (*cited twice in fn. 576*); **D6.1.733** Prak Yut WRI, EN 00364075 [“Ta An was transferred to the Central Zone in around May or June 1977, but I did not know if he had come to the Central Zone before or after I did.”]; **D219/138** You Vann WRI, A43 [“I do not remember the exact time we arrived there. [...] I estimate I had worked in the Central Zone approximately one year when the Vietnamese arrived.”]; **D29** Suon Kanil alias Neang WRI, EN 00716227 [“[Ao An’s] clique then just arrived from the Southwest, but I do not remember when it was. It could be late 1977 or early 1978.”]; **D219/249** Suon Kanil alias Neang WRI, A1 [“As far as I can remember, the Southwest Zone cadres came to the Central Zone in around late 1977.”]; **D219/870** Ry Nhor WRI, A6 [“I don’t remember when [the Southwest Zone cadres] arrived, but I remember the events. They may have arrived in late 1977 or early 1978.”]; **D219/461** Pen Thol WRI, A11 [the Southwest cadres came to replace the former cadres “probably” in mid-1977]. The one exception is **D117/43** Sbong Yann WRI, A4 [“The Southwest cadres came to replace the previous cadres in 1977, around May.”].

²⁰³ **D76** Seng Srun WRI, A6 [An replaced Sreng in July or August 1976 when the “Southwest Zoners” arrived]; **D36** Chea Maly WRI, EN 00722231 [An took control of the sector in late 1976 or early 1977]; **D74** Roth Peou WRI, A2-3 [the Southwest Zoners arrived “probably in late 1976 or early 1977” and removed the Central Zone staff]; **D117/31** You Vann WRI, A4-8 [200 people including the witness and Ao An were sent to the Central Zone in late 1976 or early 1977] (*cited twice in fn. 576*); **D117/32** Nhem [Nhim] Kol alias Say WRI, A2 [the Southwest Zone cadres arrived in Kampong Siem District at the end of 1976 or early 1977] (*cited twice in fn. 576*); **D6.1.399** Seng Srun WRI, EN 00235515 [the Southwest Zone people came to take charge in Peam Chi Kang village (Kang Meas District) in mid-1976]; **D219/606** Chea Khengthai WRI, A14 [the Southwest people arrived in Prey Totueng in 1976], A35 [An arrived in Sector 41 around 1976]; **D219/82** Riel Neang WRI, A8, 13 [the Southwest cadres arrived in Angkor Ban Commune, Kang Meas District in late 1976 and more came in 1977]; **D219/712** Sok Horn WRI, A13-18 [the Kampong Siem District Committee was removed in 1975 or 1976 and replaced in 1976 or 1977 by Yeay Yut and Ta Sy from the Southwest Zone]; **D118/259** Pech Chim WRI, A32 [the witness was transferred from Tram Kak District to Kampong Cham in late 1976], A49; **D107/7** Nhim Kol alias Say WRI, EN 00787213 [Yeay Yut arrived in Kampong Siem District during the dry season in January or February 1977; she came in the second phase when civil administrators were dispatched to take over the Zone, sectors, districts and communes]; **D117/70** Prak Yut WRI, A6 [“I was sent from Kampot province to the Central Zone in January 1977.”] *but see* **D6.1.730** Prak Yut WRI, EN 00364081 [“In around March or April 1977, they transferred me from Sector 35 to Kampong Siem district.”]; **D219/405** Chimm Bunserey WRI, A13 [“The Southwest group arrived probably in early 1977.”], A29-30 [Ao An addressed workers at the opening of the sector dam worksite in early 1977]; **D219/731** Nhem Chen WRI, A12 [Ao An arrived in “Approximately early 1977, around February or March.”]; **D219/171** Nhim Kol alias Say WRI, A2 [“The Southwest Zone cadres arrived in Kampong Siem district in the dry season in late 1976 or early 1977”]; **D219/284** Pov Sarom WRI, A25-30 [Prak Yut was transferred to Kampong Siem in March or April 1977 and came back to get her cousin (the witness) in July]; **D117/56** Chom Vong WRI, A14 [“To my recollection, Grandfather An left for Kampong Cham in April or May in 1977.”].

among these are statements from former cadres who either travelled with Ao An at the time they were transferred from the Southwest Zone, or who worked with him upon his arrival. For example:

- a. Pech Chim: Former Tram Kak District Secretary Pech Chim recalled that he travelled to the Central Zone with Ao An. In five WRIs given over a span of six years, Pech Chim consistently identified the time of the transfer from the Southwest Zone to the Central Zone as February 1977. In two of those WRIs, he identified the days of travel as 12 to 14 February 1977.²⁰⁴
- b. You Vann: You Vann, a Southwest Zone cadre who recalled being transferred to the Central Zone at the same time as Ao An and Prak Yut, stated that the Southwest Zone cadres were moved to the Central Zone in late 1976 or early 1977.²⁰⁵

²⁰⁴ **D118/79** Pech Chim WRI, A1 [“I left for the Central Zone in February 1977.”]; **D6.1.650** Pech Chim WRI, EN 00379171 [“Then it was about in February 1977 when they transferred me to [a new position] as the chairman of the Chamkar Andaung rubber plantation union of the Central Zone”]; **D117/18** Pech Chim WRI, A1 [“I have known Ta An since 1977 when I was sent along with Se, Prak Yuth, Ta An, Phen and Sim to the Central Zone. [...] In February 1977, the Party decided to send us to Phnom Penh where we met Ke Pauk. Then Ke Pauk took us to Kampong Cham province and held a meeting.”]; **D6.1.651** Pech Chim WRI, EN 00379304, 06 [“Q: What was the date they [transferred] you to the Central Zone? A: I was transferred to the Central Zone in February 1977. Q: Are you sure that you were transferred to the Central Zone in February 1977? A: Yes, I am sure. [...] As I can recall it, I was transferred to the Central Zone on 12 February 1977.”]; **D219/702.1.99** Pech Chim, T. 22 April 2015, 09.26.28-09.31.21 [describes leaving the Southwest Zone on 12 February 1977, spending the 13th in Phnom Penh and traveling to the Central Zone on 14 February 1977: “Q: [...] My question for you, is there some reason that you remember the specific date of 12 February? A: I was building a dam at Khpos Trabaek and something happened. I just came from Angk Ta Saom then Takeo, Ta Mok rode by with his motorcycle. He asked me to go to Takeo in a short time. He said we would be going to the north – he was very direct in saying words ‘going to the north’. He said Sy would soon come to pick me to see him at Takeo. Then Sy arrived in his car and I went into the car. On the way to Takeo, Sy told me about being moved to go to Kampong Cham; that was on the 12th. [...] we arrived in Phnom Penh on the 13th during the day time. And, on the 14th we spent one day in Phnom Penh before Bong Pauk came to meet and pick us up to Kampong Cham. It is this succession of events that allowed me to remember that specific date. That is to say, we prepared our journey on the 12th and departed on the 13th and we arrived in Phnom Penh on the 14th.”]. In a subsequent WRI, Pech Chim identifies the date of his transfer to the Central Zone as late 1976 or February 1976: **D118/259** Pech Chim WRI, A49, 168-173. That February 1976 is a mistake is demonstrated by the fact that Pech Chim says Yeay Chaem was transferred to the Northwest Zone in mid-1976 half a year before he was transferred to Kampong Cham (see A47-49). *Note* that the Dismissal Order isolates the February 1976 error and does not consider the remainder of the statement or his other statements as a whole, which make clear that the February 1976 date was given in error (see **D359** Dismissal Order, para. 201).

