

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

**FILING DETAILS**

**Case No:** 004/07-09-2009-ECCC/OCIJ (PTC61)      **Party Filing:** International Co-Prosecutor

**Filed to:** Pre-Trial Chamber

**Original Language:** English

**Date of Document:** 2 December 2019

**CLASSIFICATION**

**Classification of the document**

**suggested by the filing party:** CONFIDENTIAL WITH THREE CONFIDENTIAL ANNEXES

**Classification by PTC:**            សម្ងាត់/Confidential

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**




---

**INTERNATIONAL CO-PROSECUTOR'S APPEAL OF THE ORDER DISMISSING  
THE CASE AGAINST YIM TITH (D381)**

---

**Filed by:**

Brenda J. HOLLIS  
International Co-Prosecutor

**Distributed to:**

**Pre-Trial Chamber**  
Judge PRAK Kimsan, President  
Judge Olivier BEAUVALLET  
Judge NEY Thol  
Judge Kang Jin BAIK  
Judge HUOT Vuthy

**Co-Lawyers for YIM Tith**

SO Mosseny  
Suzana TOMANOVIĆ

**Copied to:**

CHEA Leang  
National Co-Prosecutor

**All Civil Party Lawyers  
in Case 004**

## TABLE OF CONTENTS

<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. PROCEDURAL HISTORY .....</b>	<b>2</b>
<b>III. APPLICABLE LAW.....</b>	<b>2</b>
A. STANDARD OF REVIEW FOR DECISIONS ON PERSONAL JURISDICTION .....	2
B. STANDARD FOR IDENTIFICATION OF THOSE “MOST RESPONSIBLE” FOR KHMER ROUGE CRIMES .....	3
C. REQUIREMENT TO INVESTIGATE AND ISSUE A DECISION ON ALL FACTS WITHIN THE SCOPE OF THE CASE .....	4
D. REQUIREMENT FOR A REASONED DECISION INCLUDING FACTUAL AND LEGAL FINDINGS REGARDING CRIMES COMMITTED AND THE CHARGED PERSON’S LIKELY CRIMINAL LIABILITY .....	5
E. STANDARD OF EVIDENCE FOR INDICTMENT .....	6
<b>IV. APPEAL SUBMISSIONS.....</b>	<b>7</b>
A. THE DISMISSAL ORDER ERRED IN LAW BY FINDING THAT DUCH IS THE ONLY “MOST RESPONSIBLE” PERSON .....	7
1. <i>Finding contradicts the Case 004/1 Closing Order and Case 004/2 Dismissal Order</i> .....	8
2. <i>Finding contradicts the plain language of the ECCC Agreement and ECCC Law ...</i>	8
3. <i>Finding is inconsistent with both the RGC’s and the UN’s expressed understanding             of personal jurisdiction when the ECCC was established.....</i>	9
B. THE DISMISSAL ORDER ERRED IN LAW BY REPEATEDLY FAILING TO RENDER A REASONED DECISION CONCERNING CRIMES COMMITTED AND YIM TITH’S LIKELY CRIMINAL LIABILITY .....	14
1. <i>Lack of legal findings regarding whether crimes within the jurisdiction of the ECCC             were committed and whether Yim Tith is likely responsible for any such crimes ...</i>	14
2. <i>Failure to assess evidence and make findings regarding Yim Tith’s de facto position             and power .....</i>	18

004/07-09-2009-ECCC/OCIJ (PTC61)

3.	<i>Improperly excluding certain crime sites and events from consideration</i>	22
4.	<i>Failure to consider Yim Tith's likely responsibility for genocide in the assessment of personal jurisdiction</i>	24
5.	<i>Failure to consider victims other than those killed when assessing personal jurisdiction</i>	29
C.	THE DISMISSAL ORDER ERRED IN LAW BY CONSIDERING SUPERIOR ORDERS AND DURESS WHEN ASSESSING PERSONAL JURISDICTION	30
1.	<i>Relying on superior orders in its analysis of personal jurisdiction</i>	30
2.	<i>Relying on duress in its analysis of personal jurisdiction</i>	33
3.	<i>Treating superior orders and duress differently in Cases 001 and 004</i>	37
D.	THE DISMISSAL ORDER ERRED IN LAW IN ITS CONSIDERATION OF THE FORM OF YIM TITH'S PARTICIPATION IN AND PROXIMITY TO CRIMES WHEN DETERMINING LEVEL OF RESPONSIBILITY FOR CRIMES COMMITTED	39
1.	<i>Giving excessive weight to "direct participation" in and proximity to crimes in the analysis of personal jurisdiction</i>	39
2.	<i>Failing to consider perpetration through a JCE when assessing personal jurisdiction</i>	43
E.	THE DISMISSAL ORDER ERRED BY MAKING ERRONEOUS FACTUAL FINDINGS THAT OCCASIONED A MISCARRIAGE OF JUSTICE	51
1.	<i>Finding that only certain CPK cadres had authority to make decisions about killings in the DK</i>	51
2.	<i>Finding that Yim Tith could only have held positions in one zone at a time</i>	57
3.	<i>Finding that Yim Tith's only role at the Northwest Zone level was that of committee member</i>	58
4.	<i>Finding that Yim Tith had no subordinates</i>	59
5.	<i>Finding that killings decreased after an alleged Khieu Samphan announcement in mid-1978</i>	61
F.	THE DISMISSAL ORDER ERRED IN LAW BY GIVING WEIGHT TO FACTS OF MARGINAL RELEVANCE	63
1.	<i>Finding that Yim Tith was not a member of the People's Representative Assembly</i>	63

2. *Finding that Yim Tith held no position in the army* ..... 64

3. *Finding that Yim Tith was not involved in preparations for the transfer of Southwest Zone cadres to the Northwest Zone* ..... 65

4. *Finding that the purge had already partially begun and some crime sites were already in operation prior to Yim Tith’s arrival in the Northwest Zone*..... 65

5. *Finding that there were approximately 100 cadres who served at the sector and zone levels in the DK regime* ..... 65

6. *Finding that some witnesses had not heard of Yim Tith* ..... 66

**V. LEGAL CONSEQUENCES OF CONFLICTING CLOSING ORDERS** ..... 67

**VI. CONCLUSION**..... 72

## I. INTRODUCTION

1. On 28 June 2019, the National Co-Investigating Judge issued a closing order dismissing the case against Yim Tith (“Dismissal Order”) on the grounds that the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) has no personal jurisdiction over Yim Tith.<sup>1</sup> On the same day, the International Co-Investigating Judge (“ICIJ”) issued a closing order (“Indictment”) indicting Yim Tith for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code and committing him for trial.<sup>2</sup>
2. The Dismissal Order is based on the finding that Yim Tith is not among the senior leaders or “those who were most responsible” for crimes and serious violations committed between 17 April 1975 and 6 January 1979. However, this finding was premised on multiple legal and factual errors that, individually or cumulatively, invalidated the Dismissal Order and/or occasioned miscarriages of justice and were fundamentally determinative of the conclusion on personal jurisdiction. The Dismissal Order’s minimisation of Yim Tith’s criminal responsibility resulted primarily from a misinterpretation of the ECCC’s personal jurisdiction; a repeated failure to render a reasoned decision concerning crimes committed and Yim Tith’s likely responsibility; an erroneous reliance on superior orders and duress; according excessive weight to “direct participation” in, and proximity to, crimes while refusing to consider other modes of liability; numerous additional factual errors on matters central to an analysis of personal jurisdiction; and an undue consideration of factors of marginal relevance.
3. The International Co-Prosecutor (“ICP”) now appeals the Dismissal Order pursuant to Internal Rules<sup>3</sup> 67(5) and 74(2). The ICP respectfully requests that the Pre-Trial Chamber reverse the dismissal of the case due to the Dismissal Order’s errors and order that the case against Yim Tith proceed to trial on the basis of the Indictment issued by the ICIJ.<sup>4</sup>

---

<sup>1</sup> **D381** Order Dismissing the Case Against Yim Tith, 28 Jun 2019 (“Dismissal Order”), para. 686. The Dismissal Order acknowledged that it formed the view that Yim Tith was not subject to the personal jurisdiction of the ECCC no later than 9 Dec 2015, *during* the judicial investigation which was not notified as being concluded until 13 Jun 2017. *See* **D381** Dismissal Order, paras 4, 16, 46-47.

<sup>2</sup> **D382** Closing Order, 28 Jun 2019 (“Indictment”).

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

<sup>4</sup> This request for relief follows from the situation of two conflicting closing orders, one an indictment and one a dismissal, in a single case, which inherently will have to be considered together. This request for relief is premised on the assumption that any appeals against the Indictment are not upheld. In that situation,

## II. PROCEDURAL HISTORY

4. The relevant procedural history is set out in **Annex 1**.

## III. APPLICABLE LAW

### A. STANDARD OF REVIEW FOR DECISIONS ON PERSONAL JURISDICTION

5. This Pre-Trial Chamber has held that the Co-Investigating Judges' ("CIJs") discretion in determining whether a suspect falls within the category of those "most responsible" for Democratic Kampuchea ("DK") crimes "is not unlimited" and "does not permit arbitrary action".<sup>5</sup> The Dismissal Order's decision in this regard is reviewable.<sup>6</sup>
6. As the Pre-Trial Chamber has recently unanimously held:

A discretionary decision may be reversed where it was: (1) based on an incorrect interpretation of the governing law (*i.e.* an error of law) invalidating the decision; [or] (2) based on a patently incorrect conclusion of fact (*i.e.* an error of fact) occasioning a miscarriage of justice[.] [...] In other words, it must be established that there was an error [...] which was fundamentally determinative of the Co-Investigating Judges' exercise of discretion.<sup>7</sup>

7. The Pre-Trial Chamber has found:

[I]t is well-established in international jurisprudence that, on appeal, alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct and alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue.<sup>8</sup>

8. Further, it is settled in ECCC jurisprudence and international law that when it is shown that a discretionary decision was premised on erroneous legal reasoning and/or factual findings, the appellate chamber must annul that decision and either send it back to the lower chamber to apply the correct standard or substitute its own judgment on the matter.<sup>9</sup>

---

where there is a valid indictment, Rule 77(13)(b) requires that the Pre-Trial Chamber ("PTC") seise the Trial Chamber ("TC") on the basis of the indictment. *See infra*, section V.

<sup>5</sup> Case 004/1-D308/3/1/20 Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 Jun 2018 ("*Im Chaem* PTC Closing Order Considerations"), para. 20 (unanimous finding). *See also* Case 001-F28 Appeal Judgement, 3 Feb 2012 ("*Duch* AJ"), paras 62-74, 79.

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

<sup>7</sup> Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, para. 21 (unanimous finding).

<sup>8</sup> Case 002-D427/1/30 Decision on Ieng Sary's Appeal Against the Closing Order, 11 Apr 2011 ("Ieng Sary Closing Order Appeal Decision"), para. 113.

<sup>9</sup> ECCC: Case 001-D99/3/42 Decision on Appeal Against Closing Order Indicting Kaing Guek Eav *alias* "Duch", 5 Dec 2008, ("Decision on Duch Closing Order Appeal"), paras 40, 42; Case 002-D300/1/7 Decision on Nuon Chea's Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172,

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

9. Identification of those Khmer Rouge officials<sup>10</sup> “most responsible” for crimes falling within the ECCC’s jurisdiction requires an assessment of both the gravity of the crimes charged and the level of responsibility of the suspect.<sup>11</sup> This assessment must be “based entirely on the merits of each individual case.”<sup>12</sup> Both CIJs acknowledged in Case 004/1 that the Royal Government of Cambodia (“RGC”) and the United Nations (“UN”) did not have any agreement that only a certain finite number of named individuals were to be under the Court’s jurisdiction.<sup>13</sup>
10. Factors relevant to assessing the gravity of the crimes committed include the (i) number of victims,<sup>14</sup> (ii) geographic and temporal scope of the alleged crimes,<sup>15</sup> (iii) manner in which the alleged crimes were committed,<sup>16</sup> and (iv) number of separate incidents.<sup>17</sup>
11. Factors relevant to the level of responsibility include the accused’s (i) level of

---

D173, D174, D178 and D284, 28 Jul 2010, paras 19, 26 *referring, inter alia*, to Case 002-D365/2/17 Decision on Reconsideration of Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons’ Knowledge of the Crimes, 27 Sep 2010, paras 67, 81; Case 002-D310/1/3 Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Names in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 Jul 2010, paras 15-16. International: *S. Milošević* Interlocutory Decision, para. 10 *cited in* D260.1.2 Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 Nov 2009, para. 25; *S. Milošević* Appeals Decision, paras 5-6; *Šešelj* Interlocutory Decision, para. 14; *Halilović* Interlocutory Decision, paras 5, 64; *Karemera* Interlocutory Decision, para. 5; *Uwinkindi* Interlocutory Decision, para. 6; *Katanga* Restrictive Measures Decision, paras 1, 41-43.

<sup>10</sup> Case 001-F28 *Duch* AJ, paras 52, 61.

<sup>11</sup> Case 001-F28 *Duch* AJ, paras 71, 80; Case 001-E188 Judgement, 26 Jul 2010 (“*Duch* TJ”), para. 22; Case 004/1-D308/3 Closing Order (Reasons) in Case 004/1, 10 Jul 2017 (“*Im Chaem* Closing Order”), paras 38-41, fn. 735. *See also* Case 003-D266 Order Dismissing the Case Against Meas Muth, 28 Nov 2018 (“*Meas Muth* Dismissal Order”), paras 3, 365-367; Case 004/2-D359 Order Dismissing the Case Against Ao An, 16 Aug 2018 (“*Ao An* Dismissal Order”), paras 424-425; Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of Judges Baik and Beauvallet (“Opinion of International Judges”), para. 321; *Lukić & Lukić* Referral Decision, paras 26-28.

<sup>12</sup> Case 004/1-D308/3 *Im Chaem* Closing Order, para. 37. *See also* Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, para. 321.

<sup>13</sup> Case 004/1-D308/3 *Im Chaem* Closing Order, paras 37-38.

<sup>14</sup> The gravity of crimes is determined in part by reference to the vulnerability of those victims. *See* Case 001-F28 *Duch* AJ, para. 375.

<sup>15</sup> Case 004/1-D308/3 *Im Chaem* Closing Order, para. 317; Case 001-E188 *Duch* TJ, para. 22. *See also* Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, para. 327; *Janković* Referral Decision, para. 19; *Todović* Referral Appeal Decision, paras 13, 16.

<sup>16</sup> Case 004/1-D308/3 *Im Chaem* Closing Order, para. 317; Case 001-E188 *Duch* TJ, para. 22. *See also* Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, para. 327; Case 001-F28 *Duch* AJ, para. 375; *Tolimir* AJ, para. 633.

<sup>17</sup> Case 004/1-D308/3 *Im Chaem* Closing Order, para. 317; Case 001-E188 *Duch* TJ, para. 22. *See also* Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, para. 327; Case 001-F28 *Duch* AJ, para. 375; *Tolimir* AJ, para. 633.

004/07-09-2009-ECCC/OCIJ (PTC61)

participation in the crimes, including the level of participation in policy-making and/or policy implementation; (ii) hierarchical rank or position, including the number of subordinates and hierarchical echelons above him or her, and the permanence of the position;<sup>18</sup> (iii) effective authority<sup>19</sup> and ability to give orders;<sup>20</sup> and (iv) temporal scope of control.<sup>21</sup> The particular role of a person should not be exclusively assessed or predetermined on excessively formalistic grounds.<sup>22</sup>

12. The application of the key criteria – gravity of crimes and level of responsibility – does not require a comparison and ranking of the responsibility of all possible perpetrators,<sup>23</sup> but instead should have regard to the other cases tried by the court and the particular circumstances and context in which the crimes were committed.<sup>24</sup> Undue weight should not be placed on the local character of the crimes, since local leaders may wield significant influence and/or play a vital role in the implementation of nationwide policies warranting their inclusion within the category of those “most responsible”.<sup>25</sup>

### C. REQUIREMENT TO INVESTIGATE AND ISSUE A DECISION ON ALL FACTS WITHIN THE SCOPE OF THE CASE

13. Pursuant to Internal Rule 55(2), the CIJs have the obligation to fully and fairly investigate *in rem all* the material facts alleged in introductory and supplementary submissions.<sup>26</sup>

<sup>18</sup> Case 001-E188 *Duch* TJ, para. 22; Case 004/1-D308/3 *Im Chaem* Closing Order, paras 39-41. *See also* Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, paras 332, 335; Case 002-D427 Closing Order, 15 Sep 2010 (“Closing Order”), para. 1328; *Ademi* Referral Decision, para. 29; *Kovačević* Referral Decision, para. 20; *D. Milošević* Referral Decision, para. 23; *Lukić* Appeal Decision, para. 21.

<sup>19</sup> *Lukić & Lukić* Referral Decision, para. 28; *Ademi* Referral Decision, para. 29.

<sup>20</sup> *Ademi* Referral Decision, para. 29.

<sup>21</sup> *D. Milošević* Referral Decision, para. 23.

<sup>22</sup> Case 001-E188 *Duch* TJ, para. 24. *See also* *Ntaganda* Arrest Warrant Decision, para. 76; Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, paras 321, 334.

<sup>23</sup> Case 001-F28 *Duch* AJ, para. 62; Case 001-E188 *Duch* TJ, para. 24.

<sup>24</sup> *Ademi* Referral Decision, para. 28.

<sup>25</sup> *Lukić* Appeal Decision, para. 22. *See also* Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, paras 329, 335-336; Guéry & Chambon, *Droit et Pratique de l’Instruction Préparatoire* (7<sup>th</sup> edition), 2010-2011, pp. 157-158, s. 51.02 *citing* Cass. Crim. 31 Mar 1987, No. 86-90.769 [“Attendu que, [...] le juge d’instruction n’est autorisé à rendre une ordonnance disant qu’il n’y a lieu à informer que si, pour des causes affectant l’action publique elle-même, les faits ne peuvent légalement comporter une poursuite ou si, à supposer les faits démontrés, ils ne peuvent admettre une qualification pénale.” Unofficial translation: “Whereas, [...] the investigating judge is entitled to issue an order refusing to investigate only where, for the reasons that affect the prosecution itself, the facts cannot be prosecuted, or where the facts are established, they do not have any criminal characterisation.”].

<sup>26</sup> Internal Rules 53, 55(1), 55(2); Cambodian Code of Criminal Procedure (“Cambodian CCP”), art. 125; Case 001-D99/3/42 Decision on Duch Closing Order Appeal, para. 35; D365/3/1/5 Decision on International Co-Prosecutor’s Appeal of Decision on Request for Investigative Action Regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 Feb 2018, para. 39. *See also* D378/2.1.14 Order



004/07-09-2009-ECCC/OCIJ (PTC61)

The CIJs have a further duty to make a decision in a closing order – whether a dismissal order or an indictment<sup>27</sup> – on each of the facts of which they have been validly seised.<sup>28</sup>

**D. REQUIREMENT FOR A REASONED DECISION INCLUDING FACTUAL AND LEGAL FINDINGS REGARDING CRIMES COMMITTED AND THE CHARGED PERSON’S LIKELY CRIMINAL LIABILITY**

14. In compliance with the international standard that all decisions of judicial bodies must be reasoned:<sup>29</sup> “The [CIJs]’ decision to *either dismiss acts or indict* the Charged Person shall be reasoned as specifically provided by Internal Rule 67(4).”<sup>30</sup> As such, a closing order must “at a minimum [...] provide reasoning to support its findings regarding the substantive considerations relevant to its decision”.<sup>31</sup>
15. Since the determination of “those who were most responsible” for crimes falling within the ECCC’s jurisdiction requires an assessment of the gravity of the crimes charged and

---

Concerning the Co-Prosecutors’ Request for Clarification of Charges, 20 Nov 2009 (“OCIJ Clarification Order”), para. 6, fn. 1; Cass. Crim., 24 Mar 1977, No. 76-91.442 [“le juge d’instruction est tenu d’informer sur tous les faits dont il a été régulièrement saisi.” Unofficial translation: “the investigating judge is obliged to investigate all the facts of which he has been regularly seised.”].

<sup>27</sup> A dismissal order and an indictment are both closing orders and carry the same procedural requirements. See Internal Rules 67(1) [“The [CIJs] shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.”], 67(4) [“A Closing Order may both send the case to trial for certain acts of against certain persons and dismiss the case for others.”], Glossary [defining “Closing Order” and “Dismissal Order”]; Cambodian CCP, art. 247.

<sup>28</sup> Case 001-D99/3/42 Decision on Duch Closing Order Appeal, paras 29, 33, 37-38, 115; Case 002-D198/1 OCIJ Clarification Order, para. 10; Cass. Crim., 24 Mar 1977, No. 76-91.442 [“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 Mar 2004, No. 03-85.983 [“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”]. See also Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, paras 116, 129.

<sup>29</sup> **D344.1.2** Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, 26 Aug 2008, para. 21 (and jurisprudence therein) [“The Pre-Trial Chamber finds that all decisions of judicial bodies are required to be reasoned as this is an international standard.”]; Case 001-D99/3/42 Decision on Duch Closing Order Appeal, para. 38; Case 002-E176/2/1/4 Decision on Nuon Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, 14 Sep 2012, para. 25; Case 002-E50 Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 Feb 2011, paras 23-27 (and jurisprudence therein). See also, e.g. *Milutinović* Appeals Decision, para. 22; *Lubanga* Redaction Decision, para. 20.

<sup>30</sup> Case 001-D99/3/42 Decision on Duch Closing Order Appeal, para. 38 (emphasis added). See also Internal Rule 67(4) [“The Closing Order shall state the reasons for the decision.”]; Case 001-D99/3/42 Decision on Duch Closing Order Appeal, para. 115; Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, para. 32 (unanimous finding); Cambodian CCP, art. 247 [The closing order “may be an indictment or a non-suit order [...] A closing order shall always be supported by a statement of reasons”].

<sup>31</sup> *Milutinović* Interlocutory Decision, para. 11. See also *Lubanga* Redaction Decision, para. 20.

004/07-09-2009-ECCC/OCIJ (PTC61)

the level of responsibility of the suspect,<sup>32</sup> based on all the facts of which the CIJs were seised,<sup>33</sup> dismissing a case for want of personal jurisdiction must contain all the factual and legal findings necessary to make that decision.

16. Indeed, the Pre-Trial Chamber has unanimously held that findings on the gravity of the crimes charged and the level of responsibility of the suspect are required; in order to properly exercise its power to review decisions on personal jurisdiction, it “*must* be able to review the findings that led to it, including those regarding the existence of crimes or the likelihood of [a suspect’s] criminal responsibility.”<sup>34</sup> This includes the CIJs’ “final determinations with respect of the legal characterisation of the acts alleged by the Co-Prosecutors and [...] whether they amount to crimes within the jurisdiction of the ECCC”.<sup>35</sup>
17. Moreover, it must be clear how the CIJs assessed the evidence to reach their factual findings, including a demonstration of what evidence has been accepted as proof of all elements of the alleged crimes.<sup>36</sup> It is presumed that the CIJs have properly evaluated all the evidence before them, as long as there is no indication that they completely disregarded any particular piece of relevant evidence.<sup>37</sup> Even where an analysis in itself might be reasoned, “an analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion.”<sup>38</sup>

#### E. STANDARD OF EVIDENCE FOR INDICTMENT

18. Under Internal Rule 67, there must be “sufficient evidence [...] of the charges” to issue an indictment against a charged person.<sup>39</sup> The CIJs and Pre-Trial Chamber have clarified

<sup>32</sup> See *supra*, section III(B).

<sup>33</sup> See *supra*, section III(C).

<sup>34</sup> Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, para. 26 (unanimous finding) (emphasis added). See also Case 001-D99/3/42 Decision on Duch Closing Order Appeal, para. 115.

<sup>35</sup> D306/3.1.35 Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 Feb 2011, para. 79. See also Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, paras 321-340; *Lubanga* Redaction Decision, para. 20 [The decision “must identify which facts it found to be relevant in coming to its conclusion.”]. Every closing order issued so far at the ECCC except for this Dismissal Order, Case 003-D266 *Meas Muth* Dismissal Order, and Case 004/2-D359 *Ao An* Dismissal Order has contained these findings.

<sup>36</sup> See e.g. *Bemba* AJ, para. 52; *Kordić & Čerkez* AJ, para. 385; *Kunarac* AJ, para. 41.

<sup>37</sup> Case 002-F36 Appeal Judgement, 23 Nov 2016 (“Case 002/01 AJ”), para. 304 (and citations therein). See also *Perišić* AJ, para. 92.

<sup>38</sup> *Perišić* AJ, para. 95.

<sup>39</sup> The CIJs applied this standard in Cases 001 and 002. See Case 001-D99 Closing Order Indicting Kaing Guek Eav *alias* Duch, 8 Aug 2008 (“*Duch* Closing Order”), para. 130; Case 002-D427 Closing Order, para. 1321.

004/07-09-2009-ECCC/OCIJ (PTC61)

that this requires a “probability” of guilt, which is incrementally more than a “mere possibility” but less than the “beyond a reasonable doubt” standard used at trial.<sup>40</sup> Moreover, “[t]he evidentiary material on the Case File must be sufficiently serious and corroborative to provide a certain level of probative force.”<sup>41</sup>

#### IV. APPEAL SUBMISSIONS

19. The Dismissal Order, in its assessment of personal jurisdiction, committed several legal and factual errors that, individually<sup>42</sup> or cumulatively,<sup>43</sup> invalidated the Dismissal Order and/or occasioned a miscarriage of justice and were fundamentally determinative of the conclusion on personal jurisdiction. These errors included (i) finding that, *ex ante* and as a matter of law, the category of “those who were most responsible” could only refer to Duch; (ii) refusing to make any legal characterisations with regard to crimes and modes of liability based on the facts with which the CIJs were seised in the Introductory and Supplementary Submissions<sup>44</sup> and thereby failing to render a reasoned decision; (iii) erroneously considering and analysing superior orders and duress in the assessment of personal jurisdiction; (iv) according excessive weight to “direct participation” in crimes while ignoring more relevant modes of liability; (v) making findings that have no basis in fact and/or are clearly contradicted by the evidence; and (vi) giving weight to factors of marginal relevance when assessing jurisdiction.

##### A. THE DISMISSAL ORDER ERRED IN LAW BY FINDING THAT DUCH IS THE ONLY “MOST RESPONSIBLE” PERSON

20. The Dismissal Order erred in law by considering that Yim Tith falls outside of the ECCC’s personal jurisdiction because – *ex ante* and as a matter of law – the category of

<sup>40</sup> Case 002-D427 Closing Order, para. 1323; Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, paras 60-62 (unanimous finding).

<sup>41</sup> Case 002-D427 Closing Order, para. 1323.

<sup>42</sup> The following errors are individually determinative: IV(A); IV(B)(1)-(3), (5); IV(C); IV(D); IV(E)(1)-(2), (4); IV(F)(5).

<sup>43</sup> The following errors are cumulatively determinative: IV(B)(4), (6); IV(E)(3), (5); IV(F)(1)-(4), (6).

<sup>44</sup> D1 Co-Prosecutors’ Third Introductory Submission, 20 Nov 2008 (“Introductory Submission”); D65 Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 Jul 2011 (“Supplementary Submission Regarding Sector 1 and Khmer Krom”); D191 Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 Apr 2014 (“Supplementary Submission Regarding Forced Marriage and SGBV”); D196/1 Response to Forwarding Order D196, 23 Jun 2014; D272/1 Response to Forwarding Order Dated 5 November 2015 and Supplementary Submission Regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 Nov 2015 (“Response to Forwarding Order and Supplementary Submission Regarding Forced Marriage”).

004/07-09-2009-ECCC/OCIJ (PTC61)

“those who were most responsible” could only ever apply to Duch. In reviewing the negotiating history of the ECCC Law,<sup>45</sup> the Dismissal Order explicitly stated that the “target persons” of the ECCC “were senior leaders and Duch, the *only* most responsible person.”<sup>46</sup> This error invalidated the Dismissal Order.

21. The Dismissal Order’s assertion that Duch is the only person within the category of “those who were most responsible” for the crimes of the DK regime is incorrect for at least three reasons: (i) it contradicts previous statements made in the Case 004/1 Closing Order and the Case 004/2 Dismissal Order that there is no merit to the argument that personal jurisdiction was intended to be limited to a specific number of named individuals, (ii) it is inconsistent with the plain language of the ECCC Agreement<sup>47</sup> and ECCC Law, and (iii) it is inconsistent with both the RGC’s and UN’s expressed understanding of personal jurisdiction when the ECCC was established.

