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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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INTERNATIONAL CO-PROSECUTOR'S REPLY TO AO AN'S RESPONSE TO THE 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 indicting Ao An for genocide, crimes against humanity, and violations of the 1956 Cambodian Penal Code, and committing him for trial ("Indictment").[1] On the same day, the National Co-Investigating Judge ("NCIJ") issued a closing order dismissing all charges against Ao An on the grounds that he does not fall within the personal jurisdiction of the ECCC ("Dismissal Order").[2] The International Co-Prosecutor ("ICP") appealed the Dismissal Order on the basis that it was premised on factual and legal errors which invalidated the finding ("ICP Appeal").[3]

2. In response,[4] Ao An argues unconvincingly that a dismissal order requires less justification than an indictment; that the NCIJ properly considered coercion, duress, and superior orders; and that the NCIJ did not hold that Duch was "the only most responsible person". Further, Ao An's Response recycles his previous arguments regarding Prak Yut's credibility and Ao An's role and responsibilities and ignores fundamental errors relating to genocide. Finally, the Response attacks the process the Co-Investigating Judges ("CIJs") chose to resolve their disagreement over personal jurisdiction by trying unsuccessfully to make a distinction between processes with no material differences. The ICP now replies below.

II. PROCEDURAL HISTORY AND APPLICABLE LAW

3. The ICP incorporates by reference the procedural history set out in Annex I to his appeal of the Dismissal Order[5] and the appellate pleading history set out above.

4. In addition, on 22 January 2019, the Pre-Trial Chamber ("PTC") decided to extend the time and page limits for the parties' replies to the appeal responses relating to both closing orders, instructing them to file their 30-page replies in one language within 15 days of

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1 **D360** Closing Order (Indictment), 16 August 2018 ("Indictment"), EN 01580615-21.
2 **D359** Order Dismissing the Case Against Ao An, 16 August 2018 ("Dismissal Order"), paras 554-555.
3 **D359/3/1** International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Ao An (D359), 20 December 2018 ("ICP Appeal").
4 **D359/3/4** Ao An's Response to the International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Ao An (D359), 20 February 2019 ("Ao An Response").
5 **D359/3/1.2** International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Ao An, Annex I: Procedural History, 20 December 2018.

the translation notification for the response to which they are replying.[6] Ao An's Response was filed in English first, with the Khmer translation following on 19 March 2019,[7] making this reply due on 3 April 2019.

5. The applicable law is set out in the relevant sections below.

III. SUBMISSIONS

A. THE NCIJ WAS OBLIGATED TO MAKE A PROPER LEGAL DETERMINATION ON EVERY FACT WITH WHICH HE WAS SEISED, YET FAILED TO DO SO

6. Ao An incorrectly alleges that the ICP has deliberately conflated the procedural requirements of an indictment with those required of a dismissal order. He argues that a dismissal order requires less reasoning than an indictment and thus the NCIJ's Dismissal Order satisfies this lesser requirement.[8] However, the applicable law and jurisprudence do not support his argument.

7. First, a dismissal order and an indictment are both closing orders and carry the same procedural requirements. Article 247 of the Cambodian Code of Criminal Procedure provides that the judicial investigation is terminated by a closing order that may be either an indictment or a dismissal order.[9] Regardless of the decision as to whether to indict, the Code states that "A closing order shall always be supported by a statement of reasons."[10] The French sources that Ao An relies upon to support his proposition merely indicate that dismissal orders must be reasoned, not that less reasoning is required.[11]

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6 **D360/5/3** Decision on Requests for Extension of Time and Page Limits for Responses and Replies Relating to the Appeals Against the Closing Orders in Case 004/2, 22 January 2019, EN 01599760.

7 Notification email from the Case File Officer, 19 March 2019, 4:11 p.m.

8 **D359/3/4** Ao An Response, paras 7-13.

9 Code of Criminal Procedure of The Kingdom of Cambodia, adopted on 7 June 2007 and translated into English in September 2008 ("CCCP"), art. 247. Note that in the CCCP, a dismissal order is called a "non-suit order".

10 CCCP, art. 247.

11 **D359/3/4** Ao An Response, fn. 26. For example, the book discussing French procedure states: "L'ordonnance de non-lieu est motivée en fait ou en droit." which, loosely translated, means "A non-suit order must be reasoned in fact or in law." *See* **D359/3/4.1.4** Guery & Chambon (ed.), *Droit et pratique de l'instruction préparatoire*, 2018-2019, Sect. 3, FR 01601006. Similarly, the cited Cour de Cassation case involved an appellant arguing that the dismissal order was not reasoned enough. The Cour de Cassation confirmed the decision of the "Chambre de l'instruction", holding that "aux motifs qu'au cours d'une longue instruction de nombreuses recherches ont été effectuées et toutes les pistes successivement envisagées ou proposées ont été exploitées avec attention et minutie" which, loosely translated, means "after a long investigation, a lot of research has been done and all the possible options have been addressed with a lot of attention and meticulousness" (*see* **D359/3/4.1.5** Cass. Crim., 14 November 2018, No. 17-

8. When a dismissal order is based on a finding that the suspect or charged person does not fall within the personal jurisdiction of the ECCC – *i.e.*, was not a "senior" leader or one of "those who were most responsible" for the crimes of the DK regime – the order must consider the gravity of the crimes for which the CIJs are seised and assess the criminal responsibility of the accused or charged person.[12] In Case 004/1, the CIJs issued a joint dismissal order finding there was no personal jurisdiction, basing their assessment on findings limited to the sites and crimes that had been charged rather than all of the factual allegations with which they had been seised.[13] The PTC unanimously held:

> The determination that there is no personal jurisdiction is not unreviewable, and the Pre-Trial Chamber, as an appellate chamber, must be able to review the findings that led to it, *including* those regarding the existence of crimes or the likelihood of Im Chaem's criminal responsibility.[14]

9. Ao An acknowledges this finding but argues that "the NCIJ has no legal obligation to base his jurisdictional determination" on the existence of crimes or the likelihood of Ao An's criminal responsibility "*over and above* any other valid and relevant considerations" and that all the NCIJ had to do was provide sufficient reasons for finding the court had no personal jurisdiction over Ao An.[15] This is wrong. The CIJs must make findings on all crimes of which they are seised and weigh the gravity of those crimes as well as the responsibility of the charged person for those crimes in order to provide a reasoned decision on personal jurisdiction.[16] Without such findings, it is not possible for the PTC to review the personal jurisdiction decision. The CIJs and the PTC have all recognised that there is an "*obligation* to make a decision, *in the Closing Order*, with respect to *each* of the facts of which [the CIJs] have been validly seised".[17] Further, it

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84665, FR 01601013).

12 *See, e.g.* 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 Considerations"), para. 142 (Judges Beauvallet and Baik), concluding "that, overall, the Co-Investigating Judges failed to make a proper legal determination regarding the purge of the Northwest Zone, consider the gravity of the crimes and to assess Im Chaem's responsibility therefor".

13 *See, e.g.* Case 004/1-**D308/3/1/20** Im Chaem PTC Considerations, paras 12, 116, 128-129, 139, 141.

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

15 **D359/3/4** Ao An Response, paras 9-13 (emphasis added).

16 *See, e.g.* Case 004/1-**D308/3/1/20** Im Chaem PTC Considerations, paras 142, 155, 172, 174, 176, 188-189, 197, 203-204, 207, 213 (Judges Beauvallet and Baik).

17 *See, e.g.* Case 002-**D198/1** Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, para. 10 (emphasis added), Disposition section ["the Co-Investigating Judges hereby […] State that, in the Closing Order, the Co-Investigating Judges will make a decision in respect of all of these

makes no difference if that closing order is an indictment or a dismissal order—the requirements are the same.[18]

10. Two French criminal cases – which are useful guidance since Cambodian criminal procedure is largely based on the French system – further demonstrate that an investigating judge has a duty to render an order that pronounces on *all* of the facts with which he has been seised.[19] ICC jurisprudence also supports the principle that judges must give proper legal determinations on every allegation in a dismissal order. Decisions of the ICC Pre-Trial Chamber consider in detail each suspect's individual criminal responsibility for all facts alleged—even when the judges have decided not to confirm charges against the suspect.[20]

11. In contrast, the Case 004/2 Dismissal Order made *no* definitive legal conclusions regarding the commission of each of the crimes with which the CIJs were seised.[21] Ao An counts the number of paragraphs in which various issues were discussed in an attempt

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facts and the related legal characterisations proposed by the Co-Prosecutors (including Genocide and offences under the 1956 Penal Code), either by indicting the charged persons, after having charged them, or by issuing a dismissal order in relation to all or part of those facts"]; Case 001-**D99/3/42** Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch", 5 December 2008, paras 29, 32-39, 57, 115; Case 004/1-**D308/3/1/20** Im Chaem PTC Considerations, para. 116 (Judges Beauvallet and Baik). *See also* Case 001-**F28** Appeal Judgement, 3 February 2012 ("*Duch* AJ"), para. 80 [discussing the Trial Chamber's extremely narrow scope to review the discretion of the CIJs and Co-Prosecutors on the basis that they allegedly exercised their discretion in bad faith or used unsound professional judgement]. Of course, a review of an alleged abuse of discretion cannot be conducted when the CIJ(s) have dismissed facts without providing any legal determinations or reasoning.

18 *Contra* **D359/3/4** Ao An Response, paras 8-12. *See also* Case 004/1-**D308/3/1/20** Im Chaem PTC Considerations, paras 129, 141-142, 155, 172, 174, 176, 188-189, 197, 203-204, 207, 213 (Judges Beauvallet and Baik), all of which demonstrate that the CIJs are required to clearly address and make proper legal determinations regarding specific crimes with which they were seised, consider the gravity of the crimes, and assess the charged person's responsibility for those crimes.