²⁰⁵ **D117/31** You Vann WRI, A5-6, 8 [“Q: When were the people sent [to the Central Zone]? A: We were sent there in 1976 or early 1977 after the harvesting period was over. Q: How many people were sent with you? There were around 200 people sent to the Central Zone at the time. [...] Q: Who were the chiefs? A: Ta An was in a military car with his colleagues. Ta Si and Prak Yut were in two other cars with their respective colleagues as well.”]; **D219/138** You Vann WRI, A36 [“About 300 people were sent from the Southwest Zone

- c. Prak Yut: In two WRIs and her DC-Cam statement, former Kampong Siem District Secretary Prak Yut (who had known Ao An since their work together in the Southwest Zone²⁰⁶) gave the date of her transfer from the Southwest Zone to the Central Zone as January 1977.²⁰⁷ In her live testimony in Case 002/02, she gave the date as between February and April 1977.²⁰⁸ Shortly after her arrival in the Central Zone, Prak Yut attended two meetings at which Ao An was also present, indicating that the timing of their arrivals closely coincided.²⁰⁹
- d. Nhem Chen: Ao An's bodyguard Nhem Chen stated that Ao An and other Southwest Zone cadres arrived in Sector 41 in February or March 1977.²¹⁰
- e. Nhim Kol: In three WRIs given over the course of three years, Krala Commune Committee Member Nhim Kol consistently stated that the Southwest Zone cadres, including Prak Yut, arrived in the Central Zone in late 1976 or January-February 1977.²¹¹

including Kampot Province, Takeo Province, and Koh Kong Province to the Central Zone. We stayed one night in Phnom Penh on the campus of a university whose name I do not remember. Prak Yut and the other 10 cadres attended a meeting with Ta Mok and Khieu Samphan. I know that because Ta Mok came to pick them up for the meeting by car, and they returned that night.”]; **D219/702.1.87** You Vann, T. 14 January 2016, 14.02.52-14.05.15 [“Q: Do you remember hearing anything about a meeting that took place, not that you attended but that you heard about, during the time you were in Phnom Penh? A: Yes, Prak Yut, Ta An, Ta Mok, and Ta Chap attended the meeting while I stayed at the school. Q: And do you know who they met with? A: It is my understanding only that they went to meet with Khieu Samphan.”].

²⁰⁶ **D117/71** Prak Yut WRI, A1-5, 10.

²⁰⁷ **D117/70** Prak Yut WRI, A6 [“Q: In the previous interview, you said that you were sent to the Central Zone in 1977. Do you recall the exact date? A: In fact, I was sent from Kampot province to the Central Zone in January 1977.”]; **D117/71** Prak Yut WRI, A12 [“Q: You said that you were transferred to Kampong Cham in January 1977, correct? A: Yes, I recall that I was.”]; **D219/234.1.2** Prak Yut DC-Cam Statement, EN 01064270 [“Q: In what month were you transferred to Kampong Cham? A: In January 1977.”].

²⁰⁸ **D179/1.2.5** Prak Yut, T. 26 January 2012, 11.23.38-11.25.55 [“Q: So it was sometime between February and April 1977 that you transferred to Kampong Siem district; is that correct? A: Yes, it is.”].

²⁰⁹ **D117/70** Prak Yut WRI, A14-26; **D117/71** Prak Yut WRI, A15-19.

²¹⁰ **D219/731** Nhem Chen WRI, A12 [“Q: Did Ta [An] arrive at the end of 1977? A: Approximately early 1977, around February or March.”]

²¹¹ **D107/7** Nhim Kol alias Say WRI, EN 00787213 [“Q: Who was Yeay Yut? A: Yeay Yut was secretary of District 101, the numerical code for Kampong Siem district. She came from the Southwest-Chhuk district. She arrived in this district during the dry season in 1977 (January or February).”]; **D117/32** Nhim Kol alias Say WRI, A2 [“Q: Do you remember the date when the Southwest Zone cadres arrived in the district of Kampong Siem? A: Yes, I remember it; they came at the end of 1976 or early 1977.”]; **D219/171** Nhim Kol alias Say WRI, A2 [“The Southwest Zone cadres arrived in Kampong Siem District in the dry season in late 1976 or early 1977 when I was in a mobile unit in Kaoh Roka Commune.”].

- f. Penh Va: Penh Va, a member of the Sector 41 textile unit, saw Ao An speak at a meeting at Wat Ta Meak in March 1977.²¹² Penh Va also stated that Ao An arrived about a week after the disappearance of Taing, Ao An's predecessor as Sector 41 Secretary.²¹³ S-21 records show that Taing entered S-21 on 18 February 1977,²¹⁴ suggesting that Ao An arrived shortly after that date. Further corroboration of the March 1977 meeting date is Penh Va's recollection that the Sector Industry Office Chairman, Meng, was present at the meeting.²¹⁵ Meng was arrested and entered S-21 on 19 May 1977;²¹⁶ the meeting, therefore, could not have taken place after that date.
78. The single ambiguous reference in Ke Pauk's biography casts little doubt on the detailed and consistent evidence given by these and other witnesses that establishes Ao An's arrival considerably before June 1977. In addition, Ke Pauk's "biography" was made under unclear circumstances and not, apparently, under any form of oath—factors which are relevant in assessing the relative weight to be accorded to the evidence.²¹⁷ In light of the evidence taken as a whole, the Dismissal Order's finding that Ao An did not arrive in the Central Zone until June 1977 is unreasonable, particularly as there is no explanation as to why this evidence is preferred.