**1. Finding contradicts the Case 004/1 Closing Order and Case 004/2 Dismissal Order**

22. The Dismissal Order’s assertion that Duch is the only “most responsible” person contradicts the Case 004/2 Dismissal Order and Case 004/1 Closing Order, which acknowledged that the Supreme Court Chamber implicitly held in Case 001:

[T]here is no merit in any historical-political contention that the negotiations around the establishment of the ECCC led to a joint and binding understanding that only a certain finite number of (named) individuals were to be under the court’s jurisdiction: The selection of persons to be investigated and indicted was and is purely a matter for the discretion of the OCP and OCIJ, and based entirely on the merits of each individual case.<sup>48</sup>

**2. Finding contradicts the plain language of the ECCC Agreement and ECCC Law**

23. The ECCC’s personal jurisdiction was established under the ECCC Agreement between the RGC and the UN which was implemented in Cambodia through the ECCC Law. Both provide that jurisdiction is limited to senior leaders of DK and “those who were most responsible” for the crimes and serious violations of Cambodian penal law, international

<sup>45</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended 27 Oct 2004, (NS/RKM/1004/006) (“ECCC Law”).

<sup>46</sup> **D381** Dismissal Order, para. 638 (emphasis added).

<sup>47</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 Jun 2003 (“ECCC Agreement”).

<sup>48</sup> Case 004/2-**D359** *Ao An* Dismissal Order, para. 461. *See also* Case 004/1-**D308/3** *Im Chaem* Closing Order, para. 37.

004/07-09-2009-ECCC/OCIJ (PTC61)

humanitarian law and custom, and international conventions recognised by Cambodia.<sup>49</sup>

24. The Dismissal Order's finding that only Duch was intended to fall within the category of "those who were most responsible"<sup>50</sup> therefore contradicts the plain language of the ECCC Agreement, which is written in the plural and clearly refers to a category of people rather than an individual.<sup>51</sup> The same language appears in the ECCC Law.<sup>52</sup> The text of both documents clearly shows that the interpretation advanced by the Dismissal Order is legally incorrect.

**3. Finding is inconsistent with both the RGC's and the UN's expressed understanding of personal jurisdiction when the ECCC was established**

*a) RGC*

25. The Dismissal Order's contention that Duch is "the only most responsible person" also contradicts the explicit intent of the RGC at the time of the adoption of the ECCC Law. The representations made to the National Assembly by Deputy Prime Minister Sok An, the RGC's chief negotiator in the talks with the UN, are the best evidence of the intent of the Cambodian government at the time the ECCC Agreement was made. Sok An consistently stated that "those who were most responsible" was a limited but open category.

26. Speaking on 29 December 2000, over 18 months after the arrest of Duch and shortly

<sup>49</sup> ECCC Agreement, art. 1; ECCC Law, arts 1, 2*new*.

<sup>50</sup> This plural language occurs in all three (English, French and Khmer) versions of the ECCC Agreement and the ECCC Law. The French version refers to "les principaux responsables" and the Khmer version specifies "ជនទាំងឡាយដែលទទួលខុសត្រូវខ្ពស់បំផុត".

<sup>51</sup> ECCC Agreement, preamble ["whereas the Cambodian authorities have requested assistance from the United Nations in bringing to trial [...] those who were most responsible"], arts 1, 2(1), 5(3), 6(3). The ECCC Agreement text is presumed to be an authentic expression of the intention of its two parties, the RGC and the UN. Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331 ("Vienna Convention"), art. 31(1) ["A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."]. The parties expressly agreed that the Vienna Convention applies to the ECCC Agreement. See ECCC Agreement, art. 2(2). See also *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 3 Feb 1994, ICJ Reports 1994, p. 6, para. 41 ["Interpretation must be based above all upon the text of the treaty."]; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, 15 Dec 2004, ICJ Reports 2004, p. 279, para. 100; Interpretation of Peace Treaties (second phase), Advisory Opinion, 18 Jul 1950, ICJ Reports 1950, p. 229 ["It is the duty of the Court to interpret the Treaties, not to revise them."]; ILC Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, Vol. II, pp. 220-221, para. 11 ["Commentary to article 27 [...] [Article 27 (now Article 31)] as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this – the textual – approach to treaty interpretation."].

<sup>52</sup> ECCC Law, arts 1, 2*new*.

004/07-09-2009-ECCC/OCIJ (PTC61)

before the adoption of the 2001 ECCC Law,<sup>53</sup> Sok An said, without referring to Duch:

The circle of competence is based on three major legal aspects: The first is what we call the aspect of the competence of individuals (“La compétence personnelle”) and is to define a target that is an objective of a trial by Extra-Ordinary Chambers. So it clearly states that only senior leaders and *those who most* were responsible for [the crimes] will be tried.<sup>54</sup>

27. During the October 2004 Cambodian National Assembly debate on amending the ECCC Law to comply with the terms of the ECCC Agreement, several lawmakers asked for clarification as to what the drafters meant by “those most responsible”.<sup>55</sup> Sok An responded unambiguously that (i) the jurisdiction was not restricted to senior leaders, (ii) there was no set number of people who might fall within the jurisdiction of the ECCC, and (iii) there was no list of names of potential targets of investigation.<sup>56</sup> He also made it clear that the category of those who were “most responsible” referred to multiple potential targets. In his own words:

If we ask the question ‘who shall be indicted?’ neither the United Nations nor the Task Force of the Royal Government of Cambodia are able to give a response. Because this is the task of the courts: the Extraordinary Chambers. If we list the names of people for the prosecution instead of the courts, we violate the power of the courts. Therefore, we cannot identify A, B, C, or D as the ones to be indicted. As a solution, we have identified two targets: *senior leaders* and *those most responsible*. Considering *senior leaders*, we refer to no more than 10 people, but we don’t clearly state that they are the members of the Standing Committee. This is the task of the Co-Prosecutors to decide who are the senior leaders. [...] However, there is still the second target. They are not the leaders, but they committed atrocious crimes. That’s why we use the term *those most responsible*. There is no specific amount of people in the second group to be indicted.<sup>57</sup>

<sup>53</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed During the Period of the Democratic Kampuchea, adopted 2 Jan 2001, promulgated 10 Aug 2001 (NS/RKM/0801/12), reprinted in *Searching for the Truth*, DC-Cam, Issue 13, pp. 65-77.

<sup>54</sup> Translation by DC-Cam of Minutes on the Session of the National Assembly of the Kingdom of Cambodia, 29 Dec 2000, *Searching for the Truth*, DC-Cam, Issue 14, Feb 2001, p. 44 (emphasis added).

<sup>55</sup> Transcript translated by DC-Cam of the First Session of the Third Term of Cambodian National Assembly, 4-5 Oct 2004 (“2004 National Assembly Transcript”), p. 9 [“H.E. Ly Thuch: ‘[O]ur people and civil society want to ask H.E. [Sok An] to make it clear that who are the senior leaders and those most responsible? Do they include also chairmen of units of organization?’”], p. 14 [“H.E. Keo Remy: ‘Who are the senior leaders? [...] Will the zone chiefs be prosecuted? Or [is] this law only [being] made to try 4 or 5 leaders. Who else will be prosecuted? It is unfair if we try only 3 or 4 people.’”], p. 27 [“H.E. Eng Chhay Eang: ‘I am also not clear about *those most responsible*. For how much will those people have to be responsible? [...] I want the representative of the government to clarify for how much greatest responsibility those people must hold. [...] I would like to remind people not to be vague. If we emphasize only on the highest class, we meant Pol Pot, who died already.’”].

<sup>56</sup> 2004 National Assembly Transcript, pp. 30-31. *See also* p. 16.

<sup>57</sup> 2004 National Assembly Transcript, pp. 30-31 (underlined emphasis added).

004/07-09-2009-ECCC/OCIJ (PTC61)

28. Clearly, the RGC understanding was that the category would not be limited only to Duch. Indeed, Prime Minister Hun Sen recognised that the determination of which individuals fell within the ECCC's personal jurisdiction was a matter for the independent determination of judges at the Court. In March 1999, he told the UN Secretary-General:

The Royal Government of Cambodia does not have any power to impose anything on the competent tribunal. [...] The issue of whether to try Ta Mok alone or any other Khmer Rouge leaders depends entirely on the competence of the tribunal. The Royal Government of Cambodia will not exert any influence on or interfere, in any form, in the normal proceedings of the judiciary, which will enjoy complete independence from the executive and legislative powers.<sup>58</sup>

29. One month later, in an April 1999 meeting with US Senator John Kerry, who was involved in the negotiations, Prime Minister Hun Sen affirmed to Senator Kerry that:

The indictment and prosecution of other Khmer Rouge leaders are the sole competence of the court. The Royal Government is not entitled to give orders to the judicial branch to do this or that.<sup>59</sup>

b) UN

30. The UN shared the same understanding. In 1999, the Group of Experts, whom the Secretary-General assigned to explore options that would best bring about justice in Cambodia, stated:

[O]thers not in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true with respect to certain leaders at the zonal level. [...] [T]he Group recommends that any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities. We do not wish to offer a numerical limit on the number of such persons who could be targets of

<sup>58</sup> Letter dated 24 March 1999 from the Prime Minister of Cambodia to the Secretary-General, UN Doc. A/53/875, S/1999/324, 24 Mar 1999, paras 2-3. Note that in para. 4, Hun Sen requested that the letter be circulated as a General Assembly document.

<sup>59</sup> Statement made on 18 April 1999 by the Cabinet of Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia, UN Doc. A/53/916, 19 Apr 1999, para. 2. Additionally, “[u]pon receiving these assurances from Samdech Prime Minister Hun Sen, Senator John Kerry welcomed the positive position of the Cambodian Prime Minister.” See also Kyodo News International, *Hun Sen regrets stating number of K. Rouge leaders to be tried*, 7 Jan 2000 [In an interview with Japanese media: “Cambodian Prime Minister Hun Sen expressed regret Friday at having stated ‘four to five’ Khmer Rouge leaders will be put on trial [...]. ‘I should not comment on or say anything that is within the bounds of the judiciary,’ he said. [...] Hun Sen said anyone who specifies the number of leaders to be tried ‘is wrong, and that includes U.N. legal experts who mentioned 20 or 30 people.’ The prime minister said that by giving an exact number of the Khmer Rouge leaders to be tried, ‘We abuse the court of law.’”].

004/07-09-2009-ECCC/OCIJ (PTC61)

investigation. It is, nonetheless, the sense of the Group from its consultations and research that the number of persons to be tried might well be in the range of some 20 to 30.<sup>60</sup>

31. These recommendations formed the basis for the UN's negotiating position at the time. David Scheffer recalled in an article published in 2011, which details his own involvement in the negotiations, that "we were only interested in the surviving senior leaders who demonstrated significant responsibility *as well as other top functionaries, like Duch*, who had such instrumental roles in the atrocities."<sup>61</sup> He was clear that "the prosecutor must retain the discretion of whom to indict"<sup>62</sup> and that those "most responsible" constituted a "group" of persons.<sup>63</sup> Clearly, the UN understanding was that the category would not be limited only to Duch.
32. By March 2000, the Cambodian government had proposed the wording "those responsible", which broadened the category beyond what the UN had intended, and UN Secretary-General Kofi Annan and UN Legal Counsel Hans Corell both expressed concern to the RGC that the group was now too large. During the final negotiations on this point, neither the RGC nor the UN sought to make an express limitation of the category to Duch.<sup>64</sup> Instead, on 2 January 2001, the Cambodian National Assembly adopted the ECCC Law with the wording "those who were most responsible".<sup>65</sup> Notably, Scheffer recalled:

[H]aving been part of the negotiations for years, I know of no concession by U.N. negotiators to interpret the personal jurisdiction language so as to limit the suspect pool to only five specific individuals.<sup>66</sup>

33. It would be reasonable to assume that Cambodian lawmakers and UN negotiators recognised the basic human rights norm, reflected in the Universal Declaration of Human

<sup>60</sup> Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, UN Doc. No. A/53/850, S/1999/231, 16 Mar 1999 ("UN Group of Experts Report"), paras 109-110 (underlined emphasis added).

<sup>61</sup> **D378/5.1.205** Scheffer D.J., *The Negotiating History of the ECCC's Personal Jurisdiction*, Cambodia Tribunal Monitor, 22 May 2011 ("Scheffer article"), EN 01595693 (emphasis removed and added). See also EN 01595690-91.

<sup>62</sup> **D378/5.1.205** Scheffer article, EN 01595691.

<sup>63</sup> **D378/5.1.205** Scheffer article, EN 01595692 ["Both groups—the group of senior leaders and the group of those most responsible for the crimes—were to fall within the tribunal's personal jurisdiction. I do not recall a single suggestion otherwise."], EN 01595692, 94 [referring to the "two-group formula"].

<sup>64</sup> **D378/5.1.205** Scheffer article, EN 01595693-96.

<sup>65</sup> **D378/5.1.205** Scheffer article, EN 01595696.

<sup>66</sup> **D378/5.1.205** Scheffer article, EN 01595698 [regarding Duch, who had already been convicted in 2010, and Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith who had been indicted at the time].



004/07-09-2009-ECCC/OCIJ (PTC61)

Rights,<sup>67</sup> the International Covenant on Civil and Political Rights,<sup>68</sup> and regional human rights instruments,<sup>69</sup> and enshrined in Article 31 of the Constitution of the Kingdom of Cambodia<sup>70</sup> that all persons are equal before the law. Agreeing that “those who were most responsible” referred only to Duch as a matter of law, regardless of what evidence showed about the relative responsibility of other persons, would not have treated Duch and other persons equally and would have violated these principles and protections.

34. In sum, the ECCC negotiating history shows that the intent of both the RGC and the UN at the time of the ECCC Agreement was that “those who were most responsible” was an open category whose membership would only be determined by the Co-Prosecutors and Judges of the ECCC based on the totality of the evidence and acting impartially and independently.<sup>71</sup> It is clear that neither party intended the interpretation adopted by the Dismissal Order.
35. Having concluded the ECCC Agreement – an international treaty between the RGC and the UN – both parties are bound by its terms<sup>72</sup> including the scope of personal jurisdiction, unless an amendment is made pursuant to Article 2(3) of the ECCC Agreement.<sup>73</sup> Article 2(3) states: “In case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by

---

<sup>67</sup> UDHR, art. 7.

<sup>68</sup> ICCPR, art. 14(1).

<sup>69</sup> See e.g. American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogota, 1948, art. II; African (Banjul) Charter on Human and Peoples' Rights, adopted 27 Jun 1981, entered into force 21 Oct 1986, art. 3(1); Protocol 12 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov 2000, preamble.

<sup>70</sup> The Constitution of the Kingdom of Cambodia, adopted 21 Sep 1993 (“Cambodian Constitution”), art. 31 [“Every Khmer citizen[] shall be equal before the law”].

<sup>71</sup> ECCC Agreement, art. 3(3) [“The judges shall be persons of high moral character, impartiality and integrity [...] They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.”]; ECCC Law, art. 10<sup>new</sup>; Cambodian Constitution, arts 51 [“The Legislative, Executive, and Judicial powers shall be separate.”], 128 (previously art. 109) [“The judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens”], 129-130 (previously arts 110-111); Charter of the Association of Southeast Asian Nations, 20 Nov 2007, preamble, art. 1(7); UN Group of Experts Report, para. 97 [“fair and impartial justice requires independent decisions on whom to indict and to convict free of political pressure”]. See also Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, The Law Association for Asia and the Pacific, 28 Aug 1997, arts 3(a), 4-5; New Delhi Code of Minimum Standards of Judicial Independence, International Bar Association, 22 Oct 1982, art. 16; Basic Principles on the Independence of the Judiciary, endorsed by General Assembly Resolutions 40/32 of 29 Nov 1985 and 40/146 of 13 Dec 1985, paras 1-2.

<sup>72</sup> Vienna Convention, art. 26 [“*Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”]. See also ECCC Agreement, art. 2(2).

<sup>73</sup> Vienna Convention, art. 39 [“A treaty may be amended by agreement between the parties.”]. The *pacta sunt servanda* principle implies the need to act unanimously.

004/07-09-2009-ECCC/OCIJ (PTC61)

consultations between the parties.”<sup>74</sup> This provision makes it clear that any change in matters addressed by the ECCC Agreement (which includes personal jurisdiction) must be approved by *both* parties following a discussion in which *both* parties participate. To date, neither the RGC nor the UN have sought to amend the provision regarding the personal jurisdiction of the ECCC. Accordingly, the scope of personal jurisdiction set out in the ECCC Agreement and ECCC Law defines the personal jurisdiction of the ECCC and constitutes the law that the Pre-Trial Chamber must apply in this appeal.

36. The Dismissal Order’s conclusion that Duch was the only person falling within the category of “those who were most responsible” violated the ECCC Agreement and ECCC Law and was a legal error that invalidated the Dismissal Order. This error was fundamentally determinative of the decision that the ECCC lacks personal jurisdiction over Yim Tith.

**B. THE DISMISSAL ORDER ERRED IN LAW BY REPEATEDLY FAILING TO RENDER A REASONED DECISION CONCERNING CRIMES COMMITTED AND YIM TITH’S LIKELY CRIMINAL LIABILITY**

37. The Dismissal Order contained multiple failures to render a reasoned decision on the commission of crimes and the likelihood of Yim Tith’s criminal responsibility. The omission of these crucial elements that are required for a proper determination of personal jurisdiction amount to errors of law which, individually or together, invalidated the Dismissal Order.

**1. Lack of legal findings regarding whether crimes within the jurisdiction of the ECCC were committed and whether Yim Tith is likely responsible for any such crimes**

38. The Dismissal Order erred in law by not comprehensively reviewing the evidence on the case file and not reaching the factual findings that would follow from a thorough evidentiary analysis. Even where it did contain a partial review of the evidence and limited factual findings, the Dismissal Order erred in law by “not [...] consider[ing] the legal characterization of crimes based on facts nor the inclusion of modes of liability”<sup>75</sup> when finding that Yim Tith was not within the ECCC’s personal jurisdiction. The Supreme Court Chamber, Trial Chamber, and Pre-Trial Chamber, as well as the closing

<sup>74</sup> ECCC Agreement, art. 2(3).

<sup>75</sup> **D381** Dismissal Order, para. 4.

004/07-09-2009-ECCC/OCIJ (PTC61)

orders in Cases 001 and 004/1 and dismissal orders in Cases 003 and 004/2 have held that legal characterisation of factual findings on crimes and the legal characterisation of conduct in terms of modes of liability are legally necessary to evaluate the gravity of the crimes charged and the level of responsibility of the suspect for the personal jurisdiction assessment of “those who were most responsible”.<sup>76</sup> As a result of the Dismissal Order’s deliberate failure not to make the requisite legal findings for its assessment of personal jurisdiction, it committed a legal error that invalidated the Dismissal Order.

39. The Dismissal Order made (limited) factual findings as to Yim Tith’s positions of power and authority, and *separately* made (limited) findings demonstrating the commission of crimes in locations that Yim Tith must have been responsible for due to his positions of power and authority. However, the Dismissal Order failed both to legally classify the conduct that amounted to crimes and to legally characterise Yim Tith’s responsibility for that conduct.
40. As an example of factual findings without the necessary legal findings, the Dismissal Order found that (i) Wat Pratheat Security Centre was a Kirivong district-level facility;<sup>77</sup> (ii) Yim Tith was the Kirivong District Secretary between 1976 and 1977;<sup>78</sup> (iii) prisoners at the site were “brutally tortured”, including by being suffocated and whipped;<sup>79</sup> and (iv) prisoners died at the security centre from both executions and the inhumane conditions that prevailed.<sup>80</sup> The Dismissal Order acknowledged a witness’s evidence that “if a large number of people were for execution, [Wat Pratheat officials] would request assistance from the district”; that “tall piles of human bones and skulls” were discovered at the site following the fall of the Khmer Rouge regime; and that the total number of people killed

<sup>76</sup> Supreme Court Chamber: Case 001-**F28** *Duch* AJ, paras 71, 80. Trial Chamber: Case 001-**E188** *Duch* TJ, para. 22. Pre-Trial Chamber: Case 001-**D99/3/42** Decision on Duch Closing Order Appeal, para. 115; Case 004/1-**D308/3/1/20** *Im Chaem* PTC Closing Order Considerations, para. 26 (unanimous finding). Co-Investigating Judges: Case 004/1-**D308/3** *Im Chaem* Closing Order, fn. 735 [“since the present closing order dismisses the case only due to the lack of personal jurisdiction before the ECCC [...], he [the National Co-Investigating Judge] accepts that apart from a description of the facts related to the participation of the suspect and the gravity of the alleged crimes, their brief legal characterisation is necessary, albeit purely for the determination of the question of whether they would have fallen under the ECCC’s subject-matter jurisdiction at all and thus be capable of forming part of the determination of the gravity of the alleged crimes in the context of personal jurisdiction.”]; Case 004/2-**D359** *Ao An* Dismissal Order, paras 424-425; Case 003-**D266** *Meas Muth* Dismissal Order, paras 3, 365-367. *See also* *Lukić & Lukić* Referral Decision, paras 26-28.

<sup>77</sup> **D381** Dismissal Order, para. 190.

<sup>78</sup> **D381** Dismissal Order, paras 185, 187, 667.

<sup>79</sup> **D381** Dismissal Order, para. 197.

<sup>80</sup> **D381** Dismissal Order, para. 198.

004/07-09-2009-ECCC/OCIJ (PTC61)

may have been between 5,000 and 6,000.<sup>81</sup> The Dismissal Order did *not*, however, contain any legal conclusions as to whether these facts amounted to the crimes against humanity of imprisonment, torture, murder, extermination, or other inhumane acts such as inhumane treatment, and if so, whether Yim Tith is responsible for these crimes.

41. Likewise, the Dismissal Order found that in Bakan District, “in early 1978 they [Khmer Rouge] killed all the Khmer Krom people”, including children, the sick, and the elderly, at Tuol Seh Nhauv Execution Site; that Yim Tith was announced as the Northwest Zone Secretary at a meeting in Battambang in March 1978,<sup>82</sup> demonstrating his *de facto* power and authority; that “mass killings of Khmer Krom people occurred in Rumlech Commune and Khnar Totueng Commune”; and that “the victims were killed and buried in the pits at [Tuol] Seh Nhauv and Prey Krabau”,<sup>83</sup> but declined to say whether these facts constituted genocide and, if so, whether Yim Tith is likely criminally responsible.<sup>84</sup>
42. The Dismissal Order made similar findings regarding Yim Tith’s *de jure* and demonstrable *de facto* positions and authority in the Southwest and Northwest Zones,<sup>85</sup> as well as findings to demonstrate that the following crimes against humanity occurred at locations which Yim Tith was responsible for, given his positions and authority:<sup>86</sup>

<sup>81</sup> **D381** Dismissal Order, paras 198-199.

<sup>82</sup> **D381** Dismissal Order, paras 137, 328.

<sup>83</sup> **D381** Dismissal Order, paras 359, 367.

<sup>84</sup> The Dismissal Order observed in passing that Yim Tith was not seen at some of these sites. *See e.g.* **D381** Dismissal Order, paras 363, 371. The most that can be said for this observation is that it is of, at best, some marginal relevance to Yim Tith’s criminal liability for the events there. It is self-evident that Yim Tith’s presence is not required at a crime site for him to be liable for crimes committed there pursuant to any mode of liability other than direct commission. An observation that Yim Tith was never seen at a particular location was not a reasoned analysis of whether he is liable for crimes committed there under the modes of liability charged in this case, nor even to the degree of his contribution to such crimes. *See also, infra*, section IV(F)(6).

<sup>85</sup> Southwest Zone: **D381** Dismissal Order, paras 185, 187, 667, 680. Northwest Zone: **D381** Dismissal Order, paras 147, 161, 164, 669, 679-680. The ICP notes that the Dismissal Order also found that Im Chaem was one of the members of the Sector 13 Committee, despite having held the opposite in Case 004/1. *See* **D381** Dismissal Order, para. 100; Case-004/1-**D308/3/1/20** *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, para. 302.

<sup>86</sup> A summary of the Dismissal Order’s factual findings that should have been characterised as crimes is at **Annex 2**. The ICP maintains that the evidence on the case file shows that Yim Tith is responsible for *all* of the crimes described in the former ICP’s final submission, including genocide of the Khmer Krom, and not just those reflected in the Dismissal Order.

004/07-09-2009-ECCC/OCIJ (PTC61)

murder,<sup>87</sup> extermination,<sup>88</sup> enslavement,<sup>89</sup> deportation,<sup>90</sup> imprisonment,<sup>91</sup> torture,<sup>92</sup> persecution (on political<sup>93</sup> or racial<sup>94</sup> grounds), and other inhumane acts (forced transfer,<sup>95</sup> inhumane treatment,<sup>96</sup> forced marriages,<sup>97</sup> rapes through forced consummation,<sup>98</sup> and enforced disappearances).<sup>99</sup> Moreover, the Dismissal Order failed to explain why thousands of victims, other than those who “died or were killed”, were excluded from consideration in the section entitled “Number of Victims”.<sup>100</sup>

<sup>87</sup> See e.g. **D381** Dismissal Order, paras 208, 211-212 [Kraing Ta Chan Security Centre (“SC”)], 311-312, 317 [Khngang Kou SC], 359-360 [Tuol Seh Nhauv Execution Site (“ES”)], 388 [Wat Samdech SC], 398-400 [Kampong Prieng Commune including Kach Roteh SC], 419, 421-422 [Veal Bak Chunching ES].

<sup>88</sup> See e.g. **D381** Dismissal Order, paras 358-360 [“A civil party applicant stated that over 200 Khmer Krom families or 1,000 Khmer Krom people were sent to Tuol Seh Nhauv. [...] [I]n early 1978 they killed all the Khmer Krom people. [...] In one meeting, the Khmer Rouge announced that 3,000 Vietnamese enemies had been destroyed.”], 412, 414 [“In 1978, 500 people from Svay Rieng [...] detained at Security Office No. 8. [...] Svay Rieng people were all killed after they had been detained for three nights. One night all the prisoners in the whole security office were killed. [...] About 10 to 15 days before the Vietnamese arrived, approximately, 300 prisoners were killed at Prison No. 8.”], 249-250, 252-253 [Wat Ang Srey Muny SC and Prey Sokhon ES].

<sup>89</sup> See e.g. **D381** Dismissal Order, paras 282-283, 285 [“many people were arrested and sent to work at Kang Hort Dam worksite. Whilst people were working, soldiers armed with rifles stood guard”. “[I]f anyone dared to complain, that person would be arrested and sent to Banan Detention Centre.” “If a person was lazy, they would be reported”], 269 [Thipakdei Cooperative].

<sup>90</sup> See e.g. **D381** Dismissal Order, paras 218 [Preal Village ES], 233 [Slaeng Village Forest ES].

<sup>91</sup> E.g., **D381** Dismissal Order, paras 387 [Wat Samdech SC], 194-195 [Wat Pratheath SC], 273 [Thipakdei SC in Thipakdei Cooperative], 309, 313 [Khngang Kou SC].

<sup>92</sup> See e.g. **D381** Dismissal Order, paras 197 [“prisoners at Wat Pratheath Security Office were brutally tortured.”], 311 [At Khngang Kou SC “[p]risoners were tortured every day”.], 342 [Phum Veal SC], 397 [Kampong Prieng Commune].

<sup>93</sup> See e.g. **D381** Dismissal Order, paras 207-208 [Khmer Krom, members of the former Lon Nol regime, and 17 April people at Kraing Ta Chan SC], 257-260 [Northwest cadres, those associated with the Vietnamese, former Lon Nol soldiers, and their families at Koas Krala SC], 412 [people from the East Zone and members of the former Lon Nol regime and their families at Prison No. 8], 279, 289, 283-284 [Northwest Zone cadres at Kanghat Dam worksite], 388-389 [Wat Samdech SC], 419, 421 [Veal Bak Chunching ES].

<sup>94</sup> See e.g. **D381** Dismissal Order, paras 367 [“Mass killings of Khmer Krom people occurred in Rumlech commune, and Khnar Totueng commune, and the victims were [...] buried in the pits at [Tuol] Seh Nhauv and Prey Krabau.”], 207, 212 [Kraing Ta Chan SC], 228-229 [Wat Angkun ES], 327-329 [Kampong Kol sugary factory], 342 [Phum Veal SC].