19 Cass. Crim., 24 March 1977, No. 76-91442, p. 4 ["Le juge d'instruction avait l'obligation d'instruire, puis de statuer par une ordonnance de règlement sur l'ensemble des faits [...] Le juge est tenu de statuer par ordonnance du règlement sur tous les faits dont il a été régulièrement saisi." Unofficial translation: "The investigating judge has the obligation to investigate and then to render an order covering all the facts. [...] The judge is obliged to pronounce on all the facts of which he has been regularly seised."]; Cass. Crim., 4 March 2004, No. 03-85983, p. 3 ["le juge d'instruction n'a pas statué, comme il en a le devoir, dans son ordonnance de renvoi, sur tous les faits dont il est saisi". Unofficial translation: "The investigating judge did not rule in his closing order, as he was obliged, on all the facts of which he was seised"].

20 *See, e.g. The Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, paras 22, 113-160, 224-292, 293-300; *The Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011, paras 6-8, 108-239, 291-340; *The Prosecutor v. Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010, paras 21-24, 97-236.

21 In fact, the Dismissal Order explicitly stated that it "will neither characterise the crimes nor classify the modes of liability." *See* **D359** Dismissal Order, para. 2.

to demonstrate that the NCIJ provided sufficient reasons to support his jurisdictional determination,[22] but mere discussions fall short of the mandated obligation to make proper legal determinations, as described above, for every alleged crime, its gravity, and of Ao An's criminal responsibility for that crime.[23]

12. Finally, Ao An's argument citing judicial economy as a justification to provide less reasoning in the Dismissal Order is flawed.[24] He bases his assertion on a Case 002 Trial Chamber decision that concerned "a motion substantially similar to that previously before the Pre-Trial Chamber".[25] The Trial Chamber held that it therefore would "not issue lengthy decisions in circumstances where it can find no cogent reasons to depart from the Pre-Trial Chamber's analysis and where it concurs in the result."[26] However, in Case 004/2, the Dismissal Order is not "substantially similar" to anything that has previously been litigated, nor does it follow any previous analysis or concur with a previously made result. Rather than demonstrating that the Dismissal Order needs less justification, the Trial Chamber decision only emphasises how important a proper legal determination on every allegation is for future decisions that must examine or want to follow the Dismissal Order.

B. THE NCIJ'S ERRORS OF LAW AND FACT INVALIDATE THE DISMISSAL ORDER

13. Contrary to Ao An's assertions,[27] the ICP Appeal clearly identified portions of the Dismissal Order in which the NCIJ erred by according excessive weight to superior orders, coercion, and duress in his assessment of personal jurisdiction.[28] The ICP Appeal discussed how the NCIJ relied on the mistaken legal premise that if he found that Ao An's criminal activity did not exceed the scope of his official authority, this somehow lessened his responsibility, seemingly requiring that a person must exceed that scope in order to be held one of those "most responsible".[29] The ICP Appeal also detailed how the Dismissal Order was inconsistent with the law that was applied regarding superior orders,

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22 **D359/3/4** Ao An Response, para. 11.
23 *See also* the discussion in **D359/3/1** ICP Appeal, paras 15, 17-31.
24 **D359/3/4** Ao An Response, para. 12.
25 **D359/3/4** Ao An Response, fn. 25.
26 Case 002-**E100/6** Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, para. 26.
27 **D359/3/4** Ao An Response, paras 14-16 [stating that the ICP failed to identify any errors in fact, law, or discretion].
28 **D359/3/1** ICP Appeal, fns 93-95, 101-103, 105-106, 134-135.
29 **D359/3/1** ICP Appeal, Section IV.B.3.

coercion, and duress when personal jursidiction was assessed in Case 001 for Duch.[30]

1. The Dismissal Order gave undue weight to superior orders, coercion, and duress

14. Ao An argues that it was proper for the NCIJ to place significant weight on factors such as superior orders, coercion, and duress in making his assessment as to whether Ao An fell within the ECCC's personal jurisdiction because the NCIJ was not bound by the same limitations that would be present with the use of such defences at trial.[31] However, according to established jurisprudence, superior orders should not have been given such weight.[32] Moreover, the Supreme Court Chamber ("SCC") has held that the existence of superior orders does not preclude a finding that a suspect is among those "most responsible":

> embark[ing] upon a relative assessment of [...] criminal responsibility within the DK [...] would amount to indirectly permitting a defence of superior orders and would frustrate the express provisions of the ECCC Law, including Article 29.[33]

15. From the time the London Charter established the International Military Tribunal at Nuremberg, it has been clear that under customary international law, those committing international crimes acting pursuant to superior orders are not absolved of criminal responsibility.[34] Both the ECCC Law and the 1956 Penal Code provide that an illegal order from a superior does not relieve the suspect of individual criminal responsibility.[35] Many cases have held that there is a duty to *disobey* illegal orders,[36] and some courts

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30 **D359/3/1** ICP Appeal, Section IV.B.4. *See also* Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 ("Internal Rules" or "Rules"), Rule 21(1)(b), which states: "Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules".

31 **D359/3/4** Ao An Response, para. 16.

32 At numerous points, the Dismissal Order asserted that Ao An had no choice but to implement the upper echelon's orders. *See* **D359/3/1** ICP Appeal, fns 93-95 and 101-103 *citing* **D359** Dismissal Order, paras 496, 499-501, 510-511, 519, 528, 533, 535, 546-547, 552-553.

33 Case 001-**F28** *Duch* AJ, para. 62.

34 As discussed in **D359/3/1** ICP Appeal, para. 34, particularly the sources cited in fn. 99.

35 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), ("ECCC Law"), art. 29(4) ["The 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."]; Criminal Code of The Kingdom of Cambodia (1956), *promulgated on* 21 February 1955 (Kram No. 933NS) ("1956 Penal Code"), art. 100 ["In the case of illegal orders given by a lawful authority, the judge shall determine, on a case-by-case basis, the criminal responsibility of those executing the orders." (unofficial translation)].

36 As discussed in **D359/3/1** ICP Appeal, fn. 99 *citing Cassese's International Criminal Law*, p. 237. *See also*

have found that a charged person who follows such orders is precluded from claiming any mitigation of sentence.[37]

16. In Case 001, the Trial Chamber rejected Duch's plea of superior orders, finding that he "knew that orders of the Government of DK to commit these offences were unlawful."[38] Even the case that Ao An relies upon to support his argument bears this out.[39] Bosnian Serb officer Drago Nikolić argued that in following orders to carry out the Srebrenica massacre, his "blind dedication to the Security Service" meant he lacked the requisite intent for persecution and the shared intent to carry out the common purpose of the JCE to murder.[40] The Appeals Chamber rejected his argument, holding:

> The Trial Chamber also accepted evidence that Nikolić was devoted to the Security Service. As noted by the Trial Chamber, such factors do not justify or excuse the carrying out of patently illegal orders. In this regard, such factors are irrelevant in determining individual criminal responsibility.[41]

17. Because of Ao An's rigorous implementation of the upper echelon's orders, tens of thousands of people under his control in Sector 41 were enslaved,[42] subjected to

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Prosecutor v. Erdemović, IT-96-22-A, Judgement, Appeals Chamber, 7 October 1997, Separate and Dissenting Opinion of Judge Cassese, para. 15 ("*Erdemović* Cassese Dissent"); *Prosecutor v. Mrkšić & Šljivančanin,* IT-95-13/1-A, Judgement, Appeals Chamber, 5 May 2009, fn. 331.

37 *United States v. Ohlendorf et al.,* Opinion and Judgment, 8-9 April 1948 ("*Einsatzgruppen* Judgment"), Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. IV, pp. 470-471 ["The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of wide-spread consumption that a soldier is required to do everything his superior officer orders him to do. [...] The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offense. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order."]; *United States v. Milch,* Judgment, 16-17 April 1947, reported in Law Reports of Trials of War Criminals, Vol. VII, pp. 40-42, 65 [The US Military Tribunal rejected a plea of superior orders in mitigation on the grounds that the orders related to the waging of a war of aggression involving the commission of persecution and terrorism, which the defendant *must have known* were illegal]; *United States et al. v. Göring et al.,* Judgment, 1 October 1946, Trial of the Major War Criminals before the International Military Tribunal, Vol. I, pp. 290-291 ["Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification."].

38 Case 001-**E188** Judgement, Trial Chamber, 26 July 2010 ("*Duch* TJ"), para. 552.

39 **D359/3/4** Ao An Response, fn. 28.

40 *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, Appeals Chamber, 30 January 2015 (*Popović* AJ"), paras 723, 1027-1028.

41 *Popović* AJ, para. 515.

42 *See, e.g.* **D359/3/1** ICP Appeal, paras 27, 40; **D351/5** International Co-Prosecutor's Rule 66 Final Submission, 21 August 2017 ("ICP Final Submission"), paras 74-75, 287-291, 654, 656, 658, 663; **D360/9** ICP Response to Ao An Indictment Appeal, fn. 139(iii).

inhumane conditions,[43] tortured,[44] forced to marry and to consummate their marriages,[45] persecuted,[46] and/or arbitrarily arrested, imprisoned, and killed.[47] To the extent that Ao An was carrying out orders when he committed these crimes, the orders were manifestly unlawful and the fact that he was following orders merits little weight in evaluating his personal responsibility.

18. Ao An's Response depicts Ao An as a victim of coercion and duress, claiming that the ICP has insulted thousands of his fellow Khmer Rouge perpetrators who, like him, were forced into criminal conduct out of fear for their lives.[48] The ICP makes no apology for condemning the actions of those who enslaved and killed their own countrymen. Ao An was no victim. Rather, he rose through the ranks of the DK regime through his own active, ruthless, and critical contributions to the implementation of DK policies.