²¹² **D219/226** Penh Va WRI, A6 ["I first saw [Ao An] when he arrived in March 1977. He called upon approximately 300 cadres from the sector level to attend a meeting at a pagoda that was situated in Chrey Vien Commune. Then he made an announcement that he was the new Secretary of Sector 41. [...] During the meeting, he stated, 'Those who fought against Lon Nol now ride Lon Nol's horse.'"]; **D219/498** Penh Va WRI, A5-A6 ["I went to Wat Tameah Pagoda once when Ta An called me to attend a meeting there. [...] I went to attend the meeting at Wat Tameah Pagoda with approximately 300 other people."].

²¹³ **D219/226** Penh Va WRI, A4-6 ["Q: Was Ta Taing arrested before or after the arrival of Ta An? A: Ta Taing disappeared before Ta An arrived. Q: How long before Ta An arrived in Prey Chhor District did Ta Taing disappear? A: It was about a week. When Aom An arrived, he became the Secretary of Sector 41. [...] Q: When did you first see Ta An? A: I first saw him when he arrived in March 1977."].

²¹⁴ **D219/825.1.2** OCIJ S-21 Prisoner List, Entry 1058, EN 01222374 [Chun Chhum alias Taing, Secretary of Sector 31 (Secretary of Sector 41), North Zone, entered S-21 18 February 1977, executed 8 July 1977].

²¹⁵ **D219/226** Penh Va WRI, A33; **D219/498** Penh Va WRI, A6.

²¹⁶ **D219/825.1.2** OCIJ S-21 Prisoner List, Entry 4085, EN 01222486 [Chea Meng Thai, alias Meng, Chief of Sector 41 Industry, North Zone, entered S-21 on 19 May 1977].

²¹⁷ See **D359** Dismissal Order, paras 485, 489.

3. Most or all of the charged crimes were committed with Ao An’s participation during the time he served as Sector 41 Secretary

79. In reaching its conclusion that Ao An was not subject to the personal jurisdiction of the ECCC, the Dismissal Order placed significant reliance on the fact that Ao An’s participation in crimes occurred when the “purges in the Central Zone [...] were about to end.”²¹⁸ This finding, and the Dismissal Order’s reliance on this finding, are erroneous in several ways.
80. First, for clarity it should be noted that the Dismissal Order appears to use the term “purge” to apply to all of the charged crimes, whether the victims were CPK cadres or ordinary citizens. The Dismissal Order cites and appears to adopt Duch’s definition of the term “purge” as meaning “remove the enemies from our ranks, the army, the population so that our ranks, the army and the population be healthy.”²¹⁹ On this definition, the word “purge” would apply to crimes committed not just against CPK cadres, but against all members of the population believed to be enemies, whether due to membership in a suspect group (like Cham or New People) or because of individual characteristics. That the Dismissal Order is using this broad definition of the term “purge” is further demonstrated by its finding that “[t]he purge policy was reflected in the Decision of the Central Committee on 30 March 1976 related to the right to smash *inside and outside the ranks*.”²²⁰
81. On this understanding of the term “purge,” the Dismissal Order’s finding that Ao An participated in crimes only at a time when the “purges in the Central Zone [...] were about to end” is manifestly unreasonable. Even on the Dismissal Order’s own erroneous timetable (assuming *arguendo* that Ao An did not arrive in the Central Zone until June 1977), he was still present in the Central Zone and participating in the crimes during the most intense periods of killing—when the focus turned from CPK cadres to ordinary citizens and then the Cham. The ICP’s Final Submission clearly sets out the progression of the purge from village and commune chiefs, to ordinary citizens perceived to be a threat to the regime, to the genocide perpetrated against the Cham.²²¹ In particular, Prak Yut makes it clear that “we carried out the execution of all the Cham people after we had already arrested people of other

²¹⁸ **D359** Dismissal Order, paras 508, 553.

²¹⁹ **D359** Dismissal Order, para. 156, *citing* **D6.1.1052** Kaing Guek-Eav alias Duch WRI, EN 00160725.

²²⁰ **D359** Dismissal Order, para. 159.

²²¹ **D351/5** ICP’s Final Submission, paras 17-35, 54-71.

elements”²²² and indicates that the attack on the Cham began in late 1977.²²³ The Dismissal Order itself acknowledges that “many Cham people” were killed at Wat Au Trakuon Security Centre in September-October 1977²²⁴ and that “Cham people including children” and East Zone people were detained and killed at Wat Batheay in 1978.²²⁵

82. More obviously, the vast bulk of the evidence on the Case File shows that the crimes in the Central Zone were committed after Ao An arrived because it refers explicitly to Ao An’s role in committing the crimes. The evidence of Prak Yut, You Vann, Penh Va, Sat Pheap, Toy Meach, So Saren, Nhem Chen, Put Kol, and others does not link Ao An to crimes in the Central Zone based on the *date* that crimes occurred; it ties Ao An to crimes in the Central Zone by describing the ways in which he personally ordered, encouraged, coordinated, followed up on, and participated in the crimes. Parsing dates to determine liability is an unnecessary and meaningless exercise when the evidence refers directly and explicitly to Ao An’s actions. No uncertainty about dates could create any reasonable possibility that, for example, Prak Yut could be mistaken in identifying Ao An as the Sector 41 Secretary who gave her orders to round up village and commune chiefs, identify and kill suspected enemies within the general population, and kill all the Cham in her district. Prak Yut had known Ao An since at least 1975; Ao An appointed her to her position as Kampong Siem District Secretary; and all the crimes she gave evidence about happened during the time that she was Kampong Siem District Secretary.
83. In contrast to the clear, direct evidence of Ao An’s participation in crimes, the evidence that the Dismissal Order relies on to suggest that most of the killing had been completed by the time Ao An and the other Southwest Zone cadres arrived amounts simply to unsubstantiated speculation. The Dismissal Order contends that the rate of arrests and killings in the Central Zone decreased after Ao An arrived on the basis that “the statement of Khieu Samphan [...]