<sup>95</sup> See e.g. **D381** Dismissal Order, paras 206 [Kraing Ta Chan SC], 233 [Slaeng Village Forest ES], 249-250 [Wat Ang Srei Muny SC], 218 [Preal Village ES].

<sup>96</sup> See e.g. **D381** Dismissal Order, paras 350 [Svay Chrum SC], 247-248 [Wat Ang Srei Muni SC], 269 [Thipakdei Cooperative], 296, 298 [Banan SC], 382 [Wat Kirirum SC], 413 [Prison No. 8].

<sup>97</sup> See e.g. **D381** Dismissal Order, paras 675, 679 [“facts show Yim Tith’s involvement with [...] forced marriage in Samlout district. [...] This information is accurate and is corroborated”], 407 [in Reang Kesei Commune “forced marriages were organised”].

<sup>98</sup> See e.g. **D381** Dismissal Order, paras 407 [in Reang Kesei Commune “[t]here was an announcement to [...] those who were to get married that ‘it is imperative to follow the Party line. No one could refuse it’; soldiers walked around to spy on the people.”], 331 [at Kampong Kol sugar factory “a forced marriage ceremony [...] and those couples were led to their respective rooms, which were guarded by militiamen on the wedding night.”].

<sup>99</sup> See e.g. **D381** Dismissal Order, paras 219 [Preal Village ES], 234 [Slaeng Village Forest ES], 283-284 [Kanghat Dam worksite], 380 [Wat Kirirum SC].

<sup>100</sup> **D381** Dismissal Order, para. 589.

004/07-09-2009-ECCC/OCIJ (PTC61)

43. Had the Dismissal Order made the necessary legal conclusions that follow from its (limited) factual findings, they would have had a fundamentally determinative impact on the question of personal jurisdiction. If, for example, the Dismissal Order concluded that Yim Tith was likely responsible for genocide, or for the extermination of potentially thousands of victims, a reasoned explanation would be required as to why, despite these conclusions, Yim Tith is not among “those who were most responsible” for DK crimes. If, on the other hand, the Dismissal Order was of the view that these facts do not show that extermination or genocide were committed, or do not show that Yim Tith was responsible, a detailed, reasoned explanation would equally be required as to why that was the case. Instead, the Dismissal Order adopted an approach of simply surveying a portion of the relevant evidence on a topic, failing to reach any reasoned conclusions, and then moving on to the subsequent section with a similarly unreasoned approach affecting every single criminal allegation in the case. This lack of reasoning amounted to a legal error that invalidated the Dismissal Order and was fundamentally determinative of the decision that the ECCC lacks personal jurisdiction over Yim Tith.

**2. Failure to assess evidence and make findings regarding Yim Tith’s *de facto* position and power**

44. The Dismissal Order erred in law by ignoring Yim Tith’s *de facto* position and power in its assessment of personal jurisdiction despite (i) the heavy reliance that the dismissal orders in Cases 003 and 004/2 placed on the lack of *de facto* authority to conclude that the Court lacked personal jurisdiction in those cases, and (ii) making findings demonstrating the significant nature of Yim Tith’s *de facto* power. This error invalidated the Dismissal Order.

45. First, the Case 004/2 Dismissal Order relied very heavily on the fact that Ao An’s crimes did not exceed his official authority in reaching its conclusion on personal jurisdiction.<sup>101</sup> The Case 003 Dismissal Order similarly emphasised the importance of acting beyond official authority, stating that “the jurisdiction of the ECCC is limited, referring only to [...] those who were most responsible for participating actively in the commission of crimes [...] *through their de facto power and influence beyond their official authority.*”<sup>102</sup> While the ICP does not agree that the ECCC’s jurisdiction is limited only to persons who

<sup>101</sup> Case 004/2-D359 *Ao An* Dismissal Order, paras 494-510.

<sup>102</sup> Case 003-D266 *Meas Muth* Dismissal Order, para. 405 (emphasis added).

004/07-09-2009-ECCC/OCIJ (PTC61)

exercise *de facto* power and influence beyond their official authority, Yim Tith certainly qualifies as such a person. Therefore, even on the erroneous and unduly narrow view of jurisdiction in the dismissal orders in Cases 004/2 and 003, Yim Tith clearly would fall within the personal jurisdiction of the ECCC.

46. Second, the evidence in this case shows that Yim Tith's *de facto* power in the Northwest Zone far exceeded his formal power there – a fact that was central to the former ICP's arguments in his final submission on Yim Tith's responsibility as a DK leader:

Well before he was formally appointed as Sector 1 Secretary and Northwest Zone Deputy Secretary, however, Yim Tith was a powerful *de facto* leader in the Northwest Zone. In this, he was similar to his sponsor and protector Ta Mok, who, although he was leading the takeover of the Northwest Zone by Southwest Zone cadres, also had no formal position in the Northwest Zone until the arrest of Ros Nhim[.] [...] The earliest evidence of Yim Tith exercising an important *de facto* leadership role in the Northwest Zone is from late 1976 or early 1977[.]<sup>103</sup>

47. The Dismissal Order ignored this issue entirely, focusing solely on Yim Tith's formal positions in its assessment of personal jurisdiction.<sup>104</sup> But like Ta Mok,<sup>105</sup> Yim Tith's real power far exceeded his formal authority. In failing to take account of this fact, the Dismissal Order drastically underestimated Yim Tith's responsibility for the CPK's criminal campaign.
48. The Dismissal Order found that Yim Tith introduced himself as the Sector 1 Committee Member at a meeting in August or September of 1977<sup>106</sup> – about nine months before he was appointed to any formal position in the sector. The Dismissal Order also found that, at a large meeting of approximately 800 cadres at Kanhhat Dam, it was announced that Yim Tith had come to help lead Sector 1, and that Yim Tith then spoke about attacks by hidden enemies.<sup>107</sup> The evidence relied on by the Dismissal Order in this regard shows

<sup>103</sup> **D378/2** International Co-Prosecutor's Rule 66 Final Submission Against Yim Tith, 4 Jun 2018 ("ICP Final Submission"), paras 48-49.

<sup>104</sup> **D381** Dismissal Order, paras 147, 161, 164, 185, 187, 667-669, 679.

<sup>105</sup> The Dismissal Order acknowledged that "Ta Mok came to control the Northwest Zone in January 1977 before Ros Nhim was arrested" and that Ta Mok did not officially become the Northwest Zone secretary until Ruos Nhim was arrested approximately a year and a half later. It found that during this period, Ta Mok appointed Southwest Zone cadres to replace incumbent cadres in the administrative structure of the Northwest Zone, despite not having any formal authority to do so. He also ordered arrests to be carried out in the Northwest Zone in this period. **D381** Dismissal Order, paras 133, 139-140, 145, 161, 666.

<sup>106</sup> **D381** Dismissal Order, para. 289 *citing* **D219/368** Chhoeung Bean WRI, A50. Although the Dismissal Order stated in para. 289 that "Ta Tith introduced himself as the Sector 1 Committee chairperson", the underlying evidence it cited did not state this.

<sup>107</sup> **D381** Dismissal Order, para. 289.

004/07-09-2009-ECCC/OCIJ (PTC61)

that the announcement that Yim Tith was going to help lead Sector 1 was made by Sector 1 Secretary Ta Pet himself<sup>108</sup> and, therefore, necessarily before Yim Tith had any formal position in the Northwest Zone (since Yim Tith was not formally appointed to any position until Ta Pet's arrest).

49. In the context of the DK's rigid and controlling hierarchy,<sup>109</sup> the fact that Yim Tith could publicly introduce himself as the Sector 1 Committee Member despite having no formal role in the sector is remarkable. Such public usurpation of the official order would ordinarily have resulted in swift arrest and execution, given the CPK's intolerance for anything that even hinted at rebellion or dissent. Equally unusual is the fact that the duly-appointed Sector 1 Secretary would publicly acknowledge that someone with no formal authority in the sector was there "to help lead Sector 1."<sup>110</sup> These events show that the ordinary rules did not apply to Yim Tith because he was under the protection of his brother-in-law Ta Mok<sup>111</sup> and Yim Tith was untouchable since Ta Mok controlled the Northwest Zone (which the Dismissal Order found despite, like Yim Tith, having no formal position there).<sup>112</sup> The duly appointed authorities of Sector 1, associated with the increasingly marginalised Ruos Nhim, had to accept Yim Tith's public trampling of their authority and acquiesce in his power "to help lead Sector 1."<sup>113</sup>
50. As the Dismissal Order acknowledged, Yim Tith was able "to take charge of Kang Hort Dam worksite in November or December 1977"<sup>114</sup> despite the fact that he still had no formal position in the sector. The Dismissal Order also acknowledged other evidence of Yim Tith's *de facto* authority: it noted that an announcement was made in a meeting following Ruos Nhim's arrest that "Ta Tith would become Sector Secretary and thereafter

<sup>108</sup> **D381** Dismissal Order, fn. 1137 citing **D219/85** Vy Phan WRI, A3 ["Ta Pet announced at the meeting that Ta Tith, who was from the Southwest Zone, had come to help govern Sector 1. At that time, there was a mass assembly attended by approximately 700 to 800 participants including ordinary people and the village, commune, and district chairpersons. That assembly was held at Kanghat Dam worksite."].

<sup>109</sup> **D381** Dismissal Order, paras 95, 99, 656-664, 680. See also paras 80, 94, 96, 100, 105-106.

<sup>110</sup> **D381** Dismissal Order, para. 289.

<sup>111</sup> See e.g. **D219/835** Nop Ngim WRI, A127 ["Ta Mok was the older brother of Ta Tith's wife."]; **D118/181** Riel Son WRI, A88 ["They were close like father and son."]; **D219/956** Sao Chobb WRI, A15, 36 ["He was related to Ta Mok [...]. He accompanied Ta Mok. [...] He went everywhere with Ta Mok, which means that he was in Ta Mok['s] network."]; **D219/19** Sann Lorn WRI, A983 ["They always reported to each other, sharing information mutually."]; **D118/285** Nop Ngim WRI, A16 ["both of them got along well with each other."]; **D219/488** Moeng Vet WRI, A63; **D219/844.1.4** Long Dany Notes from DC-Cam's Promoting Accountability Project Field Trip, EN 01336628.

<sup>112</sup> **D381** Dismissal Order, para. 133.

<sup>113</sup> **D381** Dismissal Order, para. 289.

<sup>114</sup> **D381** Dismissal Order, para. 290.



004/07-09-2009-ECCC/OCIJ (PTC61)

*control* the Northwest Zone as well”<sup>115</sup> and that at “a general assembly in Battambang University participated by only bodyguards and the military [...] it was announced that Ta Tith was the Zone Chief.”<sup>116</sup> The fact that Yim Tith was perceived as, and introduced as, the Northwest Zone Secretary is highly relevant to his level of responsibility for the crimes that happened there regardless of whether he formally held the post for a period of time or not, because it demonstrates the degree of his *de facto* authority in the area. Whether he was formally the zone secretary, or merely the deputy secretary acting pursuant to Ta Mok’s sweeping delegation of powers, he was powerful enough to be perceived as the zone secretary. At a minimum, he was the second most powerful person in the Northwest Zone. This is especially significant given the Dismissal Order’s findings that Ta Mok was simultaneously serving as the zone secretary for three<sup>117</sup> and then later four<sup>118</sup> zones, representing more than half of the DK territory, in addition to serving on the Standing Committee.<sup>119</sup> This would obviously have been an impossible workload for a single individual. So, regardless of whether Yim Tith was formally appointed as zone secretary or not, the evidence that he was perceived as such clearly demonstrates that, at the very least, he was frequently required to act in that role as a practical matter.

51. The Dismissal Order also acknowledged that multiple witnesses said Yim Tith was Sector 13 Secretary in 1978,<sup>120</sup> but erroneously dismissed this *not* on the basis of the evidence, but solely because Yim Tith had positions of authority in the Northwest Zone at this time.<sup>121</sup> Indeed, additional witnesses other than the persons that the Dismissal Order had identified gave evidence about Yim Tith’s presence and authority in the Southwest Zone right up until the end of the DK regime.<sup>122</sup>

<sup>115</sup> **D381** Dismissal Order, para. 137 (emphasis added).

<sup>116</sup> **D381** Dismissal Order, para. 137. *See also* para. 328.

<sup>117</sup> **D381** Dismissal Order, para. 132, 137.

<sup>118</sup> **D381** Dismissal Order, para. 168 [“*Ta Mok* was appointed as the Northwest Zone Secretary while he was also the Southwest Zone Secretary. After the arrest of *Se, Ta Mok* became Secretary of four zones namely; the Southwest Zone, the West Zone, Northwest Zone and the new North Zone.”].

<sup>119</sup> **D381** Dismissal Order, para. 65 [“The Standing Committee of the Communist Party of Cambodia consisted of [...] *Ta Mok*”].

<sup>120</sup> **D381** Dismissal Order, para. 668 referring to para. 179 which cites to **D118/34** Nut Neou WRI, p. 3; **D118/92** Nop Nan WRI, pp. 6-7; and **D118/259** Pech Chim WRI, pp 20-21. *See also* **D381** Dismissal Order, para. 173, *citing* to **D119/85** Moeng Vet WRI, p. 10; and **D118/34** Nut Neou WRI, p. 3.

<sup>121</sup> **D381** Dismissal Order, para. 668.

<sup>122</sup> *See e.g.* **D118/305** Top Phan WRI, A101 [“Q: Are you sure that you saw *Ta Tith* all the way until the end of the Khmer Rouge regime? A101: Yes”]; **D219/55** Hor Yan WRI, A42 [“I saw *Ta Tith* while the Khmer Rouge regime was about to collapse.”]; **D219/189** Soeum Chhoeun WRI, A27 [In the last few months before the Khmer Rouge regime collapsed in 1978, “I did not see him. But I know that he still administered Kiri Vong District.”].

004/07-09-2009-ECCC/OCIJ (PTC61)

52. This evidence – most of which the Dismissal Order acknowledged – is just a fraction of the totality of the evidence regarding Yim Tith’s *de facto* power and authority.<sup>123</sup> In the context of the rigid and coercive DK regime, these actions demonstrate a staggering level of *de facto* authority and immunity from the normal rules.
53. Further, the Dismissal Order, in its concluding paragraphs, emphasised that “[i]n particular, [Yim Tith] held a position in the Northwest Zone for only a short period of time”,<sup>124</sup> a clear reference to its finding that Yim Tith served as Sector 1 Secretary and Northwest Zone Committee Member from August 1978 through the end of the DK regime,<sup>125</sup> a period of just five months. But the Dismissal Order’s “particular” reliance on this fact is completely unjustified because Yim Tith’s formal appointment had very little to do with his power to contribute to crimes. Yim Tith was exercising significant *de facto* power and participating in crimes in the Northwest Zone long before being formally appointed to any position there.
54. In disregarding this *de facto* authority, the Dismissal Order erred in law by failing to consider the most important aspect of Yim Tith’s responsibility, which invalidated the Dismissal Order and was fundamentally determinative of the conclusion on personal jurisdiction.

### 3. Improperly excluding certain crime sites and events from consideration

55. The Dismissal Order erred in law by placing Tuol Mtes, Tuol Andaet, and forced

<sup>123</sup> For example, Yim Tith (i) significantly contributed to the CPK’s enemy policy through the identification and elimination of perceived CPK enemies in the Northwest Zone, *see* **D219/85** Vy Phann WRI, A3, 5 [Yim Tith spoke at a meeting around November 1977 to 700 to 800 people at Kanhhat Dam where he said that “Yuong,” CIA, and KGB were hiding among them and instructed that all information about suspected enemies be reported to upper Angkar.] (*note*: Although the witness said this meeting occurred in November 1978, it is far more likely that it occurred in November 1977 for the reasons set out in **D378/2** ICP Final Submission, para. 58.) and **D378/2** ICP Final Submission, paras 69-70 *citing* **D219/982** Sao Chobb WRI, A26-33 [Yim Tith instructed members of the military in Koas Krala District to search and kill “CIA agents and the Vietnamese,” which resulted in “thousands of people” killed in 1976 and 1977.]; (ii) contributed to the CPK’s forced labour policy in late 1976 or the first half of 1977, when he participated in a training session for hundreds of cadres and workers at Kanhhat Dam and instructed the workers there to keep working hard, *see* **D378/2** ICP Final Submission, paras 97-100 *citing* **D219/956** Sao Chobb WRI, A13-16, 22; **D219/981** Sao Chobb WRI, A3-5, 16-17, 9, 37-38, 58; **D219/980** Sao Chobb WRI, A22-23; **D219/763** Sao Chobb WRI, A65-71; and (iii) worked closely with the incumbent Sector 1 Secretary, Ta Pet, in the period before Pet’s arrest and gathered information about Northwest Zone cadres and about the work at Kanhhat Dam, information that, in context, was used to further criminal policies, *see* **D378/2** ICP Final Submission, para. 101 *citing* **D219/368** Chhoeung Bean WRI, A33-34; **D219/430** Chhoeung Bean WRI, A86-90, 94, 96; **D219/292** Lek Piv WRI, A17, 19; **D219/654** Sok Cheat WRI, A6, 22-23.

<sup>124</sup> **D381** Dismissal Order, para. 683.

<sup>125</sup> **D381** Dismissal Order, para. 669.

004/07-09-2009-ECCC/OCIJ (PTC61)

marriages in Kampong Prieng Commune outside the scope of Case 004 and, therefore, not considering these relevant to its assessment of personal jurisdiction.<sup>126</sup> The CIJs were validly seised with facts relating to these crime sites and events,<sup>127</sup> and there was no decision from either the CIJs or Pre-Trial Chamber to exclude an investigation into those facts.<sup>128</sup> The Dismissal Order excluded these crime sites and events from consideration of personal jurisdiction by finding, without sufficient reasoning, that “not much related to Yim Tith”.<sup>129</sup>

56. There are three legal bases to exclude facts from an investigation according to the Internal Rules but none of these were applicable. Rule 66*bis* was inapplicable because the Rule required the CIJs (or single CIJ) to notify the parties of the details of their intention to exclude the facts, including how the remaining facts are representative of the scope of the Case 004 introductory and supplementary submissions, *prior* to notifying the conclusion of the investigation.<sup>130</sup> Rule 76 was inapplicable because no applications for annulment were submitted to the Pre-Trial Chamber prior to the issuance of a closing order.<sup>131</sup> While

<sup>126</sup> In the Dismissal Order, Tuol Mtes, Tuol Andaet, and forced marriages in Sangkae District, which included those at Kampong Prieng Commune, are situated under the heading entitled, in the Khmer version, “ខ. អង្គហេតុមិនដាក់ឱ្យស្ថិតក្រោមការពិនិត្យ”. This has been translated in the revised official English version to “2.2 Factual Findings for Dismissal of Charges”, or might be better translated to “2.2 Facts Excluded from the Charges”. See **D381** Dismissal Order, EN 01628696-97, para. 584, and *reiterated* at paras 589, 674. Note: Although para. 584 also referred to marriages in Reang Kerei Commune, Sangkae District, the Dismissal Order considered those facts to be within the scope of Case 004. See **D381** Dismissal Order, EN 01628695, paras 406-407.

<sup>127</sup> See **D1** Introductory Submission, paras 54, 57-59 [regarding purges in the Northwest Zone]; **D65** Supplementary Submission Regarding Sector 1 and Khmer Krom, paras 5-8 [regarding Koas Krala District, including Tuol Mtes worksite]; **D191** Supplementary Submission Regarding Forced Marriage and SGBV, paras 4-6 [regarding forced marriages in Sangkae District], para. 12 [regarding crimes at Kanghat Dam]; **D272/1** Response to Forwarding Order and Supplementary Submission Regarding Forced Marriage, paras 4-6 [clarifying the boundaries of Sangkae District and locations it encompassed]. The PTC has held that the CIJs are seised of “[t]he circumstances surrounding the acts mentioned in the Introductory or a Supplementary Submission”, which includes the locations where the alleged facts took place or which were connected to the alleged facts. See *e.g.* Case 001-**D99/3/42** Decision on Duch Closing Order Appeal, para. 35; Case 003-**D134/1/10** Decision on [Redacted] Appeal Against Co-Investigating Judge Harmon’s Decision on [Redacted] Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, Opinion of the International Judges on the Application for Annulment Concerning [Redacted], 23 Dec 2015, paras 14-15.

<sup>128</sup> See Internal Rules 66*bis* [entitled “Reduction of the Scope of the Judicial Investigation”], 76 [entitled “Applications Concerning Procedural Defects”].

<sup>129</sup> **D381** Dismissal Order, para. 674. See also para. 589 of the Dismissal Order, which, in the Khmer version, “មិនមានភស្តុតាងច្រើនពាក់ព័ន្ធនឹងជនត្រូវចោទ” has been translated in the revised official English version to “insignificant evidence related to the charged person”, or might be better translated to “not much evidence related to the accused”.

<sup>130</sup> Internal Rules 66*bis* (2), 66*bis* (1).

<sup>131</sup> **D361/4/1/10** Decision on Yim Tith’s Appeal Against the Decision on Yim Tith’s Request for Adequate

004/07-09-2009-ECCC/OCIJ (PTC61)

Rule 67 provides for the issuance of a dismissal order if, *inter alia*, “[t]here is not sufficient evidence against the Charged Person”,<sup>132</sup> the Dismissal Order’s assertion that “not much related to Yim Tith”<sup>133</sup> was in itself insufficient reasoning.

57. Moreover, the Dismissal Order’s assertion was contradicted by other findings in the Dismissal Order that demonstrated there *is* sufficient evidence to attribute crimes at the sites and events to Yim Tith. The Dismissal Order found that (i) Tuol Mtes and Tuol Andaet were in Sector 1, and Kampong Prieng Commune was in Sector 4;<sup>134</sup> (ii) Yim Tith was the Sector 1 Secretary from August 1978 and became the Northwest Zone Committee Member at some point in 1978;<sup>135</sup> and (iii) despite having no formal role in the Northwest Zone at the time, Yim Tith introduced himself as the Sector 1 Committee Member at a meeting in August or September 1977.<sup>136</sup> These findings therefore demonstrated that Yim Tith was in a position of authority over the impugned crime sites and events during the relevant period.
58. The Dismissal Order’s legal error in erroneously excluding Tuol Mtes, Tuol Andaet, and forced marriages in Kampong Prieng Commune from Case 004 resulted in the failure to consider the crimes committed at these locations when assessing personal jurisdiction.<sup>137</sup> This legal error, together with other legal errors, invalidated the Dismissal Order and was fundamentally determinative of the decision that the ECCC lacks personal jurisdiction over Yim Tith.

#### **4. Failure to consider Yim Tith’s likely responsibility for genocide in the assessment of personal jurisdiction**

59. The Dismissal Order erred in law by failing to consider Yim Tith’s likely responsibility for genocide of the Khmer Krom despite making extensive factual findings that (i) showed the killing of Khmer Krom at locations under Yim Tith’s authority and (ii) demonstrated Yim Tith’s specific intent to destroy the Khmer Krom (who were part of

---

Preparation Time, 13 Nov 2017, para. 21.

<sup>132</sup> Internal Rules 67(3)-(4).

<sup>133</sup> **D381** Dismissal Order, para. 674. *See also* para. 589.

<sup>134</sup> **D381** Dismissal Order, paras 464, 480, 486, 583-584.

<sup>135</sup> **D381** Dismissal Order, paras 679-680, 669, 147 [regarding *de jure* Northwest Zone position held], 147, 669, 680, 164, 161 [regarding *de jure* Sector 1 position held].

<sup>136</sup> **D381** Dismissal Order, para. 289 *citing* **D219/368** Chhoeung Bean WRI, A50. Although the Dismissal Order stated in paragraph 289 that “Ta Tith introduced introduced himself as the Sector 1 Committee chairperson”, the underlying evidence it cited did not state this.

<sup>137</sup> *See* **Annex 2**.

004/07-09-2009-ECCC/OCIJ (PTC61)

the Vietnamese national group), in whole or in part, through killings, deliberate infliction of conditions of life calculated to bring about destruction, and causing serious bodily or mental harm. This erroneous failure invalidated the Dismissal Order.

60. The Dismissal Order's only reference to genocide was its assertion that the "enemies" targeted during the DK era was a broad category to be distinguished from the "racial conflict" resulting in genocide in Rwanda and the "nationalist" conflict that led to genocide in the former Yugoslavia.<sup>138</sup> This is contrary to the Case 002/02 Closing Order, which found that genocide was committed against "people who belonged to the Vietnamese group".<sup>139</sup> The Case 002/02 Closing Order held that "[i]nitially the CPK focused on expelling all Vietnamese people from Cambodian territory",<sup>140</sup> "people who belonged to the Vietnamese group [...] were systematically killed",<sup>141</sup> "[e]vidence of implementation of this policy and reports on mass killings of Vietnamese were communicated from the zones to the Centre",<sup>142</sup> the "killing of Vietnamese civilians [...] was organised as a national policy",<sup>143</sup> and Vietnamese civilians were targeted and killed in Battambang in the Northwest Zone and Takeo in the Southwest Zone.<sup>144</sup> The Case 002/02 Closing Order also referred to the targeting of Khmer Krom minorities,<sup>145</sup> an April 1977 report from Tram Kak District in Sector 13 requesting guidance on the registration of Khmer Krom people,<sup>146</sup> and evidence that Pol Pot sent the "army to Kampuchea Krom [...] with the mission to kill as many men, women and children as possible of the evil race".<sup>147</sup> The Dismissal Order did not explain this change of position from the Case 002 Closing Order, nor elaborate upon why the fact that the Khmer Krom were considered "enemies" meant that they could not also be victims of genocide.

- a) *The Dismissal Order found that Khmer Krom were targeted and killed because they were considered to be Vietnamese*

61. The Dismissal Order found that, from 1975, Khmer Krom were forcibly transferred from

<sup>138</sup> **D381** Dismissal Order, para. 663.

<sup>139</sup> Case 002-**D427** Case 002 Closing Order, paras 1343-1349.

<sup>140</sup> Case 002-**D427** Case 002 Closing Order, para. 794.

<sup>141</sup> Case 002-**D427** Case 002 Closing Order, para. 1343.

<sup>142</sup> Case 002-**D427** Case 002 Closing Order, para. 1346.

<sup>143</sup> Case 002-**D427** Case 002 Closing Order, para. 802.

<sup>144</sup> Case 002-**D427** Case 002 Closing Order, para. 803. *See also* para. 804 [finding Vietnamese people were detained and killed in numerous security centres including Kraing Ta Chan].

<sup>145</sup> Case 002-**D427** Case 002 Closing Order, para. 1468.

<sup>146</sup> Case 002-**D427** Case 002 Closing Order, para. 320.

<sup>147</sup> Case 002-**D427** Case 002 Closing Order, para. 818.

004/07-09-2009-ECCC/OCIJ (PTC61)

Vietnam, detained in Sector 13,<sup>148</sup> and subsequently killed pursuant to CPK policy.<sup>149</sup> It also held that the CPK targeted the Khmer Krom and Vietnamese together,<sup>150</sup> that they conflated the Khmer Krom with the Vietnamese,<sup>151</sup> and that they characterised the Khmer Krom as “Yuon”<sup>152</sup> who had “Yuon heads and Khmer bodies”.<sup>153</sup> Finally, the Dismissal Order held that, like the Vietnamese, the Khmer Krom were identified through their skin colour and accent<sup>154</sup> and targeted as being “enemies”.<sup>155</sup>

62. The Dismissal Order’s failure to even consider that genocide was committed against the Khmer Krom is striking given that the Dismissal Order’s findings mirror the determinations made, beyond reasonable doubt, in the Case 002/02 Trial Judgment. The Trial Chamber held that from late 1975 until late 1976, CPK policy was to expel Vietnamese (who were referred to as “Yuon” and were labelled as an “enemy”)<sup>156</sup> from Cambodia in exchange for Khmer Krom living in Vietnam (who were forcibly moved to locations including Tram Kak District in Sector 13);<sup>157</sup> and that the policy changed in 1977 from expulsion to destruction of the Vietnamese civilian population through killing.<sup>158</sup> The Trial Chamber also held that the Khmer Krom were treated in the same manner as the Vietnamese because they were associated with or considered to be Vietnamese;<sup>159</sup> that the Khmer Krom were identified by their accents and dialects;<sup>160</sup> and that Khmer Krom were, like the Vietnamese, targeted matrilineally<sup>161</sup> and killed.<sup>162</sup>
63. Additionally, the Trial Chamber made various findings relating to the treatment of Khmer

<sup>148</sup> The Dismissal Order found that Khmer Krom who were taken from Vietnam were held at Preal Pagoda as late as 1978. *See* **D381** Dismissal Order, paras 207, 218-219.