19. Duch made the same claim in his own trial, arguing that everything he did to implement the torture and execution orders he received was due to the coercion of the regime he served.[49] The Trial Chamber rejected his claims, holding that "Duress cannot [...] be invoked when the perceived threat results from the implementation of a policy of terror

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43 *See, e.g.* **D359/3/1** ICP Appeal, paras 20, 22-23, 25-26; **D351/5** ICP Final Submission, paras 127, 156, 214-215, 258-261, 316-319.

44 *See, e.g.* **D359/3/1** ICP Appeal, paras 20, 22-23, 25-26, 71(c), 109; **D351/5** ICP Final Submission, paras 128, 157, 262-263, 323-326; **D360/9** ICP Response to Ao An Indictment Appeal, paras 65-66.

45 *See, e.g.* **D359/3/1** ICP Appeal, paras 29, 109; **D351/5** ICP Final Submission, paras 73, 677(xxxi-xxxv), 441-461; **D360/9** ICP Response to Ao An Indictment Appeal, paras 45, 55, 102-103, fns 68(9), 77, 139(xxii-xxiv).

46 *See, e.g.* **D359/3/1** ICP Appeal, paras 21-22, 25, 28, 70, 81, 95, 109; **D351/5** ICP Final Submission, paras 135, 164, 223-226, 239-240, 269-270, 341-357, 378-387; **D360/9** ICP Response to Ao An Indictment Appeal, paras 26, 73-76, 106-111, fn. 68(7).

47 *See, e.g.* **D359/3/1** ICP Appeal, paras 18-26, 28, 40, 69-71, 81, 95, 109; **D351/5** ICP Final Submission, paras 17-35, 122-126, 129-134, 149-155, 158-163, 177-192, 204-213, 216-222, 232-238, 254-257, 264-268, 294-295, 309-315, 327-340, 350-357, 397-412; **D360/9** ICP Response to Ao An Indictment Appeal, paras 56, 60, 64-66, 69-70, 74-76, 106-111, fns 68(4), 68(6-7), 91.

48 **D359/3/4** Ao An Response, para. 17.

49 *See, e.g.* Case 001-**F1/4.1** Appeal Proceedings, T. 30 March 2011, 16.29.05-16.33.45 [Duch: "The right to smash was well respected or followed by me. [...] I would like to also make it clear that the persons who violated such orders shall be smashed, without fail, for example in the case of Koy Thuon, In Lorn alias Nat. I would like to make it very clear that I survive the regime because I respectfully and strictly followed the orders. [...] the principle and policy of the Party were very clear that whatever you were ordered to do, you had to do it. You had to do them. Otherwise you would end up being smashed. Regarding the day to day operations at S-21, I was working under duress, I may say. I was under severe pressure from my superiors."], 16.40.45-16.42.00 [Duch: "each Khmer Rouge cadre or individual who dare to sacrifice everything, even their lives, for their country, they cannot be avoided from the criminal Party line that we were under duress to implement their line. And if we carelessly implemented their line we would be beheaded. Under the pretext that we were opposing the Party."].

in which [the accused] himself has willingly and actively participated."[50] Just as Duch implemented the policies to persecute and kill enemies at S-21, Ao An implemented the same policies (and more) throughout Sector 41 and even beyond. His attempts to now portray himself as a victim of the very policies he fostered deserve no credit.

20. In fact, Ao An willingly joined the Khmer Rouge after the March 1970 coup, actively serving as a military commander and member of various district and sector committees outside of Phnom Penh and in the Southwest Zone for the next seven years.[51] He was then transferred to the Central Zone and promoted to Secretary of Sector 41 and Deputy Secretary of the Central Zone.[52] In those roles, Ao An publicly and privately promoted the CPK's policies. He ordered his subordinates to commit crimes, personally participated in crimes, and monitored the activities of his subordinates to ensure that they fully carried out his orders.[53] The long time-span, the scale, and the significance of Ao An's contributions to the common criminal plan in Sector 41 demonstrate his active and willing participation.[54]

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50 Case 001-**E188** *Duch* TJ, para. 557. *See also* **D359/3/1** ICP Appeal, para. 39 *citing* Case 001-**E188** *Duch* TJ, para. 607. *See further Einsatzgruppen* Judgment, p. 480 ["The doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior. When the will of the doer merges with the will of the superior in the execution of the illegal act, the doer may not plead duress under superior orders."]; *Erdemović* Cassese Dissent, paras 16-17 ["According to the case-law on international humanitarian law, duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law."].

51 *See, e.g.* **D351/5** ICP Final Submission, paras 6-8.

52 *See, e.g.* **D359/3/1** ICP Appeal, para. 18; **D351/5** ICP Final Submission, paras 9-15; **D360/9** ICP Response to Ao An Indictment Appeal, paras 55-59, 80-83.

53 *See, e.g.* **D359/3/1** ICP Appeal, paras 18-31, 40, 68-71, 81-86, 95, 109; **D351/5** ICP Final Submission, paras 17, 19-21, 23, 27-28, 31-35, 41, 43, 51-53, 56-62, 73-75, 119-121, 148, 150-151, 160-161, 170-172, 177, 179, 188, 200-204, 222, 231, 237, 251, 274-275, 279-281, 291, 306-308, 345, 347-349, 351, 394, 398-401, 406, 441-442, 444, 447, 449-450, 455-456, 675-679; **D360/9** ICP Response to Ao An Indictment Appeal, paras 55-56, 66-70, 74-76, 85-87, 102, 106-107, 110, fn. 68(8).

54 *Contra* **D359/3/4** Ao An Response, para. 17. Ao An's contention that the ICP's claims were unsubstantiated and based on hearsay or otherwise non-credible and unreliable evidence is without merit. Ao An parses the evidence and ignores how the totality of the evidence is corroborative, and he disregards the fact that hearsay is admissible at the ECCC. The ICP has addressed Ao An's erroneous approach to the evidence elsewhere and incorporates those arguments by reference (*see, e.g.* **D360/9** ICP Response to Ao An Indictment Appeal, paras 48, 52-53). In reply to Ao An's specific allegations, Ao An's argument that Penh Va does not corroborate Sat Pheap because Penh Va's statement is "hearsay evidence from a partially identified individual who is now deceased" does not withstand scrutiny (*see* **D359/3/4** Ao An Response, fn. 34). The ICP cited Sat Pheap and Penh Va for their evidence regarding cruel language that Ao An had used in his speeches about enemies (*see* **D359/3/1** ICP Appeal, para. 40). The hearsay portion of Penh Va's cited answer does not relate to the meeting in which Ao An used the cruel language, but to the fact that the people loaded into the trucks at the Phsar Prey Toteung market were taken to Phnom Pros. Sat Pheap and Penh Va's statements are corroborative of the purpose for which they were cited (*see* **D219/504** Sat Pheap

21. Moreover, Ao An's conduct after the fall of the regime belies his current attempts to portray himself as an unwilling victim. Rather than trying to escape his "captor" or join any of the forces opposed to the CPK, Ao An continued to align himself with Pol Pot and the CPK leadership, living in Khmer Rouge-controlled areas.[55] In 2011 when interviewed about his experiences, Ao An told DC-Cam that he had been satisfied with Democratic Kampuchea.[56] These are not the actions or the words of a victim.

22. In light of the totality of the evidence, it is clear that the NCIJ gave undue weight to the fact that Ao An followed the orders of Ke Pauk and to a lone statement that if Ao An did not obey orders, he would be killed.[57] This evidence falls far short of demonstrating that Ao An had no choice in committing the crimes for which he was accused, that he was personally threatened, or that he attempted to dissociate himself from his criminal conduct.[58] When the SCC reviewed the sentence for Duch, it held that the "mitigation on account of the 'coercive climate in DK'" was minimal.[59] Further, because Duch knew that the superior orders he received were unlawful and were not "accompanied by threats causing duress," the fact that Duch received orders for his crimes had no mitigating effect.[60] As stated by the CIJs in Case 004/1, "the considerations to be employed for the question of personal jurisdiction are not entirely dissimilar to those one would use for sentencing purposes."[61] As the factors of superior orders, coercion, and duress were given little to no weight in sentencing Duch, the NCIJ should not have given them undue weight

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WRI, A24-25; **D219/226** Penh Va WRI, A6). Similarly, the ICP cited So Saren's statement that he saw Ao An order his military to kill and cut open the stomach of a pregnant woman who had repeatedly come to the sector office to ask about her husband who had been arrested (*see* **D359/3/1** ICP Appeal, para. 40). Ao An again misunderstands what portion of So Saren's evidence was hearsay. So Saren specifically said "I did see one event" when describing the order given by Ao An, and the hearsay related to someone telling him that she was killed in the paddy fields behind the sector office: "I only knew that she had already been taken to be killed." (*see* **D359/3/4** Ao An Response, fn. 34; **D219/837** So [Sau] Saren WRI, A75-77). Finally, the ICP cited evidence to demonstrate that killings in Sector 41 continued until the end of the regime despite the Party's 1978 directive. Ao An concedes that the statements may discuss the continued killings but argues that none state Ao An ordered or was in any way connected to the killings. The ICP notes that the cited evidence and following sentence about Ao An's instruction to compile more thorough lists of the Cham support the conclusion that Ao An never ordered his subordinates to comply with the directive (*see* **D359/3/1** ICP Appeal, para. 40; **D359/3/4** Ao An Response, fn. 34).

55 *See, e.g.* **D359/3/1** ICP Appeal, paras 41, 110.

56 *See, e.g.* **D359/3/1** ICP Appeal, paras 41, 110.

57 *See, e.g.* **D359/3/1** ICP Appeal, paras 32-46 (particularly fns 93-95 *referencing* the NCIJ's analysis in **D359** Dismissal Order, paras 496, 533, 552-553, *et al.*).