²²² **D219/120** Prak Yut WRI, A21 [“Q: Were those orders related to the arrests of Cham people to be killed? A: Yes, it was the order to make arrests and smash at the same time, but we carried out execution of all the Cham people after we had already arrested people of other elements.”].

²²³ **D219/702.1.95** Prak Yut, T. 19 January 2016, 09.14.17-09.17.03 [“Allow me to answer your question on the issue of purging the Cham. It did not start yet when I arrived, so it happened at around late -- at a later part of that year.”].

²²⁴ **D359** Dismissal Order, paras 305-307, 310.

²²⁵ **D359** Dismissal Order, paras 316-317, 321.

about amnesty (stop the killings) clearly indicates the existence of the purges and arguably the number of arrests or executions actually decreased when Ao An arrived in the Central Zone.”²²⁶ The Dismissal Order contains no citation to Khieu Samphan’s alleged statement, but, like many DK propaganda statements, it clearly has no basis in reality. As detailed in this appeal, the ICP’s Final Submission, and even in findings in the Dismissal Order itself, it is clear that killings did not decrease in the period after the arrival of Ao An. Given the extensive contradictory evidence on the Case File, relying on Khieu Samphan’s alleged statement that killings decreased is manifestly unreasonable.

84. The Dismissal Order also asserts that any deaths that occurred after Ao An’s arrival in the Central Zone were due to starvation or lack of medical care.²²⁷ The Dismissal Order cites no evidence for this proposition and fails to engage with any of the extensive evidence regarding the massive program of intentional killings during Ao An’s administration of Sector 41. While there is no doubt that some of those who died during the period in which Ao An controlled Sector 41 died from starvation and lack of medical care, to conclude that because this was one possible cause of death, it must necessarily have been the sole or predominant cause of death is manifestly speculative and unreasonable in the context of overwhelming evidence to the contrary that establishes a large-scale program of intentional killings in Sector 41 during the period of Ao An’s control.
85. If the term “purge” is understood in a more limited sense to refer only to CPK cadres, the Dismissal Order’s finding is still at least partially inaccurate. While there is evidence that some zone-, sector- and district-level cadres may have been arrested before Ao An, Prak Yut, and You Vann arrived in the Central Zone,²²⁸ Prak Yut is explicit that the arrest of the lower-level cadres occurred after she and Ao An arrived. Specifically, she says that “Grandfather An led [the] arrest and organized [the] replacement” of commune and village

²²⁶ D359 Dismissal Order, para. 508.

²²⁷ D359 Dismissal Order, para. 509.

²²⁸ See, e.g., D219/226 Penh Va WRI, A4-6 [“Q: Was Ta Taing arrested before or after the arrival of Ta An? A: Ta Taing disappeared before Ta An arrived. Q: How long before Ta An arrived in Prey Chhor District did Ta Taing disappear? A: It was about a week. When Aom An arrived, he became the Secretary of Sector 41. [...] Q: When did you first see Ta An? A6: I first saw him when he arrived in March 1977.”].

chiefs in her district.²²⁹ You Vann corroborates the involvement of both Ao An and Prak Yut in the purge of commune and village chiefs.²³⁰ So Saren recalls Prak Yut's involvement in the removal of one commune chief in particular.²³¹ Nhim Kol says that "after Prak Yuth arrived in Kampong Siem District", the former commune chairmen were never seen at work again.²³²

86. More importantly, if the term "purge" is taken to refer solely to CPK cadres, the "fact" that the purge was largely completed by the time Ao An arrived in the Central Zone (even if it were true) would simply not be very relevant to an assessment of the overall gravity of Ao An's crimes (and therefore to personal jurisdiction). It is clear that the great majority of the thousands or tens of thousands of victims in Sector 41 were the perceived "enemies" among ordinary citizens (including Cham) rather than higher-level CPK cadres suspected of disloyalty, since there simply were not enough cadres for them to have made up a significant portion of such a large group of victims. Even if Ao An were not responsible for the death of a single CPK cadre (which is clearly not the case), he would still be among those "most responsible" for DK crimes.²³³

4. Contrary to the Dismissal Order's portrayal, the evidence shows that Ke Pauk and Ao An reached decisions cooperatively and collectively

87. The Dismissal Order seeks to portray Ke Pauk as an active and powerful leader with extensive decision-making authority and Ao An as a cadre with limited decision-making authority tasked primarily with implementing policies decided on by Ke Pauk and his superiors in Phnom Penh.²³⁴ Not only is this issue of limited legal relevance to the question

²²⁹ **D117/71** Prak Yut WRI, A40 ["I did not [join] in making arrest of those old commune chiefs. Grandfather An led their arrest and organized their replacement with the Southwest cadres. The arrest and the replacement were organized by the sector level."]. *See also* **D351/5** ICP's Final Submission, fns 49-51.

²³⁰ **D219/138** You Vann WRI, A44-49; **D219/702.1.87** You Vann, T. 14 January 2016, 14.06.37-14.08.41; **D219/702.1.94** You Vann, T. 18 January 2018, 10.00.34-10.02.00.

²³¹ **D219/800** So [Sau] Saren WRI, A13-14.

²³² **D107/7** Nhim Kol alias Say WRI, EN 00787216; **D219/171** Nhim Kol alias Say WRI, A14-15.

²³³ Obviously, there can be no contention that Ao An's responsibility is reduced because his victims were less "important" than CPK cadres. While power over high-status victims might be an indicator of seniority within the CPK, there is no merit to the argument that the life of a CPK cadre is more valuable than the life of an ordinary citizen when assessing the gravity of crimes for purposes of analysing the category of "those who were most responsible."

²³⁴ **D359** Dismissal Order, paras 157-162, 494-520, 543-551.

of personal jurisdiction,²³⁵ it is also unsupported by the evidence the Dismissal Order relies on.