<sup>149</sup> **D381** Dismissal Order, para. 221. *See also* paras 235-236, 359-360, 219-220, 252, 405, 408, 366-368, 212, 343, 228, 367, 229, 369.

<sup>150</sup> **D381** Dismissal Order, paras 328, 342, 405, 329, 235, 328, 358.

<sup>151</sup> **D381** Dismissal Order, paras 135, 358, 328.

<sup>152</sup> **D381** Dismissal Order, para. 207.

<sup>153</sup> **D381** Dismissal Order, para. 342.

<sup>154</sup> **D381** Dismissal Order, para. 328. *See also* paras 219, 353.

<sup>155</sup> **D381** Dismissal Order, para. 252.

<sup>156</sup> Case 002-**E465** Case 002/02 Judgement, 16 Nov 2018 (“Case 002/02 TJ”), section 13.3.5.1 [entitled “The use of the terms ‘Yuon’ and Vietnamese ‘Enemy’”].

<sup>157</sup> Case 002-**E465** Case 002/02 TJ, para. 1125. *See also* paras 825, 938, 1078, 1111, 1119-1121; section 13.3.7 [entitled “Movement of Vietnamese Civilians from Cambodia to Vietnam”].

<sup>158</sup> Case 002-**E465** Case 002/02 TJ, sections 13.3.8 [entitled “Killing of Vietnamese Civilians in Prey Veng and Svay Rieng Provinces”], 13.3.9 [entitled “Killing of Vietnamese Civilians Outside Prey Veng and Svay Rieng Provinces”], 13.3.10.5 [entitled “Genocide”].

<sup>159</sup> Case 002-**E465** Case 002/02 TJ, paras 1125, 1192, 2472, 2802-2803, 2806, 2846, 3388.

<sup>160</sup> Case 002-**E465** Case 002/02 TJ, paras 1116, 2802.

<sup>161</sup> Case 002-**E465** Case 002/02 TJ, para. 3424. *See also* paras 1122, 2803, section 13.3.6 [entitled “Identification of the Vietnamese and Matrilineal Ethnicity”].

<sup>162</sup> Case 002-**E465** Case 002/02 TJ, paras 1201, 1117, 1080, 1125, 2802. *See also* para. 1078.

004/07-09-2009-ECCC/OCIJ (PTC61)

Krom in areas relevant to Yim Tith's responsibility. For example, the Trial Chamber found that "there were both Vietnamese and a larger number of Khmer Krom – who were labelled as Vietnamese – at Kraing Ta Chan";<sup>163</sup> that there was "a concerted effort to track and screen Khmer Krom persons in Tram Kak District in April 1977";<sup>164</sup> and that "[I]sts of Khmer Krom were prepared in various communes" in Tram Kak in 1977.<sup>165</sup> While the CIJs are not bound by these determinations, it bears reiterating that the Trial Chamber made these findings beyond reasonable doubt, having assessed live testimony, contemporary records, and other evidence.

b) *The Dismissal Order's findings demonstrate the likelihood that Yim Tith implemented the policy to destroy the Khmer Krom, in whole or in part, with specific intent to do so*

64. Despite not considering Yim Tith's likely responsibility for genocide of the Khmer Krom, the Dismissal Order contained numerous findings that demonstrate that the Khmer Krom were mistreated and killed in locations under Yim Tith's authority and the likelihood that he specifically intended their destruction.

65. In the Southwest Zone, the Dismissal Order found, *inter alia*, that (i) reports on arrests of Khmer Krom were sent between commune offices, the Kirivong District Office, and Kraing Ta Chan Security Centre;<sup>166</sup> (ii) approximately 400 Khmer Krom families were forcibly transferred to Wat Ang Srei Muny and were killed because they were considered enemies;<sup>167</sup> (iii) more than 1,000 Khmer Krom were killed at Preal Village,<sup>168</sup> including the children of Khmer Krom who were considered "Yuon";<sup>169</sup> (iv) people with spouses who had Vietnamese connections were also killed at Preal Village;<sup>170</sup> (v) during meetings at Slaeng Pagoda in 1978, Khmer Krom were described as having "Yuon heads with Khmer bodies" who had to be killed to prevent them fleeing to Vietnam;<sup>171</sup> (vi) Khmer Krom were sent to Kraing Ta Chan continually during the period 1975 to 1978, with most transferred in 1977;<sup>172</sup> and (vii) over 100 Khmer Krom, including children, were killed

<sup>163</sup> Case 002-E465 Case 002/02 TJ, para. 2802.

<sup>164</sup> Case 002-E465 Case 002/02 TJ, para. 2803.

<sup>165</sup> Case 002-E465 Case 002/02 TJ, para. 2804.

<sup>166</sup> **D381** Dismissal Order, para. 207.

<sup>167</sup> **D381** Dismissal Order, paras 250, 252.

<sup>168</sup> **D381** Dismissal Order, para. 220.

<sup>169</sup> **D381** Dismissal Order, para. 219.

<sup>170</sup> **D381** Dismissal Order, para. 219.

<sup>171</sup> **D381** Dismissal Order, para. 235.

<sup>172</sup> **D381** Dismissal Order, para. 207.

004/07-09-2009-ECCC/OCIJ (PTC61)

and thrown into pits at Kraing Ta Chan.<sup>173</sup>

66. In the Northwest Zone, the Dismissal Order found, *inter alia*, that (i) the resistance against the Vietnamese became stronger during the period when Yim Tith arrived in the Northwest Zone;<sup>174</sup> (ii) the purges targeted anyone suspected of having relations with Vietnam such as the Khmer Krom people;<sup>175</sup> (iii) Yim Tith chaired a meeting about searching for Yuon enemies and that as a result, those who spoke Vietnamese or had blood relations with the Vietnamese were arrested and killed;<sup>176</sup> (iv) two to three Khmer Krom were killed almost every day at the Kanghat Dam worksite;<sup>177</sup> (v) Khmer Krom and Vietnamese were arrested at Kampong Kol Sugar Factory because they were considered to have “Yuon” connections, were identified because of their complexion, or because they spoke Khmer with a Vietnamese accent,<sup>178</sup> and were transported away in trucks, which returned empty;<sup>179</sup> (vi) people who could not speak Khmer well and had a Vietnamese appearance were taken to Koas Krala Security Centre;<sup>180</sup> (vii) all Vietnamese families in Chheu Teal Commune, Banan District, were arrested and brought to Khnang Kou Security Office;<sup>181</sup> (viii) many Khmer Krom were arrested, detained, tortured, and interrogated at Phum Veal Security Centre because they were considered as having “Yuon heads and Khmer bodies”,<sup>182</sup> before being killed and having their corpses pushed into pits;<sup>183</sup> (ix) widows and widowers of Khmer Krom who had been killed were forced to remarry at Prey Krabau and Tuol Seh Nhauv;<sup>184</sup> (x) hundreds of Khmer Krom families and people suspected of being Khmer Krom or having connections with Vietnam were sent to Tuol Seh Nhauv and killed;<sup>185</sup> (xi) in a meeting at Tuol Seh Nhauv, CPK cadres announced that 3,000 Vietnamese enemies had been destroyed;<sup>186</sup> (xii) mass killings of Khmer Krom from Rumlech Commune and Khnar Totueng Commune occurred at Prey

<sup>173</sup> D381 Dismissal Order, paras 207, 212.

<sup>174</sup> D381 Dismissal Order, para. 154.

<sup>175</sup> D381 Dismissal Order, para. 135.

<sup>176</sup> D381 Dismissal Order, para. 153.

<sup>177</sup> D381 Dismissal Order, para. 287.

<sup>178</sup> D381 Dismissal Order, para. 328.

<sup>179</sup> D381 Dismissal Order, para. 329.

<sup>180</sup> D381 Dismissal Order, para. 259.

<sup>181</sup> D381 Dismissal Order, para. 310.

<sup>182</sup> D381 Dismissal Order, para. 342.

<sup>183</sup> D381 Dismissal Order, para. 343.

<sup>184</sup> D381 Dismissal Order, paras 362, 370.

<sup>185</sup> D381 Dismissal Order, paras 358-359.

<sup>186</sup> D381 Dismissal Order, para. 360.



004/07-09-2009-ECCC/OCIJ (PTC61)

Krabau,<sup>187</sup> with a child surviving because her mother was Khmer but her father, who was Khmer Krom, was killed;<sup>188</sup> and (xiii) hundreds of people considered “Yuon” were killed in front of Rumlech Pagoda.<sup>189</sup>

67. Despite these myriad findings, and given the clear scope of the findings as to how and why Khmer Krom were killed in areas under Yim Tith’s authority, as well as Yim Tith’s involvement in the CPK policy, the Dismissal Order did not consider the commission of genocide nor Yim Tith’s likely responsibility for the targeted destruction of the Khmer Krom. Had it done so, applying the relevant standard of proof to the factual findings noted above would have resulted in a finding that Yim Tith was likely responsible for specifically intending to destroy the Khmer Krom, in whole or in part. This legal error invalidated the Dismissal Order and was fundamentally determinative of the conclusion on personal jurisdiction.

##### 5. Failure to consider victims other than those killed when assessing personal jurisdiction

68. The Dismissal Order erred in law by considering only victims who died, either as a result of conditions at crime sites or as a result of intentional killings, when listing the reasons for the decision on personal jurisdiction.<sup>190</sup> This shows that, despite having found that prisoners were detained in horrific conditions and tortured, and despite having found that victims were enslaved or forcibly married,<sup>191</sup> the Dismissal Order considered only those victims who had been killed when assessing the gravity of the crimes. In the context of the Dismissal Order’s findings, this failure to consider the suffering of other victims was a legal error that led the Dismissal Order to underestimate the gravity of the crimes in Case 004 which, together with other legal errors, invalidated the Dismissal Order and was

<sup>187</sup> **D381** Dismissal Order, para. 367.

<sup>188</sup> **D381** Dismissal Order, para. 368.

<sup>189</sup> **D381** Dismissal Order, para. 375.

<sup>190</sup> **D381** Dismissal Order, para. 680, *citing* paras 589-590. Paragraphs 589 and 590, which were cited for the total number of victims by paragraph 680, dealt exclusively with victims who died.

<sup>191</sup> *See Annex 2* [Dismissal Order’s factual findings at crime sites]. In some cases, the Dismissal Order found that crimes occurred but gave no indication of victim numbers. Where the number of victims who endured crimes other than murder was quantifiable in the Dismissal Order, approximately 5,000 were calculated. *See D381* Dismissal Order, paras 209 [59 unlawfully imprisoned at Kraing Ta Chan SC], 250 [2,400 unlawfully imprisoned at Wat Ang Srei Muny SC], 300 [200 unlawfully imprisoned at Banan SC], 323 [4 unlawfully imprisoned or disappeared at Kampong Kol Sugar Factory], 337 [76 forcibly married in Samlout District], 350 [2,080 unlawfully imprisoned at Svay Chrum SC], 366 [60 unlawfully imprisoned at Phum Veal SC], 388-389 [300 unlawfully imprisoned at Wat Samdech SC], and 407 and 587 [286 forcibly married in Reang Kesei Commune]. Some of these figures were determined by using the ICIJ’s conservative methodology for calculating the number of victims. *See D382* Indictment, paras 131-145.

004/07-09-2009-ECCC/OCIJ (PTC61)

fundamentally determinative of the conclusion on personal jurisdiction.

69. In conclusion, the Dismissal Order’s legal failure to render a reasoned decision in relation to the commission of crimes and Yim Tith’s likely responsibility for any of those crimes invalidated the Dismissal Order and were, individually or cumulatively, fundamentally determinative of the decision that the ECCC lacks personal jurisdiction over Yim Tith.

**C. THE DISMISSAL ORDER ERRED IN LAW BY CONSIDERING SUPERIOR ORDERS AND DURESS WHEN ASSESSING PERSONAL JURISDICTION**

70. The Dismissal Order erred in law by relying on superior orders and duress, which invalidated its decision and was fundamentally determinative of the conclusion that Yim Tith falls outside of the ECCC’s jurisdiction.

**1. Relying on superior orders in its analysis of personal jurisdiction**

71. The Dismissal Order erred in law by relying on superior orders in its assessment of personal jurisdiction. In its final section on personal jurisdiction, it found that Yim Tith was subject to superior orders.<sup>192</sup> The Dismissal Order stated that victims killed in areas under Yim Tith’s control were “the result of the implementation of the suppressive policies which Yim Tith had no power to formulate, but had to implement following the Party’s line”,<sup>193</sup> and emphasised that in Yim Tith’s “participation in [...] crime sites”, he “made no initiative” and that “[p]articipation in the implementation of the Party’s policies had to be respected and followed.”<sup>194</sup> As detailed below, the consideration of superior orders when assessing personal jurisdiction contravened ECCC law. This error invalidated the Dismissal Order.
72. In Case 001, when considering Duch’s argument that there should be “a relative assessment of his criminal responsibility within the DK” to determine whether he fell within the ECCC’s personal jurisdiction of those “most responsible”,<sup>195</sup> the Supreme Court Chamber recognised that principles of criminal responsibility in relation to superior orders were applicable to the assessment of those “most responsible” and held that giving

<sup>192</sup> **D381** Dismissal Order, EN 01628831 [“Chapter VII. Findings and Conclusion on Personal Jurisdiction over Yim Tith and the Conclusions of Case 004”]. *See also* paras 656-657 [In a general discussion on personal jurisdiction, the Dismissal Order found cadres at all levels had to follow “all orders” from the “upper echelons”].

<sup>193</sup> **D381** Dismissal Order, para. 680.

<sup>194</sup> **D381** Dismissal Order, para. 683.

<sup>195</sup> Case 001-F28 *Duch* AJ, para. 62.

004/07-09-2009-ECCC/OCIJ (PTC61)

weight to superior orders in a jurisdictional analysis would “frustrate the express provisions of the ECCC law”:

[T]he notion of comparative criminal responsibility is inconsistent with Article 29 of the ECCC Law, which states, ‘[t]he position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.’ This provision also expressly confirms the principle that superior orders do not constitute a defence to the crimes set out in Chapter II of the ECCC Law. The Accused, in effect, submits that the Trial Chamber is required to embark upon a relative assessment of his criminal responsibility within the DK. *This would amount to indirectly permitting a defence of superior orders and would frustrate the express provisions of the ECCC Law, including Article 29.*<sup>196</sup>

73. The Supreme Court Chamber’s finding demonstrates that when determining “those who were most responsible” for DK crimes in the context of personal jurisdiction, superior orders ought not to be considered because to do so would permit a defence of superior orders by another route. The Dismissal Order’s heavy reliance on superior orders as a factor that diminished Yim Tith’s responsibility cannot be squared with this judicial finding.
74. International, ECCC, and Cambodian legal authority regarding criminal responsibility support the general principle set out in the Supreme Court Chamber’s approach to personal jurisdiction: namely, that it is important to hold perpetrators to account regardless of superior orders. At least since the London Charter established the International Military Tribunal (“IMT”) at Nuremberg,<sup>197</sup> it has been clear that under customary international law, those acting pursuant to superior orders remain criminally responsible for any international crimes they commit.<sup>198</sup> The IMT held that “[s]uperior

<sup>196</sup> Case 001-F28 *Duch* AJ, para. 62 (emphasis added). See also Case 001-E188 *Duch* TJ, para. 527; Case 002-E313 Case 002/01 Judgement, 7 Aug 2014 (“Case 002/01 TJ”), para. 702 [“Responsibility may ensue where an accused issues, passes down or otherwise transmits an order, including through intermediaries.”].

<sup>197</sup> Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, London, 8 Aug 1945, 82 UNTS 279, art. 8 [“The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”].

<sup>198</sup> See e.g. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 Dec 1945, art. II(4)(b) [“The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.”]; Charter of the International Military Tribunal for the Far East, 19 Jan 1946, art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 as updated Sep 2009, art. 7(4) [“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires”]; Statute of the International Criminal Tribunal for Rwanda, 8 Nov 1994 as amended 26 Mar 2004, art. 6(4); Statute of the Special Court for Sierra Leone, annexed to the

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.”<sup>199</sup>

75. Similarly, the ECCC Law<sup>200</sup> and the 1956 Penal Code<sup>201</sup> both establish that an illegal order from a superior does not relieve a suspect of individual criminal responsibility. Nor, where the order is manifestly unlawful, such as an order to commit genocide or crimes against humanity,<sup>202</sup> can the charged person claim any mitigation of sentence.<sup>203</sup> In the face of manifestly illegal orders, the duty is to disobey rather than to obey.<sup>204</sup> As such,

---

Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone, Freetown, 15 Jan 2002 (“SCSL Statute”), art. 6(4); Security Council Resolution 1757, Attachment, Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757, 30 May 2007, art. 3(3); *United States v. List et al.*, Opinion and Judgment, 19 Feb 1948, Trials of War Criminals before the Nürnberg Military Tribunals Under Control Council Law No. 10 (“TWC”), Vol. XI, pp. 1236-1237; *Šainović* AJ, para. 1661. *See also Taylor* TJ, para. 476 [“an intermediary lower in the chain of command who passes the order on to the perpetrator may also be held responsible for ordering the underlying offence as long as he has the requisite state of mind.”] *upheld in Taylor* AJ, para. 589; *Kupreškić* TJ, para. 862; *Milutinović* TJ, para. 87.

<sup>199</sup> *United States et al. v. Göring et al.*, Judgment, 1 Oct 1946, Trial of the Major War Criminals before the International Military Tribunal, Vol. I, pp. 290-291. *See also* p. 325 [Alfred Jodl’s “defense, in brief, is the doctrine of “superior orders”, prohibited by Article 8 of the Charter as a defense. There is nothing in mitigation. Participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes.”].

<sup>200</sup> 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”]. *See also* Case 001-E188 *Duch* TJ, para. 552 [“acting pursuant to superior orders does not constitute a legitimate defence to charges of crimes against humanity and war crimes.”].

<sup>201</sup> Cambodian Penal Code, 1956, 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)].

<sup>202</sup> *See e.g.* Rome Statute of the International Criminal Court, 17 Jul 1998, 2187 UNTS 90, art. 33(2).

<sup>203</sup> *United States v. Ohlendorf et al.*, Opinion and Judgment, 8-9 Apr 1948 (“*Einsatzgruppen* Judgment”), TWC, Vol. IV, pp. 470-471 [“A soldier [...] 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.”]. *See also United States v. Milch*, Judgment, 16-17 Apr 1947, reported in Law Reports of Trials of War Criminals (“LRTWC”), Vol VII, pp. 40-42, 65 [The US Military Tribunal rejected a plea of superior orders in mitigation because the defendant *must have known* that the orders involving the commission of persecution and terrorism were illegal]; *Buck et al.*, British Military Court, Wuppertal (6-10 May 1946), reported in LRTWC, Vol V, pp. 42-43 [“The Judge Advocate stated that in principle, superior orders provided no defence to a criminal charge [...] The Judge Advocate expressed the view that an accused would be guilty if he committed a war crime in pursuance of an order, first if the order was *obviously unlawful*, secondly if the accused *knew that the order was unlawful*, or thirdly if he *ought to have known it to be unlawful had he considered the circumstances in which it was given.*”] (original emphasis); *Golkel et al.*, British Military Court, Wuppertal, Germany, 15-21 May 1946 (“*Golkel* Case”), reported in LRTWC, Vol. V, p. 51.

<sup>204</sup> *Mrkšić & Šljivančanin* AJ, fn. 331; *Erdemović* AJ Cassese Opinion, para. 15; *Erdemović* 1996 SJ, para. 18; International Committee of the Red Cross, Customary IHL Database, Rule 154, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule154](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule154).

004/07-09-2009-ECCC/OCIJ (PTC61)

where a suspect acted on the basis of manifestly unlawful orders, this should not have an impact on the assessment of his/her level of responsibility for jurisdictional purposes.

76. If the Dismissal Order's logic regarding superior orders in relation to personal jurisdiction had been accepted in previous ECCC cases, no one would have been investigated or tried. Duch, Khieu Samphan, and Nuon Chea, who have all been tried and convicted at the ECCC, claimed, or could have claimed, that they were only following orders and that Pol Pot was above them and tolerated no dissent. For example, Duch said that his "authority was to disseminate the decisions from above", that "he did not act on his own initiative", and that his superiors did not allow him to release anyone from S-21.<sup>205</sup>
77. The legal error to rely on superior orders invalidated the Dismissal Order and was fundamentally determinative of the conclusion on personal jurisdiction.

## 2. Relying on duress in its analysis of personal jurisdiction

78. The Dismissal Order further erred in law by relying on duress when assessing personal jurisdiction. Its finding that Yim Tith was subject to superior orders was based on the implicit premise that, because those who disobeyed the DK regime were subject to punishment, Yim Tith must have feared for his own safety and that this fear must necessarily have been his primary motivation for participating in crimes.<sup>206</sup> In its general discussion on personal jurisdiction,<sup>207</sup> the Dismissal Order stated that lower echelons had to carry out orders or be "taken away and killed instantly"; and that "[i]f cadres did not follow the policies of Angkar, those cadres, no matter which levels the cadres belonged to, became the targets of being purged."<sup>208</sup> Notwithstanding the fact that potentially mitigating factors like duress must be demonstrated by the Defence<sup>209</sup> and not simply presumed to exist by a finder of fact, the Dismissal Order's implicit finding that Yim Tith acted under duress should not have formed part of the Dismissal Order's assessment of personal jurisdiction. Had a comprehensive review of the case file been undertaken, it

<sup>205</sup> **D6.1.1067** Duch WRI, EN 00147602; Case 001-F14 Appeal Brief by the Co-Lawyers for Kaing Guev Eav *alias* "Duch" Against the Trial Chamber Judgement of 26 July 2010, para. 25; **D6.1.1058** Kaing Guek Eav *alias* Duch WRI, EN 00177609.

<sup>206</sup> **D381** Dismissal Order, paras 671 ["Yim Tith was under supervision of powerful zone secretaries such as Ta Mok and Ros Nhim"], 680, 683. With regard to the Standing Committee, *see* **D381** Dismissal Order, paras 112, 99, 130.

<sup>207</sup> **D381** Dismissal Order, EN 01628831 [Chapter VI. Applicable Laws Regarding Personal Jurisdiction at ECCC"]. *See also* paras 95, 99.

<sup>208</sup> **D381** Dismissal Order, paras 657, 659. *See also* paras 95, 99, 664, 661-663.

<sup>209</sup> Case 002-E313 Case 002/01 TJ, para. 1070; Case 002-E465 Case 002/02 TJ, para. 4352.

004/07-09-2009-ECCC/OCIJ (PTC61)

would have been seen from the evidence that the legal criteria for duress to be a valid mitigating factor in relation to Yim Tith were not satisfied. Instead, the evidence shows that Yim Tith willingly and enthusiastically participated in the common criminal plan. The erroneous consideration of duress invalidated the Dismissal Order.

79. According to ECCC jurisprudence, duress requires showing that a specific person faced an imminent threat, that this threat was the reason for his/her actions, and that the threat did not result from policies in which the accused himself/herself willingly and actively participated.<sup>210</sup> The Dismissal Order pointed to no evidence on the case file that satisfies these legal criteria.
80. Additionally, the Dismissal Order overlooked the fact that Yim Tith did nothing to dissociate himself from his criminal conduct. Despite the Dismissal Order finding that some Khmer Rouge cadres stopped contributing to the CPK's criminal activity by fleeing to Vietnam or hiding in the jungle,<sup>211</sup> it did not consider the fact that Yim Tith, who was based far from the CPK's headquarters in Phnom Penh and relatively close to the border with Thailand, had the advantage, unlike Duch for example, of fleeing from the DK regime if he had wished. For the Dismissal Order to effectively find that Yim Tith had no choice but to enslave and kill thousands of Cambodians under his authority in order to save his own life ignored other possible courses of action that Yim Tith could have availed himself of during the DK regime.
81. As detailed below, the evidence on the case file instead shows that Yim Tith had a genuine desire to participate in the common criminal plan and willingly and enthusiastically participated in that plan. In other words, Yim Tith's criminal acts were not the result of a fear of punishment. His acts contributed to the creation and maintenance of a coercive DK regime.<sup>212</sup>

---

<sup>210</sup> Case 001-E188 *Duch* TJ, paras 553, 557-558; Case 001-F28 *Duch* AJ, para. 364. See also *Erdemović* AJ Cassese Opinion, 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."], 41, 50 [confirmed by *Erdemović* AJ Stephen Opinion, para. 68]; *Erdemović* 1996 SJ, para. 18; *Einsatzgruppen* Judgment, pp. 480-481; *United States v. Milch*, Judgment, 16-17 Apr 1947, TWC, Vol. II, p. 791.

<sup>211</sup> **D381** Dismissal Order, para. 156 ["The purges led to an internal breakage of the CPK as some Khmer Rouge cadres fled to Vietnam and the others went into the jungle."].

<sup>212</sup> The coercive nature of the DK regime has been given, at the most, limited weight as a mitigating factor. See Case 001-F28 *Duch* AJ, paras 364, 371-373. See also, e.g. *Tadić* Sentencing AJ para. 48 [giving undue weight to a relevant factor when making a discretionary decision may constitute error]; *Mejakić* Referral

004/07-09-2009-ECCC/OCIJ (PTC61)

82. Evidence on the case file showing Yim Tith's willing participation in the common criminal plan demonstrates that he was in accord with the principle and intent of his superiors. For example, evidence shows that Yim Tith visited Wat Pratheat Security Centre in order to personally interrogate detainees on at least two occasions<sup>213</sup> – a task beyond his responsibilities as district secretary or deputy district secretary. On one of those occasions, he personally engaged in an attempt to identify more “enemies” by asking one of the prisoners: “Where are you from? How many people are there in your group? Why did you want to escape? Where did you escape to?”<sup>214</sup> On another occasion, Yim Tith was present at Wat Pratheat when a group of prisoners were killed and their gallbladders were removed.<sup>215</sup> The prison staff then gave these harvested organs to Yim Tith and another cadre, who drove off with them.<sup>216</sup>
83. These are not the actions of a terrified functionary caught up in events beyond his control and forced to go along with a campaign of terror with which he disagrees. Rather, they show that Yim Tith shared his superiors' contempt for the lives and dignity of the CPK's “enemies” and the determination to destroy them.
84. This is further demonstrated by the callous way Yim Tith discussed potential deaths. Talking about cotton production at one worksite, Yim Tith said: “If cotton cannot be grown, if grubs eat the cotton, then grubs will eat humans too”,<sup>217</sup> a casual dismissal of the killing of those who failed to reach agricultural goals. Again, this is not the language

---

Appeal, para. 10.

<sup>213</sup> **D118/22** Tun Soun WRI, A16 [“Ta Tit [...] came to [...] Voat Preah Thiet Pagoda. I knew this through hearing militiamen and Ta Tit interrogating the prisoners.”]; **D219/110** Tun Soun WRI, A3 [“I saw Ta Tith interrogate a prisoner twice. The first time, he interrogated a prisoner with Yeay Bau, and the second time, he interrogated a prisoner by himself.”], A4; **D219/346** Tun Soun WRI, A26, 47-49.

<sup>214</sup> **D219/110** Tun Soun WRI, A6. *See also* **D219/346** Tun Soun WRI, A54-56.

<sup>215</sup> **D219/326** Hor Yan WRI, A32 [“Q: Could you please clarify what happened when they cut the gallbladders from prisoners in front of Ta Tith? A32: They took prisoners out and cut through their stomachs to remove their gallbladders. That happened at a location about 50 metres away from the prison. Then they took the gallbladders to Ta Tith who was in his car.”], A33-36; **D118/155** Hor Yan WRI, A22-26, 34-35; **D105/6** Hor Yan WRI, A12-14 (The ICP notes that this WRI was taken pursuant to a rogatory letter issued by, and during the tenure of, Reserve ICIJ Judge Kasper-Ansermet and therefore falls within the category of evidence that the Dismissal Order indicated that it will not consider. *See* **D381** Dismissal Order, para. 50. However, the refusal to consider evidence collected by the Reserve ICIJ was a legal error because Article 26 of the ECCC Law provides that “the reserve Investigating Judges shall replace the appointed Investigating Judges in case of their absence.”); **D1.3.11.18** Hor Yan SOAS Interview, EN 00217607.

<sup>216</sup> **D118/155** Hor Yan WRI, A26 [“Ta Tit was also there, and they loaded the gallbladders in a vehicle and took them away”].