58 Case 001-**F28** *Duch* AJ, para. 364.

59 Case 001-**F28** *Duch* AJ, paras 363-364.

60 Case 001-**F28** *Duch* AJ, para. 365 (*see also* para. 373).

61 Case 004/1-**D308/3** Closing Order (Reasons), 10 July 2017, para. 38.

in his personal jurisdiction assessment of Ao An.[62]

2. The Dismissal Order's application of the law was inconsistent with prior ECCC jurisprudence

23. The excessive weight given to superior orders, coercion, and duress is just one example of the way the Dismissal Order applied the law in a starkly disparate way from the precedents set in Case 001.[63] Ao An struggles in his Response to provide some reasonable justification for why Duch was held to be "most responsible" and Ao An was not. He asserts that he controlled "only a small portion of the Democratic Kampuchea, whereas Duch was the head of S-21 which received prisoners from around the country."[64] As stated elsewhere, the size of the geographic area controlled by an individual does not determine his or her level of responsibility for crimes—if it did, a commander of an extermination camp (such as Duch) could claim not to be among those most responsible on the basis that he controlled just a few thousand square metres of territory.[65] Rather, it is the gravity of the crimes committed and the individual criminal responsibility of the charged person that is relevant.[66] As Ao An stated in his appeal of the Indictment, the crimes he is charged with amount to "the most serious criminal accusations known to humankind."[67]

24. Even so, Ao An's "justification" as to why Duch was found to be "most responsible" and he was not is flawed in multiple ways. Even if Sector 41 was "only a small portion of the Democratic Kampuchea", it far surpasses the geographical area of S-21. Ao An also controlled a vastly greater number of civilians than prisoners under Duch's control,[68]

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62 *Contra* **D359/3/4** Ao An Response, para. 16.

63 *See further* **D359/3/1** ICP Appeal, paras 43-46.

64 **D359/3/4** Ao An Response, para. 18.

65 *See* **D360/9** ICP Response to Ao An Indictment Appeal, para. 90. *See also Prosecutor v. Lukić & Lukić*, IT-98-32/1-AR11*bis*.1, Decision on Milan Lukić's Appeal Regarding Referral, Appeals Chamber, 11 July 2007, para. 22.

66 *See, e.g.* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, paras 329, 335-336 (Judges Beauvallet and Baik).

67 **D360/5/1** Ao An's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment), 19 December 2018 ("Ao An Indictment Appeal"), para. 227.

68 While it is impossible to precisely quantify the number of civilians in Sector 41 during the time Ao An was Sector Secretary, even the Dismissal Order (which made no findings in regard to numbers other than to say the evidence failed to prove there were 400,000 victims who died in the Central Zone—*see* **D359** Dismissal Order, paras 419-420) provides enough basis to demonstrate there were thousands more civilians under Ao An's control than the more than 12,272 prisoners for whom Duch was found to be responsible in Case 001. Sector 41 civilians under Ao An's control: **D359** Dismissal Order, paras 297 ["Around 10,000 (ten thousand) people died at Phnom Pros according to government documents"], 311 ["After the

commanded a higher number of subordinates,[69] and was charged with a wider array of

liberation, according to officials of the State of Cambodia, the number of the victims who were killed at Wat Au Trakuon Security Centre was around 30,000 (thirty thousand) people."], 322 ["It is estimated there were thousands or around 10,000 (ten thousand) victims killed at Wat Batheay Security Centre."], 331 ["Around 2,000 (two thousand) people were estimated to be killed or died of illness at Met Sop Security Centre."], 336 [estimates for the number of victims executed at Kok Pring ranged from 1,000 to 25,000], 339 ["It was estimated that around 1,000 (one thousand) and 1,500 (one thousand and five hundred) people were gathered by Angkar to work at Anlong Chrey Dam."], 395 ["According to a witness, thousands of victims were executed at Tuol Beng."]. *Note* that the Dismissal Order provides no findings regarding the number of forced marriage victims in Kampong Siem and Prey Chhor districts, nor for the total number of Cham killed. Prisoners under Duch's control: Case 001-**D99** Closing Order indicting Kaing Guek Eav alias Duch, 8 August 2008 ("*Duch* Closing Order"), paras 47, 107, 140 [the CIJs based their numerical finding on the 12,380 names identified in a compiled prisoner list, which was subsequently revised down to 12,272 or 12,273 during the trial phase]; Case 001-**E188** *Duch* TJ, paras 340, 597, 603, 630; Case 001-**F28** *Duch* AJ, paras 7, 376, 380, 416.

[69] The evidence on the Case File demonstrates that Ao An commanded substantially more than the 40 to 50 subordinates estimated in the Dismissal Order as well as more than the estimated 200 subordinates under Duch's direct control at S-21, as the Dismissal Order accounted only for Ao An's subordinates living at the Sector 41 Office and failed to consider the district- and commune-level committee members who reported to Ao An either directly or indirectly, the staff of security centres under his control within Sector 41, and the members of militias and military who carried out his arrest orders (*see* **D359** Dismissal Order, paras 241, 507, 545). Using extremely conservative estimates as detailed below, evidence on the Case File shows that Ao An commanded at least 329 subordinates (40 subordinates at the Sector 41 Office +15 district committee members + 195 commune committee members + 79 security centre subordinates). *See, e.g.* **1. Subordinates at the Sector 41 Office:** 40 (*see* **D359** Dismissal Order, paras 241, 507, 545). **2. District-level subordinates within Sector 41:** 5 districts x 3 committee members per district = 15 committee members (*see* **D359** Dismissal Order, para. 239; **D1.3.15.1** Craig Etcheson Written Record of Analysis, para. 9 ["Districts were governed by three-person Party Committees"]). **3. Commune-level subordinates within Sector 41:** 5 districts x 13 communes per district x 3 committee members per commune = 195 committee members. *Note* that this calculation uses Kampong Siem District as an example, which contained at least 14 identified communes, each governed by a committee of at least three people (*see* **D1.3.15.1** Craig Etcheson Written Record of Analysis, para. 10; (i) Ampil Commune: **D219/377** Morn Mot WRI, EN 01132624 [place of birth], A1; **D219/543** Nam Monn WRI, EN 01174536 [place of birth]; **D219/711** Chhorn Pech WRI, EN 01216010 [place of birth]; **D3/4** Chin Sinal WRI, EN 00607234; (ii) Trean Commune: **D219/484** Prak Yut WRI, A3; **D117/38** Kruoch Kim WRI, A3-4; **D219/707** Thoem Thim WRI, EN 01215989 [place of birth]; **D219/702.1.87** You Vann, T. 14 January 2016, 14.20.45-14.23.05; (iii) Ro'ang Commune: **D219/138** You Vann WRI, A1, 18; **D219/702.1.87** You Vann, T. 14 January 2016, 14.55.52-14.57.17, 15.00.23-15.03.27; **D219/702.1.94** You Vann, T. 18 January 2016, 09.50.20-09.53.05; (iv) Krala Commune: **D117/32** Nhim [Nhem] Kol WRI, A9; **D117/71** Prak Yut WRI, A54; **D117/44** Nov Hoeun WRI, A2; **D219/136** Than Yang WRI, A2; **D117/48** Wat Angkuonh Dei and Tuol Beng Site ID Report, EN 00987175; (v) Vihear Thom [Thum] Commune: **D219/83** Suon Yim WRI, A1; **D219/17** Pin Dan WRI, A6; **D117/57** Kean Ley WRI, A3; **D107/3** Kak Sroeun WRI, EN 00787202; **D107/16** Kok Pring Site ID Report, EN 00787436; (vi) Kokor Commune: **D219/706** Yaub Ly WRI, EN 01215984 [place of birth], A34-37; **D219/606** Chea Kheang Thai WRI, EN 01184883 [place of birth]; **D219/709** Tes Raun WRI, EN 01215999 [place of birth]; **D219/702.1.94** You Vann, T. 18 January 2016, 09.50.20-09.53.05; (vii) Kaoh (Koh) Roka Commune: **D117/32** Nhim [Nhem] Kol WRI, EN 00966995 [place of birth], A1-4; **D219/59** Mom Sroeurng WRI, EN 01053865 [place of birth]; **D219/702.1.85** Say Doeun, T. 12 January 2016, 10.14.24-10.16.52; (viii) Kien Chrey Commune: **D219/877** Aum Yat WRI, EN 01362684 [place of birth]; (ix) Koh Samraong Commune: **D117/3** Chhov Kim Mol WRI, EN 00877980 [place of birth]; **D117/4** Nin Sophal WRI, EN 00876968 [place of birth]; (x) Ou Svay Commune: **D117/42** Khoem Neary WRI, A5; **D117/37** Leng Ra WRI, A5, 22; **D219/800** So Saren WRI, A2, 18; (xi) Srak Commune: **D117/38** Kruoch Kim WRI, A4; **D219/702.1.87** You Vann, T. 14 January 2016, 14.20.45-14.23.05; (xii) Kaoh Mitt Commune: **D219/702.1.87** You Vann, T. 14 January 2016, 14.20.45-14.24.23; **D117/32** Nhim [Nhem] Kol WRI, A15; **D117/26** Put Kol WRI, A14; (xiii) Han Chey Commune: **D117/45** Thou Sokheng WRI, EN 01031700 [place of birth], A1; **D219/776.1.1** So [Sau] Saren DC-Cam Statement, EN 01309869. **4. Identified subordinates at the Sector 41 Security Centres**

crimes – notably, Ao An was charged with genocide, while Duch was not.[70] Ao An's contention that S-21 *received* prisoners from around the country[71] merely emphasises that Duch's role in the transfer of such prisoners was largely limited to receiving them, whereas Ao An was at the center of a vast logistical network coordinating the transfer of civilians (including thousands of civilians from the East Zone) to and from security centres throughout Sector 41 whom he and his subordinates had identified for arrest and/or execution.[72] Finally, Ao An contrasts Duch's regular communication with members of the Standing and Central Committees against his own lack thereof,[73] but this merely emphasises how Ao An was entrusted with much more discretion than Duch in determining the fate of those under his control.[74]

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and execution sites, including military/militia members: (i) Kor (Met Sop): Youk Ngov + Ke (deputy) + 30 soldiers who oversaw the daily running of the prison = 32 subordinates (*see* **D351/5** ICP Final Submission, paras 144-145); (ii) Wat Ta Meak: 10-12 Sector soldiers acting as guards per group x 2 groups = 20 subordinates (*see* **D219/504** Sat Pheap WRI, A49, 56); (iii) Tuol Beng & Wat Angkuonh Dei: Ny + an unknown number of district military at Tuol Beng and Wat Angkuonh Dei Security Centre = 1 subordinate (*see* **D351/5** ICP Final Submission, para. 203); (iv) Wat Batheay: Pin Pov + Lim (deputy) + 7 guards = 9 subordinates (*see* **D351/5** ICP Final Submission, para. 247); (v) Wat Au Trakuon: Horn + Bot/Kuong (deputy) + Muy Vanny + 14 Long-Sword members = 17 subordinates (*see* **D351/5** Final Submission, paras 301-304, fns 1059, 1062-1064, 1066). 32 + 20 + 1 + 9 + 17 = 79 identified security centre subordinates.