88. Paragraph 159 of the Dismissal Order discusses the authority of Ke Pauk as follows:

Witness Ban Siek, former deputy secretary of Chamkar Leu district and secretary of Krauch Chmar district, testified that, *'The zone was controlled by Secretary Ke Pauk. Ke Pauk served as chief of the Zone Standing Committee ... To my knowledge, important decisions, for example, on a purge were made by the Standing Committee.'*²³⁶

89. This statement is quoted in a section of the Dismissal Order ascribing primary responsibility for the purges to the Central Zone Standing Committee and central authorities, and seeks to identify the Zone Standing Committee solely with Ke Pauk.²³⁷ But the quotation relied upon has been edited in a way that changes its meaning. The full quotation from Ban Siek's WRI is as follows:

The zone was controlled by Secretary Ke Pauk. He served as chief of the zone's Standing Committee, *which consisted of three sector committees-Ta An (from the Southwest Zone, secretary of Sector 41), Sim (from the Southwest Zone, secretary of Sector 43), Oeun (from the Central Zone, secretary of Sector 42) and the Zone Office Chief.* To my knowledge, important decisions, for example, on a purge were made by the Standing Committee *during its secret meeting.*²³⁸

90. Taken as a whole, Ban Siek's evidence is that the Zone Standing Committee consisted of five individuals, including Ao An, who met with each other to make important decisions together regarding the purge. Although it might be reasonable to ascribe somewhat higher status and authority to Ke Pauk based on his higher position, there is no reasonable reading of this evidence that does not give Ao An a significant role in the decision-making process. In this paragraph, it is clear that Ban Siek is discussing Ke Pauk and the Zone Standing Committee as separate entities, as Ke Pauk would have no need to meet secretly with himself

²³⁵ See Sections IV.B, IV.C, *supra*.

²³⁶ **D359** Dismissal Order, para. 159, *citing* **D107/15** Ban Siek WRI, EN 00841965 (emphasis in original).

²³⁷ **D359** Dismissal Order, paras 157-162, 520.

²³⁸ **D107/15** Ban Siek WRI, EN 00841965 (emphasis added).

to make decisions. The Dismissal Order's reliance on this evidence to ascribe sole responsibility for the purge to Ke Pauk was manifestly unreasonable.

91. The Dismissal Order next discusses the 30 March 1976 Standing Committee decision regarding the authority to smash inside and outside the ranks.²³⁹ In this discussion, the Dismissal Order emphasises that purges were “to be decided by the Zone Standing Committee”,²⁴⁰ implying, in light of the incomplete quote in the paragraph above, that this decision granted sole authority to Ke Pauk to make decisions regarding purges. In fact, when Ban Siek's statement is viewed in its entirety, it shows that this decision vested Ao An, in cooperation with Ke Pauk and the other three members of the Central Zone Standing Committee, with the authority to smash inside and outside the ranks.
92. The ICP also notes that the WRI of Ban Siek which the Dismissal Order relies upon for this point was taken on 1 April 2012, during the period that Reserve ICIJ Laurent Kasper-Ansermet was discharging the duties of the International CIJ.²⁴¹ The investigator who took the statement did so pursuant to a rogatory letter dated 8 February 2012 and signed by Judge Kasper-Ansermet.²⁴² This is far from the only instance in which the Dismissal Order relies on evidence collected by Judge Kasper-Ansermet: Ban Siek's WRI is cited a total of 25 times, including for a key point regarding Ao An's authority at the zone level,²⁴³ and evidence placed on the Case File between 1 November 2011 and 4 May 2012 is cited at least 177 times in the Dismissal Order.²⁴⁴

²³⁹ **D359** Dismissal Order, paras 159-160.

²⁴⁰ **D359** Dismissal Order, para. 160, *citing* **D1.3.19.1** Decision of the Central Committee Regarding a Number of Matters, 30 March 1976, EN 00182809.

²⁴¹ **D107/15** Ban Siek WRI, EN 00841963.

²⁴² **D107/15** Ban Siek WRI, EN 00841963 [indicating that the WRI was taken by investigator Christian Baudesson pursuant to a rogatory letter dated 8 February 2012]; **D107** Rogatory Letter, 8 February 2012 [authorising Christian Baudesson and others to undertake investigative action and signed by Laurent Kasper-Ansermet in his capacity as Reserve International Co-Investigating Judge].

²⁴³ **D359** Dismissal Order, para. 227, *quoting* **D107/15** Ban Siek WRI, EN 00841966 [regarding the issue of who acted as zone secretary in Ke Pauk's absence]. *See also* **D359** Dismissal Order, fns 370, 536, 560, 561, 562, 563, 565, 581, 651, 653, 655, 792, 793, 794, 795, 796, 797, 798, 799, 804, 812, 816, 1143, 1144, 1160 [all citing this WRI from Ban Siek].

²⁴⁴ *Note* that all footnote references cited in this footnote relate to the **D359** Dismissal Order. *See* **D106/5** Tum Soeun WRI, 29 March 2012 [3 times: fns 208, 463, 464]; **D107/2** Sann Son WRI, 16 February 2012 [9 times: fns 1030, 1036, 1037, 1039, 1040, 1042, 1241, 1242, 1285]; **D107/3** Kak Sroeun WRI, 16 February 2012 (*note* that sometimes the Dismissal Order incorrectly cites the date as 16 February 2015) [12 times: fns 1026, 1029, 1030, 1032, 1034, 1035, 1036, 1037, 1038, 1042, 1146, 1250]; **D107/4** Vorng Sokun WRI, 17 February 2012

93. The ICP does not object to the Dismissal Order's heavy reliance on evidence placed on the Case File during the tenure of Reserve ICIJ Kasper-Ansermet. The ECCC Law provides clear guidance in Article 26 that "the reserve Investigating Judges shall replace the appointed Investigating Judges in case of their absence",²⁴⁵ which clearly authorises the use of this evidence made in the Dismissal Order.
94. The ICP also notes that while he too has relied to some extent on evidence collected by Judge Kasper-Ansermet, all of the arguments contained in the ICP's Final Submission would stand even in the absence of this evidence, which has in the past been disputed. A review of the evidence cited in the ICP's Final Submission shows that a relatively insignificant part of it was collected in the period between 1 November 2011 and 4 May 2012. This evidence was not determinative of Ao An's overall criminal liability. The vast majority of the most important evidence in this case was collected during the tenure of Judge Kasper-Ansermet's successors, and the case against Ao An would stand on this evidence alone.