<sup>217</sup> **D219/64** Peou Koeun WRI, A30 [“I heard from others that Ta Tith ordered Ta Keu, ‘If cotton cannot be grown, if grubs eat the cotton, then grubs will eat humans too.’”]. The Dismissal Order attributed this statement to “upper cadres” in the Northwest Zone, but the evidence is clear that this statement came from Yim Tith. *See* **D381** Dismissal Order, para. 78.

004/07-09-2009-ECCC/OCIJ (PTC61)

of a terrified victim going along with a plan because he has no other choice; it is the language of someone relishing the exercise of power over those under his control.

85. Yim Tith's determined implementation of CPK policy extended to the last days of the regime. As the Khmer Rouge fled before approaching Vietnamese forces in December 1978, Yim Tith ordered the killing of all prisoners remaining at Wat Bay Damram Security Centre, and the orders were carried out by his subordinates.<sup>218</sup> Yim Tith ordered this atrocity as DK power was collapsing and when the coercive power of the regime was at its most feeble. Despite this, he continued his dogged pursuit of the CPK's criminal policies to the very end.
86. Even after the fall of the DK regime, Yim Tith continued to live with other Khmer Rouge leaders and exercise authority in the Khmer Rouge hierarchy – a clear demonstration that he never rejected the goals and policies of the regime.<sup>219</sup>
87. If the Dismissal Order's approach to duress had been adopted in previous ECCC cases, no one would have been investigated or tried. Duch, Khieu Samphan, and Nuon Chea, who have all been tried and convicted at the ECCC have claimed that they feared for their safety if they did not obey. Khieu Samphan claimed that he had no decision-making power<sup>220</sup> and disagreed with certain aspects of CPK policy, but stated: "I would not have survived if I dared to reveal any disagreement or objection to anything."<sup>221</sup> Duch said he was terrified and feared for his life.<sup>222</sup> Even Nuon Chea told his biographers that he feared

<sup>218</sup> **D219/533** Chhoeung Bean WRI, A104, 108 ["When they [...] drove the ox-carts to the uplands, prisoners had all been taken to be killed. When people drove those cadres by ox-carts to the uplands, there were no more prisoners in Wat Bay Damram Pagoda or Sister Chou's house. [...] The Southwest militiamen of Ta Nen took the prisoners to be killed under Ta Tith's instruction."].

<sup>219</sup> **D123/1/5.41** Long Sokhy (*alias* Long Ratha) DC-Cam Statement, 24 May 2012, EN 01082053 ["we actually came to Samlout during 1979. [...] My unit used to be in Samlout with Om Tith. [...] I worked closely with him. Later on, I worked directly with him as a physician. [...] he was in charge of everything. [...] he supervised both the people and the troops."], EN 01082058 ["Dany: So, from 1979 to 1982, you were with Ta Tith, right? Ratha: Yes."]; **D123/2/1.27a** Tim Phuon DC-Cam Statement, 22 Jan 2011, EN 01531278 [Witness was Yim Tith's nephew who fled to Samlout District in 1979: "Dany: Who was in charge of Samlot? Phuon: Ta Tith was."] and *summarised* at **D65.1.3** DC-Cam's Promoting Accountability Project: Leng Ann & Yim Tith, 22 Jan 2011, EN 00704584; **D219/844.1.4** DC-Cam's Promoting Accountability Project: Yim Tith aka Ta Tith, 20 Jan 2011, EN 01336628 [Based on researcher's interview notes with Yim Tith's nephew Ngim Noeun: After 1979, Noeun [...] moved to live in Samlot, where Ta Tith was chief of Samlot district.]; **D219/952** Hem Em WRI, A85-86, 101, 106; **D219/665** Norng Sophang WRI, A18; **D219/380** Pok Sophat WRI, A30; **D219/117** Top Seung WRI, A195, 197, 200; **D219/294** Moul En WRI, A106. *See also*: **D219/931** Prak Soeun WRI, A67, 69, EN 01492936; **D219/551** Heng Khly WRI, A71, 160, 166; **D219/774** Oum Seng WRI, A103, 105, 113; **D219/518** Sin Sot WRI, A62-63.

<sup>220</sup> **D6.1.1259** Khieu Samphan Statement (SOAS/HRW), 17 Aug 2005, EN 00184680; **D1.3.36.1** Khieu Samphan WRI, EN 00156750; **D6.1.1036** Khieu Samphan WRI, EN 00156757.

<sup>221</sup> **D6.1.1036** Khieu Samphan WRI, EN 00156757. *See also* **D1.3.36.1** Khieu Samphan WRI, EN 00156949.

<sup>222</sup> Case 001-**D99** Duch Closing Order, paras 169-170.



004/07-09-2009-ECCC/OCIJ (PTC61)

being called an enemy after so many leading cadres were taken to prison and tortured.<sup>223</sup>

88. The legal error to rely on duress invalidated the Dismissal Order and was fundamentally determinative of the conclusion on personal jurisdiction.

### 3. Treating superior orders and duress differently in Cases 001 and 004

89. The factual and legal findings in the Case 001 Closing Order provide a stark rebuttal of the principles in the Dismissal Order that acting pursuant to superior orders and duress excludes an individual from the ECCC's personal jurisdiction. Given that superior orders and duress rightly did not exclude Duch from the category of "those who were most responsible," they cannot do so with respect to Yim Tith. Holding that Yim Tith is outside of the ECCC's jurisdiction because he was following orders and had reason to fear the consequences of any dissent while Duch was within the ECCC's jurisdiction despite also being subject to superior orders and duress embraces an arbitrarily different application of the law to similarly situated persons. Yet, the Dismissal Order provided no explanation for its departure from Case 001.
90. With regard to superior orders, in Case 001 the CIJs found that Duch received specific orders from his superiors in a host of areas, including (i) the extraction and content of specific confessions,<sup>224</sup> (ii) the rations that were to be provided to prisoners,<sup>225</sup> (iii) the use of torture on specific prisoners,<sup>226</sup> (iv) the precise administrative procedures to be followed when executing prisoners,<sup>227</sup> and (v) the manner of killing and disposal of the remains of certain important prisoners.<sup>228</sup> They further found that Duch had limited influence over who was arrested.<sup>229</sup> He could not refuse to receive a prisoner who was sent to him, nor could he release them.<sup>230</sup> He was not free to conclude after investigation that anyone was innocent<sup>231</sup> and he had no discretion not to execute any prisoner sent to him; the greatest leeway his superiors granted him was the authority to keep some skilled prisoners alive for a certain period of time to work.<sup>232</sup> The CIJs explicitly found that "[t]he

<sup>223</sup> **D219/370.1.7** G. Chon & T. Sambath, *Behind the Killing Fields*, EN 00757519 (p. 81, bottom).

<sup>224</sup> Case 001-D99 *Duch* Closing Order, para. 44.

<sup>225</sup> Case 001-D99 *Duch* Closing Order, para. 68.

<sup>226</sup> Case 001-D99 *Duch* Closing Order, paras 85, 99.

<sup>227</sup> Case 001-D99 *Duch* Closing Order, para. 107.

<sup>228</sup> Case 001-D99 *Duch* Closing Order, para. 122.

<sup>229</sup> Case 001-D99 *Duch* Closing Order, paras 33, 51-52.

<sup>230</sup> Case 001-D99 *Duch* Closing Order, paras 53, 31.

<sup>231</sup> Case 001-D99 *Duch* Closing Order, para. 44.

<sup>232</sup> Case 001-D99 *Duch* Closing Order, paras 31, 111.

004/07-09-2009-ECCC/OCIJ (PTC61)

primary role of S-21 was to implement '[t]he Party's political line regarding the enemy'".<sup>233</sup>

91. A review of the Case 001 Closing Order and the evidence on Case File 004 shows that Yim Tith had far *more* discretion in how he carried out orders than did Duch. While Yim Tith was tasked with implementing the CPK's internal and external enemies policy, there is little or no evidence of him receiving orders to arrest and execute specific individuals. Unlike Duch, who simply received the prisoners sent to him and had limited or no authority to release those he had been ordered to murder, Yim Tith *did* have the power to release prisoners under his control if he chose to, as the Dismissal Order acknowledged.<sup>234</sup>
92. There is little or no evidence that Yim Tith, unlike Duch, was "subjected to constant surveillance"<sup>235</sup> by his superiors. To the contrary, evidence shows that Ta Mok made a public announcement that "'Ta Tit is in charge of the [Northwest] zone when I am absent,'"<sup>236</sup> an apparently full delegation of Ta Mok's authority. Indeed, with Ta Mok's simultaneous responsibility for three or four zones, while also serving on the Standing Committee,<sup>237</sup> there is no way Ta Mok could have micromanaged Yim Tith in the way that Nuon Chea and the Standing Committee micromanaged Duch.
93. Additionally, when rejecting Duch's plea of superior orders during the Case 001 trial, the Trial Chamber found that Duch "knew that orders of the Government of DK to commit these offences were unlawful."<sup>238</sup> Yim Tith also knew he was participating in horrific crimes by: carrying out manifestly unlawful orders to force the population to work; forcibly marrying couples; and arresting, imprisoning, torturing, and persecuting and/or executing perceived enemies without a justifiable legal basis and without any due process. The Dismissal Order made no finding, and there is no evidence, that Yim Tith ever sought to disobey superior orders.<sup>239</sup>

<sup>233</sup> Case 001-**D99** *Duch* Closing Order, para. 31 (emphasis added).

<sup>234</sup> **D381** Dismissal Order, paras 201, 676. *See also* **D219/369** Ork Chan WRI, A103-110 [discussing Yim Tith's orders to release prisoners at Wat Pratheath]; **D219/430** Chhoeung Bean WRI, A21 ["all of them were taken to be killed, except Ta Saman, whom Ta Tith decided to keep alive"].

<sup>235</sup> Case 001-**D99** *Duch* Closing Order, para. 170.

<sup>236</sup> **D118/150** Hem Moeun WRI, A61 (emphasis added); **D118/222** Hem Moeun WRI, A14.

<sup>237</sup> **D381** Dismissal Order, paras 65 ["The Standing Committee of the Communist Party of Cambodia consisted of [...] Ta Mok"], 168 ["Ta Mok was appointed as the Northwest Zone Secretary while he was also the Southwest Zone Secretary. After the arrest of Se, Ta Mok became Secretary of four zones namely; the Southwest Zone, the West Zone, Northwest Zone and the new North Zone."], 132, 137.

<sup>238</sup> Case 001-**E188** *Duch* TJ, para. 552.

<sup>239</sup> The TC found the same about Duch: "the Accused [...] did not cite disobedience to an order." *See* Case

004/07-09-2009-ECCC/OCIJ (PTC61)

94. With regard to duress, although the Case 001 Closing Order did not make any legal findings on whether it existed, the factual findings that it did make in relation to Duch's fear did not prevent a correct finding that Duch fell within the category of "those who were most responsible". The CIJs cited to evidentiary material in which Duch stated that he "was obliged to accept every assignment without fail" and "was in total fear for my life";<sup>240</sup> and that if he abandoned his post, it "would mean death" for him and his family.<sup>241</sup> While the evidence involving Duch also failed to satisfy the legal requirements for duress due to the absence of an imminent threat, the underlying evidence relied on by the CIJs in Case 001 shows that Duch was subjected to the same kinds of pressure as Yim Tith – yet the CIJs did not consider this as a factor militating against the correct finding of personal jurisdiction with respect to Duch.
95. In conclusion, the Dismissal Order erred in law by allowing superior orders to be a legal defence in its consideration of personal jurisdiction contrary to ECCC jurisprudence and Article 29 of the ECCC Law, and by implicitly finding that duress existed despite the legal criteria for it not being met and despite the evidence on the case file proving otherwise. These errors invalidated the Dismissal Order and were, individually or cumulatively, fundamentally determinative of the decision that the ECCC lacks personal jurisdiction over Yim Tith.

**D. THE DISMISSAL ORDER ERRED IN LAW IN ITS CONSIDERATION OF THE FORM OF YIM TITH'S PARTICIPATION IN AND PROXIMITY TO CRIMES WHEN DETERMINING LEVEL OF RESPONSIBILITY FOR CRIMES COMMITTED**

96. The Dismissal Order erred in law by focusing exclusively on "direct participation" and proximity to the commission of crimes and refusing to consider other modes of liability, specifically JCE. These errors invalidated the decision and were fundamentally determinative of the conclusion on personal jurisdiction.

**1. Giving excessive weight to "direct participation" in and proximity to crimes in the analysis of personal jurisdiction**

---

001-E188 *Duch* TJ, para. 555.

<sup>240</sup> **D1.3.29.2** (previously Case 001-D21) Kaing Guek Eav *alias* Duch WRI, EN 00149916, which is referred to in Case 001-D99 *Duch* Closing Order, para. 169 (fns 501, 503).

<sup>241</sup> **D6.1.1064** (previously Case 001-D73) Kaing Guek Eav *alias* Duch WRI, EN 00209177, which is referred to in Case 001-D99 *Duch* Closing Order, para. 169 (fn. 502). Given that Duch's post necessarily involved the commission of crimes, this amounts to evidence that Duch believed that if he stopped killing, he and his family would be killed.

004/07-09-2009-ECCC/OCIJ (PTC61)

97. The Dismissal Order erred in law by asserting that “the criterion for ‘most responsible person’ [...] mainly focuses on actual and direct participation regardless of positions.”<sup>242</sup> The Dismissal Order’s erroneous focus on direct participation – which the Dismissal Order did not define but erroneously equated to direct perpetration – and deliberate exclusion of the consideration of other modes of liability was a legal error that invalidated the Dismissal Order.
98. When assessing Yim Tith’s participation and authority at individual crime sites, the Dismissal Order’s repeated assertion that Yim Tith was not physically present at crime sites,<sup>243</sup> did not actively participate in or initiate crimes, and that, consequently, “victims did not result from Yim Tith’s direct crimes”<sup>244</sup> was logically and legally flawed. Because direct perpetration is the only form of individual liability which requires direct participation and proximity, the Dismissal Order clearly and erroneously equated direct participation with direct perpetration. The “most responsible” category found in the ECCC Agreement and ECCC Law is, both by its text and by the intention of the RGC and the UN, an open category whose membership may only be determined by the Co-Prosecutors and Judges of the ECCC based on the totality of the evidence.<sup>245</sup> As was correctly found in previous closing orders, “those who were most responsible” must be discerned by reference to the gravity of the crimes and level of responsibility of the suspects or charged persons, taking into account a non-exhaustive variety of factors,<sup>246</sup> none of which require either physical proximity to the crimes or direct perpetration.<sup>247</sup>
99. The conduct that contributes to the commission of international crimes can be, and for those “most responsible” often is, geographically and temporarily removed from the physical act of commission itself. It has been established in jurisprudence since the post-World War II trials that to find responsibility through any of the modes of liability found

<sup>242</sup> **D381** Dismissal Order, para. 683. *See also* paras 636, 638, 682.

<sup>243</sup> *See e.g.* **D381** Dismissal Order, paras 401 [Kampong Prieng Commune], 479 [Tuol Mtes], 332 [Kampong Kol Sugar Factory], 344 [Phum Veal Security Centre], 275 [Thipakdei Cooperative].

<sup>244</sup> **D381** Dismissal Order, paras 683, 680.

<sup>245</sup> *See supra*, section IV(A)(3).

<sup>246</sup> Case 004/1-**D308/3** *Im Chaem* Closing Order, paras 38-41, fn. 735; Case 003-**D266** *Meas Muth* Dismissal Order, paras 3, 365-367; Case 004/2-**D359** *Ao An* Dismissal Order, paras 424-425; *supra*, section III(B).

<sup>247</sup> One of the factors to be considered in an analysis of the charged person’s level of responsibility is his or her level of participation in the crimes. Whilst “participation” is not a term of art, it is not limited to *direct* participation, and has frequently been used to refer to all the modes of responsibility in art. 29 of the ECCC Law. *See e.g.* *Kayishema & Ruzindana* AJ, para. 185; *Musema* TJ, para. 114; *Kamuhanda* TJ, para. 588; *Delalić* AJ, para. 351.

in Article 29 of the ECCC Law, other than direct perpetration, physical presence at the crime site is not required.<sup>248</sup> This has also been recognised for commission through a JCE,<sup>249</sup> wherein participation in the common purpose need not even involve the commission of a crime,<sup>250</sup> and participants can incur liability for crimes committed by direct perpetrators who were not JCE members.<sup>251</sup> Similarly, by their very nature, neither direct perpetration nor physical presence is required for criminal responsibility through planning, instigating, and ordering,<sup>252</sup> nor for aiding and abetting<sup>253</sup> or superior responsibility.<sup>254</sup>

100. To find that direct participation, which the Dismissal Order effectively characterised as direct perpetration, is the only mode of liability that would render a suspect “most responsible” would prevent the prosecution of almost anyone but the lowest-ranking tools of a criminal regime like the DK. Given the collective nature of international crimes, the

<sup>248</sup> See e.g. *Tadić* TJ, paras 679 [“That participation in the commission of the crime does not require an actual physical presence or physical assistance appears to have been well accepted at the Nürnberg war crimes trials”], 691 citing *Golkel* Case, p. 53 [“it is quite clear that those words [‘concerned in the killing’] do not mean that a man actually had to be present at the site of the shooting”] and *Trial of Max Wielen and 17 Others*, British Military Court, Hamburg, Germany, 1 Jul-3 Sep 1947, reported in LRTWC, Vol. XI, pp. 43-44, 46 [“By finding the accused Schimmel and Gmeiner guilty, the court indicated that being ‘concerned in the killing’ does not necessarily require the presence of the accused on the scene of the crime, since both Schimmel and Gmeiner gave instructions to their subordinates but were not present at the shooting.” (citing from p. 46)]; *Gustav Becker, Wilhelm Weber and 18 Others*, Permanent Military Tribunal at Lyon, 17 Jul 1947, LRTWC, Vol. VII, pp. 67, 70 [The accused, except for one, had arrested several French civilians in occupied France who were, as a consequence, deported to a concentration camp in Germany where three of them died from ill-treatment. They were found guilty of having caused the death of the French civilians in Germany by contributing to and facilitating the deportation of the civilians.]; *Kayishema & Ruzindana* TJ, para. 200 [“It is not presupposed that the accused must be present at the scene of the crime, nor that his contribution be a direct one.”].

<sup>249</sup> See e.g. *Krnjelac* AJ, para. 81 [“The Appeals Chamber considers that the presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required”]; *Kvočka* AJ, para. 112; *Simba* AJ, para. 296; *Karemera & Ngirumpatse* AJ, para. 153 [“It is immaterial whether Ngirumpatse was out of the country while some of the criminal acts were perpetrated. A participant in a joint criminal enterprise is not required to be physically present when and where the crime is being committed”]; *Bagilishema* TJ, para. 33.

<sup>250</sup> Case 002-E313 Case 002/01 TJ, para. 693; Case 001-E188 *Duch* TJ, para. 508; *Tadić* AJ, paras 227, 229; *Šainović* AJ, para. 985; *Prlić* AJ, paras 1410, 1880; *Sesay* AJ, para. 611.

<sup>251</sup> Case 002-F36 Case 002/01 AJ, para. 1040; Case 002-E313 Case 002/01 TJ, para. 225; *Prlić* AJ, para. 1998; *Brđanin* AJ, paras 410-414, 418, 430; *Dorđević* AJ, para. 165; *Sesay* AJ, paras 398-400.

<sup>252</sup> *Boškoski & Tarčulovski* AJ, para. 132 [“The Appeals Chamber recalls that the accused’s presence at the crime scene is not a requisite element of planning, instigating and ordering”]. For instigating, see also *Nahimana* AJ, para. 660; *Nyiramasuhuko* AJ, para. 3327. For ordering, see also *D. Milošević* AJ, para. 290.

<sup>253</sup> The one exception being the case of the approving spectator. See e.g. *Lukić & Lukić* AJ, para. 425 [“The Appeals Chamber notes that the physical presence of an aider and abettor at or near the scene of the crime may be a relevant factor in cases of aiding and abetting by tacit approval. Further, the actus reus of aiding and abetting may be fulfilled remotely”]; *Ntagerura* AJ, para. 372; *Akayesu* TJ, para. 484; *Rutaganda* TJ, para. 43; *Brima* TJ, para. 775.

<sup>254</sup> *Karemera & Ngirumpatse* AJ, para. 259 [“Bearing in mind that presence is not required for superior responsibility pursuant to Article 6(3) of the Statute”].

004/07-09-2009-ECCC/OCIJ (PTC61)

level of responsibility generally increases as the proximity and physical perpetration decreases. The General who planned a mass killing is considered more responsible than the foot soldier who carried out the plan.<sup>255</sup> Focusing on direct perpetration and physical proximity in determining who is most responsible for organised mass atrocities therefore fails to capture the nature and mechanisms behind the most serious international crimes.

101. Moreover, the position adopted in this Dismissal Order<sup>256</sup> also differed from the findings on personal jurisdiction in Case 002. There, the CIJs found that Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith were not only senior leaders but also fell within the category of “those who were most responsible” because of “their personal participation in the implementation of the CPK’s common purpose through criminal means”.<sup>257</sup> The CIJs did not find that Nuon Chea, Khieu Samphan, Ieng Sary, or Ieng Thirith had directly participated in any crimes, nor that their responsibility was solely founded on their attendance at any crime sites investigated.<sup>258</sup>
102. Finally, the Dismissal Order overlooked the contrary jurisprudence of other international criminal tribunals. None of the ICTY Referral Bench’s decisions where the individual was confirmed to be most responsible gave any substantive weight to proximity to the crimes or direct participation.<sup>259</sup> Moreover, the ICTY sentenced Zdravko Tolimir to life

<sup>255</sup> See e.g. *Tadić* AJ, para. 191 [“Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act [...] the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question”].

<sup>256</sup> See *supra*, para. 97. See also Case 003-**D266** *Meas Muth* Dismissal Order, para. 368 [“Senior leaders who did not actively participate in criminal activities of the DK regime may fall outside the jurisdiction of the Court as they are those who were not most responsible.”].

<sup>257</sup> Case 002-**D427** Closing Order, paras 1327-1328.

<sup>258</sup> Case 002-**D427** Closing Order, paras 1521-1563. See also paras 862-993 (Nuon Chea), 994-1125 (Ieng Sary), 1126-1200 (Khieu Samphan), 1201-1295 (Ieng Thirith).

<sup>259</sup> *D. Milošević* Referral Decision, paras 21-23. [The Referral Bench decided that Milošević was among those “most senior” because: (i) he held the permanent position of commander of the SRK, a corps with 18,000 soldiers, over a prolonged period of time; (ii) there was only one echelon of military commander above him; and (iii) he played a clear leadership role, for example taking part in negotiations.]; *Lukić* Appeal Decision, paras 21-23 [The Appeals Chamber reversed the *Lukić & Lukić* Referral Decision to refer the case to the authorities of Bosnia finding that the Referral Bench placed excessive emphasis on the limited geographical scope of the accused’s acts and failed to appreciate his level of participation as a “leader and orchestrator of these crimes”]; *Delić* Referral Decision, paras 20-25 [The Referral Bench found that the accused was among those “most responsible” because of his senior military position and his role in planning, directing, and monitoring military operations. The Referral Bench noted the accused was not charged with physical perpetration and then explicitly stated that it is “not persuaded by the Prosecution that the ‘remoteness’ of the Accused from the underlying offences is such that it diminishes his alleged level of responsibility to a degree which would make the case suitable for referral”].

004/07-09-2009-ECCC/OCIJ (PTC61)

imprisonment for genocide<sup>260</sup> for his participation in a JCE to murder the men and boys from Srebrenica, despite Tolimir having been under the direct command of Ratko Mladić and never present in Srebrenica during the genocide.<sup>261</sup>

103. The *Taylor* case at the Special Court for Sierra Leone (“SCSL”) is perhaps the most compelling example of the error in the Dismissal Order’s approach. Article 1(1) of the SCSL Statute limits the personal jurisdiction of the Court to those “who bear the *greatest responsibility*” for crimes committed during the Sierra Leone civil war.<sup>262</sup> The SCSL Trial Chamber convicted the former Liberian Head of State, who had never set foot in Sierra Leone,<sup>263</sup> for aiding and abetting and planning crimes there and sentenced him to 50 years’ imprisonment,<sup>264</sup> which was affirmed on appeal.<sup>265</sup>
104. The Dismissal Order’s erroneous focus on “direct participation” and failure to consider other modes of liability contradicted ECCC and international jurisprudence. This legal error invalidated the Dismissal Order and had a fundamentally determinative impact on the conclusion of personal jurisdiction.

## 2. Failing to consider perpetration through a JCE when assessing personal jurisdiction

105. The Dismissal Order erred in law by refusing to consider JCE (or any other mode of liability)<sup>266</sup> when assessing personal jurisdiction.<sup>267</sup> This is contrary to the Case 004/1 Closing Order, which acknowledged that “[p]articipation in a JCE amounts to commission under Article 29 of the ECCC Law”<sup>268</sup> and quoted the Pre-Trial Chamber’s assessment that “participation in a JCE embraces situations where the charged person may be ‘*more remote from the actual perpetration of the actus reus of the crime than those foreseen by the direct participation required under domestic law*’”.<sup>269</sup>

<sup>260</sup> *Tolimir* AJ, para. 648 [The Appeals Chamber found that considering Tolimir’s convictions for genocide committed through the killings of the men and boys from Srebrenica and through the infliction of serious bodily or mental harm to the Bosnian Muslim population of Srebrenica alone, Tolimir’s level of responsibility warranted the life sentence imposed by the Trial Chamber.].

<sup>261</sup> *Tolimir* TJ, paras 914-916, 1096, 1099, 1101, 1103-1104, 1109-1110, 1129, 1242.

<sup>262</sup> SCSL Statute, art. 1(1) (emphasis added).

<sup>263</sup> *Taylor* SJ, para. 98 [“While Mr. Taylor never set foot in Sierra Leone, his heavy footprint is there, and the Trial Chamber considers the extraterritoriality of his criminal acts to be an aggravating factor”].

<sup>264</sup> *Taylor* TJ, Disposition, para. 6994; *Taylor* Sentencing Judgment, Disposition, p. 40.

<sup>265</sup> *Taylor* AJ, Disposition, p. 305.

<sup>266</sup> **D381** Dismissal Order, para. 4.

<sup>267</sup> **D381** Dismissal Order, para. 683.

<sup>268</sup> Case 004/1-**D308/3** *Im Chaem* Closing Order, para. 90.

<sup>269</sup> Case 004/1-**D308/3** *Im Chaem* Closing Order, para. 101 (original emphasis), *citing* Case 002-**D97/15/9**

004/07-09-2009-ECCC/OCIJ (PTC61)

106. Nonetheless, based on the Dismissal Order's limited factual findings, the following may be concluded: (i) there were a plurality of persons in the CPK who agreed a common criminal purpose involving the commission of crimes within the jurisdiction of this Court; (ii) Yim Tith likely participated in, and made a significant contribution to, the common criminal purpose; and (iii) Yim Tith likely intended to participate in the common criminal purpose and intended each of the crimes involved in the common criminal purpose, and had knowledge of an organised system of ill-treatment and the intent to further the system. Despite extensive findings establishing the elements of JCE, the Dismissal Order erred by not finding Yim Tith likely responsible for crimes under this mode of liability. The legal error in not considering JCE liability invalidated the Dismissal Order.

*a) The Dismissal Order found that the CPK implemented criminal policies throughout Cambodia*

107. The CPK's policies involved the commission of crimes and the participation of a plurality of persons.<sup>270</sup> The Dismissal Order found that the following policies occurred. First, populations were forcibly moved from cities and towns to the countryside.<sup>271</sup> This included people and cadres in the Southwest Zone being sent to the Northwest Zone from mid-September 1975 to 1977.<sup>272</sup>

108. Second, people were forced to labour at worksites, creeks, dams, canals, reservoirs, and other projects.<sup>273</sup> There was insufficient food for workers and many died of starvation.<sup>274</sup>

109. Third, the CPK targeted every person who they perceived to be an "enemy",<sup>275</sup> establishing 196 security centres for extrajudicial detention and execution throughout Cambodia.<sup>276</sup> This policy targeted former members of the Lon Nol regime; Khmer Krom and people suspected of having relations with Vietnam; Northwest Zone cadres; those considered capitalist, feudalist, or intellectual;<sup>277</sup> people who were characterised as not following the CPK's policies;<sup>278</sup> and even those who made small mistakes such as

---

Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise, 20 May 2010, para. 101.