70 Ao An was charged with the crime of genocide against the Cham in the Central Zone; the crimes against humanity of imprisonment, murder, extermination, enslavement, torture, other inhumane acts (enforced disappearances, forced labour, inhumane conditions of detention, physical abuse of prisoners, forced marriage, and rape), persecution on religious and political grounds; and premeditated homicide pursuant to the 1956 Penal Code. These crimes were committed at Wat Ta Meak Security Centre, Kor (Met Sop) Security Centre, Phnom Pros execution site, Tuol Beng Security Centre, Wat Angkuonh Dei Security Centre, Kok Pring execution site, Wat Batheay Security Centre, Anlong Chrey Dam, Wat Au Trakuon Security Centre, and Prey Chhor and Kampong Siem Districts in the case of forced marriage and rape (*see* **D242** Written Record of Initial Appearance, 27 March 2015, EN 01096765-67; **D303** Written Record of Further Appearance, 14 March 2016, EN 01213485-90; **D337** Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66*bis*, 16 December 2016, EN 01363646). Duch was indicted for the crimes against humanity of murder, extermination, enslavement, imprisonment, torture, rape, persecution on political grounds, and other inhumane acts; as well as grave breaches of the Geneva Conventions of 1949. These crimes occurred at S-21 Security Centre and Choeung Ek execution site (*see* Case 001-**D99** *Duch* Closing Order, paras 112-119, Dispositive section).

71 **D359/3/4** Ao An Response, para. 18 (emphasis added).

72 *See, e.g.* Case 001-**D99** *Duch* Closing Order, paras 38-39, 48, 51-59; **D359/3/1** ICP Appeal, paras 44, 69-71; **D360/9** ICP Response to Ao An Indictment Appeal, paras 65-70, 72; **D351/5** ICP Final Submission, paras 19-35, 39-46, 51-53.

73 **D359/3/4** Ao An Response, para. 18.

74 As discussed in detail in **D359/3/1** ICP Appeal, paras 43-44.

C. THE NCIJ INCORRECTLY INTERPRETED THE LAW WHEN HE FOUND THAT DUCH WAS "THE ONLY MOST RESPONSIBLE PERSON", WHICH LED HIM TO MISAPPLY THE LAW

25. Ao An claims that the ICP "incorrectly argues that the NCIJ held that Duch is 'the only most responsible person'"[75] despite the fact that his assertion is directly contradicted by those exact words in the Dismissal Order. First, the NCIJ stated "the prosecution of these senior leaders shall not extend to low-level cadres besides Duch whose name had already been considered by the legislature."[76] Then, in the section discussing the negotiations on personal jurisdiction, the Dismissal Order concluded:

> In summary, the activities and intention of the Cambodian side before and during the negotiations to create the ECCC illustrate narrow personal jurisdiction to find justice and maintain peace. Those target persons were senior leaders and Duch, the only most responsible person. In the Closing Order in Case 004/1, the Co-Investigating Judges asserted that the judges of the ECCC must respect political decisions of the drafters.[77]

26. Ao An argues that the NCIJ did not believe that the "most responsible" category was limited to Duch because otherwise the Dismissal Order would not contain the analysis it makes to demonstrate that Ao An was not one who was "most responsible".[78] But the Dismissal Order's unambiguous wording and reminder thereafter that judges "must respect the political decisions of the drafters" demonstrate that the NCIJ had already concluded that the "most responsible" category could only be applied to Duch. In short, the Dismissal Order analysis was fundamentally flawed, as it was based on an incorrect interpretation of the governing law (the ECCC Agreement), which the NCIJ believed mandated him to find that Ao An was not among those "most responsible" for the crimes of the DK regime and thus did not fall into the personal jurisdiction of the ECCC.

27. Ao An fails to address the error of law articulated and substantiated in Section IV.C. of the ICP Appeal. He ignores all of the evidence presented that deeming the "most responsible" category to be limited to Duch directly contradicts statements made by Royal Government of Cambodia negotiators at the time the ECCC Law was passed, is inconsistent with the expressed understanding of UN negotiators, contradicts holdings by

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75 **D359/3/4** Ao An Response, paras 20-21.
76 **D359** Dismissal Order, para. 478 (emphasis added).
77 **D359** Dismissal Order, para. 542 (emphasis added).
78 **D359/3/4** Ao An Response, paras 22-23.

the SCC and joint CIJs in other ECCC cases, is inconsistent with the plain language of the ECCC Law and the Internal Rules, and violates international human rights norms and protections.[79] Ao An's Response does not attempt to defend the argument that the "most responsible" category was intended to be limited to Duch because the evidence is clear that this was not the intent of those who drafted the ECCC Agreement and ECCC Law.

D. THE DISMISSAL ORDER UNREASONABLY ASSESSED KEY EVIDENCE, A FACTUAL ERROR WHICH WAS DECISIVE TO THE DETERMINATION THAT AO AN WAS NOT ONE OF THOSE "MOST RESPONSIBLE"

28. Contrary to Ao An's assertion, the ICP Appeal properly identified factual errors in how the Dismissal Order evaluated evidence, particularly the evidence of Prak Yut that implicated Ao An in crimes.[80] Although her evidence was cited extensively in the Dismissal Order to support discussions of nationwide policy, the DK administrative structure generally, and the location of crime sites,[81] the NCIJ ignored much of Prak Yut's evidence that directly implicated Ao An.[82] Instead, the Dismissal Order merely stated that Prak Yut's evidence regarding Ao An's participation in the "commission of *certain acts*" appeared to be unreliable because of Prak Yut's discontent with the DK regime due to the arrest of her husband.[83] No further indication was given as to what specific implicating evidence was unreliable. The ICP Appeal set out the corroboration for Prak Yut's evidence that Ao An instructed his subordinates to remove and replace incumbent commune and village chiefs, to root out and kill the Cham as well as ordinary citizens suspected of disloyalty, and that these orders were carried out.[84]

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79 **D359/3/1** ICP Appeal, paras 47-57.

80 **D359/3/1** ICP Appeal, paras 58-61. *See also* **D359** Dismissal Order, paras 502-504. *Contra* **D359/3/4** Ao An Response, para. 25.

81 As discussed in **D359/3/1** ICP Appeal, para. 58, fn. 155. *See also* **D359** Dismissal Order, para. 502. For further examples of the NCIJ's reliance on Prak Yut's evidence for general information, *see, e.g.* **D359** Dismissal Order, fns 79, 88, 91, 106-107, 110, 116, 118, 133, 135, 163, 167, 180, 182, 184, 192-193, 210, 216, 221-222, 232-234, 273, 292, 293, 323-324, 443, 446, 456-457, 464, 475, 484, 513-522, 535-537, 554, 559-560, 581, 584, 653, 689-691, 694, 696-698, 717-721, 723-724, 829, 890, 1025.

82 Entire sections of the Dismissal Order which focused on crimes that occurred in Kampong Siem District where Prak Yut was Secretary made no mention of her evidence of orders to commit crimes that she and others received from Ao An. *See, e.g.* the lack of mention in **D359** Dismissal Order, Kok Pring: paras 332-336 (fns 1025-1042) – Prak Yut's evidence was only cited to support the location of the site (fn. 1025) and the fact that people were killed at Boeng Thom (fn. 1030); Wat Angkuonh Dei: paras 387-391 (fns 1241-1263); Tuol Beng: paras 392-396 (fns 1264-1285), forced marriage: 165-179 (fns 382-441), 397-408 (fns 1286-1321), 500-501 (fn 1421) – Prak Yut's evidence was only cited to support the statement that during the DK regime, some people were not forced to get married (fn. 382).

83 **D359** Dismissal Order, paras 502 (emphasis added), 504. *See also* **D359/3/1** ICP Appeal, paras 58-61.

84 **D359/3/1** ICP Appeal, paras 60-61.