F. LEGAL ERROR OF FAILING TO ADEQUATELY CONSIDER THE IMPACT OF AO AN'S DETERMINED LEADERSHIP OF A REGIONAL CAMPAIGN OF GENOCIDE ON THE ASSESSMENT OF WHETHER AO AN WAS AMONG THE "MOST RESPONSIBLE"

95. One of the most prominent shortcomings in the Dismissal Order is its failure to take into account the impact of Ao An's role in the genocide committed against the Cham on the issue

[1 time: fn. 1250]; **D107/5** Orn Kim Eng WRI, 18 February 2012 [18 times: fns 345, 364, 639, 694, 705, 708, 711, 714, 716, 805, 887, 891, 892, 898, 901, 1030, 1250, 1425]; **D107/6** Chheng Yeun WRI, 18 February 2012 [9 times: fns 722, 724, 771, 1250, 1256, 1258, 1259, 1269, 1285]; **D107/7** Nhim Kol alias Say WRI, 19 February 2012 [17 times: fns 576, 581, 690, 696 (twice), 711, 714, 724, 732, 761, 771, 1250, 1251, 1252, 1253, 1268, 1269]; **D107/8** Nhim Kol alias Say WRI, 20 February 2012 [4 times: fns 1056, 1241, 1254, 1269]; **D107/9** Mean Savuth WRI, 21 February 2012 [13 times: fns 1138, 1139, 1141, 1143, 1144, 1145, 1146, 1149, 1158, 1159, 1166, 1169, 1170]; **D107/11** Khok Nhe WRI, 13 March 2012 [12 times: fns 144, 1142, 1143, 1144, 1154, 1158, 1159, 1161, 1164, 1166, 1169, 1171]; **D107/12** Kien Lei alias Im WRI, 14 March 2012 [2 times: fns 1025, 1042]; **D107/13** Long Sokhai WRI, 15 March 2012 [20 times: fns 549, 554, 598, 798, 803, 804, 810, 1138, 1139, 1146, 1147, 1149, 1151, 1152, 1153, 1157, 1158, 1159, 1168, 1169]; **D107/14** Chhun La WRI, 16 March 2012 [9 times: fns 1146, 1149, 1153, 1155, 1161, 1163, 1164, 1166, 1168]; **D107/15** Ban Siek WRI, 1 April 2012 [25 times: fns 370, 536, 560, 561, 562, 563, 565, 581, 651, 653, 655, 792, 793, 794, 795, 796, 797, 798, 799, 804, 812, 816, 1143, 1144, 1160]; **D107/16** Kok Pring Site ID Report, 28 February 2012 (*note* that the Dismissal Order incorrectly cites the date as 30 June 2012) [9 times: fns 1025, 1027, 1028, 1029, 1030, 1036, 1037, 1040, 1041]; **D107/18** Tuol Ta Phlong Site ID Report, 2 April 2012 (*note* that the cited date of 2 February 2012 is incorrect) [5 times: fns 1099, 1105, 1108, 1112, 1117]; **D107/19.1** Vorng Sokun WRI, 17 February 2012 [9 times: fns 602, 620, 743, 898 (twice), 1250, 1264, 1425 (twice)].

²⁴⁵ ECCC Law, art. 26. *See* Case 003–Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72, 10 February 2012; **D114** Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004, 21 March 2012.

of personal jurisdiction. As discussed in the ICP's Final Submission, Ao An's role in the genocide of the Cham was determined and direct. The evidence shows that Ao An ordered his subordinates to identify the Cham in areas under their control and then kill them all.²⁴⁶ He insisted on reports from his subordinates so he could monitor the progress of the genocide,²⁴⁷ and he personally took steps to ensure it was being carried out as comprehensively as possible when, after the initial killings, he ordered his subordinates to go directly into the villages to see whether any Cham remained.²⁴⁸ This is perhaps the clearest possible evidence of genocidal intent that can be imagined. Factual findings in the Dismissal Order itself also strongly support this conclusion. The Dismissal Order found that there was a DK policy to destroy the Cham,²⁴⁹ that Ao An received orders to implement this policy from his superiors and passed them down to his subordinates,²⁵⁰ and that the policy was in fact carried out in areas under his control.²⁵¹

96. Genocide is universally acknowledged as an extremely grave crime, as it is an attack on the whole of the human family as well as the victims themselves.²⁵² Recognising this, Cambodia acceded to the Genocide Convention in 1950, and now is one of 149 parties to the Convention. The Genocide Convention contains mandatory language requiring the

²⁴⁶ D351/5 ICP's Final Submission, paras 54-59.

²⁴⁷ D351/5 ICP's Final Submission, para. 60.

²⁴⁸ D351/5 ICP's Final Submission, paras 61-62.

²⁴⁹ D359 Dismissal Order, paras 141-146.

²⁵⁰ D359 Dismissal Order, paras 410-418. *See also* Case 002-E1/529.1 Pronouncement of Judgment in Case 002/02, T. 16 November 2018, 10.24.31-10.29.55.

²⁵¹ D359 Dismissal Order, paras 306-307, 310-311, 413-415.

²⁵² Genocide Convention, preamble ["[G]enocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world [...] genocide has inflicted great losses on humanity [...] in order to liberate mankind from such an odious scourge, international co-operation is required"]; UN General Assembly Resolution 96(I), *The Crime of Genocide*, 11 December 1946, A/RES/96(I), pp. 188-189 ["Genocide is a denial of the right of existence of entire human groups [which] shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. [...] The punishment of the crime of genocide is a matter of international concern."]; *Prosecutor v. Krstić*, IT-98-33-T, Judgement, Trial Chamber, 2 August 2001 ("*Krstić* Trial Judgement"), paras 553, 700 ["The Convention thus seeks to protect the right to life of human groups, as such. This characteristic makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as such. [...] It can also be argued, however, that genocide is the most serious crime because of its requirement of the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. In this sense, even though the criminal acts themselves involved in a genocide may not vary from those in a crime against humanity or a crime against the laws and customs of war, the convicted person is, because of his specific intent, deemed to be more blameworthy."].

punishment of genocide. For example, Article I states that “Contracting Parties [...] undertake to prevent and *to punish*” genocide; Article IV states that “[p]ersons committing genocide [...] *shall* be punished”; and Article VI provides that “[p]ersons charged with genocide [...] *shall* be tried by a competent tribunal of the State in the territory of which the act was committed”.²⁵³ Moreover, the International Court of Justice (“ICJ”) has held that the Convention embodies principles that are part of general customary international law.²⁵⁴