<sup>270</sup> **D381** Dismissal Order, paras 57, 58, 639.

<sup>271</sup> **D381** Dismissal Order, paras 59, 76, 82-87.

<sup>272</sup> **D381** Dismissal Order, para. 86.

<sup>273</sup> **D381** Dismissal Order, paras 59, 66, 76, 84, 644.

<sup>274</sup> **D381** Dismissal Order, para. 67.

<sup>275</sup> **D381** Dismissal Order, paras 91-100, 128-157, 654.

<sup>276</sup> **D381** Dismissal Order, paras 94, 100.

<sup>277</sup> **D381** Dismissal Order, paras 63, 91, 135.

<sup>278</sup> **D381** Dismissal Order, paras 81, 95, 657.



004/07-09-2009-ECCC/OCIJ (PTC61)

breaking a spoon or stealing some rice.<sup>279</sup>

110. Fourth, people were forcibly married by the CPK.<sup>280</sup> Men and women of the same political status were forced to marry and have sexual intercourse in order to increase the population and have more workers and people to defend the DK.<sup>281</sup>
111. Fifth, all religion was prohibited.<sup>282</sup> Buddhist monks were forcibly defrocked, monasteries were destroyed, and pagodas were turned into detention centres, execution sites, kitchen halls, and places for livestock.<sup>283</sup>
112. The Dismissal Order found that these CPK policies were disseminated to people nationwide through meetings at each level of the hierarchy<sup>284</sup> and implemented throughout the country from the top to the bottom levels of the Khmer Rouge chain of command.<sup>285</sup> Cadres at the commune level had to report to the district, the district to the sector, and the sector to the zone.<sup>286</sup> Additionally, there was a system of monitoring individuals at all times and places,<sup>287</sup> allowing higher-level leaders to ensure policies were implemented by lower-level cadres.<sup>288</sup>

b) *The Dismissal Order's findings demonstrate that Yim Tith likely participated in, and made a significant contribution to, the common criminal purpose*

113. The Dismissal Order found that Yim Tith was the deputy secretary and then secretary of Kirivong District<sup>289</sup> between approximately 1975 and 1977;<sup>290</sup> Sector 13 Secretary from approximately June 1976 to 1977;<sup>291</sup> introduced himself as the Sector 1 Committee Member in August or September 1977;<sup>292</sup> was formally appointed Sector 1 Secretary from

<sup>279</sup> **D381** Dismissal Order, paras 76, 648.

<sup>280</sup> **D381** Dismissal Order, paras 76, 88-90, 652.

<sup>281</sup> **D381** Dismissal Order, paras 88-89.

<sup>282</sup> **D381** Dismissal Order, para. 72. Religious persecution was not within the scope of Case 004. Nonetheless, the Dismissal Order's findings that these crimes occurred in areas under Yim Tith's authority is relevant to his involvement in the JCE.

<sup>283</sup> **D381** Dismissal Order, para. 72.

<sup>284</sup> **D381** Dismissal Order, paras 64, 109, 641, 658.

<sup>285</sup> **D381** Dismissal Order, paras 110, 126, 128-129, 141, 158-160, 656-657, 664-665.

<sup>286</sup> **D381** Dismissal Order, para. 127.

<sup>287</sup> **D381** Dismissal Order, paras 80, 661.

<sup>288</sup> **D381** Dismissal Order, para. 104.

<sup>289</sup> **D381** Dismissal Order, paras 185, 187.

<sup>290</sup> **D381** Dismissal Order, paras 185, 667, 680.

<sup>291</sup> **D381** Dismissal Order, paras 668, 680. The ICP notes that the Dismissal Order also found that Im Chaem was one of the members of the Sector 13 Committee, despite having held the opposite in Case 004/1. *See* **D381** Dismissal Order, para. 100; Case-004/1-**D308/3/1/20** *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, para. 302.

<sup>292</sup> **D381** Dismissal Order, para. 289. Although the Dismissal Order stated in paragraph 289 that "Ta Tith

004/07-09-2009-ECCC/OCIJ (PTC61)

August 1978 until the end of the Khmer Rouge regime;<sup>293</sup> and became the Northwest Zone Committee Member at some point in 1978.<sup>294</sup> Additionally, the Dismissal Order acknowledged, but failed to properly assess, witness evidence that Yim Tith held the position of Sector 13 Secretary in 1978 until the end of the regime<sup>295</sup> and that he was considered the Northwest Zone Secretary.<sup>296</sup> While holding these various positions, Yim Tith implemented the common purpose involving the commission of crimes at locations under his authority. The Dismissal Order made the following findings in relation to crime sites under Yim Tith's authority.

114. Forced Movement: Hundreds of families, including those of members of the former Lon Nol regime and Khmer Krom, were forced out of Phnom Penh and Takeo and sent to Samphli Village.<sup>297</sup> People were forced to travel on foot for days,<sup>298</sup> before being divided into groups and assigned to work.<sup>299</sup> Khmer Krom were also forcibly moved from Kampuchea Krom and to Slaeng Village.<sup>300</sup>
115. Forced Labour: Cadres in Slaeng Village held meetings to assign people to plough and transplant rice seedlings;<sup>301</sup> people were forced to work day and night without rest, *inter alia*, strengthening rice field dikes and making fertiliser in Samphli Village and were told by cadres to be committed to producing five tons of rice per hectare;<sup>302</sup> people in Thipakdei Cooperative had to transplant rice seedlings, build dikes, and harvest rice without rest, sufficient food, or medicine;<sup>303</sup> thousands of people, including children, laboured under armed supervision at Kanghat Dam, with those deemed "lazy" reported to the upper level and many workers dying from starvation;<sup>304</sup> prisoners at Banan Security Centre had to carry the corpses of prisoners who had been killed and bury the bodies;<sup>305</sup> prisoners at Khnang Kou Security Centre were forced to work with such insufficient food

---

introduced himself as the Sector 1 Committee chairperson", the underlying evidence it cited did not state this.

<sup>293</sup> D381 Dismissal Order, paras 147, 161, 164, 669, 680.

<sup>294</sup> D381 Dismissal Order, paras 147, 161, 526, 669, 679-680.

<sup>295</sup> D381 Dismissal Order, paras 173-175, 668.

<sup>296</sup> D381 Dismissal Order, paras 137, 328.

<sup>297</sup> D381 Dismissal Order, para. 249.

<sup>298</sup> D381 Dismissal Order, para. 246.

<sup>299</sup> D381 Dismissal Order, para. 247.

<sup>300</sup> D381 Dismissal Order, para. 233.

<sup>301</sup> D381 Dismissal Order, para. 232.

<sup>302</sup> D381 Dismissal Order, paras 247-248.

<sup>303</sup> D381 Dismissal Order, para. 269.

<sup>304</sup> D381 Dismissal Order, paras 282-283, 286.

<sup>305</sup> D381 Dismissal Order, para. 303.

004/07-09-2009-ECCC/OCIJ (PTC61)

rations that some resorted to eating the skins of cassava that had been thrown away;<sup>306</sup> detainees at Prison No. 8 had to work 11 hours per day without rest and were shackled at night;<sup>307</sup> workers died of starvation and lack of medicine at Wat Po Langka/Katch Roteh Security Centre and Reang Kesei Commune;<sup>308</sup> detainees at Wat Angkun were forced to dig ditches;<sup>309</sup> and workers at Kampong Kol Sugar Factory sometimes had to labour through the night to meet the CPK's production plan of three to five tons of sugar.<sup>310</sup>

116. Targeting Groups and Killing Enemies: There were meetings at Kraing Ta Chan Security Centre in which the types of people to be killed were announced, including those with connections to the Lon Nol regime,<sup>311</sup> while attendees at meetings at Slaeng Pagoda were told that Khmer Krom had "Yuon heads with Khmer bodies" and were to be killed.<sup>312</sup> Such instructions were carried out. For example, former officials of the Lon Nol regime were arrested and taken to Kraing Ta Chan Security Centre,<sup>313</sup> Wat Samdech Security Centre,<sup>314</sup> Koas Krala Security Centre,<sup>315</sup> Banan Security Centre,<sup>316</sup> and Khnang Kou Security Centre.<sup>317</sup> Khmer Krom were arrested and detained at Wat Pratheath;<sup>318</sup> disappeared from Wat Ang Srei Muny<sup>319</sup> and Kampong Kol Sugar Factory;<sup>320</sup> and were killed at Slaeng Village,<sup>321</sup> Kanhath Dam,<sup>322</sup> and Phum Veal Security Centre.<sup>323</sup> Khmer Krom families and children were also killed at Kraing Ta Chan,<sup>324</sup> Tuol Seh Nhauy,<sup>325</sup>

<sup>306</sup> D381 Dismissal Order, para. 312.

<sup>307</sup> D381 Dismissal Order, para. 413.

<sup>308</sup> D381 Dismissal Order, paras 398, 403. The ICP did not seize the CIJs with the crime of forced labour in Reang Kesei Commune. Nonetheless, the Dismissal Order's findings that these crimes occurred in areas under Yim Tith's authority is relevant to his involvement in the JCE.

<sup>309</sup> D381 Dismissal Order, para. 226.

<sup>310</sup> D381 Dismissal Order, para. 325. The ICP did not seize the CIJs with the crime of forced labour at Kampong Kol Sugar Factory. Nonetheless, the Dismissal Order's findings that these crimes occurred in areas under Yim Tith's authority is relevant to his involvement in the JCE.

<sup>311</sup> D381 Dismissal Order, para. 208.

<sup>312</sup> D381 Dismissal Order, para. 235.

<sup>313</sup> D381 Dismissal Order, para. 207.

<sup>314</sup> D381 Dismissal Order, para. 388.

<sup>315</sup> D381 Dismissal Order, para. 257.

<sup>316</sup> D381 Dismissal Order, para. 297.

<sup>317</sup> D381 Dismissal Order, para. 309.

<sup>318</sup> D381 Dismissal Order, para. 194.

<sup>319</sup> D381 Dismissal Order, para. 252.

<sup>320</sup> D381 Dismissal Order, paras 238-239.

<sup>321</sup> D381 Dismissal Order, para. 236.

<sup>322</sup> D381 Dismissal Order, para. 287.

<sup>323</sup> D381 Dismissal Order, paras 342-343.

<sup>324</sup> D381 Dismissal Order, para. 212.

<sup>325</sup> D381 Dismissal Order, paras 358-359.

004/07-09-2009-ECCC/OCIJ (PTC61)

Wat Ang Srei Muny,<sup>326</sup> and Prey Krabau.<sup>327</sup> Moreover, mass graves of Khmer Krom were found at Preal Village<sup>328</sup> and Wat Angkun.<sup>329</sup>

117. The arrival of Southwest Zone cadres in the Northwest Zone resulted in purges of Northwest cadres from the village level upwards.<sup>330</sup> For example, Northwest cadres were denounced as traitors and replaced by Southwest Zone cadres at Wat Kirirum Security Centre;<sup>331</sup> Northwest cadres disappeared and were replaced by Southwest Zone cadres at Thipakdei Cooperative;<sup>332</sup> large numbers of Northwest cadres were arrested and taken away almost every night after the arrival of Southwest cadres at Kanghat Dam;<sup>333</sup> Northwest cadres were held prisoner at Khnang Kou Security Centre;<sup>334</sup> and all Northwest cadres were arrested, tied up, and taken to be killed at Wat Samdech shortly after the arrival of Southwest cadres.<sup>335</sup>
118. Various findings also demonstrated how other individuals were considered “enemies”. For example, those who committed so-called “moral offences” or stole food were detained at Banan Security Centre;<sup>336</sup> at Kanghat Dam, workers who were frequently ill were characterised as enemies, those who were found to have secretly visited their family would be killed, and a young man who talked to a girl was killed for committing a “moral offence”.<sup>337</sup> Additionally, anyone deemed to have made a “mistake” in Slaeng Village<sup>338</sup> or at Wat Kirirum was killed.<sup>339</sup>
119. Forced Marriage: Yim Tith and Ta Mok oversaw forced marriages in Samlout District, with Yim Tith telling those who had been forcibly married to love each other and be united.<sup>340</sup> Couples were forced to marry and were monitored by militiamen at Kampong

---

<sup>326</sup> **D381** Dismissal Order, para. 252.

<sup>327</sup> **D381** Dismissal Order, para. 367.

<sup>328</sup> **D381** Dismissal Order, paras 220-221.

<sup>329</sup> **D381** Dismissal Order, paras 228-229.

<sup>330</sup> **D381** Dismissal Order, para. 143.

<sup>331</sup> **D381** Dismissal Order, para. 380.

<sup>332</sup> **D381** Dismissal Order, para. 266.

<sup>333</sup> **D381** Dismissal Order, paras 279, 283-284.

<sup>334</sup> **D381** Dismissal Order, para. 310.

<sup>335</sup> **D381** Dismissal Order, para. 389.

<sup>336</sup> **D381** Dismissal Order, para. 297.

<sup>337</sup> **D381** Dismissal Order, paras 285, 287.

<sup>338</sup> **D381** Dismissal Order, para. 236.

<sup>339</sup> **D381** Dismissal Order, para. 382.

<sup>340</sup> **D381** Dismissal Order, para. 339.

004/07-09-2009-ECCC/OCIJ (PTC61)

Kol Sugar Factory;<sup>341</sup> forced marriages took place in Reang Kesei Commune;<sup>342</sup> and widows and widowers of Khmer Krom who had been killed were forced to remarry at Tuol Seh Nhauv<sup>343</sup> and Prey Krabau.<sup>344</sup>

120. Prohibiting Religion:<sup>345</sup> Monks were forcibly moved from various pagodas to Preal Pagoda and were disrobed.<sup>346</sup> Subsequently, young monks were sent to join the army and abbots were sent to Kouk Prech.<sup>347</sup> Moreover, pagodas were desecrated through their use as security centres and execution sites, including: Wat Pratheath Security Centre, Wat Angkun Execution Site, Wat Ang Srei Muni Execution Site, Koas Krala Security Centre, Thipakdei Security Centre, Wat Chanreangsei Execution Site, Wat Kirirum Security Centre, Wat Samdech Security Centre, Wat Po Langka/Katch Roteh Security Centre, and Wat Reang Kesei.

c) *The Dismissal Order's findings demonstrate the likelihood that Yim Tith intended to significantly contribute to the common criminal plan, intended the crimes, and had knowledge of the commission of crimes*

121. Yim Tith told village, commune, and district chairpersons about attacks by “hidden enemies” at a meeting at Kanghat Dam;<sup>348</sup> told cadres in the Northwest Zone to search for “Yuong enemies” or those who had joined the Vietnamese, which resulted in people who spoke Vietnamese or had Vietnamese family being arrested and killed;<sup>349</sup> said at a meeting in Battambang that Southwest Zone cadres had come to protect Kampong Kol Sugar Factory from the Yuon;<sup>350</sup> told people who had been forcibly married in Samlout District to work hard to increase agricultural production;<sup>351</sup> and told those at Kanghat

<sup>341</sup> **D381** Dismissal Order, para. 331. The ICIJ did not accept that forced marriages at Kampong Kol Sugar Factory were within the scope of Case 004, *see* **D341/1** Decision on the International Co-Prosecutor’s Request for Investigative Action Regarding a Sugar Factory in Kampong Kol and Witness Long Sokhy, 8 Jun 2017. Nonetheless, the Dismissal Order’s findings that these crimes occurred in areas under Yim Tith’s authority is relevant to his involvement in the JCE.

<sup>342</sup> **D381** Dismissal Order, para. 407.

<sup>343</sup> **D381** Dismissal Order, para. 362. The ICP did not seize the CIJs with forced marriages at Tuol Seh Nhauv. Nonetheless, the Dismissal Order’s findings that these crimes occurred in areas under Yim Tith’s authority is relevant to his involvement in the JCE.

<sup>344</sup> **D381** Dismissal Order, para. 369.

<sup>345</sup> Religious persecution was not within the scope of the case against Yim Tith. Nonetheless, the Dismissal Order’s findings that these crimes occurred in areas under Yim Tith’s authority is relevant to his involvement in the JCE.

<sup>346</sup> **D381** Dismissal Order, para. 218.

<sup>347</sup> **D381** Dismissal Order, para. 218.

<sup>348</sup> **D381** Dismissal Order, para. 289.

<sup>349</sup> **D381** Dismissal Order, para. 153.

<sup>350</sup> **D381** Dismissal Order, para. 332.

<sup>351</sup> **D381** Dismissal Order, para. 339.

004/07-09-2009-ECCC/OCIJ (PTC61)

- Dam to continue to work hard building dams and growing rice and to prevent enemies attacking, *even* when the regime was about to collapse.<sup>352</sup>
122. Moreover, the Dismissal Order found that Wat Pratheat personnel had to report to the Kirivong District Committee (which was Yim Tith<sup>353</sup>) before issuing orders for arrest and detention,<sup>354</sup> the Kirivong District authorities would send lists of people to be arrested and transferred to Wat Pratheat to the commune level,<sup>355</sup> and assistance from the Kirivong District level was requested when large numbers of people were killed.<sup>356</sup> Similarly, arrest reports were sent from Tram Kak District to the Sector 13 Committee (when Yim Tith was the Sector 13 Secretary<sup>357</sup>), who then forwarded instructions to Kraing Ta Chan Security Centre;<sup>358</sup> and Kraing Ta Chan officials frequently reported to the Sector 13 or Angkar regarding those who had to be smashed.<sup>359</sup>
123. JCE is a core means of attributing individual responsibility at the ECCC,<sup>360</sup> and the former ICP made extensive submissions on Yim Tith's responsibility pursuant to JCE in his final submission.<sup>361</sup> However, the Dismissal Order failed to even consider Yim Tith's likely responsibility under JCE, despite the various findings demonstrating that the elements of JCE were established. Instead, the Dismissal Order relied on the hierarchical structure of the CPK and how policies were uniformly disseminated and implemented to erroneously absolve Yim Tith of responsibility by suggesting Yim Tith had no choice but to accept instructions and implement policies.<sup>362</sup> This error of law invalidated the Dismissal Order and was fundamentally determinative of the conclusion that Yim Tith was not among "those who were most responsible".
124. In conclusion, the Dismissal Order's legal errors of focusing exclusively on direct participation in and proximity to crimes and deliberately refusing to consider JCE (and other modes of liability) invalidated its decision and were fundamentally determinative

---

<sup>352</sup> **D381** Dismissal Order, para. 291.

<sup>353</sup> **D381** Dismissal Order, para. 185.

<sup>354</sup> **D381** Dismissal Order, para. 192.

<sup>355</sup> **D381** Dismissal Order, para. 194.

<sup>356</sup> **D381** Dismissal Order, para. 198.

<sup>357</sup> **D381** Dismissal Order, para. 668.

<sup>358</sup> **D381** Dismissal Order, para. 213.

<sup>359</sup> **D381** Dismissal Order, para. 211.

<sup>360</sup> Case 001-E188 *Duch* TJ, paras 514-517; Case 002-E313 Case 002/01 TJ, paras 861-877, 960-996; Case 002-E465 Case 002/02 TJ, paras 4116-4175, 4255-4307.

<sup>361</sup> **D378/2** ICP Final Submission, paras 1092-1118.

<sup>362</sup> **D381** Dismissal Order, paras 680, 683.

of the conclusion on personal jurisdiction.

**E. THE DISMISSAL ORDER ERRED BY MAKING ERRONEOUS FACTUAL FINDINGS THAT OCCASIONED A MISCARRIAGE OF JUSTICE**

125. The Dismissal Order contained several errors of fact that, alone or together, occasioned a miscarriage of justice and were fundamentally determinative of the conclusion on personal jurisdiction.

**1. Finding that only certain CPK cadres had authority to make decisions about killings in the DK**

*a) 30 March 1976 Central Committee decision*

126. The Dismissal Order erred in fact by finding that approximately 13 people made all of the decisions about whom to kill throughout the entire DK territory over a period of almost four years.<sup>363</sup> The Dismissal Order relied heavily on the fact that Yim Tith “was not among the over 13 individuals, including zone secretaries such as Ta Mok, who had power to destroy enemies based on the [Central Committee] decision dated 30 March 1976” to exclude him from the ECCC’s jurisdiction.<sup>364</sup> Reliance on this factual error occasioned a miscarriage of justice.

127. The Dismissal Order based this erroneous factual finding on the wording of a 30 March 1976 Central Committee decision and a portion of Duch’s testimony. The Dismissal Order stated:

Through the decision by the Central Committee of the Party in 1976, the purge policy was issued relating to the right to smash enemies inside and outside the Party. The policy clearly stated that *‘For the base level, the zone permanent members will decide; for the offices at the Central zone, the committee of the Central office will decide; for the independent sectors, the permanent members of the central will decide; for the central army, the General Staff will decide.’* In the meantime, the former S-21 Chief, Kaing Guek Eav alias Duch explained the decision-making process in 1976 as follows *‘The decision makers at the base level were not only the permanent committee of the zone. The zone secretary had the right to decide who was to be smashed and who was not to be. If the zone secretary decided to let someone live, that person could live. The power was in the hands of the zone secretary.’*<sup>365</sup>

<sup>363</sup> D381 Dismissal Order, para. 671.

<sup>364</sup> D381 Dismissal Order, para. 671.

<sup>365</sup> D381 Dismissal Order, para. 92 (original emphasis). The “over 13 people” that the Dismissal Order

004/07-09-2009-ECCC/OCIJ (PTC61)

128. The Dismissal Order’s statement that “over 13 individuals, including zone secretaries such as Ta Mok [...] had power to destroy enemies based on the decision dated 30 March 1976”<sup>366</sup> relied solely on Duch’s interpretation of the 30 March 1976 decision to conclude that, with respect to the “base level”, all authority to order killings was vested in the zone secretaries (with the other named officials having authority to order killings in the Party Centre, the independent sectors, or within the armed forces).
129. The plain language of the 30 March 1976 decision contradicts this interpretation – the decision says that the right to smash those at the base belonged to the “Zone Standing Committee”<sup>367</sup> (or “zone permanent members” as translated in the Dismissal Order). This would have included Yim Tith from at least mid-1978, around the time of Ta Pet’s and Ruos Nhim’s arrest, when Yim Tith became the deputy secretary of the Northwest Zone<sup>368</sup> (or, even on the Dismissal Order’s erroneous finding, the Northwest Zone Committee Member<sup>369</sup>).
130. The Dismissal Order’s interpretation contradicted prior analysis of the effect of this document. The Case 002 Closing Order acknowledged the wording of the 30 March 1976 decision but then found that:

In practice, some sectors subordinated to zones made the decisions to ‘smash’ or oversaw decisions to ‘smash’ at the district level. Elsewhere, it appears that districts made such decisions on their own authority. In addition, the Central Committee delegated this authority to at least some cooperatives. Some cooperatives retained the power to smash as evidenced by witness statements, official media reports, and telegrams. At the same time, authorities at some cooperatives nominated prisoners to district security offices for execution, as was the case in Tram Kok district[.]<sup>370</sup>

131. The Dismissal Order did not explain the basis upon which it abandoned this previous careful and nuanced analysis of the effect of the 30 March 1976 decision in order to prefer Duch’s interpretation. While Duch was a careful observer of the workings of the CPK and DK, he acknowledged that he had never seen the 30 March 1976 decision until he

---

erroneously concluded had authority to order killings appears to be the zone secretaries, the Standing Committee, and possibly the General Staff.

<sup>366</sup> **D381** Dismissal Order, para. 671.

<sup>367</sup> **D1.3.19.1** Decision of the Central Committee Regarding a Number of Matters, 30 Mar 1976, EN 01627130.

<sup>368</sup> *See infra*, section IV(E)(3).

<sup>369</sup> **D381** Dismissal Order, paras 666, 680.

<sup>370</sup> Case 002-**D427** Closing Order, para. 186 (internal citations omitted).



004/07-09-2009-ECCC/OCIJ (PTC61)

received access to it through the ECCC case file following his arrest.<sup>371</sup> In addition, Duch never served at the “base level” and accordingly did not have first-hand knowledge of the way in which decisions to smash were made there.

132. Furthermore, simple matters of practicality and logistics would render it entirely unworkable for just one person – the secretary of a given zone – to have the authority to decide specifically who should be killed and who should be spared throughout the entire territory of a zone. The Dismissal Order found that more than 25,000 victims were intentionally killed at just the crime sites within the scope of Case 004<sup>372</sup> and more than 50,000 were killed if the excluded crime sites are included in the total.<sup>373</sup> The idea that Ta Mok and Ruos Nhim familiarised themselves with the facts related to each of these individual cases and then decided on an individual basis whether each should be killed is manifestly unreasonable. This is especially true with respect to Ta Mok, who, as the Dismissal Order found, eventually came to control three or four zones whilst also serving on the Standing Committee.<sup>374</sup> The Dismissal Order’s finding that zone secretaries were the sole decision-makers would effectively imply that Ta Mok was making *all* of the decisions about who was to be killed over an area that spanned half the territory of Cambodia. Given the scale of killing in the DK, no one person working alone could do this, even if he or she had no other responsibilities. From a logical standpoint it is obvious – and the evidence also shows<sup>375</sup> – that zone-level leaders passed down *policies* regarding

<sup>371</sup> **D118/103.3** Accused’s Final Written Submission, para. 35 [“Document of 30 March 1976 was known to me at the ECCC.”].

<sup>372</sup> **D381** Dismissal Order, paras 199 [5,000 killed at Wat Pratheat SC], 212 [127 killed at Kraing Ta Chan SC], 220 [1,000 killed at Preal Village], 253 [4,000 killed at Prey Sokhon ES], 261 [200 killed at Koas Krala SC], 273 [100 killed at Thipakdei SC], 287 [730 killed at Kanghai Dam worksite], 328-329 [30 killed at Kampong Kol Sugar Factory], 314-315 [90 killed at Khnang Kou SC], 359-360 [3,000 to 4,000 killed at Tuol Seh Nhauv ES], 367 and 369 [2,200 killed at Prey Krabau ES], 375 [300 killed at Wat Chanreangsei ES], 383 [200 killed at Wat Kirirum SC], 389 [100 killed at Wat Samdech SC], 400 [5,000 killed at Wat Kach Roteh SC], 408 [1 killed in Reang Kesei Commune], 416 [2,000 killed at Prison No. 8], 421 [2,000 killed at Veal Bak Chuhchuh ES]. This large number of victims does not include the Dismissal Order’s non-quantifiable finding of “many” executed victims at the following crime sites: **D381** Dismissal Order, paras 235 [“Khmer Rouge transporting Khmer Krom people in many horse carts [...] for execution in the forests in Slaeng Village”], 302 [“Many people were [...] killed at Banan security office.”].

<sup>373</sup> **D381** Dismissal Order, paras 589-590, 680. The excluded crime sites are all in the Northwest and Southwest Zones, which means that, on the Dismissal Order’s finding, Ta Mok and Ruos Nhim would have been the only ones with authority to order any of these killings.

<sup>374</sup> **D381** Dismissal Order, paras 65, 168, 132, 137.

<sup>375</sup> See e.g. **D219/120** Prak Yut WRI, A19, 28, 29 [In the Central Zone, the witness was a district secretary who received an order from her sector secretary to identify, arrest, and smash certain types of enemies. The witness ordered her commune chiefs to “designate by level of seriousness” those enemies. Then, the witness “would decide on a case-by-case basis [...] who could be kept and who could not be kept”]; **D6.1.796** Kaing Guek Eav *alias* Duch WRI, EN 00414347-48 [regarding **D219/702.1.40** DK letter from a cadre who was a zone deputy secretary and sector secretary, which informs Angkar who is being sent to the organisation.

004/07-09-2009-ECCC/OCIJ (PTC61)

categories of enemies to smash to sector-level leaders, who then often passed those policy guidelines down further, and that many of the actual decisions about whom to kill were made by relatively low-ranking cadres pursuant to delegated authority.