29. Ao An's Response distorts the ICP's position on Prak Yut by claiming that the ICP's Final Submission admitted that Prak Yut lacked credibility, thereby implying that the ICP said none of her evidence was credible.[85] This was not the case. Rather, the ICP has consistently demonstrated that much of Prak Yut's evidence is both *corroborated by* and *corroborative of* the totality of the evidence on the Case File and that there is every reason to give great weight to that evidence.[86] The ICP has also acknowledged that Prak Yut partially retreated from her prior statements on Ao An's order to smash all the Cham but explained why that could not be believed.[87] In further regard to Prak Yut's evidence, Ao An merely references arguments he has previously made,[88] so the ICP will in turn rely on his own arguments already made elsewhere in response[89] and reiterate that even if a witness is not credible in one aspect of her evidence, that does not justify rejecting the entirety of her evidence.[90]

30. Ao An also wrongly alleges that the ICP failed to substantiate how the NCIJ erred in regard to his statement that the strictness and secrecy of the regime and the effects of time could affect witness accounts.[91] To be clear, the ICP does not dispute that these are indeed factors that could affect the reliability of some accounts. However, the ICP Appeal clearly articulated that rather than examining the substance of the accounts and the high level of corroboration from witnesses and civil parties in widely diverse vantage points to determine if the nature of the regime or the passage of time had affected the evidence implicating Ao An, the NCIJ seemingly dismissed such evidence with a broad brush because of these factors.[92] Contrary to Ao An's argument, it is not a "leap of reasoning" to say that the NCIJ categorically found the evidence of Ao An's participation in crimes to be unreliable,[93] particularly because the Dismissal Order failed to specify, either in the impugned paragraph or elsewhere, any particular evidence that had been affected by

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85 **D359/3/4** Ao An Response, para. 25.
86 *See, e.g.* **D351/5** ICP Final Submission, paras 19-20, 27-29, 399-406; **D359/3/1** ICP Appeal, paras 59-61, 82, 85; **D360/9** ICP Response to Ao An Indictment Appeal, paras 35-38, 53, 61-63, 65-66, 73-76.
87 *See, e.g.* **D351/5** ICP Final Submission, paras 63-71, 407-408.
88 **D359/3/4** Ao An Response, para. 25.
89 **D360/9** ICP Response to Ao An Indictment Appeal, paras 35-38, 53, 61-62, 65-67, 73-75.
90 *See, e.g.* **D360/9** ICP Response to Ao An Indictment Appeal, para. 34, particularly the sources cited in fn. 61.
91 **D359/3/4** Ao An Response, para. 26.
92 **D360/9** ICP Response to Ao An Indictment Appeal, paras 62-64.
93 **D359/3/4** Ao An Response, para. 26.

these factors.[94] Moreover, the Dismissal Order failed to reference much of the key evidence that implicated Ao An, let alone discuss in any sort of reasoned, case-by-case assessment why such evidence was not convincing.[95] It is noteworthy that the Dismissal Order extensively cited other evidence from the same witnesses whose implicating evidence was ignored, indicating that their evidence was considered reliable despite the secrecy of the regime or passage of time.[96]

E. AO AN'S FACTUAL ANALYSIS IS FLAWED AND UNPERSUASIVE

31. Ao An's attempts to support the Dismissal Order's unreasonable factual findings are flawed and unpersuasive when the evidence is considered in its totality.

1. The Dismissal Order's findings regarding Ao An's role in arrests and killings were unreasonable

32. No reasonable trier of fact could have found that "there is certainly very little evidence that shows orders to arrest and execute people were given by Ao An"[97] or that "[e]vidence shows that Ao An might [...] have been involved in giving orders to arrest and execute a small number of people".[98] In an attempt to support these findings from the Dismissal Order, Ao An reviews the evidence on the Case File in a piecemeal fashion, an improper

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94 **D359** Dismissal Order, para. 506. *See also* paras 460, 528.

95 For example, aside from the illustrative examples given in fn. 82, *supra*, of the noticeable absence in the Dismissal Order of any of Prak Yut's evidence that implicated Ao An of crimes in the district where she was Secretary, the Dismissal Order similarly made no mention of Nhem Chen's evidence that implicated Ao An, including (1) evidence that Nhem Chen attended a meeting at Wat Ta Meak that was chaired by Ao An in which the attendees were instructed to trick former Lon Nol officials into telling what positions they had previously held, then send them to be killed [*see* **D219/855** Nhem Chen WRI, A166-172 and the lack of any mention of this evidence, including in discussions of Sector 41, Wat Ta Meak, and Ao An's responsibility in **D359** Dismissal Order, paras 239-262 (fns 689-790), 340-349 (fns 1055-1098), 494-510 (fns 1416-1428), 549-551]; (2) evidence that Nhem Chen went to Met Sop (Kor) Security Centre to collect reports of killings, which he brought back to Ao An [*see* **D219/855** Nhem Chen WRI, A58-59, 75-77 and the lack of any mention of this evidence, including in discussions of Sector 41, Met Sop (Kor) Security Centre, and Ao An's responsibility in **D359** Dismissal Order, paras 239-262 (fns 689-790), 323-331 (fns 992-1024), 494-510 (fns 1416-1428), 549-551]; and (3) evidence that Ao An gave orders to Ta Aun to arrest people [*see* **D219/855** Nhem Chen WRI, A71-73 and the lack of any mention of this evidence, including in discussions of Sector 41 and Ao An's responsibility in **D359** Dismissal Order, paras 239-262 (fns 689-790), 494-510 (fns 1416-1428), 549-551].

96 For example, aside from the Dismissal Order's extensive reliance on Prak Yut's evidence when it did not directly implicate Ao An (Prak Yut's interviews were referenced 192 times in the footnotes of the Dimissal Order), Nhem Chen's evidence was relied upon 82 times, including his evidence that when Nhem Chen asked Ao An whether he pitied the others, Ao An told him, "If I do not obey orders, they will kill me too." *See* **D359** Dismissal Order, paras 328, 496.

97 **D359** Dismissal Order, para. 549; **D359/3/1** ICP Appeal, para. 67.

98 **D359** Dismissal Order, para. 497; **D359/3/1** ICP Appeal, para. 67.

approach that has been explicitly rejected by the SCC.[99] As he has throughout these proceedings, Ao An insists that individual witnesses and individual pieces of evidence be considered in isolation,[100] while ignoring the overwhelming corroboration provided by the consistent accounts of numerous witnesses and civil parties that establish Ao An's role, responsibility, and participation in the crimes in the Central Zone.[101]

33. As an example, Ao An attempts to support the Dismissal Order's findings regarding arrests and killings on the basis that Prak Yut, You Vann, and Nhem Chen are not credible witnesses.[102] He alleges that Prak Yut's evidence cannot be believed because she was trying to scapegoat Ao An,[103] that You Vann was only regurgitating Prak Yut's evidence,[104] and that Nhem Chen's evidence should not be accepted because he was too young at the time of the relevant events to give reliable evidence.[105] These critiques are without merit for many reasons detailed elsewhere,[106] but they fail in particular to deal with the way in which the independent accounts corroborate each other: Ao An never attempts to deal with the question as to how the three separate accounts could so closely match each other unless they were true.

34. Ao An also attempts to minimise the quantity of evidence of Ao An ordering arrests and killings. Ao An points out that many of the allegations of orders to kill come from Prak Yut, You Vann, and Nhem Chen,[107] but ignores the fact that Ke Pich Vannak, Toy Meach, and So Saren also gave direct evidence that Ao An issued orders to kill.[108] The six witnesses and civil parties who give direct, consistent accounts of Ao An personally ordering killings all corroborate each other. They are additionally corroborated by evidence that Ao An threatened killings at one large public meeting,[109] boasted about

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99 Case 002-**F36** Appeal Judgement, 23 November 2016, para. 419.

100 **D359/3/4** Ao An Response, paras 31-32 *incorporating by reference* **D360/5/1** Ao An Indictment Appeal, paras 63-66, 69-70, 120-125, 146-150 and **D351/6** Ao An's Response to the Co-Prosecutors' Rule 66 Final Submissions, 24 October 2017, paras 284, 308-312.

101 **D360/9** ICP Response to Ao An Indictment Appeal, paras 55-88.

102 **D359/3/4** Ao An Response, para. 32 *citing* **D360/5/1** Ao An Indictment Appeal, paras 63-66, 69-70.

103 **D360/5/1** Ao An Indictment Appeal, paras 63-64.

104 **D360/5/1** Ao An Indictment Appeal, paras 65-66.

105 **D360/5/1** Ao An Indictment Appeal, paras 69-70.

106 **D360/9** ICP Response to Ao An Indictment Appeal, paras 35-39, 42.

107 **D359/3/4** Ao An Response, para. 32.

108 **D359/3/1** ICP Appeal, para. 70.

109 **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

killings that had already been committed at another meeting,[110] visited a security centre to ensure that orders to kill were being carried out,[111] received reports about killings,[112] and personally escorted truckloads of prisoners who were later killed.[113] Ao An himself even admitted that he told Ke Pauk that he had carried out orders to kill Lon Nol soldiers

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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."].

110 **D6.1.700** Seng Srun WRI, A6 ["The unit chairman Hoeun told the people in the village to go join a meeting to be attended by the Sector Chairman; he said that everyone had to attend. During that meeting, An said that those there previously had been killed because they had been cruel; however, in fact, they had not been cruel like the new arrivals."]

111 **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."].

112 **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 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.'"].

113 **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."].

(though he claims that he was lying to Ke Pauk and was actually protecting the soldiers).[114]

35. The evidence of Ao An giving orders to kill is simply overwhelming. No reasonable trier of fact considering the evidence in its totality could have failed to find that Ao An ordered killings.

2. Ao An's Responsibility for Crimes in the Central Zone

36. The Dismissal Order erroneously found that Ao An arrived in the Central Zone in mid-1977 when the purge was largely completed.[115] This finding relied primarily on a single piece of evidence not prepared under judicial supervision (Ke Pauk's autobiography) that is inconsistent with the vast majority of the evidence on the Case File.[116] In his Response, Ao An repeats the Dismissal Order's erroneous assertion that Ke Pauk's evidence on this point is well-corroborated,[117] but in fact, most of the evidence that the Dismissal Order cites as corroboration for a mid-1977 arrival date indicates that the Southwest Zone cadres arrived in the Central Zone in late 1976 or early 1977, and much of the rest is ambiguous or silent on the point.[118] In light of the totality of the evidence, the Dismissal Order's excessive and unexplained reliance on Ke Pauk's autobiography was unreasonable.