97. In the *Bosnia and Herzegovina vs. Serbia and Montenegro* case, the ICJ held that Serbia had violated its obligation to punish genocide by failing to arrest Ratko Mladić and hand him over to the ICTY for prosecution of the genocide at Srebrenica,²⁵⁵ in which it found (relying on ICTY jurisprudence) that approximately 7,000 Bosnian Muslim men and boys had been killed.²⁵⁶ In the Case 004/2 Indictment, the ICIJ calculated a conservative minimum estimated number of victims of the Cham genocide in Sector 41 as 7,910.²⁵⁷ The actual number is likely far higher; after surveying Trean Commune in Kampong Siem District, OCIJ investigators estimated that there were 1,800 Cham victims from that commune alone, which was just one of 11 communes in Kampong Siem District.²⁵⁸ While the Dismissal Order did not give a specific number, it found that most of the Cham in Kampong Siem and Kang Meas Districts were killed.²⁵⁹
98. Thus, by virtue of being a party to the Genocide Convention, the RGC has an obligation under international law independent from its obligations under the ECCC Agreement and ECCC Law to bring Ao An to trial on these charges. It is reasonable to assume that Cambodian lawmakers and UN negotiators were aware of the international obligation to punish genocide when the UN-RGC negotiations were carried out and the ECCC Law was

²⁵³ Genocide Convention, arts I, IV, VI (emphasis added).

²⁵⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007 (“*Bosnia and Herzegovina v. Serbia and Montenegro Judgment*”), para. 161.

²⁵⁵ *Bosnia and Herzegovina v. Serbia and Montenegro Judgment*, paras 439-450.

²⁵⁶ *Bosnia and Herzegovina v. Serbia and Montenegro Judgment*, paras 278-297 citing *Krstić Trial Judgment*, para. 1.

²⁵⁷ **D360** Indictment, paras 647 [minimum of 1,027 Cham killed in Kampong Siem District]; 651 [minimum of 6,443 Cham killed in Kang Meas District]; 653 [minimum of 200 Cham killed in Prey Chhor District]; 655 [minimum of 240 Cham killed in Batheay District].

²⁵⁸ **D219/492** WRIA, EN 01138987.

²⁵⁹ **D359** Dismissal Order, paras 307, 414.

passed. Both parties therefore must have intended that the ECCC personal jurisdiction covering those “most responsible” for the crimes of the DK regime would include a leader who played a key role in a genocide by personally giving orders to kill thousands with the intent to destroy a religious and ethnic group.

99. The failure to consider the impact of genocide with respect to personal jurisdiction is particularly prominent in the Dismissal Order’s comparison of Ao An’s responsibility to Duch’s. Despite discussing this comparison at length²⁶⁰ and relying on it significantly in reaching its conclusion on personal jurisdiction,²⁶¹ the Dismissal Order does not even consider Ao An’s central role in genocide (with which Duch was not charged) in assessing their relative levels of responsibility.

V. SUBMISSIONS REGARDING CONFLICTING CLOSING ORDERS

100. As set out in this appeal, the ICP is strongly of the view that the Dismissal Order’s finding on personal jurisdiction should be reversed and the case against Ao An should be sent for trial on the basis of the Indictment. However, the ICP is mindful that a supermajority of PTC judges is required to reach a binding decision.²⁶² The ICP is also aware that the Indictment will also be subject to appeal, with the same supermajority requirement. It is therefore well within the realm of possibility that both the Dismissal Order and Indictment will be appealed but the PTC will fail to reach the required consensus to decide them.²⁶³
101. Should such a situation arise, the relevant provisions of the Internal Rules mandate that the case proceed to trial on the basis of the Indictment. This result is consistent with SCC jurisprudence and the policy evidenced by the ECCC Agreement, ECCC Law, and other ECCC jurisprudence.

²⁶⁰ **D359** Dismissal Order, paras 543-551.

²⁶¹ **D359** Dismissal Order, para. 553.

²⁶² Internal Rule 77(13).

²⁶³ Ao An has indicated that he intends to file submissions on the effect of the conflicting closing orders as part of his appeal of the Indictment, and the ICP expects to file additional arguments on this point in response to Ao An’s submissions on the subject. However, the ICP wishes to put a brief outline of his submissions on this point on the record at this stage due to the procedural ambiguity over precisely when such issues are properly addressed.

102. Internal Rule 77(13) provides:

A decision of the [Pre-Trial] Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, then the default decision of the Chamber shall be as follows:

- a) As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand.
- b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges.

103. Rule 1(2) further provides that “a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually”. Rule 77(13)(b) therefore applies to an indictment issued by a single CIJ, as in the case at hand.

104. Rule 77(13)(b) makes it explicitly clear that if the Indictment is not reversed by a supermajority decision on appeal, the case against Ao An must be sent to trial. Even if the word “order” in Rule 77(13)(a) is taken to include dismissal orders, Rule 77(13)(b) is *lex specialis* relating to indictments and thereby prevails over the general terms of Rule 77(13)(a). The ICP notes that “Dismissal Order” and “Closing Order”, like “Indictment”, are defined terms in the Internal Rules,²⁶⁴ and had the drafters of the Internal Rules wished to specifically address the effect of the failure of the PTC to reach the required majority to rule on an appeal of a dismissal order, they clearly could have done so. Even if Rule 77(13)(a) is taken to mean that an unsuccessfully appealed dismissal order “stands” as a record of one CIJ’s exercise of his independent discretion and decision not to participate in the indictment, Rule 77(13)(b) indicates a policy choice that, in case of conflicting closing orders, the Trial Chamber must be seised with the indictment and the case must be tried.

105. SCC jurisprudence confirms this interpretation. In the Case 001 Appeal Judgment, the SCC held:

²⁶⁴ Internal Rules, Glossary, pp. 83-84.

If, for example, the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in proposing to issue an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, ‘the investigation shall proceed.’²⁶⁵

106. Although the SCC used the phrase “the investigation shall proceed” because it was quoting directly from the ECCC Law, the only reasonable interpretation of this statement is that the Indictment would proceed to trial—there is no other sense in which anything could “proceed” at the stage that the SCC is discussing (*i.e.* when a conflicting indictment and dismissal order have been issued). Given that the Internal Rules define the “Trial Stage” as “refer[ring] to the date from which the Trial Chamber is seised of a case,”²⁶⁶ the SCC appears to consider the “investigation” as continuing until the moment that the PTC discharges its duty to seise the Trial Chamber with an indictment as required by Rule 77(13)(b).
107. This result is also consistent with the spirit and structure of the ECCC Agreement, ECCC Law, and the Internal Rules. All firmly embrace the principle that CIJs and Co-Prosecutors can act independently to advance proceedings and a policy preference for proceedings to continue in the case of unresolved disagreements.²⁶⁷ The PTC has repeatedly upheld this principle.²⁶⁸
108. Finally, in the current situation of a parallel indictment and dismissal order from the CIJs, Article 7(4) of the ECCC Agreement provides clear guidance as to what must be done should the PTC be unable to reach the necessary majority to rule on the parallel appeals. It provides that when the PTC is unable to resolve a disagreement between the CIJs or the Co-

²⁶⁵ Case 001-**F28** Appeal Judgement, 3 February 2012, para. 65 *citing* ECCC Law, art. 23*new*; ECCC Agreement, art. 7(4); Internal Rule 72(4)(d).

²⁶⁶ Internal Rules, Glossary, p. 85.

²⁶⁷ See ECCC Agreement, arts 5(4), 6(4), 7(4); ECCC Law, arts 20 *new*, 23 *new*; Internal Rules 71, 72, 77(13).

²⁶⁸ See, e.g. **D1/1.3** Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, paras 16, 26, 45; Case 002-**D427/1/30** Ieng Sary Closing Order Appeal Decision, paras 274-276; **A122/6.1/3** Decision on Im Chaem’s Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 15 August 2014, para. 14; Case 003-**D117/1/1/2** Decision on [Redacted] Appeal Against the International Co-Investigating Judge’s Order on Suspect’s Request Concerning Summons Signed by One Co-Investigating Judge, 3 December 2014, para. 16; **D212/1/2/2** Decision on Yim Tith’s Appeal Against the International Co-Investigating Judge’s Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, 4 December 2014, para. 7; **D208/1/1/2** Decision on Ta An’s Appeal Against the Decision Rejecting His Request for Information Concerning the Co-Investigating Judges’ Disagreement of 5 April 2013, 22 January 2015, para. 11.

Prosecutors, “the investigation or prosecution shall proceed.”²⁶⁹ Whether one considers the transfer of the indictment and case file to the Trial Chamber to be part of the investigation or part of the prosecution, it is clear that if the PTC is unable to reach the supermajority necessary to decide an appeal of an indictment, the Trial Chamber must be seised and the case brought to trial.

VI. CONCLUSION

109. As set out in the ICP’s Final Submission, Ao An ordered the arrest and killing of thousands or tens of thousands of victims in the areas under his control.²⁷⁰ He organised and presided over the genocidal campaign conducted against the Cham throughout Sector 41.²⁷¹ He managed the network of security centres in Sector 41 where prisoners were brutally tortured prior to execution, and he facilitated the transportation of massive numbers of these victims throughout the sector to ensure the smooth functioning of the purge in Sector 41.²⁷² He dehumanised and mocked those he planned to kill, and he justified and incited the crimes committed by his subordinates by describing the victims as traitors.²⁷³ He also forced those under his control to marry spouses chosen by the CPK and consummate their marriages, both without their true consent.²⁷⁴
110. There is no evidence that Ao An ever felt remorse for his actions or felt unjustified in receiving the benefits that accrued to him from his willing and active participation in the campaign of crimes in Sector 41. To the contrary, he remained loyal to the CPK even after the end of the DK regime, continuing to live in areas controlled by the Khmer Rouge following the fall of the DK regime.²⁷⁵ In 2011, when asked about his thoughts about the DK

²⁶⁹ ECCC Agreement, art. 7(4). This also reflects the understanding of one of the main UN negotiators of the ECCC Agreement, David Scheffer, who stated that under the supermajority rule, “The only way the prosecution or investigation is halted is if the Pre-Trial Chamber decides by supermajority vote that it should end.” See David Scheffer, “The Extraordinary Chambers in the Courts of Cambodia”, *International Criminal Law*, Third Edition, Vol. III, 2008, p. 246.

²⁷⁰ **D351/5** ICP’s Final Submission, paras 17-35, 47-50, 54-59, 677.

²⁷¹ **D351/5** ICP’s Final Submission, paras 54-62, 677.

²⁷² **D351/5** ICP’s Final Submission, paras 36-53, 677, sections VI.A. Wat Ta Meak Security Centre, VI.B. Kor (Met Sop) Security Centre, VI.C. Phnom Pros Execution Site, VI.D. Tuol Beng and Wat Angkuonh Dei Security Centres, VI.E. Kok Pring Execution Site, VI.F. Wat Batheay Security Centre, VI.H. Wat Au Trakuon Security Centre.

²⁷³ **D351/5** ICP’s Final Submission, paras 17, 677.

²⁷⁴ **D351/5** ICP’s Final Submission, paras 73, 677(xxxi-xxxv), section VI.J. – Forced Marriage and Rape.

²⁷⁵ **D191.2** Ao An DC-Cam Statement, EN 01025331-35.

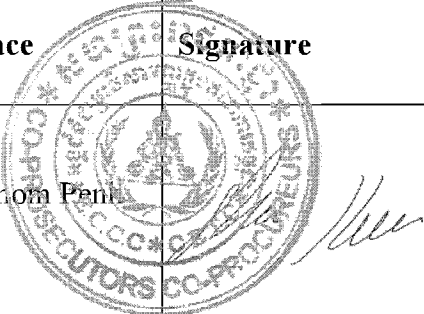
regime, he said he was “satisfied with the Democratic Kampuchea” because its leaders “defended, did their best to build and restored the country.”²⁷⁶

111. The Dismissal Order’s minimisation of Ao An’s criminal responsibility is premised on its faulty legal analysis of the effect of superior orders on a determination of whether an individual falls within the category of those “most responsible” for DK crimes and on unreasonable factual findings about Ao An’s critical, enthusiastic, and unremorseful participation in a horrendous criminal campaign that victimised tens of thousands of Cambodians.

VII. RELIEF SOUGHT

112. For the foregoing reasons, the ICP respectfully requests that the Pre-Trial Chamber reverse the Dismissal Order’s erroneous finding that Ao An is not subject to the personal jurisdiction of the ECCC; find that Ao An was one of “those who were most responsible” for DK-era crimes; and send Ao An for trial on the basis of the Indictment issued by the ICIJ.

Respectfully submitted,

| Date | Name | Place | Signature |
|------------------|--|------------|--|
| 20 December 2018 | Nicholas KOUMJIAN International Co-Prosecutor | Phnom Penh |  |

²⁷⁶ **D191.2** Ao An DC-Cam Statement, EN 01025335.