133. Perhaps the best illustration of the fact that the right to smash was not limited to zone secretaries is the significant evidence of cadres far *lower* in the hierarchy than Yim Tith exercising discretion regarding whom to kill. This evidence makes it clear that even cadres at the village, cooperative, commune, or mobile unit levels had the authority to decide which people fell within the categories of enemies defined by the leadership and therefore were to be killed.<sup>376</sup> Strikingly, the CIJs expressly found in the Case 004/1 Closing Order that Im Chaem, who operated at the district and sector level of authority, ordered executions.<sup>377</sup> The Dismissal Order contained no explanation of why it contradicted this previous holding.
134. The Dismissal Order's unrealistic interpretation of the 30 March 1976 decision is at odds with logic, the record, and the Dismissal Order's own previous analysis. The finding that only zone secretaries had the authority to decide whom to smash at the base level was a

---

Duch observed on the letter the annotation "'S-21 already'". At Kanghat Dam, the ICP submits that there is no reasonable possibility that, in the time between Yim Tith inspecting the site and workers disappearing or being killed shortly after the inspection, that Yim Tith communicated information regarding every "lazy" worker to Ta Mok, and Ta Mok reached individualised decisions on the fate of each worker and communicated it back to Yim Tith, who then passed it on to the relevant cadres at the dam. This would have been particularly unworkable had Ta Mok been anywhere but in the Northwest Zone at the relevant time. See **D219/46** Sorm Vanna WRI, A41, 44 ["if we saw Ta Tith during daytime, people would disappear that night. [...] Whenever we saw Ta Tith coming, we knew people would definitely disappear."]; **D219/797** Dos Doeun WRI, A218-219. The case file contains copious additional evidence of Yim Tith giving orders to arrest and to kill. While this evidence does not necessarily preclude the possibility that any given order originated at a higher level, the quantity of orders to arrest and kill shows the unworkability of a system in which mid- and lower-level cadres had no discretion to make individual decisions within the broad policy outlines set out by the Party Centre. See e.g. **D34.1.10** Heng Teav *alias* Ta Pet Interview by Steve Heder, EN 01181080-81 (see also **D1.3.11.15** Heng Teav Interview by Steve Heder, EN 00426119); **D219/294** Moul En WRI, A190-191; **D219/85** Vy Phann WRI, A3, 5; **D118/209** Ek (UI) Hoeun WRI, A139, 141, 143, 145-146; **D219/533** Chhoeung Bean WRI, A104, 108; **D118/86** Nhoek Ly WRI, A5; **D219/19** Sann Lorn WRI, A873; **D219/34** Ek (UI) Hoeun WRI, A33; **D6.1.1105** Ben Kiernan, *The Pol Pot Regime*, EN 00678590 (see also **D219/726.1.1** Ben Kiernan's notes from interview with Ngaol, EN 01312560, 62-63). See also **D382** Indictment, paras 419, 420iii, 421.

<sup>376</sup> See e.g. **D118/245** Chuon Than WRI, A17 [regarding the witness who was a low-level cadre in charge of a small mobile unit]; **D219/85** Vy Phann WRI, A7 [regarding village and unit chairpersons]; **D118/96** Loch Eng WRI, A35 [regarding witness who was a cooperative committee member]. See also **D219/982** Sao Chobb WRI, A28 [regarding a military commander in a district]; **D118/243** Chham Luy WRI, A14-15 [regarding Yim Tith's assistant Nim]; **D378/2** ICP Final Submission, paras 57, 59, 63, 69; **D382** Indictment, paras 413, 420iii.

<sup>377</sup> Case 004/1-**D308/3** *Im Chaem* Closing Order, para. 309 ["Im Chaem contributed to [the CPK's] plan by running worksites and security centres, and by ordering arrests and executions, which were carried out by militia under her control."].

004/07-09-2009-ECCC/OCIJ (PTC61)

factual error occasioning a miscarriage of justice.

135. Even assuming, *arguendo*, that only zone secretaries had the authority to decide whom to kill, the evidence shows that Ta Mok delegated his powers as Northwest Zone Secretary to Yim Tith, which would still place Yim Tith in the group with the power to smash. Ta Mok had many responsibilities outside the Northwest Zone that necessarily required his frequent absence from the area. These included leading forces fighting the Vietnamese and sitting on other zone committees and the Standing Committee in the DK.<sup>378</sup> Unsurprisingly, this required him to confer his power on Yim Tith in his absence. Hem Moeun heard his uncle Ta Mok announce in Battambang Province that “‘Ta Tit is *in charge* of the zone when I am absent.’”<sup>379</sup> Hem Moeun worked closely with Ta Mok and said he knew that “[i]n Battambang, Ta Tit ranked second after Ta Mok” because (i) “Ta Tit brought *his* forces from Takeo *with* Ta Mok” and (ii) when guarding the road to the meetings, he observed during Ta Mok’s absence that “Ta Tit used to invite *military commanders* to the meetings”.<sup>380</sup> Ta Pet’s bodyguard and messenger, Chhean Hea, told OCIJ investigators that Ta Pet had showed him documents from the Centre which appointed Yim Tith “to be responsible for the Northwest Zone.”<sup>381</sup> A former messenger in Sector 13 said: “Ta Mok [...] never gave power to anyone besides Ta Tith”.<sup>382</sup> Ta Mok’s delegation of his powers in the Northwest Zone is corroborated by several other witnesses.<sup>383</sup> Thus, even on the unreasonably limited view in the Dismissal Order of the authority conferred by the 30 March 1976 decision, Yim Tith would still have been within

<sup>378</sup> See **D378/2** ICP Final Submission, paras 45, 114 (and evidence cited therein).

<sup>379</sup> **D118/150** Hem Moeun WRI, A61 (emphasis added); **D118/222** Hem Moeun WRI, A14. See also **D219/853** Chann Vichet WRI, A50-51 [Witness was a former messenger in Sector 13: “Q: According to what you said, when Ta Mok was not present, Ta Tith was the one who arranged the armed forces. What level of military was it that he arranged? [...] A50: It was the zone military. Q: We would like to know about internal security. Was it under the supervision of Ta Mok or Ta Tith? A51: It was under Ta Mok. However, if Ta Mok was not present, there could be a meeting to grant Ta Tith that role.”]; **D378/2** ICP Final Submission, para. 45; **D382** Indictment, paras 383, 994.

<sup>380</sup> **D118/150** Hem Moeun WRI, A9, 17, 60-61 (emphasis added); **D118/222** Hem Moeun WRI, A14.

<sup>381</sup> **D118/136** Chhean Hea WRI, A13 [“Ta Pet attended the meeting and while I was driving him back, he told me Ta Tit came to make an announcement and showed me the documents from the Centre which appointed him to be responsible for the Northwest Zone.”].

<sup>382</sup> **D219/853** Chann Vichet WRI, A144.

<sup>383</sup> **D118/108** Loem Tim WRI, A17 [“I knew Ta Tit when our security guards were sent to attend an assembly at Battambang University in Battambang town. Ta Tit was introduced in the meeting as the Chairman of the Northwest Zone.”] and *reiterated* at **D219/649** Loem Tim WRI, A37; **D219/64** Peou Koeun WRI, A28-29 [Former chairman of labourers at Thipakdei Cooperative: “Ta Tith administered the Northwest Zone as well. There was a meeting and a person subordinate to Ta Tith said, ‘[...] Comrade Tith controls Battambang Province. [...]’”]; **D1.3.27.5** Masato Matsushita and Stephen Heder, *Interviews with Kampuchean Refugees at Thai-Cambodia Border*, 1980, EN 00170728 [interview 18]. See also **D118/69** Nuon Muon WRI, A14, 16; **D20** Han Thy WRI, EN 00710286; **D382** Indictment, para. 383.

004/07-09-2009-ECCC/OCIJ (PTC61)

the group of those empowered to make decisions about killings on the basis of Ta Mok's delegation.

*b) Military cadres during the purge*

136. Furthermore, the Dismissal Order directly contradicted the notion that only approximately 13 people, including zone secretaries, had authority to make decisions about killings by finding that in the “purge campaign, the civilian cadres did not have the right to kill people; it was the military who had those rights”.<sup>384</sup> This assertion, itself an error of fact that occasioned a miscarriage of justice by causing the Dismissal Order to underestimate Yim Tith's level of responsibility, was based on evidence from a single witness and failed to acknowledge, let alone analyse, evidence on the case file from a range of other witnesses that demonstrate civilian cadres also killed cadres<sup>385</sup> and ordinary people<sup>386</sup> in the Northwest Zone, as did Yim Tith.<sup>387</sup> It also disregarded that zone

<sup>384</sup> **D381** Dismissal Order, para. 141 [“In this purge campaign, the civilian cadres did not have the right to kill people; it was the military who had those rights”]. The Dismissal Order used the term “purge” to mean, *inter alia*, “kill”. See **D381** Dismissal Order, paras 129-130.

<sup>385</sup> See e.g. **D219/242** Ap Chroeng *alias* Ran WRI, A24 [Witness was a platoon soldier in a commune in Bakan District, Sector 2: “When Ben [Sector 2 Secretary from the Southwest Zone] arrived here, he arrested the Battalion Commanders and took them to be killed”]; **D219/223** Nuon Rin WRI, A30 [Witness was a mobile unit worker in Sector 2: “Whilst Ben was in charge, he arrested and killed many base cadres in Pursat Province [...] at village, commune, district and battalion level.”]; **D118/238** Kol Set *alias* Keo Set WRI, A58 [Witness was a militiaman and then a farmer in Bakan District: “When Yeay Rim [on the Bakan District Committee] had arrived, she took former Khmer Rouge cadres to be imprisoned and killed and replaced them with new persons.”]; **D219/188** Phan Khorn WRI, A88; **D134/3** Sat Chhang WRI, A28 (see also **D6.1.618** Sat Chhang SOAS Interview, EN 00352085).

<sup>386</sup> See e.g. **D219/46** Sorm Vanna WRI, A53-54 [The civil party was a mobile unit worker in Sector 4 when he saw “at Wat Reang Kesei Pagoda [...] Ta Loek and Yeay Chan sprayed automatic fire right at those people and a bullet struck and killed Ta Seung. Many people were wounded [...] Ta Loek and Yeay Chan collected them and took them to be killed.”] (see also **D219/312** Pang Thai WRI, A12; **D219/939** Sek Muntha WRI, A25; **D5/85** Saoy Yen CPA, EN 01548053; **D219/866** Loeuy Mon WRI, A41, 47-49; **D219/257** Sek Chaot WRI, A7); **D118/4** Kan Choek WRI, A30-31.

<sup>387</sup> For victims who were soldiers or cadres, see e.g. **D34.1.10** Heng Teav *alias* Ta Pet Interview by Steve Heder, EN 01181080-81 [“Tit instructed soldiers in his army to kill those murderers. Those murderers were soldiers from the Northwest Zone.”]; **D20** Han Thy WRI, EN 00710286-87 [Witness was a commune chief in Sector 1: “the plan by the Khmer Rouge to kill Khmer Rouge [cadres] [...] was ordered from the upper level, so those at the upper level must have been Ta Tith”] (see also **D105/8** Han Thy WRI, A12; **D118/271** Chhean Hea WRI, A29); **D6.1.1105** Ben Kiernan, *The Pol Pot Regime*, EN 00678590 [In an interview in August 1980, Ngaol, the former chief of Ream Andaeuk Commune, Kirivong District stated that “directives always came from district chief Tith who instructed Ngaol to arrest people and hand them over to district security forces. Those [...] killed in 1976, including a Hanoi-trained CPK cadre”] (see also **D219/726.1.1** Ben Kiernan's notes from interview with Ngaol, EN 01312560, 62-63). See also **D382** Indictment, para. 421; **D378/2** ICP Final Submission, para. 34. For ordinary victims, see e.g. **D219/982** Sao Chobb, WRI, A26-33 [The witness was a former platoon chief in Koas Krala District and saw An, a military commander, “arresting and killing people”. When he asked An “who assigned him to be a killer like that [...] [h]e said Tith did.” “[T]housands of people” were killed.]; **D219/263** Chham Luy WRI, A33-35, 41-42, 45, 47-49, 58 (see also **D118/136** Chhean Hea WRI, A7-8; **D219/233** Chhean Hea WRI, A22-24); **D118/209** Ek (UI) Hoeun WRI, A138, 143, 146; **D219/533** Chhoeung Bean WRI, A108; **D6.1.1105** Ben Kiernan, *The Pol Pot Regime*, EN 00678590 (see also **D219/726.1.1** Ben Kiernan's notes from interview with Ngaol, EN

004/07-09-2009-ECCC/OCIJ (PTC61)

secretaries were not under the authority of the RAK or General Staff,<sup>388</sup> and that Ta Mok, whom the Dismissal Order (accurately) assigned great responsibility for the purge in the Northwest Zone,<sup>389</sup> was a civilian.

137. No reasonable factfinder could have failed to have found that (i) more than approximately 13 people had the power to make decisions on killings, based on all the evidence on the case file; and (ii) civilian cadres had power to kill during the purge of the Northwest Zone. The Dismissal Order's factual errors occasioned a miscarriage of justice and were fundamentally determinative of the conclusion on personal jurisdiction.

## 2. Finding that Yim Tith could only have held positions in one zone at a time

138. The Dismissal Order erred in fact by dismissing evidence that Yim Tith continued to hold the position of Sector 13 Secretary into late 1978 on the ground that “many witnesses said that a group of Southwest Zone cadres, including Yim Tith, had already travelled to the Northwest Zone in mid-1977.”<sup>390</sup> This amounted to an implicit finding that Yim Tith could not simultaneously have held positions in both the Northwest and Southwest Zones. But, in the next paragraph, the Dismissal Order found that Ta Mok simultaneously served as the secretary of four zones, collectively covering close to half the DK territory, in addition to the Dismissal Order's earlier finding that Ta Mok was a member of the Standing Committee.<sup>391</sup> Given that Ta Mok was Yim Tith's sponsor and protector,<sup>392</sup> and that, as his brother-in-law, Yim Tith was one of Ta Mok's most trusted associates, it is not only possible, but likely that Ta Mok would have assigned Yim Tith to serve in multiple roles in multiple zones simultaneously, just as Ta Mok himself did. No reasonable factfinder could have failed to find that this was possible. The Dismissal Order's factual finding resulted in an erroneous analysis of the degree of Yim Tith's authority and responsibility. The factual error occasioned a miscarriage of justice and was fundamentally determinative of the conclusion on personal jurisdiction.

---

01312560, 62-63). *See also* **D378/2** ICP Final Submission, paras 34, 69, 71, 73; **D382** Indictment, paras 413, 421, 679.

<sup>388</sup> **D381** Dismissal Order, paras 132, 671, 92. *See* **D1.3.15.1** Craig Etcheson Written Record of Analysis, paras 7 [Zones are below the Standing Committee], 12 [CPK Statute refers to the RAK belonging to the Centre], 104 [a political and military structure constitute the DK regime], paras 67, 49-50.

<sup>389</sup> **D381** Dismissal Order, paras 139-140.

<sup>390</sup> **D381** Dismissal Order, para. 668.

<sup>391</sup> **D381** Dismissal Order, paras 669, 65.

<sup>392</sup> *See* **D378/2** ICP Final Submission, paras 9, 11, 45; **D382** Indictment, paras 327, 348-350, 994.

### 3. Finding that Yim Tith's only role at the Northwest Zone level was that of committee member

139. The Dismissal Order erred in fact by finding that Yim Tith's role at the Northwest Zone level was that of committee member, rather than deputy secretary.<sup>393</sup> The Dismissal Order cited no evidence for this finding, and the overwhelming weight of relevant evidence on the case file is to the effect that Yim Tith was (at least) the Northwest Zone Deputy Secretary rather than merely the committee member.<sup>394</sup> This unreasonable factual finding caused the Dismissal Order to err in its assessment of Yim Tith's level of responsibility for Khmer Rouge crimes in the Northwest Zone. No reasonable factfinder could have failed to find, based on the totality of the evidence, that Yim Tith was, at least, the

<sup>393</sup> **D381** Dismissal Order, paras 666, 680.

<sup>394</sup> **D118/108** Loem Tim WRI, A16-18 ["I knew Ta Tith; he was in charge of the Northwest Zone. [...] I knew Ta Tit when our security guards were sent to attend an assembly at Battambang University in Battambang town Ta Tit was introduced in the meeting as the Chairman of the Northwest Zone. I also knew that Ta Tit came to Battambang before Ta Mok. He was there probably one year before the Vietnamese soldiers arrived. [...] Probably in mid-1978 [...] Ta Tit was introduced as on the Committee of the Northwest Zone at that time [...] Ta Ruos Nhim and Ta Kan were arrested later about five to six months before the arrival of the Vietnamese."], A27 ["Q: When you attended the assembly in Battambang was Ta Nhim there? A27: No, he was not. Ta Tit was the most senior there."]; **D118/271** Chhean Hea WRI, A34 ["They arrested Ta Nhim first, and about five months later they arrested Ta Keu. Ta Tith and Ta Mok replaced them."]; **D118/150** Hem Moeun WRI, A59-61, 65 ["Ta Tit and Ta Bit were Ta Mok's subordinates. [...] In Battambang, Ta Tit ranked second after Ta Mok. Ta Tit was in charge of the Northwest Zone during Ta Mok's absence. [...] Ta Mok made an announcement in front of the army that 'Ta Tit is in charge of the zone when I am absent.' [...] I first met him in late 1977 or early 1978 in Battambang, but I might be wrong because it was a long time ago."] (see also **D118/222** Hem Moeun WRI, A14); **D118/69** Nuon Muon WRI, A14, 16-17 ["A14: [...] Ta Tith became Deputy Chairman of Ta Mok's Northwest Zone, in charge of Sector 1. [...] Q: Why did you know that Ta Tith was Deputy of the Northwest Zone? A16: Because at the time there were only two high-ranking figures from the Southwest Zone – they were Ta Mok and Ta Tith, not anyone else. Q: Did they ever announce that Ta Tith became Deputy of the Zone? A17: They never announced that. I knew that through people and Southwest cadres who controlled a cooperative and union."]; **D219/917** Chey Touch WRI, A11, 13, 15 ["when I was relocated to Daun Teav in Battambang I heard of [Yim Tith] [...] I heard people talking about him in a worker meeting. [...] [Ta Bo] just said that Ta Tith was the Secretary of the Zone."]; **D105/8** Han Thy WRI, A27 ["During my second meeting, he [Yim Tith] asked me to hold a meeting with the people in Kantueu commune in order to remove Ta Paet from his position in the Northwest Zone, and for him to rise to the zone's secretary."]; **D118/136** Chhean Hea WRI, A10, EN 00969639 ["Q: You said Ta Tit was a close aide of Ta Mok who controlled the Northwest Zone: Did you mean Ta Tit also held some position in the Northwest Zone? A10: Sure! Ta Tit held a position in the Zone as well.], A13 ["Ta Pet attended the meeting and while I was driving him back, he told me Ta Tit came to make an announcement and showed me the documents from the Centre which appointed him to be responsible for the Northwest Zone."]; **D1.3.27.5** Masato Matsushita and Stephen Heder, *Interviews with Kampuchean Refugees at Thai-Cambodia Border*, 1980, EN 00170728; **D123/2/1.1a** Top Seung DC-Cam Statement, EN 01069524; **D219/34** Ek (UI) Hoeun WRI, A43 ["I saw the name lists, in which Ta Tith was assigned to take charge of Battambang"]. See also **D118/63** Han Thy WRI, A29-30; **D105/4** Huy Krim WRI, A20; **D118/75** Huy Krim WRI, A25; **D219/835** Nop Ngim WRI, A91; **D123/1/1.4a** Nhoek Ly *alias* Ta Kim DC-Cam Statement, EN 01390380; **D1.3.11.53** Ten Cheum SOAS Interview, EN 00217752; **D118/65** Chim Chanthoeun WRI, A28; **D219/117** Top Seung WRI, A78-79; **D219/515** Chheun Chhuoy WRI, A30, 47, 57; **D219/268** Nom Phoun WRI, A43, 48; **D219/373** Nom Phoun WRI, A89-90, 117.

004/07-09-2009-ECCC/OCIJ (PTC61)

Northwest Zone Deputy Secretary. This factual error, together with other factual errors, occasioned a miscarriage of justice and was fundamentally determinative of the conclusion on personal jurisdiction.

#### 4. Finding that Yim Tith had no subordinates

140. The Dismissal Order erred in fact, and contradicted virtually all available evidence regarding the CPK and DK administrative structures and its own findings, when it found that Yim Tith “did not have specific subordinates”.<sup>395</sup> This unreasonable finding was made in the portion of the Dismissal Order specifically addressing personal jurisdiction over Yim Tith, demonstrating its significance to the erroneous conclusion on jurisdiction. This factual error occasioned a miscarriage of justice.
141. As discussed above, the Dismissal Order explicitly found that Yim Tith served as (i) the deputy secretary of Kirivong District, (ii) the secretary of Kirivong District, (iii) the secretary of Sector 13, (iv) the secretary of Sector 1, and (v) the member of the Northwest Zone committee.<sup>396</sup> The Dismissal Order also found that “[t]he administrative structure [of the DK] was a top-down hierarchy which included: zones, sectors, districts, communes, villages, cooperatives, groups, and units”;<sup>397</sup> that “each Party policy was disseminated to the people nationwide through [...] meetings at all levels from the high level to the low level based on the leading hierarchy from the Central Zone, the sectors, the autonomous sectors, districts, communes, villages, and cooperatives”;<sup>398</sup> and that “all communes had to report to district committees, and district committees reported to sector committees. The sector committees had to report to zone committees.”<sup>399</sup> In making these findings, the Dismissal Order specifically relied on<sup>400</sup> an analytical report that stated “CPK leadership at the Sector echelon had broad authority over personnel and organizational matter, security, and economics within their respective sectors”<sup>401</sup> and contained analogous findings with respect to district- and zone-level leaders.<sup>402</sup>
142. These findings accord with the CPK Statute, which provides that sector committees are

<sup>395</sup> D381 Dismissal Order, para. 682.

<sup>396</sup> See *supra*, para. 42.

<sup>397</sup> D381 Dismissal Order, para. 158.

<sup>398</sup> D381 Dismissal Order, para. 64.

<sup>399</sup> D381 Dismissal Order, para. 127.

<sup>400</sup> D381 Dismissal Order, para. 127, fn. 362.

<sup>401</sup> D1.3.15.1 Written Record of Analysis of Craig Etcheson, para. 58.

<sup>402</sup> D1.3.15.1 Written Record of Analysis of Craig Etcheson, paras 41-44, 74.

004/07-09-2009-ECCC/OCIJ (PTC61)

to “[g]o down close to the Districts and Branches and the specific bases of the Branches [...] in order to lead the implementation of tasks, both among the popular masses and internally” and “[c]onstantly and tightly grasp the District organizations, the Branch organizations, the cadres, and Party members along with all the core organizations of the Sector in regards to personal histories, politically, ideologically, and organizationally”.<sup>403</sup> Similar provisions apply to zones and districts.<sup>404</sup>

143. Based on the Dismissal Order’s own findings, and in the absence of evidence to the contrary, no reasonable factfinder could have failed to conclude that Yim Tith had subordinates.
144. Additionally, had the Dismissal Order complied with the legal duty and comprehensively considered other evidence on the case file, it would have identified specific subordinates of Yim Tith. Chhoeung Bean discussed a meeting he attended that “included Ta Tith *and his subordinates*, named Ta Koan (a unit chief), Vat, Tem, Ran, Ron, Ta Khauv”.<sup>405</sup> Discussing Kanhgath Dam, another witness said, “Ta Tith was at Kanhgath. [...] I saw him once. Later on [...] I only saw *his subordinates such as unit chiefs*.”<sup>406</sup> Nop Ngim gave evidence that, as the Samlout District Deputy Secretary, she was Yim Tith’s subordinate.<sup>407</sup> Several witnesses indicated that Ta Nim was a high-ranking subordinate of Yim Tith in Sector 1.<sup>408</sup> Other witnesses stated that Yim Tith gave orders to kill to a Koas Krala military cadre named An and another cadre called Ta Saman.<sup>409</sup> A soldier

<sup>403</sup> **D1.3.20.1** Statute of the Communist Party of Kampuchea, arts 16(1), (3), EN 00184042-43.

<sup>404</sup> **D1.3.20.1** Statute of the Communist Party of Kampuchea, arts 13(1), 3, 19(1), 3, EN 00184041, 00184044.

<sup>405</sup> **D219/368** Chhoeung Bean WRI, A90 [Witness attended a meeting in late 1978 in Bay Damram Commune, Banan District: “the meeting included Ta Tith and his subordinates, named Ta Koan (a unit chief), Vat, Tem, Ran, Ron, Ta Khauv”] (emphasis added). *See also* A114 [“I saw Ta Tith going back and forth to Kanhgath Dam [...]. He also transferred his subordinates - Tem, Vat, Ran, Rom and Chhea, amongst others - to this dam site in April or May 1977.”].

<sup>406</sup> **D219/943** Lam Lin WRI, A12-13 (emphasis added).

<sup>407</sup> **D123/2/2.17a** Nop Ngim DC-Cam Statement, EN 01155610; **D118/285** Nop Ngim WRI, A31.

<sup>408</sup> **D118/136** Chhean Hea WRI, A7 [Witness was Ta Pet’s bodyguard and messenger: “Ta Tit’s deputy was Ta Nim. Ta Tit and Ta Nim came to stay at Kang Hort dam and both of them arrested and killed many people [...]. Both of them were in charge of Sector 1.”]; **D219/904** Yoeum Kuonh WRI, A82 [“My husband [Nim] went to report at Ta Ti[t]h’s house”] (*note*: The witness was unaware of her husband’s senior CPK position, *see* **D219/904** Yoeum Kuonh WRI, A113); **D219/263** Chham Luy WRI, A54, 56, 58; **D219/894** Kao Porn WRI, A19, 22.

<sup>409</sup> An: **D219/982** Sao Chobb WRI, A28-29 [The witness was a former platoon chief in Koas Krala District and saw An, a military commander, “arresting and killing people”. When he asked An “who assigned him to be a killer like that [...] [h]e said Tith did.”]. *See also* **D382** Indictment, para. 413; **D378/2** ICP Final Submission, para. 69. Saman: **D219/368** Chhoeung Bean WRI, A141 [Witness was a labourer at Kanhgath Dam whose Commander told him Yim Tith gave the order to kill: “My unit chief escaped, and Ta Saman chased him in order to have him killed, under the orders of Ta Tith.”] (*see also* **D219/465** Chhoeung Bean WRI, A35; **D219/533** Chhoeung Bean WRI, A220); **D219/689** Sok Cheat WRI, A72.



004/07-09-2009-ECCC/OCIJ (PTC61)

gave evidence that “Ta Tit brought *his forces* from Takeo with Ta Mok.”<sup>410</sup> The Dismissal Order itself appeared to accept evidence that “Ta Tith *personally led forces* to inspect the situation at Kampong Kol factory and assigned Yan to be in charge of the factory.”<sup>411</sup>

145. The Dismissal Order’s finding that Yim Tith had no clear subordinates is manifestly unreasonable. Its prominence in the concluding portions of the Dismissal Order shows that this factual error occasioned a miscarriage of justice and was fundamentally determinative of the conclusion on personal jurisdiction.

**5. Finding that killings decreased after an alleged Khieu Samphan announcement in mid-1978**

146. The Dismissal Order erred in fact by claiming that Khieu Samphan announced “the cancellation of killings, which resulted in the decrease in purging” at the time that Yim Tith became Sector 1 Secretary and Northwest Zone Committee Member.<sup>412</sup> This erroneous assertion is contained in the “Findings and Conclusion on Personal Jurisdiction” section of the Dismissal Order and purported to reduce the number of killings for which Yim Tith is likely responsible. The factual error, together with other factual errors, occasioned a miscarriage of justice.

147. The Dismissal Order cited *no* evidence from Case 004 to support this claim and did not refer to any document in which Khieu Samphan made an announcement on stopping killings. Instead, the Dismissal Order based the assertion *solely* on paragraph 508 of the Case 004/2 Dismissal Order.<sup>413</sup> And the Case 004/2 Dismissal Order contained *no* citation to Khieu Samphan’s alleged statement either.

148. Moreover, this erroneous statement is contradicted by the Dismissal Order’s findings that demonstrated the commission of crimes. For example, the Dismissal Order held that (i) Southwest Zone cadres increasingly came to purge the Northwest Zone cadres in mid-1978,<sup>414</sup> (ii) arrests became more serious upon the arrival of Southwest Zone cadres,<sup>415</sup> (iii) resistance against the Vietnamese became stronger in the Northwest Zone from the

<sup>410</sup> **D118/150** Hem Moeun WRI, A60 [Witness was a soldier who worked closely with Ta Mok: “Ta Tit brought his forces from Takeo with Ta Mok.”] (emphasis added).

<sup>411</sup> **D381** Dismissal Order, para. 332 (emphasis added). *See also, infra*, section IV(F)(2).

<sup>412</sup> **D381** Dismissal Order, para. 680.

<sup>413</sup> **D381** Dismissal Order, fn. 2506.

<sup>414</sup> **D381** Dismissal Order, para. 141.

<sup>415</sup> **D381** Dismissal Order, para. 143.

004/07-09-2009-ECCC/OCIJ (PTC61)

time Yim Tith arrived until the end of the regime,<sup>416</sup> (iv) Northwest Zone cadres were announced as traitors by Southwest Zone cadres at Wat Kirirum in mid-1978 and were then arrested and replaced,<sup>417</sup> (v) killings increased “dramatically” at Banan Security Centre in mid-1978,<sup>418</sup> (vi) Koas Krala pagoda was used as a security centre *after* the arrival of Southwest Zone cadres,<sup>419</sup> (vii) Wat Samdech began to be used as a place to detain and kill people in mid-1978<sup>420</sup> and subsequently all Northwest Zone cadres were arrested and taken for execution,<sup>421</sup> (viii) most of the prisoners in Thipakdei Security Centre died in late 1978 and then equal numbers of new prisoners were brought into the security centre,<sup>422</sup> (ix) arrests were more frequent at Kampong Kol Sugar Factory after 1978,<sup>423</sup> and (x) Southwest Zone cadres arrested Northwest Zone cadres in Kampong Prieng Commune *after* mid-1978.<sup>424</sup>

149. Assuming, *arguendo*, that the Dismissal Order was relying on a CPK Central Committee document from 20 June 1978 purporting to pardon those alleged to be in the CIA and KGB networks,<sup>425</sup> the claim remains erroneous. The Case 002 Closing Order noted that this document “appeared to prescribe re-education for those who joined the CIA, KGB and Vietnamese before July 1978, but ordered the Party and the Cambodian people to eliminate networks which continued to oppose the Party from July 1978 onwards”.<sup>426</sup> And the Trial Chamber in the Case 002/02 Trial Judgment noted that “[p]risoner lists from S-21 confirm that arrests continued throughout the country [...] after June 1978 until the end of the regime”.<sup>427</sup>
150. The Dismissal Order’s reliance on an uncited statement, which is contradicted by the Dismissal Order’s own findings, amounted to an error of fact which, together with other factual errors, occasioned a miscarriage of justice. Further, the Dismissal Order’s erroneous inference that Yim Tith bears less responsibility for killings because of this

---

<sup>416</sup> D381 Dismissal Order, para. 154.

<sup>417</sup> D381 Dismissal Order, para. 380.

<sup>418</sup> D381 Dismissal Order, para. 304.

<sup>419</sup> D381 Dismissal Order, para. 255.

<sup>420</sup> D381 Dismissal Order, para. 386.

<sup>421</sup> D381 Dismissal Order, para. 389.

<sup>422</sup> D381 Dismissal Order, para. 273.

<sup>423</sup> D381 Dismissal Order, para. 306.

<sup>424</sup> D381 Dismissal Order, para. 399.

<sup>425</sup> D6.1.473 CPK Central Committee Policy Directive, Jun 1978.

<sup>426</sup> Case 002-D427 Closing Order, para. 919.

<sup>427</sup> Case 002-E465 Case 002/02 TJ, para. 1468.

004/07-09-2009-ECCC/OCIJ (PTC61)

unsupported statement, together with other factual errors, was fundamentally determinative of the conclusion that Yim Tith is not among “those who were most responsible”.

151. In conclusion, the Dismissal Order contained multiple errors of fact that, individually or cumulatively, occasioned a miscarriage of justice and were fundamentally determinative of its conclusion that Yim Tith was outside of the ECCC’s jurisdiction.

**F. THE DISMISSAL ORDER ERRED IN LAW BY GIVING WEIGHT TO FACTS OF MARGINAL RELEVANCE**

152. The Dismissal Order erred in law by giving any or excessive weight to numerous facts of marginal relevance when reaching its decision on personal jurisdiction. These legal errors, alone or together, invalidated the Dismissal Order and were fundamentally determinative of the conclusion on personal jurisdiction.

**1. Finding that Yim Tith was not a member of the People’s Representative Assembly**

153. The Dismissal Order erred in law by giving any weight to the fact that Yim Tith was not a member of the People’s Representative Assembly when making its jurisdictional assessment,<sup>428</sup> despite having earlier found that the Assembly was a purely symbolic institution that met only once and “seemed to have no real power since everything was under the control of the Party”.<sup>429</sup> The fact that Yim Tith was not a member of this powerless and borderline-fictitious institution says nothing about his degree of responsibility for DK crimes. This error, together with other legal errors, invalidated the Dismissal Order.
154. In addition, the International Judges of the Pre-Trial Chamber noted that, in Case 004/1, the CIJs had failed to consider that Im Chaem had been a Member of the People’s Representative Assembly.<sup>430</sup> The Dismissal Order’s reference to Yim Tith not being a member of the same body thus represented an inconsistent approach to this factor, evaluating it as relevant on one occasion and disregarding it on another.
155. The legal error of giving weight to Yim Tith not being a member of the People’s Representative Assembly, together with other legal errors, invalidated the Dismissal

<sup>428</sup> D381 Dismissal Order, para. 670.

<sup>429</sup> D381 Dismissal Order, para. 124. *See also* paras 119-125.

<sup>430</sup> Case-004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, Opinion of International Judges, para. 302.

004/07-09-2009-ECCC/OCIJ (PTC61)

Order and was fundamentally determinative of the conclusion on personal jurisdiction.

## 2. Finding that Yim Tith held no position in the army

156. The Dismissal Order erred in law by according excessive weight to the fact that Yim Tith had no position in the army.<sup>431</sup> Evidence shows that, as a general matter, zone and sector committees “commanded armed units” and “were in ‘overall charge’ of all matters within their jurisdiction, whether military or civilian”.<sup>432</sup> There is also significant evidence that Yim Tith specifically had authority over and issued orders to military forces in the areas where he was active. Ta Mok’s nephew stated that Yim Tith summoned military leaders to meetings at Battambang University.<sup>433</sup> The former secretary of Bavel District (in Sector 3) stated that Yim Tith was in charge of the Sector 3 military.<sup>434</sup> A mobile unit worker in Sangkae District (in Sector 1) stated that Yim Tith was in charge of the military there.<sup>435</sup> A former platoon chief in Koas Krala District (in Sector 1) gave evidence that Yim Tith issued execution orders to a Koas Krala District military company commander, and that thousands of people were killed as a result of those orders.<sup>436</sup> A zone-level soldier said that “Yim Tith had personally led *his* forces” to inspect the situation at Kampong Kol Sugar Factory (in Sector 1).<sup>437</sup> Indeed, the Case 002 Closing Order acknowledged that civilian cadres could oversee soldiers.<sup>438</sup> Given that Yim Tith had authority over the

<sup>431</sup> **D381** Dismissal Order, para. 670 [Yim Tith “held no position in the army.”].

<sup>432</sup> **D1.3.15.1** Craig Etcheson Written Record of Analysis, paras 67, 49-50.

<sup>433</sup> **D118/150** Hem Moeun WRI, A61 [Witness was Mok’s nephew and travelled extensively with Mok: “Ta Mok made an announcement in front of the army that ‘Ta Tit is in charge of the zone when I am absent.’ Ta Tit used to invite military commanders to the meetings on the university campus.”].

<sup>434</sup> **D219/294** Muol En WRI, A36 [secretary of Bavel District], A190-193 [“Q: Do you recall if Yim Tith, the Sector Secretary, had the authority to make arrests or resolve security problems? A190: Yes, I do. He had such authority. Any Sector Secretary had such authority. Q: Do you mean to say the Sector Secretary was in charge of the sector military? A191: Yes, I do. They were in charge of the sector military affairs. [...] A192: In Sector 3 there a Company of approximately 120 soldiers. Q: Do you recall if each sector in the Zone had its own Companies? A193: Yes, I do. It was the case everywhere. However, Ta Mok was in charge of all the military personnel. He delegated his power to the provincial echelon cadres to manage the military on his behalf.”].

<sup>435</sup> **D219/538** Soeun Mat WRI, A20, 38, 56 [Soeun Mat was a mobile unit worker in Sangkae District: “A20: [...] Ta Tith was in charge of the military [...] A38: [...] Everyone knew Ta Tith, because they heard that Ta Tith was a strong military leader. [...] A56: The village chief and the unit chief mentioned Ta Tith’s soldiers. Therefore, I knew that he was a military commander.”].

<sup>436</sup> **D219/982** Sao Chobb, WRI, A26-33 [The witness was a former platoon chief in Koas Krala District and saw An, a military commander, “arresting and killing people”. When he asked An “who assigned him to be a killer like that [...] [h]e said Tith did.” “[T]housands of people” were killed.].

<sup>437</sup> **D118/106** Huon Choeum WRI, A12 [“A Zone soldier told me that Ta Tit had personally led his forces to see the situation at the Kampong Kul white sugar refinery [...] Ta Tit assigned female Yan from the Southwest to control that sugar refinery instead.”] (emphasis added). *See also* **D381** Dismissal Order, para. 332.

<sup>438</sup> Case 002-**D427** Closing Order, paras 133 [“Zone Armies [...] were integrated into the Zone administration”], 135 [“militias [...] were called on by the civil administration to perform security tasks.”].

004/07-09-2009-ECCC/OCIJ (PTC61)

military forces relevant to his areas of activity and to the crimes he is charged with, the fact that he had no position in the Centre army (the RAK) is of very limited relevance to his level of responsibility for crimes during the DK period. The legal error, together with other legal errors, invalidated the Dismissal Order and was fundamentally determinative of the conclusion on personal jurisdiction.

**3. Finding that Yim Tith was not involved in preparations for the transfer of Southwest Zone cadres to the Northwest Zone**

157. The Dismissal Order erred in law by giving any weight to its finding that Yim Tith was not involved in the preparations for the transfer of Southwest Zone cadres to the Northwest Zone and that these preparations were instead carried out by Ta Mok when assessing personal jurisdiction.<sup>439</sup> This is also irrelevant to the overall consideration as to whether Yim Tith was among “those who were most responsible”. The fact that Yim Tith did not participate in preparations for the transfer does not change the fact that he participated in the crimes in a myriad of other – and far more critical – ways. The legal error, together with other legal errors, invalidated the Dismissal Order and was fundamentally determinative of the conclusion on personal jurisdiction.

**4. Finding that the purge had already partially begun and some crime sites were already in operation prior to Yim Tith’s arrival in the Northwest Zone**

158. The Dismissal Order erred in law by giving any weight to the fact that some of the sites at which Yim Tith is responsible for crimes already existed prior to his arrival in the Northwest Zone and that some aspects of the purge had begun to be implemented before Yim Tith’s arrival.<sup>440</sup> Again, this is of, at most, very marginal relevance. What matters is the fact that Yim Tith enthusiastically continued the implementation and increased the intensity of the purge policy following his arrival in the Northwest Zone. The legal error, together with other legal errors, invalidated the Dismissal Order and was fundamentally determinative of the conclusion on personal jurisdiction.

**5. Finding that there were approximately 100 cadres who served at the sector and zone levels in the DK regime**

---

*See also* D381 Dismissal Order, paras 147 [“Ta Vanh, who was the Sector 1 Secretary and Sector Military Commander”], 164.

<sup>439</sup> D381 Dismissal Order, para. 140.

<sup>440</sup> D381 Dismissal Order, paras 155, 673.

004/07-09-2009-ECCC/OCIJ (PTC61)

159. The Dismissal Order erred in law by basing its conclusion on jurisdiction on the fact that Yim Tith was “one among the 100 people at a minimum at the zone and sector levels”<sup>441</sup> in the DK regime. The Dismissal Order implied that this means that Yim Tith was not very important and so does not satisfy the ECCC’s jurisdictional requirements. This approach failed to appreciate that there were vast differences in power among these 100 people (a number for which, in any event, no evidence is cited) and that Yim Tith was among the most powerful. As other cadres were purged, arrested, and killed, Yim Tith was promoted to ever more important positions and exercised ever greater power. The Dismissal Order’s inference that all of these cadres were equally responsible for the crimes of the DK regime was unreasonable. The legal error invalidated the Dismissal Order and was, together with other legal errors, fundamentally determinative of the conclusion on personal jurisdiction.

#### 6. Finding that some witnesses had not heard of Yim Tith

160. The Dismissal Order erred in law by giving any weight to the fact that some witnesses had never heard of Yim Tith.<sup>442</sup> This error, together with other legal errors, invalidated the Dismissal Order.

161. Without undertaking an analysis of whether each of those witnesses would have been in a position to know or have heard of Yim Tith, the Dismissal Order’s reliance on this finding alone was unreasonable, particularly since it had also found “[a]bout 24 witnesses affirmed that they knew Ta Tith.”<sup>443</sup> The Dismissal Order found that secrecy was one of the operating principles of the CPK criminal plan: “The purge was not announced because it was confidential”<sup>444</sup> and the communication systems and chain of command were characterised by “intended secrecy which did not permit or at least did not encourage a free [...] exchange[] of tactical and operational information on the levels below the top leadership.”<sup>445</sup> Indeed, the regime was so secretive that very few people had ever heard of Pol Pot himself until 1977 – but this fact obviously did not make Pol Pot any less

<sup>441</sup> **D381** Dismissal Order, para. 671.

<sup>442</sup> **D381** Dismissal Order, paras 672, 676.

<sup>443</sup> **D381** Dismissal Order, para. 672. It is not clear what the Dismissal Order meant by “knew” Yim Tith, but at least 50 witnesses had heard of Yim Tith based on their direct experience or knowledge from other individuals. *See Annex 3.*

<sup>444</sup> **D381** Dismissal Order, para. 142.

<sup>445</sup> **D381** Dismissal Order, para. 665.

004/07-09-2009-ECCC/OCIJ (PTC61)

responsible for the regime's crimes.<sup>446</sup> As the Trial Chamber found in Case 002/01:

Limited, if any, information about the leadership structure was accessible to ordinary people, who were often simply required to obey without question decisions made by 'Angkar' (literally 'organisation'), an anonymous entity seen as having the power to control the whole of society. Lower-ranking cadres sometimes had only a cursory understanding of the organisation of power in the CPK.<sup>447</sup>

162. Similarly, in this case, the policy of secrecy explains why not every witness in the case file had heard of Yim Tith. But when the evidence is evaluated in total with due regard for the scope of each witness's knowledge in light of what each witness would be expected to know, the picture of Yim Tith's power and positions is clear. Witnesses that would be expected to know, or know of, Yim Tith generally did; those who would not have been expected to know him sometimes did not. In light of the Dismissal Order's own findings regarding secrecy, it was an error to give weight to the simple fact that some witnesses were not familiar with Yim Tith in assessing jurisdiction. The legal error invalidated the Dismissal Order and was fundamentally determinative of the conclusion on personal jurisdiction.
163. In conclusion, the Dismissal Order erred in law by giving any or excessive weight to numerous facts of marginal relevance. These legal errors, alone or together, invalidated the Dismissal Order and were fundamentally determinative of its conclusion that Yim Tith was outside of the ECCC's jurisdiction.

#### V. LEGAL CONSEQUENCES OF CONFLICTING CLOSING ORDERS

164. For the reasons articulated in this appeal, the ICP submits that the Dismissal Order's finding on personal jurisdiction should be reversed. If this appeal is upheld, it is clear that the case file should then be sent to the Trial Chamber for trial on the basis of the Indictment against Yim Tith. However, the ICP is mindful that the Indictment is also subject to appeal by Yim Tith and the NCP. The ICP notes that there are two possible scenarios in which, even after the Pre-Trial Chamber rules on all appeals in this case, two conflicting closing orders will remain in effect. The first scenario could occur should the Pre-Trial Chamber be unable to reach the supermajority required by the ECCC

<sup>446</sup> **D6.1.596** David P. Chandler, *Brother Number One*, 1999, EN 00392916; **D219/370.1.70** Gina Chon and Thet Sambath, *Behind the Killing Fields*, 2010, EN 00757527.

<sup>447</sup> Case 002-E313 Case 002/01 TJ, para. 199.

004/07-09-2009-ECCC/OCIJ (PTC61)

Agreement, ECCC Law, and Internal Rules for a decision. The second scenario would arise should the Pre-Trial Chamber reach decisions to deny all appeals, finding that both the Indictment and the Dismissal Order acted within the respective Co-Investigating Judge's discretion. As explained below, should either situation arise, the relevant provisions of the Internal Rules and Supreme Court Chamber jurisprudence mandate that the case proceed to trial on the basis of the Indictment. This result is consistent with the ECCC Agreement, ECCC Law, and Pre-Trial Chamber jurisprudence.

165. Internal Rule 77(13) provides:

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

a) As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand.

b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges.

166. Rule 1(2) further provides that “a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually”. Rule 77(13)(b) therefore applies to an indictment issued by a single CIJ, as in the case at hand. Thus, Rule 77(13)(b) makes clear that if the Indictment is not reversed by a supermajority decision on appeal, the case against Yim Tith must be sent to trial.

167. Assuming, *arguendo*, that the word “order” in Rule 77(13)(a) includes dismissal orders,<sup>448</sup> Rule 77(13)(b) is *lex specialis* relating to indictments and thereby prevails over the general terms of Rule 77(13)(a). “Dismissal Order” and “Closing Order”, like

---

<sup>448</sup> The ICP notes that the French version of Internal Rules 77(13) and 77(13)(a) read: “Lorsque la majorité requise n’est pas atteinte, la Chambre préliminaire est présumée avoir rendu une décision s’interprétant comme suit: a) Concernant un appel contre une ordonnance ou une requête en annulation d’un acte d’instruction, *autre que l’ordonnance de clôture*, l’ordonnance ou l’acte d’instruction demeure”, thereby excluding a dismissal order from the ambit of Internal Rule 77(13)(a). The Khmer version, like the English, refers to “an order or investigative action *other than an indictment*”, leaving dismissals orders with the scope of that rule. In Case 004/1, where the PTC was unable to reach a supermajority decision on the ICP’s Appeal of Case 004/1-D308/3 *Im Chaem* Closing Order (a dismissal order), the PTC unanimously “declared that the Closing Order (Reasons) dismissing the charges against Im Chaem shall stand”, in accordance with Internal Rule 77(13)(a). See Case 004/1-D308/3/1/20 *Im Chaem* PTC Closing Order Considerations, p. 27 (unanimous finding).



004/07-09-2009-ECCC/OCIJ (PTC61)

“Indictment”, are defined terms in the Internal Rules.<sup>449</sup> Had the drafters of the Internal Rules wished to specifically address the effect of the failure of the Pre-Trial Chamber to overturn a dismissal order, they could have done so. Therefore, even where an unsuccessfully appealed dismissal order “stands” as a record of one CIJ’s exercise of his or her independent discretion and decision not to participate in the indictment, Rule 77(13)(b) indicates a policy choice that, in case of conflicting closing orders, the Trial Chamber must be seised of the indictment and the case must be tried. This is best demonstrated by Rule 79(1), which provides that “[t]he Trial Chamber *shall* be seised by an Indictment from the Co-Investigating Judges *or* the Pre-Trial Chamber”.<sup>450</sup>

168. Supreme Court Chamber jurisprudence confirms this interpretation of the applicable procedure when there are conflict closings orders. The Case 001 Appeal Judgment held:

If, for example, the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in proposing to issue an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, ‘the investigation shall proceed.’<sup>451</sup>

169. Although the Supreme Court Chamber used the phrase “the investigation shall proceed” because it was quoting directly from the ECCC Law, the only reasonable interpretation of this statement is that the Indictment would proceed to trial. There is no other sense in which anything could “proceed” at the stage that the Supreme Court Chamber was discussing, *i.e.*, when a conflicting indictment and dismissal order have been issued and both have been subjected to unsuccessful challenges on appeal. Given that the Internal Rules define the “Trial Stage” as “refer[ring] to the date from which the Trial Chamber is seised of a case,”<sup>452</sup> the Supreme Court Chamber’s pronouncement indicates that it considered the “investigation” as continuing until the moment that the Trial Chamber is seised with an indictment, which can occur pursuant to Rules 77(13)(b) or 79(1).

170. The Pre-Trial Chamber has interpreted “investigation” consistent with this view. In Case

---

<sup>449</sup> Internal Rules, Glossary, pp. 83-84.

<sup>450</sup> Emphasis added.

<sup>451</sup> Case 001-F28 *Duch* AJ, para. 65 *citing* ECCC Law, art. 23*new*; ECCC Agreement, art. 7(4); Internal Rule 72(4)(d). Whilst this finding arises out of a discussion of the scenario where one or both of the CIJs has referred the question of a conflicting indictment and dismissal order to the PTC under Internal Rule 72, the substantive outcome is equally applicable to the current situation where the PTC has been seised of appeals by the parties, since the manner in which the PTC has been seised of the same question – whether either judge erred in issuing his Dismissal Order or Indictment – is irrelevant.

<sup>452</sup> Internal Rules, Glossary, p. 85.

004/07-09-2009-ECCC/OCIJ (PTC61)

002, where the CIJs were “in a procedural stalemate”,<sup>453</sup> the Pre-Trial Chamber held:

The Co-Investigating Judges are under no obligation to seise the Pre-Trial Chamber when they do not agree on an issue before them, the default position being that the ‘investigation shall proceed’ which is coherent with the approach taken by the Co-Investigating Judges in the current case.<sup>454</sup>

171. The mentioned “approach” was to send the accused to trial.<sup>455</sup> Thus, the Pre-Trial Chamber interpreted “the investigation shall proceed” – like the Supreme Court Chamber – as including the sending of an indictment to the Trial Chamber.
172. This result comports with the spirit and structure of the ECCC Agreement, ECCC Law, and the Internal Rules. All firmly embrace the principle that the CIJs (and Co-Prosecutors) can act independently to advance proceedings and a policy preference for proceedings to continue in the case of unresolved disagreements.<sup>456</sup> The co-equal status of the CIJs and their independent mandate is evidenced by the repeated acknowledgement in the Court’s foundational texts that the CIJs may disagree on the progress of proceedings. For example, Article 5(4) of the ECCC Agreement specifically envisages situations where the CIJs are “unable to agree whether to proceed with an investigation”, mandating that “the investigation shall proceed” unless the disagreement is brought to the Pre-Trial Chamber under Article 7, which stipulates that if a supermajority of the Pre-Trial Chamber is unable to resolve the differences between the CIJs, then “the investigation or prosecution shall proceed”. This procedure is reproduced in Article 23<sup>new</sup> of the ECCC Law. Rules 72 and 77 and Article 23<sup>new</sup> of the ECCC Law make clear that the CIJs are *not required* to bring a disagreement before the Pre-Trial Chamber for resolution. Thus, while utilising the mechanism to resolve disputes is discretionary, the ECCC Agreement, ECCC Law, and Internal Rules uniformly mandate that the judicial process *shall* go forward where the CIJs (or Co-Prosecutors), while acting in their independent capacity, are unable to agree. The Pre-Trial Chamber has repeatedly upheld this principle.<sup>457</sup>

<sup>453</sup> Case 002-D427/1/30 Ieng Sary Closing Order Appeal Decision, para. 272.

<sup>454</sup> Case 002-D427/1/30 Ieng Sary Closing Order Appeal Decision, para. 274.

<sup>455</sup> Case 002-D427/1/30 Ieng Sary Closing Order Appeal Decision, para. 274.

<sup>456</sup> See ECCC Agreement, arts 5(4), 6(4), 7(4); ECCC Law, arts 20 *new*, 23 *new*; Internal Rules 71-72, 77(13).

<sup>457</sup> See e.g. **D1/1.3** Considerations of the PTC Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 Aug 2009, paras 16, 26, 45; Case 002-D427/1/30 Ieng Sary Closing Order Appeal Decision, paras 274-276; **A122/6.1/2** Decision on Im Chaem’s Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 8 Aug 2014, para. 14; **D306/17.1/1/6.1.8** Decision on [Redacted] Appeal Against the International Co-Investigating Judge’s Order on Suspect’s Request

004/07-09-2009-ECCC/OCIJ (PTC61)

173. This framework applies to the issuance of conflicting closing orders. To find otherwise would be to defeat the various provisions relating to disagreements between the CIJs – thereby unduly limiting the exercise of the independence of each of the CIJs – and would be inconsistent with Rule 67(1), which permits the CIJs to issue a closing order, “either indicting a Charged Person and sending him or her to trial, or dismissing the case.” As already noted, Rule 1(2) provides that reference to the CIJs “includes both of them acting jointly and each of them acting individually”. Read together, the Internal Rules clearly envisage a situation in which the CIJs each issue a closing order, one of which is to indict and one of which is to dismiss.
174. Thus, in the current situation of a parallel indictment and dismissal order from the CIJs, Article 7(4) of the ECCC Agreement gives clear guidance as to what must be done should the Pre-Trial Chamber be unable to resolve the difference between the CIJs. It provides that “the investigation or prosecution shall proceed.”<sup>458</sup> Whether one considers the transfer of the indictment and case file to the Trial Chamber to be part of the investigation, as the Supreme Court Chamber and Pre-Trial Chamber did, or part of the prosecution, it is clear that if the Pre-Trial Chamber fails to overturn an indictment by supermajority, the Trial Chamber must be seised and the case brought to trial.
175. Finally, this result is also mandated by the important goal of ending impunity. The Dismissal Order acknowledged that “[t]he real purpose of the creation of the ECCC was to end the culture of impunity for international crimes.”<sup>459</sup> For a case not to go forward, despite the existence and continued effectiveness of an indictment related to crimes committed over years against tens of thousands of victims, would make a mockery of the

---

Concerning Summons Signed by One Co-Investigating Judge, 3 Dec 2014, para. 16; **D212/1/2/2** Decision on Yim Tith’s Appeal Against the International Co-Investigating Judge’s Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, 4 Dec 2014, para. 7; **D208/1/1/2** Decision on Ta An’s Appeal Against the Decision Rejecting His Request for Information Concerning the Co-Investigating Judges’ Disagreement of 5 April 2013, 22 Jan 2015, para. 11.

<sup>458</sup> ECCC Agreement, art. 7(4). This also reflects the understanding of one of the main UN negotiators of the ECCC Agreement, David Scheffer, who stated that under the supermajority rule “[t]he only way the prosecution or investigation is halted is if the Pre-Trial Chamber decides by supermajority vote that it should end.” See David Scheffer, “The Extraordinary Chambers in the Courts of Cambodia”, *International Criminal Law*, Third Edition, Vol. III, 2008, p. 246.

<sup>459</sup> **D381** Dismissal Order, para. 636. The ICP recognises that both CIJs have held that, because an impunity gap was expressly contemplated and intended at the time of the creation of the ECCC, the existence of this gap cannot be a factor militating in favour of finding jurisdiction. But that is a separate issue from what is to happen in the situation in which the CIJs have reached differing determinations on personal jurisdiction and both an indictment and a dismissal order remain effective following appeals. Case 004/1-**D308/3** *Im Chaem* Closing Order, paras 26-36.

004/07-09-2009-ECCC/OCIJ (PTC61)

concept of accountability. Moreover, the case proceeding to trial properly balances this important goal with rights of the charged person as a trial will afford that person all the rights to which he or she is entitled, including the right to a fair hearing before an impartial tribunal of independent judges, the right to test evidence and examine witnesses, the right to representation by counsel, and the ultimate requirement that the prosecution prove its case beyond reasonable doubt.

## VI. CONCLUSION

176. The Dismissal Order contained numerous legal and factual errors that, individually or cumulatively, invalidated the decision and/or occasioned a miscarriage of justice and were fundamentally determinative of the conclusion on personal jurisdiction. The Dismissal Order's erroneous minimisation of Yim Tith's criminal responsibility resulted primarily from a misinterpretation of the ECCC's personal jurisdiction; a repeated failure to render a reasoned decision concerning crimes committed and Yim Tith's likely responsibility; an erroneous reliance on superior orders and duress; according excessive weight to "direct participation" in, and proximity to, crimes while refusing to consider other modes of liability; numerous additional factual errors on matters central to an analysis of personal jurisdiction; and an undue consideration of factors of marginal relevance. These errors resulted in the manifestly erroneous finding that Yim Tith is not subject to the personal jurisdiction of the ECCC.
177. For the foregoing reasons, the ICP requests that the Pre-Trial Chamber reverse the dismissal of the case due to the Dismissal Order's erroneous finding that Yim Tith is not subject to the personal jurisdiction of the ECCC and send Yim Tith for trial on the basis of the Indictment issued by the ICIJ.

Respectfully submitted,

Date	Name	Place	Signature
2 December 2019	Brenda J. HOLLIS International Co-Prosecutor	Phnom Penh	