37. More importantly, the precise date of Ao An's arrival in the Central Zone is not determinative of his level of criminal responsibility, since the evidence shows that the crimes he is charged with were committed with his active supervision, management, and participation.[119] Ao An's liability for crimes is established through direct evidence of, for example, Ao An threatening, ordering, and monitoring killings.[120] Logically, if Ao An had arrived in the Central Zone only in mid-1977, as found in the Dismissal Order, it

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114 **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.'"].

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

116 **D359** Dismissal Order, para. 494. For further discussion of the evidence on this point, *see* **D359/3/1** ICP Appeal, paras 73-78.

117 **D359/3/4** Ao An Response, para. 36.

118 **D359/3/1** ICP Appeal, paras 76-77.

119 **D359/3/1** ICP Appeal, paras 79-86.

120 **D359/3/1** ICP Appeal, paras 67-72.

would only mean that the crimes alleged occurred after this date.

38. Ao An argues that the timing of the charged crimes matters because it "is relevant to assessing whether Ao An had significant roles in the most serious crimes when compared to other known Khmer Rouge officials, who may have participated in crimes throughout the Khmer Rouge period."[121] This argument misses the point that it is the gravity of the crimes that matters, not how long it takes to commit them. A perpetrator who causes the killing of 10,000 people over a period of two years is not more responsible than one who causes the same number of deaths over a period of two months.

39. Ao An also emphasises the Dismissal Order's finding that evidence tending to incriminate Ao An is unreliable.[122] Ao An states that the NCIJ found this evidence unreliable because the witnesses concerned "were likely to incriminate Ao An due to their own direct involvement".[123] Ao An's attempt to portray the criminal campaign, particularly the genocide of the Cham, as originating with District Secretary Prak Yut fails to explain why the same crimes were happening in all of the other districts in Sector 41. Moreover, the Dismissal Order never made any finding that Prak Yut was implicating Ao An to exonerate her own responsibility for crimes, rather, it found that Prak Yut implicated Ao An because she was "not satisfied with the Revolution due to the arrest and removal of [her] husband from his position."[124] Aside from the implausibility of this argument on its face, it also fails to explain why Prak Yut waited for years and years – and for follow-up interviews that might never have come – to launch her campaign of revenge against Ao An and the "Revolution".[125] More significantly, this finding is irreconcilable with other findings in the Dismissal Order itself. The Dismissal Order found, for example, that there was a central DK policy to "smash" all the Cham, that orders and instructions in the DK were passed down through "mostly vertical lines of communication in the chain of command", and that most of the Cham in Kampong Siem District and Kang Meas District were, in fact, killed.[126] Based on all of those findings, the only credible evidence Prak Yut could have given is the account she did give—that

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121 **D359/3/4** Ao An Response, para. 40.
122 **D359/3/4** Ao An Response, para. 41 *citing* **D359** Dismissal Order, paras 502-504.
123 **D359/3/4** Ao An Response, para. 41.
124 **D359** Dismissal Order, para. 504. *See also* **D6.1.722** Prak Yut WRI, A4.
125 **D359/3/1** ICP Appeal, para. 59.
126 **D359/3/1** ICP Appeal, para. 61.

Ao An passed down orders to kill to her, which she in turn passed down to her subordinates, who carried them out.[127]

3. Ao An's Role at the Zone Level

40. Ao An supports the Dismissal Order's unreasonable finding that he had no role in zone-level decisions by ignoring the relevant evidence. The WRI of Ban Siek, which the Dismissal Order cited in support of its portrayal of Ke Pauk as the sole architect of the Central Zone purge,[128] reads 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.[129]

41. The Dismissal Order edited this quote in a way that changed its meaning (by removing the references to Ao An and the other sector secretaries),[130] but there is no reasonable reading of this evidence, when taken as a whole, that does not give Ao An an important role in making decisions regarding the Central Zone purge. Ao An incorporates his previous arguments that the evidence of Ao An holding a Central Zone position and participating in Central Zone decision-making regarding the purge is insufficient.[131] The ICP has addressed these arguments elsewhere,[132] but Ban Siek's evidence is corroborated by the seven witnesses and civil parties who state that Ao An was the Deputy Central Zone Secretary[133] and therefore someone who would be expected to be involved in such decision-making.

42. In any event, a finding that Ao An was involved in Central Zone-level decision-making regarding the purges is not required to conclude that Ao An was among the "most responsible"; even had he simply received orders from Ke Pauk with no participation in setting zone-level policy, his implementation of these orders and the gravity of the crimes

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127 **D359/3/1** ICP Appeal, para. 61.
128 **D359** Dismissal Order, para. 159.
129 **D107/15** Ban Siek WRI, EN 00841965.
130 **D359** Dismissal Order, para. 159.
131 **D359/3/4** Ao An Response, paras 46-47.
132 **D360/9** ICP Response to Ao An Indictment Appeal, paras 79-83.
133 **D360/9** ICP Response to Ao An Indictment Appeal, paras 79-83.

he oversaw are manifestly sufficient to place him in that category. The persuasive evidence that he was likely involved in Central Zone-level decision-making simply reinforces the conclusion that he was among the "most responsible" for DK crimes.

F. THE NCIJ ERRED IN LAW BY FAILING TO ASSESS THE GRAVITY OF, AND AO AN'S CRIMINAL RESPONSIBILITY FOR, THE CHARGED CRIME OF GENOCIDE

43. As set forth in Section III.A. above, the NCIJ erred in law by failing to assess the Court's personal jurisdiction over Ao An under the requisite standard and by failing to issue a reasoned opinion.[134] To determine whether a charged person is one of "those most responsible" under the ECCC Agreement and ECCC Law, a CIJ must assess both "the gravity of the crimes charged" and "the level of responsibility of the charged [person]".[135] Despite expressly confirming that this was the applicable standard[136] and identifying no cogent reasons[137] to depart from it, the NCIJ simply refused to follow this standard[138] or to make the requisite underlying findings on "the existence of crimes" and the "likelihood" of Ao An's "criminal responsibility" for them.[139] This constituted legal error, invalidating the NCIJ's jurisdictional assessment.

44. The cumulative impact of this and the other errors detailed in the ICP's Appeal is that when considering the Court's personal jurisdiction over Ao An as one of "those most responsible", the NCIJ erred in law by failing in particular to assess the existence of the charged crime of genocide, its gravity, or Ao An's criminal responsibility for implementing it.[140] As a result, the NCIJ effectively excised genocide from the personal jurisdiction assessment altogether.

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134 *Contra* **D359/3/4** Ao An Response, paras 49-50, 55-56, 62. *See also* **D359/3/1** ICP Appeal, paras 15, 95, 99.

135 **D359** Dismissal Order, para. 424 *citing* Case 001-**E188** *Duch* TJ, para. 22.

136 **D359** Dismissal Order, para. 424.

137 *See, e.g.* Case 002-**E313** Case 002/01 Judgement, Trial Chamber, 7 August 2014, paras 710, 719 (no cogent reasons to depart from prior jurisprudence).

138 *See in general* **D359** Dismissal Order *and in particular* para. 2 (refusing to "characterise the crimes []or classify the modes of liability", both of which are plainly necessary in order to identify the applicable *actus reus* and *mens rea* elements for individual criminal responsibility and determine if they are met). In fact, after confirming the applicable standard at para. 424, the NCIJ never again mentions the "gravity of the charged crimes" until the final footnote (fn. 1452), in which he again acknowledges that such findings are required. He makes no findings on criminal responsibility.

139 *See, e.g.* Case 004/1-**D308/3/1/20** Im Chaem PTC Considerations, para. 26 (unanimous holding).

140 *Contra* **D359/3/4** Ao An Response, paras 49-50, 55-56, 62. *See also* **D359/3/1** ICP Appeal, paras 15, 95, 99.

45. One of the ways that genocide is distinguished from other international crimes is that 149 states, including Cambodia, have ratified the Genocide Convention, committing each to ensure the prevention and punishment of this crime. Ao An argues that it is unreasonable to assume that the RGC and the United Nations intended to fulfil the obligation of the Genocide Convention to punish genocide, arguing that to do so would require the ECCC to prosecute hundreds or thousands of perpetrators of this crime.[141] But this was not the ICP's argument, which pointed out that the Genocide Convention obligated states to ensure the crime was deterred by punishing key perpetrators.[142] Contrary to Ao An's submission,[143] there is nothing unreasonable in assuming that the RGC intended to fulfil its treaty obligations or that both the RGC and the United Nations were committed to live up to the Convention purpose of deterring the genocide by punishing key perpetrators. The ICP has never argued that every foot soldier involved in a genocide must be punished,[144] but Ao An was no foot soldier. Rather, he led an entire Sector,[145] and not just any sector. Sector 41 was part of the traditional heartland of the Cham people and was the very centre of the Cham genocide of the DK regime.[146] Many thousands of Cham died there pursuant to the orders of Ao An to identify and kill all Cham.[147] When the United Nations and the RGC agreed that the ECCC would prosecute those "most responsible" for the crimes of the DK regime, they surely intended that the leading implementers of a genocide would not continue to enjoy impunity.

46. In his Response, Ao An never contests the relevance of genocide to any personal jurisdiction assessment – he simply ignores these fundamental errors and mischaracterises the Dismissal Order. For example, contrary to Ao An's claims, none of the Dismissal Order paragraphs he cites "discussed" – much less made findings on – the gravity of the charged crimes or Ao An's criminal responsibility for them, including

141 **D359/3/4** Ao An Response, paras 57-65.
142 *See, e.g.* **D359/3/1** ICP Appeal, para. 98 (arguing that ECCC personal jurisdiction over those "most responsible" for the crimes of the DK regime would necessarily include a leader who played a key role in implementing the genocide). *Contra* **D359/3/4** Ao An Response, para. 57.
143 *See* **D359/3/4** Ao An Response generally, paras 57-61.
144 *Contra* **D359/3/4** Ao An Response, para. 57.
145 **D359** Dismissal Order, paras 242, 510.
146 *See, e.g.* **D359** Dismissal Order, paras 141-146, 307, 409-418, 498.
147 *See, e.g.* **D359** Dismissal Order, paras 141-146, 307, 410-420, 498.

genocide.[148] Ao An even concedes that the NCIJ made no genocidal intent findings,[149] which would plainly be required for any assessment of criminal responsibility. Moreover, while the NCIJ may have a measure of discretion to consider and weigh "a range of factors related to personal jurisdiction",[150] he does *not* have the discretion to wholesale ignore what he agrees are required findings for this assessment, nor to purport to compare Ao An's and Duch's relative levels of responsibility[151] while excluding any consideration of Ao An's criminal responsibility for genocide against the Cham.

G. THE ICP'S POSITION ON CONFLICTING CLOSING ORDERS HONOURS THE ECCC AGREEMENT, THE INTENT OF THE DRAFTERS, THE INTERNAL RULES, AND ECCC JURISPRUDENCE

47. Ao An argues that because the CIJs did not submit their personal jurisdiction disagreement to the PTC, Article 7(4) of the ECCC Agreement and the SCC's holding in Case 001 are inapplicable should the PTC fail to reach a supermajority on either closing order appeal or find that neither CIJ erred.[152] But Ao An fails to explain why the outcome should be different. Substantively, the two procedures are the same. The only difference is that issuing separate closing orders – which the CIJs had the right to do[153] – arguably shortens the process.

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148 *Contra* **D359/3/4** Ao An Response, paras 11 (fns 21, 24), 50 (fn. 103), 55. Similarly, the ICP did not argue that the NCIJ did not "consider" – however inadequately - the "alleged genocide" or "Ao An's potential role in it" (*contra* **D359/3/4** Ao An Response, para. 55; *see* **D359** Dismissal Order, paras 409-418), but that the NCIJ plainly made no assessment of the gravity of the charged crime of genocide or Ao An's criminal responsibility for it. Moreover, even where the NCIJ touched on a potentially relevant underlying factor for one of these prongs, he failed to make even cursory factual findings on which an ultimate conclusion might properly rest, much less assess such findings in the context of these prongs. *See, e.g.* **D359** Dismissal Order, paras 419-420.

149 **D359/3/4** Ao An Response, para. 53.

150 *Contra* **D359/3/4** Ao An Response, para. 56.

151 *See, e.g.* **D359** Dismissal Order, paras 543-553. The NCIJ further made a series of unexplained and legally unsupported distinctions between types of "participation". For example, the Dismissal Order contained no explanation as to why Duch "directly participating" in the commission of some crimes would make him "more responsible" than Ao An using tools to cause the deaths of tens of thousands of people.

152 **D359/3/4** Ao An Response, paras 64, 66 (*referencing* Case 001-**F28** *Duch* AJ, para. 65).

153 The CIJs have the option to submit a dispute to the PTC for resolution, but it is not mandatory that they do so. Article 23*new* of the ECCC Law provides that: "The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled" by the PTC. *See also* Internal Rule 72(3), which recognises that an investigative action or decision may be taken by a single investigating judge if the disagreement was never submitted to the PTC for dispute resolution, provided the 30-day waiting period has been satisfied (measured from the date the disagreement was registered).

48. The ICP acknowledges that both Article 7(4) and the SCC holding refer to scenarios in which the CIJs followed the Rule 72 dispute resolution procedure, which was not used when the CIJs issued their separate closing orders in this case.[154] Presumably the CIJs chose to issue separate closing orders in Case 004/2 because they did not want to delay the proceedings. They also likely saw the benefit of allowing the parties to be fully heard on the matter of personal jurisdiction, providing additional arguments which could assist the PTC in making a more fully-informed decision.[155] In any event, the end result of either procedure is the same: the PTC's role is to settle the specific issue – personal jurisdiction – upon which the CIJs disagree.[156] Accordingly, Article 7(4) and the scenario envisioned in the Case 001 Appeal Judgement are applicable should two conflicting orders remain after the PTC has considered all of the issues.

49. Ao An's argument that the ICP's interpretation of Rule 77(13)(b) gives more power and control to one CIJ than the other[157] fails to take into account the concerns the drafters had when they established the ECCC and the solution they agreed to after extensive negotiations.[158] That solution, the supermajority rule, was specifically implemented to keep a case progressing.[159] The PTC has consistently upheld this solution, allowing investigative acts to continue whenever there has been a disagreement and the PTC could not reach the supermajority vote required for a decision.[160] As noted by David Scheffer,

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154 Here, the CIJs chose to register their disagreement under Internal Rule 72(1), wait the requisite 30 days mandated by Internal Rule 72(3), and then issue separate and opposing closing orders that disagreed on the issue of personal jurisdiction. *See, e.g.* **D360** Indictment, paras 1, 16 ["On 12 July 2018, the CIJs registered a disagreement regarding the issuance of separate and opposing closing orders."]. *Note* that both **D359** and **D360** were issued on 16 August 2018, thereby satisfying the requisite 30-day waiting period to act after registering a disagreement.

155 If the CIJs had instead chosen to submit their disagreement to the PTC under Internal Rule 72 and the PTC had subsequently reached a decision, the parties would have never had a chance to have their views considered. *See* Internal Rule 72(4)(d), which states in relevant part: "A decision of the Chamber shall require the affirmative vote of at least four judges. This decision is not subject to appeal."

156 The SCC has noted that when the dispute resolution procedure is used, "the Pre-Trial Chamber's role would be to settle the specific issue upon which the Co-Investigating Judges or Co-Prosecutors disagree." *See* Case 001-**F28** *Duch* AJ, para. 65.

157 **D359/3/4** Ao An Response, para. 65.

158 Report of the Secretary-General on Khmer Rouge trials, UN Doc. A/57/769, 31 March 2003 ("Secretary-General Report"), paras 10(e), 13, 16-17, 20-23, 27-30, 79; David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia", *International Criminal Law*, Third Edition, Vol. III, M. Cherif Bassiouni, ed., 2008 ("Scheffer article"), pp. 230-231, 233-234, 246-247.

159 Secretary-General Report, paras 29, 34, 40-42; Scheffer article, pp. 245-247.

160 *See, e.g.* **D257/1/8** Considerations on Ao An's Application to Seise the Pre-Trial Chamber with a view to Annulment of Investigative Action Concerning Forced Marriage, 17 May 2016; **D263/1/5** Considerations on Ao An's Application for Annulment of Investigative Action Related to Wat Ta Meak, 15 December 2016; **D299/3/2** Considerations on Ao An's Application to Seise the Pre-Trial Chamber with a View to

who was involved in the efforts to create the Court, "The only way the prosecution or investigation is halted is if the Pre-Trial Chamber decides by supermajority that it should end."[161]

50. As detailed more fully in the ICP Appeal, the relevant provisions of the Internal Rules, the negotiating history documenting the intent of the drafters of the ECCC Agreement, and ECCC jurisprudence all mandate that if the PTC fails to reach the required consensus to decide either closing order appeal, or if it finds that neither CIJ erred, the case must proceed to trial on the basis of the Indictment issued by the ICIJ.[162] Such a result does not violate the principle of *in dubio pro reo*, as there is no "procedural uncertainty" to resolve – the path forward is confirmed by all of these sources.[163] Moreover, holdings in Case 002 refute Ao An's assertion of the *in dubio pro reo* principle here. In those situations, the Accused argued that Rule 21(1) required the Court to interpret the Internal Rules in their favour in order to safeguard their interests, but the SCC held that the interpretive direction of the Rule "does not [...] mean that Internal Rules are to be construed so as to automatically grant the Accused an advantage in every concrete situation arising on the interpretation of the Internal Rules"—the relevant consideration is that the interpretation does not infringe on any fundamental rights of the Accused.[164]

51. Accordingly, the ICP's interpretation does not violate Ao An's fundamental right to be presumed innocent as Ao An contends.[165] The presumption of innocence ensures that before criminal sanctions can be imposed, the burden is on the prosecution to prove the accused's guilt beyond a reasonable doubt *at trial*.[166] All suspects, charged persons, and Accused persons, including Ao An, enjoy the presumption of innocence unless and until they are convicted by a supermajority of the Trial Chamber judges.

Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges Relating to Tuol Beng, 14 December 2016.

161 Scheffer article, p. 246.

162 *See* **D359/3/1** ICP Appeal, paras 100-108.

163 *Contra* **D359/3/4** Ao An Response, paras 65, 67.

164 *See, e.g.* Case 002-**E50/2/1/4** Decision on Immediate Appeals by Nuon Chea and Ieng Thirith on Urgent Applications for Immediate Release, 3 June 2011, para. 39; Case 002-**E50/3/1/4** Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, para. 30, *see also* para. 31; Case 002-**E154/1/1/4** Decision on Ieng Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex-Parte Communications, 25 April 2012, para. 14.

165 **D359/3/4** Ao An Response, paras 65, 67.

166 *See, e.g.* ECCC Law, art. 35*new*; Internal Rule 21; *The Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-A, Judgment (Reasons), Appeals Chamber, 1 June 2001, para. 107; Case 001-**F28** *Duch* AJ, para. 33.

IV. RELIEF SOUGHT

52. As stated in the ICP Appeal, 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**
3 April 2019	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh	