

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

**FILING DETAILS**

**Case No:** 004/2/07-09-2009-ECCC-OCIJ/PTC 60    **Party Filing:** International Co-Prosecutor

**Filed to:** The Pre-Trial Chamber

**Original Language:** English

**Date of Document:** 22 February 2019

**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:**                      CONFIDENTIAL

**Classification by PTC:**    សម្ងាត់/Confidential

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**




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**INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO AO AN'S APPEAL OF  
THE CASE 004/2 INDICTMENT**

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## I. INTRODUCTION

1. On 16 August 2018, the International Co-Investigating Judge (“ICIJ”) issued a closing order (“Indictment”) indicting Ao An for genocide, crimes against humanity, and violations of the 1956 Cambodian Penal Code, committing him for trial.<sup>1</sup> On the same day, the National Co-Investigating Judge (“NCIJ”) issued a closing order (“Dismissal Order”) dismissing all charges against Ao An on the grounds that he does not fall within the personal jurisdiction of the ECCC.<sup>2</sup> Ao An appealed the Indictment (“Appeal”),<sup>3</sup> acknowledging that the crimes for which he was indicted are among “the most serious criminal accusations known to humankind,”<sup>4</sup> yet maintaining that he was not among those most responsible for them. Ao An’s Appeal should be dismissed for the reasons set forth herein.

## II. PROCEDURAL HISTORY

2. The International Co-Prosecutor (“ICP”) incorporates by reference the procedural history set out in Annex I to his appeal of the Dismissal Order.<sup>5</sup>

3. On 22 January 2019, the Pre-Trial Chamber (“PTC”) decided to extend the time and page limits for the parties’ responses to the appeals of both closing orders, instructing them to file their 50-page responses within 30 days of the notification of the translation for the appeal to which they are responding.<sup>6</sup> The Khmer translation of Ao An’s Appeal was notified on 23 January 2019,<sup>7</sup> making this Response due on 22 February 2019.

## III. APPLICABLE LAW

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

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<sup>1</sup> **D360** Closing Order (Indictment), 16 August 2018 (“Indictment”), EN 01580615-21.

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

<sup>3</sup> **D360/5/1** Ao An’s Appeal against the International Co-Investigating Judge’s Closing Order (Indictment), 19 December 2018 (“Appeal”).

<sup>4</sup> **D360/5/1** Appeal, para. 227.

<sup>5</sup> **D359/3/1.2** Annex I: Procedural History, 20 December 2018.

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

<sup>7</sup> See Notification email from the Case File Officer, 23 January 2019, 3:35 p.m.

## IV. SUBMISSIONS

### A. GROUND 1: THE RELEVANT LAW PROVIDES FOR THE ISSUANCE OF A CONFLICTING INDICTMENT AND DISMISSAL ORDER AND REQUIRES THAT THE INDICTMENT PREVAIL

5. Ao An unpersuasively argues that the issuance of both an indictment and a dismissal order in a single case constitutes legal error.<sup>8</sup>

#### 1. Ao An's textual argument is flawed

6. The foundation of Ao An's textual argument is the assertion that "[t]he ordinary meaning of the words, syntax, and grammar in IR 67 is unambiguous – the drafters explicitly envisaged a single Closing Order per investigation." He argues that "[t]his is most apparent from the first sub-paragraph, providing for 'a Closing Order, *either* indicting a Charged Person and him or her to trial, *or* dismissing the case'".<sup>9</sup>

7. The full *English* text of the provision that Ao An relies on reads as follows:

The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.<sup>10</sup>

8. However, the *Khmer* version of the Rule does not use the plural "Co-Investigating Judges" and can refer to either a single Co-Investigating Judge or both Co-Investigating Judges. In addition, Rule 1(2) provides that "unless otherwise specified, a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly *and each of them acting individually*, whether directly or through delegation" (emphasis added). Therefore, Rule 67(1) must be read to authorise the possibility of a single judge issuing a closing order.

9. Ao An implies that the words "either" and "or" in Rule 67 indicate that there can be only one closing order per investigation, but in fact they simply articulate the requirement that a closing order dispose of all the facts and charges before a Co-Investigating Judge or Judges: a closing order is required to definitively conclude a case, either by indictment or dismissal (or by indictment on some charges and dismissal on others).<sup>11</sup> Rule 67(1) permits each CIJ to issue his own closing order; it simply requires that any closing order issued be dispositive of all

<sup>8</sup> D360/5/1 Appeal, paras 20-36.

<sup>9</sup> D360/5/1 Appeal, para. 22 (emphasis in original).

<sup>10</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 ("Internal Rules" or "Rules"), Rule 67(1).

<sup>11</sup> Internal Rule 67(1); Case 004/1-D308/3/1/20 Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018 ("Im Chaem PTC Closing Order Considerations"), para. 116.

relevant matters of which the OCIJ is seised.

10. Supreme Court Chamber (“SCC”) jurisprudence confirms the view that Rule 67(1) does not preclude the issuance of two conflicting closing orders in a single case. In the Case 001 Appeal Judgment, the SCC 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>12</sup>

## **2. The issuance of two conflicting closing orders does not infringe on Ao An’s fair trial rights**

11. Ao An fails to show that the issuance of two closing orders violated his fair trial rights.<sup>13</sup> First, his assertion that because the issuance of two closing orders is unprecedented, it is therefore unfair ignores the fact that the Royal Government of Cambodia (“RGC”) and the United Nations (“UN”) deliberately created a unique structure for the ECCC. Ao An suggests that conflicting closing orders have not arisen “before any other jurisdiction in the world” because such a situation is manifestly unfair.<sup>14</sup> This ignores the obvious fact that conflicting closing orders could not have not arisen elsewhere because the ECCC’s structure itself, with two investigating judges, is unprecedented. This unique structure was negotiated and approved after great deliberation by parties determined to uphold “international standards of justice, fairness, and due process of law”.<sup>15</sup>

12. Ao An likewise fails to show that the issuance of two closing orders violates his right to be presumed innocent.<sup>16</sup> The presumption of innocence ensures that before criminal sanctions can be imposed, the burden is on the prosecution to prove the accused’s guilt beyond a

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<sup>12</sup> Case 001-F28 Appeal Judgement, 3 February 2012 (“*Duch AJ*”), para. 65 *citing* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), (“ECCC Law”), art. 23*new*; Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Phnom Penh, 6 June 2003 (“ECCC Agreement”), art. 7(4); Internal Rule 72(4)(d).

<sup>13</sup> **D360/5/1** Appeal, paras 26-32.

<sup>14</sup> **D360/5/1** Appeal, paras 26-27.

<sup>15</sup> ECCC Agreement, art. 12(2).

<sup>16</sup> **D360/5/1** Appeal, para. 28.

reasonable doubt *at trial*.<sup>17</sup> That is not the burden of proof required for an indictment. All suspects, charged persons, and Accused persons, including Ao An, enjoy the presumption of innocence unless and until they are convicted by a supermajority of the Trial Chamber judges. The issuance of an indictment by one CIJ does not remove the presumption of innocence.

13. Finally, contrary to Ao An's claims that the issuance of conflicting closing orders raises the possibility that Case 004/2 will be left in "unregulated limbo",<sup>18</sup> the future course of proceedings is clear: all parties are now exercising their right to appeal the closing orders, and those appeals will be decided by the PTC. If none of those appeals is successful (because of the supermajority rule or otherwise), pursuant to Rule 77(13)(b), the Trial Chamber will be seised with the Indictment. As set out in the ICP's appeal of the Dismissal Order, this result is mandated by the ECCC Agreement, SCC jurisprudence, and the relevant provisions of the Internal Rules.<sup>19</sup>

### **3. Ao An seeks an arbitrary and unprincipled resolution of the conflict between the closing orders**

14. Ao An suggests that, in a case like this one where the CIJs have declined to use the Rule 72 mechanism to resolve a disagreement among them, the act of the CIJ who files first should trump the conflicting act of the CIJ who files second.<sup>20</sup> He further contends that in this case, the numbering of the documents indicates that the Dismissal Order was filed prior to the Indictment and therefore must be deemed to be the only effective closing order.<sup>21</sup>

15. In essence, Ao An asks that principled, legal disagreements between CIJs be resolved through a race to file. Such an approach would have no basis whatsoever in the merits of a given position or the legality of a given action—the rights of charged persons and society's interest in achieving justice would be determined simply by the speed at which a given judge could cause a document to be filed. Given Ao An's arguments regarding legal certainty and the importance of a clear process,<sup>22</sup> it is surprising that he advocates such an arbitrary system.

<sup>17</sup> *Kayishema & Ruzindana* AJ, para. 107; Internal Rule 21; Case 001-F28 *Duch* AJ, para. 33; ECCC Law, art. 35*new*.

<sup>18</sup> **D360/5/1** Appeal, paras 29-32.

<sup>19</sup> **D359/3/1** International Co-Prosecutor's Appeal of the Order Dismissing the Case against Ao An, 20 December 2018 ("ICP Appeal of Dismissal Order"), paras 100-108.

<sup>20</sup> **D360/5/1** Appeal, paras 33-34.

<sup>21</sup> **D360/5/1** Appeal, para. 34.

<sup>22</sup> **D360/5/1** Appeal, paras 30, 32.

## B. GROUND 2: THE ICIJ CORRECTLY DETERMINED THE EXTENT OF HIS DISCRETION

16. Ao An alleges that the ICIJ erred in asserting that he had “unfettered discretion” in determining whether Ao An falls within the ECCC’s personal jurisdiction.<sup>23</sup> In doing so, he misstates the ICIJ’s holding—which says very nearly the opposite of what Ao An claims.

17. Ao An bases his argument on the ICIJ’s paraphrase of an SCC holding in which the ICIJ said that *the SCC had found* the jurisdictional categories of “senior leaders” and “most responsible” “to be in principle unfettered by any strict rules of interpretation and in essence non-justiciable before the Trial Chamber or SCC, *short of a showing of abuse of discretion* through bad faith or unsound professional judgment.”<sup>24</sup> It is clearly inaccurate to characterise this as an assertion of “unfettered discretion” on the part of the ICIJ. First, he is discussing the review power of the Trial Chamber and the SCC—not the Pre-Trial Chamber—with respect to the jurisdictional question. Second, he acknowledges that even before those two chambers, the assessment would be subject to challenge if it amounted to an abuse of discretion.<sup>25</sup>

18. Most importantly, the ICIJ goes on to argue that in his own view, the CIJs’ discretion is *more limited* than the paraphrased SCC jurisprudence suggests, and is in fact reviewable by other chambers. The ICIJ incorporates by reference his Case 004/1 Closing Order discussion, in which he (alongside the NCIJ) said that, despite the SCC’s statements on the matter:

[I]n a judicial context, such an important threshold criterion [...] cannot be interpreted without recourse to at least some pivotal considerations. Indeed, the very reference to an abuse of discretion based on bad faith or unsound professional judgement presupposes that there are parameters against which the exercise of the discretion can and must be measured, i.e. what constitutes the boundaries of good faith and sound professional judgement before the decision moves into the field of arbitrariness. The SCC cannot have had in mind an entirely free-wheeling selection policy approach by the OCP or OCIJ.<sup>26</sup>

19. The CIJs concluded that the question of personal jurisdiction “entails a wide but not entirely non-justiciable margin of appreciation for the OCP and OCIJ.”<sup>27</sup> No reasonable

<sup>23</sup> **D360/5/1** Appeal, paras 39-42.

<sup>24</sup> **D360** Indictment, para. 54.

<sup>25</sup> Case 004/1-**D308/3** Closing Order (Reasons), 10 July 2017 (“Im Chaem Closing Order (Reasons)”), para. 8.

<sup>26</sup> **D360** Indictment, para. 54 *incorporating by reference* Case 004/1-**D308/3** Im Chaem Closing Order (Reasons), para. 9.

<sup>27</sup> Case 004/1-**D308/3** Im Chaem Closing Order (Reasons), para. 9 (incorporated by **D360** Indictment, para. 54).

construction of the ICIJ's statements could lead to the conclusion that he believed himself to have "unfettered discretion".

**C. GROUND 3: IN ANALYSING PERSONAL JURISDICTION, THE ICIJ CORRECTLY INTERPRETED THE TERM "MOST RESPONSIBLE"**

20. Ao An fails to demonstrate that the ICIJ interpreted the term "most responsible" in an overly broad manner.<sup>28</sup> His arguments in this regard are based on a misunderstanding of the negotiating history of the ECCC Agreement and an incorrect interpretation of the criteria by which the determination of whether a person falls within the category of "those who were most responsible" is to be assessed.

21. In his first subground, Ao An argues that based on the ECCC negotiating history, subsequent practices of the parties, and separate opinions in some decisions where the applicable chamber failed to reach a decision, "it is clear that the Court was created to prosecute only the top Khmer Rouge leadership."<sup>29</sup> This is manifestly wrong on its face. The ECCC Agreement and the ECCC Law make it indisputably clear that the ECCC was established to bring to trial "senior leaders of Democratic Kampuchea *and* those who were most responsible for the crimes and serious violations" of the relevant laws committed during the period.<sup>30</sup> Disregarding the second jurisdictional category cannot be justified, given the plain meaning of the Agreement and the ECCC Law.

22. Contradicting his own claim that the ECCC "was created to prosecute only the top Khmer Rouge leadership", Ao An concedes that Kaing Guek Eav ("Duch") was properly found to be within the court's personal jurisdiction as among those "most responsible".<sup>31</sup> Ao An then suggests that the category of "most responsible" in the ECCC Law and Agreement was added "to enable the prosecution of Duch".<sup>32</sup>

23. Statements made by Cambodia's chief negotiator at the time of the adoption of the ECCC Law make it clear that the category of "most responsible" was intended to do far more than simply "enable the prosecution of Duch". Explaining the jurisdictional categories to the Cambodian National Assembly, Deputy Prime Minister Sok An said:

If we ask the question 'who shall be indicted?,' neither the United Nations

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<sup>28</sup> D360/5/1 Appeal, paras 43-54.

<sup>29</sup> D360/5/1 Appeal, para. 46.

<sup>30</sup> ECCC Agreement, art. 1 (emphasis added); ECCC Law arts 1-2 (emphasis added).

<sup>31</sup> D360/5/1 Appeal, para. 46.

<sup>32</sup> D360/5/1 Appeal, para. 46.

nor the Task Force of the Royal Government of Cambodia are able to give a response. Because this is the task of the courts: the Extraordinary Chambers. If we list the names of people for the prosecution instead of the courts, we violate the power of the courts. Therefore, we cannot identify A, B, C, or D as the ones to be indicted. As a solution, we have identified two targets: *senior leaders* and *those most responsible*. Considering *senior leaders*, we refer to no more than 10 people, but we don't clearly state that they are the members of the Standing Committee. That is the task of the Co-Prosecutors to decide who are the senior leaders. [...] However, there is still the second target. They are not the leaders, but they committed atrocious crimes. That's why we use the term *those most responsible*. There is no specific amount of people in the second group to be indicted.<sup>33</sup>

24. The rest of Ao An's submissions on this subground are simply unsupported conclusory statements that Ao An does not fall within the jurisdictional category of "those who were most responsible." These should be summarily dismissed.<sup>34</sup>

25. Contrary to Ao An's second subground,<sup>35</sup> the ICIJ properly applied the principles of *in dubio pro reo* and strict construction in determining the bounds of the category of "those who were most responsible." The ICIJ acknowledged the importance of these principles in his analysis<sup>36</sup> and correctly set out that they have "a residual role in the interpretation of legal provisions", with their application "limited to doubts that remain after the application of standard rules of interpretation."<sup>37</sup>

26. The ICIJ correctly found that on any reasonable understanding of the term "those who were most responsible", Ao An falls within the personal jurisdiction of the ECCC.<sup>38</sup> As the ICIJ found, Ao An was "certainly one of the persons most responsible for DK crimes";<sup>39</sup> his "position and the nature, the geographical reach and the impact of his actions clearly surpass those attributable to [...] Duch", who was held to be subject to the ECCC's personal jurisdiction;<sup>40</sup> he was a "highly trusted cadre";<sup>41</sup> he had "the defining role in orchestrating and implementing the annihilation of the Cham in the Central Zone across Sector 41 in particular"

<sup>33</sup> **D359/3/1.1.45** Transcript translated by DC-Cam of the First Session of the Third Term of Cambodian National Assembly, 4-5 October 2004, EN 01598763-64 (emphasis added).

<sup>34</sup> For a list of challenges that warrant summary dismissal, see, e.g. *Prlić* AJ, Vol. 1, para. 25.

<sup>35</sup> **D360/5/1** Appeal, para. 48.

<sup>36</sup> **D360** Indictment, para. 55; Case 004/1-**D308/3** Im Chaem Closing Order (Reasons), paras 26-36.

<sup>37</sup> Case 004/1-**D308/3** Im Chaem Closing Order (Reasons), para. 26.

<sup>38</sup> **D360** Indictment, paras 697-712.

<sup>39</sup> **D360** Indictment, para. 697.

<sup>40</sup> **D360** Indictment, para. 699.

<sup>41</sup> **D360** Indictment, para. 701.

and this role “alone puts him solidly within the bracket of personal jurisdiction”;<sup>42</sup> and he was also responsible for crimes against humanity and domestic crimes including the deaths of at least 12,944 people—and probably far more.<sup>43</sup> There is, simply put, no room to doubt that Ao An falls within the personal jurisdiction of the ECCC, even at its narrowest reasonable construction.

27. In his third subground, Ao An claims that the ICIJ viewed personal jurisdiction “through the lens of JCE I” and asserts that the ICIJ should first have determined whether Ao An was among the “most responsible” before assessing his criminal liability.<sup>44</sup>

28. In fact, the PTC has said that in order 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>45</sup>—a clear indication that an individual’s criminal responsibility is of central relevance to determining whether the ECCC has personal jurisdiction.<sup>46</sup> It was therefore not only appropriate, but necessary, for the ICIJ to assess Ao An’s criminal responsibility in evaluating whether he falls within the personal jurisdiction of the ECCC.

29. Nor is there merit to Ao An’s contention that the ICIJ’s finding that Ao An is among the “most responsible” rests “solely on Ao An’s alleged membership in a broad JCE that potentially includes the entire chain of command”.<sup>47</sup> In fact, the ICIJ carefully analysed Ao An’s own acts and conduct to determine the magnitude of his contribution to the JCE and the crimes with which he was charged.<sup>48</sup> The Indictment is not an assertion of guilt by association, as Ao An implies, but rather a well-reasoned and thoroughly substantiated conclusion that Ao An was a “willing and driven participant in the brutal and criminal implementation of [the] inhuman policies” of the DK regime.<sup>49</sup>

30. In his fourth subground, Ao An asserts that it was error for the ICIJ not to compare Ao

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<sup>42</sup> **D360** Indictment, paras 707-708.

<sup>43</sup> **D360** Indictment, paras 710-711.

<sup>44</sup> **D360/5/1** Appeal, paras 49-52.

<sup>45</sup> Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 26 (unanimous holding) (emphasis added).

<sup>46</sup> See also Case 001-**E188** Judgement, 26 July 2010 (“*Duch TJ*”), para. 22; Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 321; **D359** Dismissal Order, para. 424.

<sup>47</sup> **D360/5/1** Appeal, para. 49.

<sup>48</sup> See, e.g. **D360** Indictment, paras 224, 246, 256-319, 344, 347, 351-354, 363-364, 394-396, 406, 410, 423, 427, 429, 431, 455, 463, 465, 491, 503, 545-546, 564, 633-637, 680-681, 685, 708, 826-848, 850-852.

<sup>49</sup> **D360** Indictment, para. 712.

An to Ke Pauk, Ta Mok, and Sao Sarun,<sup>50</sup> but does not explain why an analysis of whether these individuals (two of whom were dead long before the OCIJ was seised with this case) were among those most responsible would be necessary to determine whether Ao An is among those most responsible, and cites no authority for his argument.

**D. GROUND 4: THE ICIJ APPLIED THE CORRECT STANDARD OF PROOF TO THE ISSUE OF PERSONAL JURISDICTION**

31. Ao An fails to demonstrate that the ICIJ applied an incorrect standard of proof to the issue of personal jurisdiction.<sup>51</sup> His arguments are in part unfounded allegations of factual error<sup>52</sup> and in part unsubstantiated conclusory statements that fail to articulate a discernible error. Accordingly, they should be dismissed.

**E. GROUND 5: THE ICIJ FULLY AND CORRECTLY ASSESSED THE EVIDENCE**

32. Ao An's claims in Ground 5 fail to show the ICIJ erred in law or in fact in assessing the evidence, as his attempts to discredit key witnesses are largely based on flawed analysis and allegations of impropriety already found to be baseless.<sup>53</sup>

**1. The ICIJ correctly examined the substance of the evidence in keeping with the PTC's holding in Case 004/1**

33. Ao An incorrectly asserts that the ICIJ chose a form-over-substance approach to assessing the evidence.<sup>54</sup> Although the ICIJ took issue with some of the PTC's reasoning in Case 004/1, he explicitly stated that he did not apply a rigid hierarchy when he assessed the evidence.<sup>55</sup> This was borne out throughout the Indictment, as the ICIJ examined the evidence's intrinsic value, staying mindful of credibility issues and rejecting aspects that did not seem reasonable, were unsupported, or went against the weight of the evidence.<sup>56</sup> While the ICIJ

<sup>50</sup> D360/5/1 Appeal, paras 53-54.

<sup>51</sup> D360/5/1 Appeal, paras 55-57.

<sup>52</sup> D360/5/1 Appeal, fn 102. These allegations of factual error are addressed in Ground 6 below.

<sup>53</sup> D360/5/1 Appeal, paras 58-79.

<sup>54</sup> D360/5/1 Appeal, paras 58-61.

<sup>55</sup> D360 Indictment, para. 37(a)(i).

<sup>56</sup> *Contra* D360/5/1 Appeal, paras 58, 61. *See, e.g.* D360 Indictment, paras 223 [the ICIJ considered the evidence that Pol Pot issued a directive in late 1978 to stop executions, but "While it is possible that the killing may have decreased in some areas, it is clear from other witnesses that killings continued until the arrival of the Vietnamese."], 229 ["Although Prak Yut and You Vann claim that marriages in Kampong Siem District were organised only when both parties agreed, and Prak Yut denies that newlyweds were required to consummate their marriage, the overwhelming evidence of coercion militates against the truthfulness of their testimony."], 241, 261, 342 ["In his DC-Cam interview, Ao An also denies that there were food shortages at the worksites and states that sufficient food was provided. This assertion is not credible in light of the extensive evidence of numerous former workers who state that food was insufficient."], 368 [noting Prak Yut's Case 002/2 trial testimony about her lack of knowledge regarding the

approached statements taken by parties or under unknown circumstances with caution, he relied on them when the information was corroborated by other sources.<sup>57</sup> The ICIJ also explained that because of concern about an “emerging pattern” of civil party applications which had not been properly screened before being submitted, his office determined which applications seemed to be most useful to the investigation and conducted formal interviews of those applicants.<sup>58</sup> Clearly, he considered their evidence to be important, as he referenced the WRIs of civil party applicants more than 800 times in support of his findings. Relying on such WRIs in which investigators tested the evidence – rather than potentially questionable applications taken in unknown circumstances – reflects an appropriately careful approach to assessing the evidence.<sup>59</sup>

## 2. The ICIJ properly assessed the credibility of key witnesses and civil parties

34. Credibility assessments involve numerous subjective determinations fully within the trier of fact’s discretionary power, and review benches are loathe to disturb such assessments unless there was an abuse of discretion.<sup>60</sup> The trier of fact must evaluate inconsistencies in a witness’s account to consider whether the evidence as a whole is reliable and credible, and may accept some aspects of the evidence while rejecting others.<sup>61</sup> The trier of fact is not required to set out in detail why he accepted or rejected particular testimony but must provide reasons for accepting testimony despite material inconsistencies when it is the principal evidence relied upon.<sup>62</sup> Ao An fails to show that the ICIJ erred, as the Indictment demonstrates that he respected

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Kok Pring execution site was not credible in light of other evidence], 375 [finding that although there is evidence of orders to kill Lon Nol soldiers at Kok Pring, it is unclear whether the orders were carried out and it “thus cannot be concluded” that they were killed there], 378 [discussing a discrepancy in two accounts of the same event], 390 [finding that Ngov was not credible when he claimed he had not been the chief of Met Sop Security Centre “in light of the volume and consistency of countervailing testimony” and “his likely motivation to downplay his responsibility for the crimes carried out there”], 404, 411 [discussing why the detailed and consistent evidence of Ao An’s former bodyguard was preferred over Ngov’s statements], 529-530 [discussing Pin Pov’s lack of credibility on the types of victims and number of killings at Wat Batheay in light of contradictory evidence that was reliable, credible and corroborated], 587, 621, 622, 624.

<sup>57</sup> **D360** Indictment, paras 124-126, *contra* **D360/5/1** Appeal, para. 61 [claiming the ICIJ failed to examine the circumstances in which evidence was obtained]. Examples of reliance on statements taken by parties and corroborated by other sources include but are not limited to **D360** Indictment, fns 1009, 1011, 1079, 1108, 1602, 1734, 2108.

<sup>58</sup> **D360** Indictment, para. 37(v). *See also* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 59 [stating that if the CIJs found statements given by the Suspect to other institutions insufficient for ascertaining the truth because of their provenance, they should have invited her in for an OCIJ interview] (unanimous).

<sup>59</sup> *Contra* **D360/5/1** Appeal, para. 61.

<sup>60</sup> *See, e.g.* *Popović* AJ, paras 131-132; *Nchamihigo* AJ, para. 47; *Nahimana* AJ, para. 194.

<sup>61</sup> *See, e.g.* *Rutaganda* AJ, paras 353, 443, 501; *Popović* AJ, paras 132, 136-137, 1228; *Muvunyi II* AJ, para. 26; *Setako* AJ, paras 31, 48; *Munyakazi* AJ, para. 71; *Kupreškić* AJ, para. 31.

<sup>62</sup> *Popović* AJ, paras 133, 137; *Čelebići* AJ, para. 498.

these principles.

a. Prak Yut

35. Ao An makes many strenuous but unsuccessful attempts to undermine Prak Yut, his former direct subordinate,<sup>63</sup> who had firsthand knowledge of orders he gave his subordinates and how those orders were implemented. While Prak Yut was a reluctant witness who was clearly concerned about admitting mass crimes, and her testimony thus required careful appraisal,<sup>64</sup> Ao An fails to demonstrate that the ICIJ abused his discretion or erred in relying upon parts of her evidence.

36. Much of Ao An's analysis of what he claims are inconsistencies in Prak Yut's statements is seriously flawed. Many of his claims are based on snippets of evidence taken out of context, while the ICIJ reasonably assessed her evidence as a whole. For example, Ao An alleges that Prak Yut changed her story about who appointed her Kampong Siem District Secretary: Ao An, Ke Pauk, or Kang Chap.<sup>65</sup> However, when the evidence is properly read in full rather than in isolation, it is clear Prak Yut stated that (i) Sector 35 Secretary Kang Chap, either personally or through his messenger, informed her that she and other cadres were being transferred to the Central Zone; (ii) at a meeting with Ke Pauk in Kampong Cham town, the Central Zone sector secretaries were appointed and the cadres being transferred were told where they would be sent; and (iii) following that meeting, Ao An held a meeting at the Sector 41 Office in Prey Chhor District where he appointed her and other district secretaries.<sup>66</sup> There were no material inconsistencies requiring the ICIJ to explain why he relied on Prak Yut's evidence here: Ao An was the only person Prak Yut ever identified to have appointed her as district secretary.<sup>67</sup> Ao An's remaining claims similarly fail to show that no reasonable trier of fact would have

<sup>63</sup> **D360/5/1** Appeal, paras 63-68; **D360/5/1.4** Annex C: Prak Yut's Ever-Changing Story ("Annex C"); **D360/5/1.5** Annex D: Prak Yut's Inconsistent Statements Related to Personal Jurisdiction ("Annex D"); **D351/6** Ao An's Response to the Co-Prosecutors' Rule 66 Final Submissions, 24 October 2017 ("Ao An's Final Submission Response"), paras 144-156 (which were incorporated by reference in **D360/5/1** Appeal, fns 119, 120).

<sup>64</sup> See, e.g. **D360** Indictment, paras 229, 241, 368, 454.

<sup>65</sup> **D360/5/1.5** Annex D, EN 01597562-63.

<sup>66</sup> **D117/70** Prak Yut WRI, A4-8, 10-11, 20-23, 25-26; **D117/71** Prak Yut WRI, A2-4, 12-13, 15, 17-20, 23-24; **D219/234.1.2** Prak Yut DC-Cam Statement, EN 01064269-70, 01064277-85; **D219/702.1.95** Prak Yut, T. 19 January 2016, 13.47.30-13.59.09.

<sup>67</sup> **D360/5/1.5** Annex D, EN 01597562-63 seems to assert that (1) Ke Pauk's announcement about where people would be sent and (2) Kang Chap's act of telling Prak Yut to go to Kampong Cham Province constitute testimony that they appointed her as district secretary. It does not; these are very different acts. Ke Pauk and Kang Chap sent Prak Yut to her next destination. It was not established that the transfer order or letter of mission Kang Chap gave Prak Yut did anything more than authorise her travel. Any other conclusion assumes facts not in evidence.

relied on her evidence.<sup>68</sup>

<sup>68</sup> (1) **D360/5/1.5** Annex D, EN 01597561-62 notes that Prak Yut changed her story about whether the Southwest Zone group arrived in the Central Zone in early 1977, but the ICIJ properly considered her inconsistent evidence regarding the timing of her transfer (*see* **D360** Indictment, fn. 593 listing contradictory evidence after the notation “*c.f.*”). While he did not explain why he rejected those aspects of her testimony and chose to accept her evidence that she arrived in January 1977, fn. 593 indicates this evidence was corroborated by numerous other accounts. Moreover, Ao An’s analysis shows that Prak Yut remained consistent with the January 1977 date after she explained in 2013 that she had not said everything in her previous interviews (*see* **D117/70** Prak Yut WRI, A47). (2) **D360/5/1.5** Annex D, EN 01597561-62 notes that Prak Yut changed her story about whether Ao An travelled to the Central Zone with Prak Yut, but the previous response is applicable here because it concerns the same finding (**D360** Indictment, fn. 593), which is supported by corroborating evidence and lists contradictory evidence (of Prak Yut and others) that the ICIJ considered. Failure to list Prak Yut’s DC-Cam statement does not mean the ICIJ did not consider it but indicates he did not rely on it because it was not corroborated by other sources (*see, e.g.* **D360** Indictment, paras 124-127; *Kamuhanda* AJ, para. 32). (3) **D360/5/1.5** Annex D, EN 01597562 alleges that Prak Yut changed her story about whether Ao An attended a planning meeting on the ‘purge’ in Phnom Penh by misstating her evidence to create contradictions. *Contra* Ao An’s summarised assertions, Prak Yut never stated that she attended a meeting in Phnom Penh (*see* **D6.1.730** Prak Yut WRI, EN 00364081; **D219/702.1.95** Prak Yut, T. 19 January 2016, 13.54.34-14.06.37; **D219/120** Prak Yut WRI, A62), never stated that Ao An did *not* attend a meeting in Phnom Penh (*see* **D6.1.730** Prak Yut WRI, EN 00364081; **D219/702.1.95** Prak Yut, T. 19 January 2016, 14.02.59-14.06.37), never said no meeting was held with senior cadres (*see* **D219/702.1.95** Prak Yut, T. 19 January 2016, 13.54.34-14.06.37), and never said the meeting discussed the purge (*see* **D219/120** Prak Yut WRI, A62). As failure to discuss a meeting does not equate to an assertion that there was *no* meeting, Ao An has not substantiated any incompatibilities that would require the ICIJ to explain why he relied on Prak Yut’s evidence. (4) **D360/5/1.5** Annex D, EN 01597563 alleges that Prak Yut changed her story about whether Ao An conducted the ‘purge’ of former Central Zone cadres. The ICIJ did not rely on Prak Yut for any finding regarding the purge of the Kampong Siem district committee members who preceded her, so that aspect of her evidence is irrelevant. What *is* relevant is that she consistently maintained that when she arrived in Kampong Siem District, she met with the base commune chiefs, recommended to Ao An that they be replaced, and they were (*see* **D6.1.730**, EN 00364082 [re. meeting to introduce herself]; **D117/70** Prak Yut WRI, A32-36; **D117/71** Prak Yut WRI, A25, 37-41; **D219/120** Prak Yut WRI, A42-44, 51-54), and this was corroborated by other witnesses. Thus the ICIJ’s reliance on Prak Yut in **D360** Indictment, para. 297 was reasonable. (5) **D360/5/1.5** Annex D, EN 01597563-64 alleges that Prak Yut changed her story about whether Ao An was her superior in Sector 41, noting that in four statements made in 2009, Prak Yut did not mention Ao An’s name but in statements from 2013 on, she specified that Ao An was Sector 41 Secretary and/or her superior. Failing to mention a name because of an inability to recall it or even an unwillingness to state it does not contradict evidence given later that *does* provide more specifics such as a name. There was no incompatibility that would require the ICIJ to explain why he relied on such evidence (*see, e.g.* *Nahimana* AJ, para. 428; *Munyakazi* AJ, para. 71). (6) **D360/5/1.5** Annex D, EN 01597564-65 alleges that Prak Yut changed her story about whether Ao An issued orders to collect all Cham people. As with the previous analysis, the absence of a reference to Ao An giving orders to collect the Cham is not incompatible with evidence that he did. Prak Yut’s admission that she did not know where Ao An got his orders from, or even if he got any orders, is also not contradictory, and sparing one person in a protected group does not disprove that he gave orders to collect all Cham (*see, e.g.* *Muhimana* AJ, para. 32; *Ntabakuze* AJ, para. 241). The ICIJ’s reliance on this evidence was reasonable and required no explanation. (7) **D360/5/1.5** Annex D, EN 01597565 alleges that Prak Yut changed her story about whether Ao An issued orders to arrest and kill former cadres, enemies, or others. The only outlier identified by Ao An’s analysis is Prak Yut’s statement in **D117/70**. A proper reading of the full statement shows Prak Yut said that Ao An did not order her to arrest the “old” commune chiefs – he organized that – but he *did* order her to arrest Cham people and Lon Nol soldiers. She stays consistent on these points in her other statements. *See* Prak Yut’s WRIs **D117/70**, A37, 39, 44-45; **D117/71**, A40-41, 47-53; **D117/72**, A3, 6-7; **D219/120**, A12-14, 18-32; **D219/484**, A1, 8-12; and **D219/792.1.2** Prak Yut, T. 20 January 2016, 09.34.20-09.39.58. *Note* that in her testimony, Prak Yut implausibly retreated from her statements about the orders to arrest and kill all the Cham. The ICP incorporates by reference the arguments it made on this matter in **D351/5** International Co-Prosecutor’s Rule 66 Final Submission, 21 August 2017 (“ICP Final Submission”), paras 63-71. (8) **D360/5/1.5** Annex D, EN 01597565-66 alleges that Prak Yut changed her story about whether

37. Ao An's numerous allegations that Prak Yut was fed inculpatory information because OCIJ investigators were "keen on generating incriminating evidence" against him<sup>69</sup> have already been unanimously rejected by the PTC.<sup>70</sup> Ao An repeats them in his Appeal in an attempt to strengthen his narrative that the OCIJ, OCP, and Prak Yut wove a "web of lies" to prosecute him at all cost,<sup>71</sup> but this narrative is baseless. Ao An's mere repetition of previously unsuccessful arguments without explaining why they warrant reconsideration should be summarily dismissed.<sup>72</sup>

38. Finally, as Ao An concedes, the ICIJ acknowledged Prak Yut's credibility issues and rejected some of her evidence as unreliable.<sup>73</sup> The ICIJ's explicit discussions of the reasons for such rejection further demonstrate that he carefully assessed her evidence and reasonably relied on the parts he found credible.<sup>74</sup> Ao An has not proven any error in the ICIJ's approach.

b. You Vann

39. Ao An's criticism of You Vann's evidence fails to meet the requisite burden to demonstrate that the ICIJ erred in giving weight to her statements.<sup>75</sup> First, his claim that her

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Prak Yut and her subordinates reported to Ao An. In the first statement cited, it is clear that Prak Yut meant Ao An never came to her district to *physically* verify the number of people arrested, detained or smashed, but he *did* come to meet her when necessary, and when he did, they discussed issues including names identified for arrest (see **D219/120** Prak Yut WRI, A30-31). This evidence is not incompatible with her subsequent statements that she reported to Ao An about arrests. It therefore does not require the ICIJ to explain why he relied on it. (9) **D360/5/1.5** Annex D, EN 01597566 alleges that Prak Yut changed her story about whether Ao An had authority to arrange marriages. However, Prak Yut consistently testified that the sector secretary had to approve marriages proposed by the district and even that Ao An advised her on arranging marriages (see **D219/702.1.95** Prak Yut, T. 19 January 2016, 11.26.00-13.41.08). Differences arose from whether You Vann's testimony that Ao An told Prak Yut that "Cham had to marry Cham and Khmer had to marry Khmer" was accurate or not. Prak Yut consistently maintained that she was not aware of such a rule. Moreover, it is not clear what Prak Yut qualified to be a "mass wedding ceremony" when she denied that they took place in her district, but even if the wedding of 10 couples was considered such, she modified her testimony and acknowledged Ao An's and her participation in such a ceremony when her memory was refreshed in a proper manner. This does not contradict the evidence that Ao An had authority to arrange marriages. The ICIJ reasonably relied on Prak Yut's evidence in this regard.

<sup>69</sup> See, e.g. **D360/5/1** Appeal, para. 63, fn. 121; **D351/6** Ao An's Final Submission Response, fns 207-208, 210-211, 213-216, paras 146, 148, 150, 152 (incorporated by **D360/5/1** Appeal, para. 62, fn. 116); **D360/5/1.5** Annex D.

<sup>70</sup> **D338/1/5** Decision on Ao An's Application to Annul Written Records of Interview of Three Investigators, 11 May 2017 ("PTC Annulment Decision"), paras 21-22, Disposition [unanimously rejecting all claims in **D338/1/2** Application to Annul Written Records of Interview of Three Investigators, 9 February 2017 ("WRI Annulment Request") and its related annexes, including arguments that investigators improperly fed Prak Yut an inculpatory narrative and used other dubious methods].

<sup>71</sup> See, e.g. **D360/5/1** Appeal, fn. 120; **D351/6** Ao An's Final Submission Response, paras 137, 146, 149, 152 (incorporated by **D360/5/1** Appeal, para. 62, fn. 116); **D360/5/1.4** Annex C; **D360/5/1.5** Annex D.

<sup>72</sup> For a list of challenges that warrant summary dismissal, see, e.g. *Prlić* AJ, Vol. 1, para. 25.

<sup>73</sup> **D360/5/1** Appeal, para. 63, fn. 122.

<sup>74</sup> See, e.g. **D360** Indictment, paras 229, 241, 368, 454.

<sup>75</sup> **D360/5/1** Appeal, paras 65-66.

answers were a product of improper investigative practices raises no new arguments that would justify overturning the PTC's unanimous finding that there were no improprieties.<sup>76</sup> Second, his allegation that she is "inconsistent on key issues" is also unfounded.<sup>77</sup> Third, his attempt to discredit her evidence as a regurgitation of Prak Yut's evidence only emphasises how their accounts mutually corroborate and reinforce each other.<sup>78</sup> As discussed in Ground 6,<sup>79</sup> the fact that Prak Yut's evidence is corroborated by You Vann's recollection of what her superior told her at the time of events – a time when Prak Yut needed her subordinates to carry out her orders and therefore had no reason to lie – demonstrates its reliability. Finally, the allegation that You Vann "may have been influenced" by Prak Yut is merely speculative.<sup>80</sup> As such, Ao An has not discharged his burden to show that no reasonable trier of fact could have relied upon You Vann's evidence.

c. Pov [Peou] Sarom, Put Kol, and Keo Voeun

40. Ao An's attack on the relatives of Prak Yut and what he dubs "members of her clique" fails to demonstrate that these witnesses blamed Ao An "to protect Prak Yut and their family name" as he alleges.<sup>81</sup> In fact, in the evidence that Ao An impugns, these witnesses barely mention Ao An's role in crimes. For example, Put Kol states that her group of Southwest cadres stopped in Phnom Penh on the way to the Central Zone (she did not know why), they then traveled to Kampong Cham, she saw Ao An meeting with Prak Yut but did not go near, and Prak Yut's husband worked at the sector office with Ao An and was arrested.<sup>82</sup> Keo Voeun

<sup>76</sup> **D360/5/1** Appeal, para. 66, fn. 130; **D338/1/5** PTC Annulment Decision, paras 21-25, Disposition [dismissing, *inter alia*, Ao An's allegations relating to You Vann's statements as set out in **D338/1/2.3** Annex B: OCIJ Investigator Christian Baudesson, EN 01388927, 01388971-72; **D338/1/2.5** Annex D: OCIJ Investigator Andrea Ewing, EN 01364467-69].

<sup>77</sup> **D360/5/1** Appeal, para. 66, fn. 131. First, Ao An takes issue with the fact that You Vann revised her answer after she had her memory refreshed on the stand, but accepting an answer that the witness corrected does not call her entire evidence into question (*see, e.g. Popović* AJ, paras 136-137). Second, he misunderstands evidence that is clearly not contradictory when read in its entirety. In **D219/138** You Vann WRI, A80, You Vann stated that Prak Yut told her (Prak Yut's subordinate) that Ao An was the one who announced the rule that those who had married had to sleep together. In other words, Prak Yut heard the rule from her superior and passed it down (announcing it) to her subordinate, telling You Vann the source of the order. This answer did not change in **D219/702.1.87** You Vann, T. 14 January 2016, 15.40.03-15.43.25. Prak Yut passed the rule down to her subordinates, and You Vann confirmed the source of that order was Ao An. There is no inconsistency just because Ao An and Prak Yut both "announced" the policy to their subordinates. One does not preclude the other or create an inconsistency. The same logic applies for **D219/702.1.94** You Vann, T. 18 January 2016, 10.53.47-10.58.39.

<sup>78</sup> **D360/5/1** Appeal, para. 66, fn. 132.

<sup>79</sup> *See generally* paras 52-53, 62 *infra*.

<sup>80</sup> *Contra* **D360/5/1** Appeal, para. 66.

<sup>81</sup> **D360/5/1** Appeal, paras 67-68.

<sup>82</sup> **D360/5/1** Appeal, fn. 133 objects to **D360** Indictment, fns 594, 596, 599 *citing* **D117/26** Put Kol WRI, A5 ["We left Kampot and laid over in Phnom Penh for two nights. I did not know why we had to lay over. Then

discussed competitions between commune mobile units at a dam worksite, making no mention of Ao An.<sup>83</sup> Pov Sarom's evidence, which *does* implicate Ao An to some extent, also implicates Prak Yut as the head of Kampong Siem District and Pov Sarom herself for her role in making lists used to arrest people.<sup>84</sup> This too fails to prove Ao An's allegation that the witnesses were falsely implicating Ao An in order to protect their family name.

41. Finally, the contact between these witnesses and Prak Yut that has been established reveals that Prak Yut told Put Kol "to tell the truth about the Khmer Rouge regime and there was no need to hide anything."<sup>85</sup> Allegations of impropriety are baseless speculation. Ao An therefore fails to demonstrate how the ICIJ's reliance on the evidence was an abuse of his discretion.

#### d. Nhem Chen

42. Ao An's claims that Nhem Chen was unreliable<sup>86</sup> are unpersuasive and fail to demonstrate that the ICIJ erred by relying on Nhem Chen's evidence. First, Nhem Chen was not a child as Ao An asserts; he was 17 years old when he began working for Ao An in early 1977.<sup>87</sup> Second, Ao An mischaracterises a direct question and response to allege that "suggestive questioning" affected Nhem Chen's answers,<sup>88</sup> but the PTC has already unanimously rejected similar claims and decided that no investigative improprieties occurred.<sup>89</sup>

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we travelled to Kampong Cham laying over there for two nights. We then went back to Prey Chhor where we stayed for two nights before we finally arrived in Kampong Siem District – where we stayed.”], fn. 661 *citing* **D117/26** Put Kol WRI, A13 [“Ta An, who was Chairman of Sector 41, also visited that district. He met with Prak Yut, but I did not dare to go near them to listen to their discussions.”], fn. 778 *citing* **D117/26** Put Kol WRI, A4 [“Ta An was a cadre in Sector 35; later on he was secretary of Sector 41 in the Central Zone. Prak Yut’s husband was Ta Am. He was working at the sector office with Ta An, but he was arrested a few months later.”].

<sup>83</sup> **D360/5/1** Appeal, fn. 133 objects to **D360** Indictment, fn. 1001 *citing* **D219/191** Keo Voeun WRI, A47.

<sup>84</sup> **D360/5/1** Appeal, fn. 133 objects to **D360** Indictment, fn. 633 *citing* **D117/24** Pov [Peou] Sarom WRI, A11 [Ao An appointed Prak Yut to be in charge of Kampong Siem District], fn. 778 *citing* **D219/284** Pov Sarom WRI, A33 [Prak Yut’s husband was arrested], fn. 783 *citing* **D219/284** Pov Sarom WRI, A73-75 [re. orders from her superior in the commune (Nan) to make lists, her own role in doing so, and the arrest of a village chief], fn. 1327 *citing* **D219/284** Pov Sarom WRI, A76-78 [Pov Sarom says she does not know if people on the name lists disappeared, only that Nan told her at the time that it was the work of the sector-level cadres].

<sup>85</sup> **D360/5/1** Appeal, para. 68, fn. 137 *citing* **D117/26** Put Kol WRI, A29.

<sup>86</sup> **D360/5/1** Appeal, para. 70; **D351/6** Ao An’s Final Submission Response, paras 170-176 (which were incorporated by reference in **D360/5/1** Appeal, para. 70, fn. 139).

<sup>87</sup> *Contra* **D360/5/1** Appeal, para. 70; **D219/731** Nhem Chen WRI, EN 01224101 [born on 6 November 1959], A6, A12; **D219/855** Nhem Chen WRI, EN 01374641 [born on 6 November 1959].

<sup>88</sup> *See* **D360/5/1** Appeal, para. 70, fn. 143 *citing* **D219/855** Nhem Chen WRI, A166-172. Ao An alleges that it was not until the investigator suggested Ao An was connected to a meeting at Wat Ta Meak that Nhem Chen began to accuse Ao An of giving instructions. The investigator did not suggest anything. He simply asked, “Did Ta An attend that meeting?” and Nhem Chen answered, “Yes, he did. He chaired the meeting. He also gave speech in that meeting.” (*see* Q & A171). This was a proper, direct question and a detailed response.

<sup>89</sup> **D338/1/5** PTC Annulment Decision, paras 20-22, Disposition.

Third, Ao An's single purported example of the ICIJ relying on uncorroborated hearsay evidence<sup>90</sup> – which in any event is not precluded – is in fact corroborated in part by Pech Chim and Ao An himself.<sup>91</sup> Ao An also fails to establish why it would be error for the ICIJ to consider a statement from Ke Pauk's nephew, since the nephew was clearly in a position to know that the letter Ke Pauk ordered him to deliver to Ao An contained orders to kill. The nephew was acting as Ke Pauk's messenger and bodyguard and had no apparent reason to lie to Nhem Chen about the letter. The hearsay was relevant, probative, from an identified source, and corroborated. The remaining challenges similarly fail to discredit Nhem Chen or demonstrate that the ICIJ erred.<sup>92</sup>

e. Chom Vong (Ngov)

43. Ao An wrongly contends that because the ICIJ found Ngov, the former head of Met Sop (Kor) Security Centre, unreliable on some issues, he erred by relying on him for other essential facts without explanation.<sup>93</sup> In fact, the ICIJ clearly explained what aspects of Ngov's evidence he found were not credible and why, while he accepted Ngov's admissions against his own

<sup>90</sup> **D360/5/1** Appeal, para. 70, fn. 144 citing **D219/855** Nhem Chen WRI, A79-81. Note that in his Appeal, Ao An omitted the portion of the quote that identifies the speaker as Ke Pauk's nephew, and Nhem Chen provided more detail of the incident in A82-86. See also *Nahimana* AJ, para. 509 ("it is settled jurisprudence that hearsay evidence is admissible as long as it is of probative value, and that it is for Appellant Nahimana to demonstrate that no reasonable trier of fact would have taken this evidence into account because it was second-degree hearsay evidence, which he has failed to do.").

<sup>91</sup> Both Pech Chim and Ao An discuss orders Ke Pauk gave them to kill people. See, e.g. **D118/259** Pech Chim WRI, A178 [Ke Pauk instructed Pech Chim to continue the purge]; **D103.1.39** Ao An VOA Khmer Interview, *Atrocities Suspect Says He's 'Not Fearful of Tribunal, Hell'*, EN 00750163 ["[Ao An] said even though he had been ordered by Khmer Rouge military commander Ke Pauk to kill supporters of Lon Nol's regime, he hid them in the fields of the collectives."].

<sup>92</sup> **D360/5/1** Appeal, para. 70, fns 145-149. Little understanding of the CPK structure (fn. 145): The answers cited show that Nhem Chen clearly qualified his answers when he was not certain, but a full review of his statements shows that he knew quite a bit of detail about the CPK structure regardless of the cited protestations. Although Ao An fails to specify which findings Nhem Chen's structure evidence would invalidate if the assertion were true, the ICIJ's findings that cite Nhem Chen were well corroborated (see, e.g. **D360** Indictment, fns 356, 363-365, 372, 607, 608, 611, 612, 635, 642, 643, 645, 646). Rarely worked with Ao An (fn. 146): Nhem Chen stated that he worked for Ao An after Ao An arrived in Sector 41 in early 1977 and was later transferred to work for Sok from late 1977 until the end of the regime (see **D219/731** Nhem Chen WRI, A6, 12, 96; **D219/732** Nhem Chen WRI, A44; **D219/855** Nhem Chen WRI, A1). However, his detailed evidence clearly demonstrates that within the time he worked for Ao An, he worked frequently and closely with him; he is also forthcoming about what he did not do (see, e.g. **D219/731** Nhem Chen WRI, A4-5, 12, 17, 27-29, 31, 33-34, 36-42, 53-55, 58-60, 70-72, 76, 79, 82-83, 87-89; **D219/732** Nhem Chen WRI, A9, 33-40, 46-50; **D219/855** Nhem Chen WRI, A5-12, 58-59, 71-76, 92-94, 100-105, 125-126, 130-132, 166-172, 187-188, 191, 203-210). Colleagues did not confirm statements (fns 148-149): Nhem Chen stated that he was the only person assigned to accompany Ao An; the other youths had other assignments elsewhere (**D219/731** Nhem Chen WRI, A24, 27-29; **D219/732** Nhem Chen WRI, A2-3, 9-13). Their evidence therefore does not invalidate his.

<sup>93</sup> **D360/5/1** Appeal, para. 73.

interests relating to his duties at the security centre.<sup>94</sup> Although the ICIJ did not restate these assessments every time he cited Ngov's evidence on these points, he adhered to these stated views.<sup>95</sup> The remaining findings that Ao An contests were all corroborated in whole or in part by other evidence.<sup>96</sup> Ao An therefore fails to show that the ICIJ's cautious assessment of Ngov's evidence was unreasonable.

f. Penh Va and Nhim Kol

44. Ao An fails to demonstrate the ICIJ erred in relying upon Penh Va's and Nhim Kol's evidence.<sup>97</sup> First, his attack upon their civil party applicant status runs afoul of PTC jurisprudence.<sup>98</sup> Second, even if there *were* inconsistencies as he alleges, the presence of such does not, *per se*, require a reasonable trier of fact to treat their entire evidence as unreliable.<sup>99</sup>

45. It is the appellant's burden to provide detailed reasoning to support his arguments,<sup>100</sup> but Ao An's sole example of a purported inconsistency in Penh Va's evidence fails to support his claim.<sup>101</sup> A proper, full reading of Penh Va's statements shows that Penh Va did not contradict himself as to who arranged marriages. Rather, he consistently discussed two forced marriages: (1) his own, which was arranged by Meng in 1976,<sup>102</sup> and (2) the wedding of Sot and Koan,

<sup>94</sup> **D360** Indictment, paras 390, 404, 411.

<sup>95</sup> Findings contested in D360/5/1 Appeal, fns 150 and 154; **D360** Indictment, para. 395, fns 1170-1177 (re. Ngov's admissions on his duties and observations while performing those duties); para. 396, fn. 1178 (re. monthly security reports sent from Met Sop – also corroborated by one other account). *See also* Case 002-F36 Appeal Judgement, 23 November 2016 ("Case 002/1 AJ"), para. 357.

<sup>96</sup> Findings contested in D360/5/1 Appeal, fns 150 and 154; **D360** Indictment, para. 214, fn. 489 (corroborated by 9 other accounts), para. 243, fn. 593 (the assertion is corroborated by 10 accounts; Chom Vong's evidence is listed in the contradictory evidence section), para. 256, fn. 637 and para. 272, fn. 706 (corroborative evidence in fn. 705), para. 258, fns 642, 644-645, 649 (these footnotes are all related and contain numerous accounts that corroborate the conclusion in fn. 642), para. 265, fns 664, 666 (corroborated by 21 and 4 other accounts, respectively), para. 266, fns 676-677 (corroborated by 2 and 4 other accounts, respectively), para. 273, fns 710, 713 (extensively corroborated by all evidence cited in para. 273), para. 282, fn. 737 (corroborated by 5 other accounts), para. 285, fn. 742 (corroborated by 3 other accounts), para. 296, fns 778-779 (corroborated by 5 and 3 other accounts, respectively); para. 394, fn. 1169 (corroborated by 1 other account); para. 396, fn. 1178 (corroborated by 1 other account). *See also* *Ndahimana* AJ, para. 45.

<sup>97</sup> **D351/6** Ao An's Final Submission Response, paras 177-181 (which were incorporated by reference in **D360/5/1** Appeal, para. 62, fn. 116); **D360/5/1** Appeal, paras 74-75.

<sup>98</sup> Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, paras 51-56 (unanimous holding).

<sup>99</sup> *See, e.g.* *Kupreškić* AJ, para. 31; *Čelebići* AJ, paras 485, 496-498.

<sup>100</sup> *See, e.g.* *Munyakazi* AJ, para. 10; *Sesay* AJ, paras 36-44; *Krajišnik* AJ, para. 16.

<sup>101</sup> **D360/5/1** Appeal, para. 75; **D351/6** Ao An's Final Submission Response, para. 179.

<sup>102</sup> **D219/226** Penh Va WRI, A29-32. *Note* that in A32, which has been cited by Ao An to support his allegation, the applicant explicitly stated in the first sentence of the answer that he wanted to *clarify* that it was Comrade Meng, not Ao An, who arranged the marriage "at that time". This clarification relates back to the marriage he had been discussing in the previous questions—his own—which took place in 1976. The second sentence of A32 then begins to respond to Q32, addressing what took place after the Southwest cadres arrived. In his second statement, Penh Va provided more detail about his own 1976 wedding in which they were "joined" by Meng. *See* **D219/289** Penh Va WRI, A4, 8.

which was arranged by An or Aun after the Southwest Zone cadres arrived.<sup>103</sup> As the evidence is materially consistent, Ao An fails to substantiate any error in the ICIJ's reliance on Penh Va's evidence.

46. Ao An's example for Nhim Kol is also without basis, as it cherry-picks evidence to create a contradiction that does not exist when the statement is properly read in its entirety.<sup>104</sup> In short, Nhim Kol made a distinction between *meeting* Ao An and *seeing* Ao An, and explained that on the single occasion he *saw* Ao An, he "dared not to look at his face".<sup>105</sup> This does not contradict Nhim Kol's evidence that he did not know anyone in the sector or know what Ao An looked like.<sup>106</sup> Ao An's other alleged inconsistencies are equally unpersuasive.<sup>107</sup> As such, he has not met the burden to demonstrate that the ICIJ was unreasonable to rely on Nhim Kol's evidence.

### 3. Statements were taken using proper investigative methods, and the ICIJ was reasonable to rely on them

47. Ao An's assertion that the ICIJ ignored "dubious methods and circumstances through

<sup>103</sup> **D219/226** Penh Va WRI, A32 [stating that Koan and Sot had "committed moral misconducts"], A34 [discussing the rape of Sot by Koan, Ao An's punishment of Sot, and Ao An's arrangement of their marriage]; **D219/289** Penh Va WRI, A10.

<sup>104</sup> **D360/5/1** Appeal, fn. 163.

<sup>105</sup> **D219/422.4** Nhim Kol Transcript of WRI D107/8, EN 01136840-41 ["[Investigator]: You never saw ... you never met Ta An? Interpreter: Did you never meet him? Nhim Kol: No, I didn't. Interpreter: Did you ever see him? Nhim Kol: Yes, I did. I saw him once when he came by a Jeep. [...] When he got off, I saw only his packs of rolled strong tobacco, and he said he was Ta An. [...] At that time, we dared not to look at his face, so we walked away. [...] For me, I didn't met him in person. But I saw him. Ta An had a bent back, a long jaw, dark skin and a small body like me. That's the description of Ta An when you see him."].

<sup>106</sup> **D360/5/1** Appeal, fn. 163.

<sup>107</sup> **D351/6** Ao An's Final Submission Response, para. 180. Ao An's summary of Nhim Kol's evidence fails to consider Nhim Kol's junior position in the commune and his perception in that position of Prak Yut's authority. Given the level of secrecy inherent in the DK regime and the likelihood that Prak Yut did not inform her subordinates every time she gave them an order of whether she had received the order from above or why she was giving it (and if she had, it is likely those subordinates did not pass such information to *their* subordinates), it is reasonable that Nhim Kol had no personal knowledge of whether Prak Yut made decisions about orders on her own or received orders from above and authoritatively passed them on to her own subordinates. Nhim Kol even qualified his response to indicate he was speculating, saying "I *think* she [Prak Yut] personally made the decisions on the arrests" (see **D107/7** Nhim Kol WRI, EN 00787216, emphasis added). His later statement that it was possible she received written orders from Ao An but he did not know does not contradict Nhim Kol's previous statement (see **D107/8** Nhim Kol WRI, EN 00787219). Ao An also alleges that the OCIJ investigator "fed" Nhim Kol information that caused Nhim Kol to then speculate about orders from the sector level, but the cited evidentiary support provides no indication whatsoever of any impropriety, and Ao An fails to substantiate this allegation further. Finally, Ao An says Nhim Kol contradicted himself on whether Ao An attended meetings in Kampong Siem District, but the quote he provides from **D219/422.5** Nhim Kol Transcript of WRI D107/7, EN 011368871 does not specify who was in the Southwest Zone group that was chatting about Prak Yut's husband and Ao An after the district meeting. Nothing in the discussion thereafter suggests Ao An was part of the group. There is no contradiction.

which statements were extracted by OCIJ investigators”<sup>108</sup> attempts to re-litigate issues already decided against him and substitute his own characterisation of investigative practices for the PTC’s unanimous holding that no improprieties occurred.<sup>109</sup> Ao An provides no basis for overturning the PTC’s decision and fails to establish any error that warrants appellate intervention. This subground should be summarily dismissed.

#### 4. The ICIJ’s reliance on “single, uncorroborated” accounts was legally sound

48. Ao An fails to articulate an error in the ICIJ’s reliance on what Ao An contends are single, uncorroborated witness or civil party applicant accounts.<sup>110</sup> Numerous courts, including the ECCC, have upheld the principle that corroboration of witnesses and evidence is not a legal requirement in international criminal law.<sup>111</sup> Even a *conviction*, which requires a higher evidentiary standard than an indictment, may be based on an uncorroborated material fact from a single witness, turning only on the Chamber’s assessment that the witness is credible and reliable.<sup>112</sup> Corroboration is certainly relevant to any evidentiary analysis, but the tribunals have recognised that it is simply “one of many potential factors” to consider for credibility and the weight to be accorded to the evidence.<sup>113</sup> In any event, many of the accounts that Ao An impugns are *corroborated by* and *corroborative of* other evidence.<sup>114</sup> The ICIJ’s reliance on

<sup>108</sup> **D360/5/1** Appeal, paras 72 [relating to Chom Vong alias Ngov], 76.

<sup>109</sup> See, e.g. **D338/1/2** WRI Annulment Request; **D338/1/2.3** Annex B: OCIJ Investigator Christian Baudesson, EN 01388934 [stating the Chom Vong allegations re-asserted in **D360/5/1** Appeal, fn. 152], EN 01388977-79 [stating the Prak Yut allegations re-asserted in **D360/5/1** Appeal, fn. 164]; **D338/1/2.5** Annex D: OCIJ Investigator Andrea Ewing, EN 01364467-68 [stating the You Vann allegations re-asserted in **D360/5/1** Appeal, fn. 164], EN 01364471-75 [stating the Chom Vong allegations re-asserted in **D360/5/1** Appeal, fn. 152]; **D338/1/2.2** Annex A, EN 01338902 [relating to the Orn Kim Eng allegations cited in **D360/5/1** Appeal, fn. 166], EN 01388901 [relating to the Ban Siek allegations cited in **D360/5/1** Appeal, fn. 166]; **D338/1/5** PTC Annulment Decision, paras 21-25, Disposition. Note that the PTC summarily dismissed allegations such as the one asserted in **D360/5/1** Appeal, fn. 165 relating to off-record conversations, which it viewed as “screening” conversations that did not evidence any bias or evidence contamination (see **D338/1/5** PTC Annulment Decision, para. 24).

<sup>110</sup> **D360/5/1** Appeal, para. 77.

<sup>111</sup> See, e.g. Case 002-F36 Case 002/1 AJ, paras 302, 496; *Taylor* AJ, paras 74-75; *D. Milosevic* AJ, para. 215; *Nahimana* AJ, fn. 1312; ICC Rules, Rule 63(4).

<sup>112</sup> See, e.g. *Tadić* AJ, paras 65-66 [affirming the appellant’s conviction for two murders, which was based solely on the testimony of one witness and turned only on the Trial Chamber’s assessment of the witness’s credibility and reliability]; *Haradinaj* AJ, paras 218-219; *Kayishema & Ruzindana* AJ, paras 154, 322-323.

<sup>113</sup> See, e.g. *Ntawukulilyayo* AJ, para. 21; *Setako* AJ, paras 221-222; *Kupreškić* AJ, para. 220; *Limaj* AJ, para. 203.

<sup>114</sup> When the ICIJ has referenced a specific witness account in the body of the Indictment, obviously only that witness is likely to be cited in support of that very specific account. However, other evidence cited in the same paragraph and/or section is also often corroborative (e.g. Ao An’s challenges to You Vann’s evidence in **D360** Indictment, para. 633, discussing Ao An’s involvement in making lists of Cham). Moreover, it is important to note that corroboration does not require witnesses’ accounts to be identical in all aspects, as they experience events from different vantage points. The main question is whether two or more credible accounts are incompatible (see, e.g. *Munyakazi* AJ, para. 103; *Ntawukulilyayo* AJ, para. 24; *Rukundo* AJ, para. 76; *Gatete* AJ, paras 125-126, 205). See also paras 55-56, *infra*.

such evidence was legally sound.

### 5. The ICIJ exercised appropriate caution in relying on hearsay evidence

49. The ICIJ expressly noted his practice of considering hearsay evidence with caution and detailed the factors he took into account when assessing its probative value.<sup>115</sup> The fact that he did not repeat the criteria each time he dealt with hearsay in the Indictment does not mean he did not exercise appropriate caution in making factual findings.<sup>116</sup> Moreover, two of Ao An's purported examples do not even contain the hearsay that Ao An describes,<sup>117</sup> while many of the remaining challenges would have no impact, as the hearsay evidence merely provides additional corroboration for other direct and circumstantial evidence from varied sources that are themselves sufficient to support the finding.<sup>118</sup> Finally, Ao An's suggestion that hearsay should categorically be given less probative value<sup>119</sup> is incorrect, as the weight assigned to hearsay hinges on the substance of the evidence and the circumstances surrounding it, not merely upon the fact that it is hearsay.<sup>120</sup> For all of these reasons, Ao An fails to substantiate any error warranting appellate intervention.

<sup>115</sup> **D360** Indictment, paras 129-130.

<sup>116</sup> *Contra* **D360/5/1** Appeal, para. 78. *See, e.g. Taylor* AJ, paras 198, 203 [finding that the Trial Chamber's statements of the law and how it applied it at the beginning of the Judgment were not "mere surplusage" and holding that "these statements are a transparent declaration of the standard it applied to determine whether Taylor is guilty as to each element of each count charged."]. *See also* **D360** Indictment, paras 346, 380, 448 [note the ICIJ declined to make any finding regarding the killing because it was uncorroborated], 662, 753.

<sup>117</sup> **D360/5/1** Appeal, para. 78, fn. 171 [referencing **D360** Indictment, para. 217, fn. 499 *citing* **D219/855** Nhem Chen WRI, A40-41. Ao An challenges a statement made to Nhem Chen by Ke Pauk's nephew, but the evidence he cites makes no reference to Ke Pauk's nephew] and [referencing **D360** Indictment, para. 633, fn. 2155 *citing* **D219/284** Pov Sarom WRI, A58, 66. Ao An asserts that an "elder woman" told Pov Sarom that the Cham would not be spared, but the evidence cited discusses Pov Sarom asking village chiefs to bring her information with which to make the lists and that she prepared lists twice. There is no mention of an elder woman in the evidence relied upon to make this finding].

<sup>118</sup> For example, **D360/5/1** Appeal, para. 78, fn. 171 challenges a finding that Ao An appointed and removed cadres at the sector, district and commune levels (*see* **D360** Indictment, para. 256, fn. 633). Penh Va's hearsay evidence (noted by Ao An) is supplemented by direct, firsthand evidence from Prak Yut that Ao An assigned her to be Kampong Siem District Secretary and, at the same meeting, appointed other district secretaries in Sector 41 (*see* **D360** Indictment, fn. 633 *citing* **D117/70** Prak Yut WRI, A26; **D117/71** Prak Yut WRI, A23-24), by direct evidence that Ao An appointed new commune chiefs in all the districts in Sector 41, including Kampong Siem District (*see* **D360** Indictment, fn. 633 *citing* **D117/71** Prak Yut WRI, A42-43), by evidence that Ao An appointed Prak Yut to control Kampong Siem District (*see* **D360** Indictment, fn. 633 *citing* **D117/24** Pov [Peou] Sarom, A11), by direct evidence from Prak Yut that the sector secretary came to her and asked her to appoint commune chiefs (*see* **D179/1.2.4** Prak Yut, T. 25 January 2012, 14.39.45-14.41.25), and by circumstantial evidence that orders to arrest commune officials and arrange new ones came from the Sector based on the fact that two days after Prak Yut attended a sector meeting with Ao An, some former commune chiefs disappeared and four days later, new commune chiefs were appointed to replace them (*see* **D360** Indictment, fn. 633 *citing* **D219/138** You Vann WRI, A45, 47). *See also* fn. 114, *supra*.

<sup>119</sup> **D360/5/1** Appeal, para. 78.

<sup>120</sup> *See, e.g. Popović* AJ, para. 1307; *Aleksovski* Decision on Admissibility Appeal, para. 15.

**F. GROUND 6: THE ICIJ’S FACTUAL FINDINGS REGARDING AO AN’S POSITION AND PARTICIPATION IN CRIMES ARE CORRECT AND WELL-SUPPORTED BY THE EVIDENCE**

50. In Ground 6, Ao An alleges a number of factual errors regarding his position, role, and participation in the charged crimes.<sup>121</sup> Ao An’s burden with respect to all of these allegations is to show that no reasonable investigating judge could have reached these factual findings to the required standard of proof<sup>122</sup> and to show, additionally, that any factual error demonstrated was “fundamentally determinative of the [ICIJ’s] exercise of discretion”<sup>123</sup>—in other words, that, in the absence of erroneous factual findings, the ICIJ could not have found him responsible for crimes or could not have found him subject to the personal jurisdiction of the ECCC.

51. Ao An has failed to discharge his burden of showing that no reasonable investigating judge could reach the impugned factual findings to the required standard of proof. In addition, Ao An has failed to demonstrate that some of the errors he alleges—even if proved—would invalidate the Indictment.

**1. Ao An’s Unpersuasive Challenges to Hearsay Evidence**

52. Ao An systematically impugns factual findings on the grounds that they are based on hearsay evidence,<sup>124</sup> disregarding the fact that hearsay is admissible at the ECCC and the fact that much of the hearsay evidence the ICIJ relies on is sourced, first-degree hearsay<sup>125</sup> from a declarant likely to have personal knowledge of the facts relied upon.<sup>126</sup> Ao An’s conclusory

<sup>121</sup> **D360/5/1** Appeal, paras 80-156.

<sup>122</sup> Case 002-**D427/1/30** Decision on Ieng Sary’s Appeal Against the Closing Order, 11 April 2011 (“IS Closing Order Appeal Decision”), para. 113. *See also* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 21.

<sup>123</sup> *See, e.g.* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 21.

<sup>124</sup> *E.g.* **D360/5/1** Appeal, fns 265, 297, 378.

<sup>125</sup> The SCC has stated that “a trial chamber has broad discretion to consider and rely on hearsay evidence, though this must be done with caution” and has cited with approval ICTR jurisprudence to the effect that “the weight and probative value afforded to hearsay evidence ‘will depend on the infinitely variable circumstances which surround hearsay evidence.’” *See* Case 002-**F36** Case 002/1 AJ, para. 302. The SCC has also implicitly held that sourced, first-degree hearsay is of higher probative value than anonymous, double hearsay—though even anonymous hearsay evidence is not entirely without probative value (*see* Case 002-**F36** Case 002/1 AJ, paras 442, 946). The ICTY Appeals Chamber has also held that first-degree hearsay is of higher probative value than “more removed” evidence (*see Aleksovski* Decision on Admissibility Appeal, para. 15). The ICTR Appeals Chamber has held that even second-degree hearsay and anonymous hearsay are not presumed to be without probative value—the burden falls on an appellant to show why particular pieces of such evidence are unreliable (*see Nahimana* AJ, para. 509; *Rukundo* AJ, para. 196). The ICC has held the same (*see Gbagbo* Appeal Decision re. Recorded Testimony, paras 106-107; *Katanga* TJ, para. 90; *Ntaganda* Interim Release AJ, para. 42; *Ngudjolo* TJ, para. 56). Given that even unsourced or second-degree hearsay can be relied on with caution, the ICIJ did not err in relying on the generally high-quality hearsay he considered. Ao An’s cursory dismissal of all hearsay evidence on the grounds simply that it is hearsay are without merit.

<sup>126</sup> For example, in paragraph 148 of the Appeal, Ao An criticises the ICIJ for relying on “the same non-credible, uncorroborated evidence from Prak Yut” regarding the issue of Prak Yut reporting to Ao An. In fn. 378, he

statements that it is error to rely on such evidence simply because it is hearsay fail to discharge his burden of demonstrating factual error.

53. Ao An also sometimes impugns the use of some hearsay evidence for which Prak Yut is the source, arguing that hearsay from Prak Yut cannot corroborate Prak Yut's own evidence.<sup>127</sup> Contrary to Ao An's contentions, this evidence is highly relevant and probative in light of Ao An's argument that Prak Yut's evidence is a recent fabrication.<sup>128</sup> In fact, this evidence shows that Prak Yut's account has been consistent for decades. For example, Pov Sarom describes how Prak Yut told her that Ao An "was appointed to be the Chief of Sector 41 and that we were all instructed to work in Sector 41".<sup>129</sup> From context and wording, it is clear that Prak Yut said this to Pov Sarom during the DK period—more than 30 years before the time that Ao An claims that Prak Yut decided to use Ao An as a scapegoat. In context, it is also clear that parts of You Vann's hearsay evidence from Prak Yut almost certainly came from the DK period, further undermining Ao An's attacks on Prak Yut's credibility.

## 2. Responses to specific allegations of factual errors

### a. The ICIJ reasonably found that Ao An was Secretary of Sector 41

54. Ao An devotes a considerable portion of Ground 6 to his contention that the ICIJ erred

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acknowledges that You Vann also provided evidence on this point, but dismisses it because You Vann "provides hearsay evidence from Phen about Prak Yut reporting to Ao An." But this challenge is unpersuasive: Phen is a named source, independent of Prak Yut, who, as the Kampong Siem District Military Chairman, was well-placed to know the facts he communicated to You Vann. Whether or not this piece of hearsay evidence would have been sufficient on its own to establish the fact, it indisputably provides strong corroboration for Prak Yut's own evidence, as well as the general corroboration provided by the other evidence on the case file (*see* **D360/5/1** Appeal, para. 148, fn. 378; **D219/138** You Vann WRI, A15, 55). Similarly, in paragraph 127 of the Appeal, Ao An argues that Prak Yut's evidence about reporting to Ao An is corroborated "only by hearsay from You Vann." But, You Vann's evidence is that one of Prak Yut's messengers named Khom was the one who told her about Prak Yut taking lists of names to Ao An—and that Khom was in fact the one who drove Prak Yut on this errand. Once again, this is high-quality, first-degree hearsay from a named declarant with reason to know the relevant facts. Reliance on it to corroborate Prak Yut was entirely reasonable (*see* **D360/5/1** Appeal, para. 127, fn. 297; **D219/702.1.87** You Vann, T. 14 January 2016, 15.04.43-15.09.00). In paragraph 118, Ao An argues that the ICIJ's finding that Ao An ordered the arrest and execution of Am, the Sector 41 Office chief, was based "solely on hearsay evidence and speculation." But the hearsay evidence Ao An impugns was provided by one of the messengers of Aun, the man who replaced Am following his arrest. Although Sat Pheap admits to having forgotten the name of this messenger, this is once again first-degree hearsay from an identified (though not named) source with a reasonable basis to know the relevant information. Reliance on such evidence was not unreasonable (*see* **D360/5/1** Appeal, para. 118, fn. 265; **D219/504** Sat Pheap WRI, A19, 21, 89, 135).

<sup>127</sup> **D360/5/1** Appeal, fns 132, 256 [acknowledging that Pov [Peou] Sarom also stated that Ao An was appointed Sector 41 Secretary, but emphasising that she learned this from Prak Yut, and arguing that "hearsay evidence from Prak Yut cannot be used to corroborate Prak Yut."].

<sup>128</sup> **D360/5/1** Appeal, paras 63-64; **D360/5/1.4** Annex C; **D360/5/1.5** Annex D.

<sup>129</sup> **D117/24** Pov [Peou] Sarom WRI, A7.

in finding that he served as the secretary of Sector 41,<sup>130</sup> but this finding is supported by overwhelming evidence.

*i. The Cumulative and Corroborative Nature of Evidence of Ao An's Sector 41 Role and Functions*

55. Ao An's approach to this issue is to challenge the evidence of each aspect of Ao An's role as Sector 41 Secretary in a piecemeal fashion, while systematically disregarding the way in which evidence related to all aspects of Ao An's role, acts, and conduct is mutually corroborative. At least 20 witnesses and civil parties identify Ao An as Sector 41 Secretary,<sup>131</sup>

<sup>130</sup> **D360/5/1** Appeal, paras 106-145.

<sup>131</sup> **1. Prak Yut: D117/70** Prak Yut WRI, A20-23 ["Q: Do you recall a big meeting that lasted two days, chaired by Ke Pauk, in which Ke Pau[k] assigned cadres to take over the sectors and districts in the Central Zone? A: Yes, I do. [...] I only recall the cadres in Sector 41. Grandfather An was the Secretary."]; **D219/234.1.2** Prak Yut DC-Cam Statement, EN 01064283 ["Dany: Who was on the Sector Committee? Had Ta An already gone there? Yut: Ta An had already gone there. He was Chief of Sector 41. Dany: He had gone there before you did? Yut: He went there after me, but he attended the meeting on that day as well."]; **2. Pech Chim: D117/18** Pech Chim WRI, A1 ["In February 1977, the Party decided to send us to Phnom Penh where we met Ke Pauk. Then Ke Pauk took us to Kampong Cham province and held a meeting. During the meeting, Ke Pauk announced that Se was the First Deputy in charge of economy in Siem Reap Sector (the North Zone) and Ta An was assigned as Sector 41 Secretary and Ke Pauk's Second Deputy."]; **3. You Vann: D117/31** You Vann WRI, A12 ["Ta An stayed in Prey Chhor and he was the secretary of Sector 41."]; **D219/138** You Vann WRI, A23, 35 ["Ta An was Sector 41 Secretary, and he was stationed in Prey Totueng. He was also Prey Chhor District Committee. [...] I know that Ta An was Sector Secretary and the Prey Totueng District Committee because he announced it himself. [...] His official position, as addressed on envelopes, was Sector 41 Chief."]; **D219/702.1.87** You Vann, T. 14 January 2016, 14.09.56-14.12.13 ["Q: [...] focusing on Sector 41, can you tell us who the sector's secretary was? A: It was Ta An."]; **4. Pov Sarom: D117/24** Pov [Peou] Sarom WRI, A7 ["I did not attend the meeting, but later Prak Yut told us that Ta An was appointed to be the Chief of Sector 41 and that we were all instructed to work in Sector 41."]; A34 ["Q: Did you know what Ta An's position at the sector and zone levels was? A: I knew that he was the Secretary of Sector 41, but I did not know what position he held at the zone level."]; **D219/284** Pov Sarom WRI, A18-21 ["Q: When you saw Ta An, did you know his rank? A: No, I didn't. But when at the district office I heard Ta An was in charge of this sector. Q: From whom did you hear Ta An's position? A: I heard from Prak Yuth. Her husband and Ta An were co-workers. [...] I heard Ta An was in charge of the sector. My elder brother, [Yut's husband], worked with him. He told me no one was more superior than Ta An."]; **5. Toy Meach: D219/582** Toy Meach WRI, A30 ["An, who was Sector Committee."]; **6. Hong Heng: D219/802** Hong Heng WRI, A18 ["At that time, the Sector Com's given name was Ta An, but I do not know his surname."]; **7. Khut Saret: D219/788** Khut Saret WRI, A9-10 ["Q: Can you recall who was ruling over the sector office when you were working at the new location? [...] A: I only know the big one: Ta An."]; **8. Sat Pheap: D219/315** Sat Pheap WRI, A27 ["When the Southwest Zone group arrived, a new Sector Secretary by the name of Ta An was installed."]; **9. Penh Va: D219/226** Penh Va WRI, A5 ["When Aom An arrived, he became the Secretary of Sector 41."]; **D219/498** Penh Va WRI, A20 ["Ke Pauk was Zone Committee; he administered Sector 41, 42, 43 and Siem Reap Province, all of which were under the North Zone. Ta An had to report to Ke Pauk, but I do not know what relation he had with Sectors 42 and 43. I just know that Ta An was Sector 41 Committee."]; **10. So Saren: D219/800** So Saren WRI, A61 ["Q: Please clarify this point. Please tell us the names of the Sector Chairperson and all the members of the Sector Com. A: The chairperson's name was Ta An. And Aun was Office Chairperson, put in charge by the Sector Com as next in line after Ta An."]; **D219/776.1.1** So [Sau] Saren DC-Cam Statement, EN 01309862 ["When I [came] to the Sector, I knew the Sector Com named Ta An, but surname what An, I don't know. [...] Dany: So, when you went to Sector 41, you knew Sector Com Ta An? Saren: Yes, Ta An. Dany: Was he the biggest person there? Saren: In the Sector Com, Ta An, he was the biggest."]; **11. Chom Vong: D117/56** Chom Vong alias Youk Ngov WRI, A18 ["During that time, Grandfather An was the Sector 41 Secretary."];

and Ao An himself has acknowledged that he held this position.<sup>132</sup> This evidence corroborates, and is also corroborated by, evidence Ao An carried out the functions of the position. For example, evidence that Ao An was appointed by Ke Pauk as Sector 41 Secretary at a public meeting<sup>133</sup> corroborates evidence from a different individual that Ao An introduced himself as Sector 41 Secretary on a separate occasion,<sup>134</sup> which in turn corroborates evidence from still other witnesses and civil parties that Ao An appointed and gave orders to the Sector 41 military chief,<sup>135</sup> visited security centres in Sector 41,<sup>136</sup> made public speeches at worksites in Sector 41,<sup>137</sup> and disseminated CPK policies on marriages and population increase to Sector 41 cadres.<sup>138</sup>

56. The strength of the Indictment's factual findings regarding Ao An's positions, role, and participation in crimes derives from the way in which the ICIJ's analysis of the many different aspects of his role and participation reinforce each other,<sup>139</sup> and the fact that the evidence is

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**D219/813.1.12** Chom Vong alias Youk [Yuk] Ngov DC-Cam Statement, EN 01335721 ["Dany: Ta An was Sector 41 Com, is that right? Ngov: Yes. Dany: Who was his deputy? Ngov: The deputy was Ta Sim."]; **12. Orn Kim Eng: D107/5** Orn Kim Eng WRI, A27 ["When Ke Pauk was absent, his deputy, Ta An, who was also the Sector secretary, was in charge. Ta An became the secretary of Sector 41 after Sreng, the former Sector secretary, had been arrested."]; **D117/66** Orn Kim Eng WRI, A12 ["I heard that Ta An was the sector secretary [of Sector 41], but I never saw him."]; **13. Im Pon: D117/50** Im Pon WRI, A29 ["Q: To help us understand this point clearly, can you confirm that Ta An was in fact Sector 41 Secretary in the Central Zone led by Ke Pok? A: Yes, yes."]; **14. Nhim Kol: D107/7** Nhim Kol alias Say WRI, EN 00787214 ["I heard that Ta An served as secretary of Sector 41 and Ke Pauk as Zone secretary."]; **15. Put Kol: D117/26** Put Kol WRI, A4 ["Ta An was a cadre in Sector 35; later on he was secretary of Sector 41 in the Central Zone."]; **16. Prak Ny: D117/34** Prak Ny WRI, A12 ["I heard that Ta An was the Chief of Sector 41."]; **17. Lim Seng: D117/20** Lim Seng WRI, A4 ["I still remember that Ta An was the secretary of Sector 41, Oeun who was my elder brother was the secretary of Sector 42, and Chan was the secretary of Sector 43."]; **18. Tep Pauch: D219/485** Tep Pauch WRI, A2 ["At that time [Ao An] was already Sector 41 Committee."]; **19. Saray Hean: D6.1.980** Saray Hean WRI, A6 ["Q: What were the names of the composed leadership in Sector 41? A: In Sector 41 there was comrade An"]; **20. Ban Siek: D219/355** Ban Siek WRI, A9 ["I knew [Ao An] when he was in the position of Sector 41 Secretary. I just knew that he was responsible for the sector"]; **D117/35** Ban Siek WRI, A13 ["The Central Zone consisted of three Sectors: Sector 41 (Kampong Siem), with An as Sector Secretary (An was a Southwest person)"]; **21. Ry Nha: D219/870** Ry Nha WRI, A87 ["I knew only Ta An who was the highest-ranking cadre."].

<sup>132</sup> **D191.2** Ao An DC-Cam Statement (Part 2), EN 01025312 ["Dany: Since you were there, you did not see Taing who was the secretary of Sector 41? An: He had already been removed. Dara: When you were transferred to Kampong Cham, what Sector were you assigned to take charge of? An: Sector 41. Dara: You took over Sector 41? Did you replace Taing? An: Yes, I replaced ... Taing because Taing had already been removed."]; EN 01025320 ["Dara: Until when were you at Sector 41 to build the 1 January Dam and the 6 January Dam? An: I was there until 1979. I fled when the Royal Government attacked."].

<sup>133</sup> **D360** Indictment, para. 245; **D360/5/1** Appeal, para. 108.

<sup>134</sup> **D360** Indictment, para. 247; **D360/5/1** Appeal, para. 108.

<sup>135</sup> **D360** Indictment, para. 258; **D360/5/1** Appeal, paras 136-140.

<sup>136</sup> **D360** Indictment, paras 283, 286-287; **D360/5/1** Appeal, paras 131-135.

<sup>137</sup> **D360** Indictment, para. 268.

<sup>138</sup> **D360** Indictment, paras 314-319; **D360/5/1** Appeal, paras 151-154.

<sup>139</sup> The ICIJ's finding that Ao An was the secretary of Sector 41 was based on a careful and contextual 45-page analysis of the relevant evidence (**D360** Indictment, paras 242-319). This included analysis of: eyewitness evidence of Ao An's appointment to that position (para. 245); evidence that he introduced himself as Sector

derived from many different witnesses and civil parties<sup>140</sup> and from Ao An himself.<sup>141</sup> Ao An's piecemeal approach, dealing with each factual finding in isolation, fails to acknowledge or address this corroboration and thus fails to demonstrate that no reasonable trier of fact could have reached the factual findings to the required standard.<sup>142</sup>

57. In short, the evidence that Ao An was the Sector 41 Secretary is overwhelming. Ao An's current denial that he held this position despite his prior admission can only be explained by the fact that he recognises that the horrific crimes committed in Sector 41 during his tenure

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41 Secretary at a large public meeting of Sector 41 cadres (para. 247); and a lengthy analysis of the ways in which he carried out his functions as Sector 41 Secretary, including by: (i) appointing the district secretaries of Sector 41 (para. 247); (ii) appointing and removing cadres at lower levels of the hierarchy (para. 256); (iii) supervising worksites (paras 256, 268-270); (iv) appointing the sector military chairman and giving him orders, including orders to commit crimes (para. 256); (v) controlling travel within Sector 41 (para. 272); (vi) receiving orders from Central Zone Secretary Ke Pauk to arrest and kill enemies (para. 277); (vii) coordinating with the Sector 42 and 43 Secretaries regarding a consistent method for purging cadres throughout all three sectors (para. 278); (viii) ordering his subordinates to identify and kill "all" enemies throughout the sector, including "those who opposed the revolution", in particular Cham, Vietnamese, and Lon Nol soldiers (paras 275, 283, 302-303); (ix) authorising subordinates to decide in some cases who should be arrested and where they should be imprisoned (para. 279); (x) monitoring the commission of crimes through meetings with and receiving reports from subordinates regarding the execution of prisoners and other matters (paras 279, 285, 303); (xi) assigning various categories of prisoners to various security centres throughout Sector 41 (para. 279); (xii) personally ordering executions of prisoners (paras 284, 294-96); (xiii) visiting security centres to ensure that orders to kill were carried out (paras 286-287); (xiv) maintaining and coordinating the logistical infrastructure to move prisoners around Sector 41 (para. 288); (xv) publicly accusing incumbent Central Zone cadres of betrayal and threatening them with death (para. 293); (xvi) ordering, facilitating, and supervising the arrest and execution of incumbent cadres in Sector 41 (paras 294-298); (xvii) ordering that important prisoners be transferred to the sector and that others be executed at district-level facilities (para. 303); (xviii) attending meetings with senior CPK leaders regarding the evacuation and purge of "enemies" from the East Zone (para. 308); (xix) coordinating and supervising the transportation of people from the East Zone to Sector 41 and then on to security centres for execution (para. 309); (xx) accusing mobile unit workers at the Anlong Chrey Dam of being CIA agents or Vietnamese spies (para. 310); (xxi) continuing the purge in Sector 41 even after the Party Centre's directive to cease the killing (paras 311-313); (xxii) announcing a policy that married couples had to produce children (paras 315-316); (xxiii) arranging marriages and supervising the arrangement of marriages in Sector 41 (para. 318); and (xxiv) presiding over marriages in Sector 41 (para. 319). With respect to the Cham, the ICIJ analysed evidence of Ao An (i) ordering Kampong Siem District Secretary Prak Yut to make a list of all of the Cham in her district (para. 633); (ii) ordering the Sector 41 district secretaries to kill all the Cham in areas under their control (para. 634); (iii) receiving reports from his subordinates regarding the killing of the Cham (para. 635); (iv) instructing his subordinates from throughout Sector 41 to make a second list of remaining Cham late in the DK period and announcing to them that non-Khmer people were to be purged (para. 636).

<sup>140</sup> The ICIJ's finding that Ao An was the Sector 41 Secretary and his discussion of Ao An's acts and conduct in that role was based on the evidence of more than 20 witnesses who gave accounts of Ao An's role in their WRIs and live testimony. Among the most important of the witnesses and civil parties relied on by the ICIJ are Prak Yut, You Vann, Pech Chim, Nhem Chen, Nhim Kol, Put Kol, Suon Kanil, Sat Pheap, Chom Vong, Pov Sarom, Penh Va, Im Pon, Hong Heng, Saray Hean, Lim Seng, Ban Siek, Toy Meach, So Saren, Muol Eng, Sann Son, Phann Chen, and To Sem. This is not an exhaustive list of the witnesses and civil parties whose evidence was analysed and relied upon by the ICIJ in reaching his conclusion—these are simply the most important of the witnesses.

<sup>141</sup> The ICIJ also relied on Ao An's own admission that he served as Sector 41 Secretary. *See* **D360** Indictment, para. 247, fn. 604.

<sup>142</sup> The SCC has explicitly disapproved of the piecemeal approach advocated by Ao An. Case 002-F36 Case 002/01 AJ, para. 418.

would make the person in charge of that sector among those “most responsible” for DK crimes and therefore subject to ECCC jurisdiction.

*ii. Ao An’s De Jure Appointment as Sector 41 Secretary*

58. Ao An argues that the ICIJ erred in concluding that he was the *de jure* secretary of Sector 41 because “the exact date”, the “specific location”, and the reason for his appointment are unknown, and that there are “only” two eyewitness accounts of Ke Pauk making the appointment as well as one eyewitness account of Ao An himself (on a different occasion) announcing that he held the position.<sup>143</sup> The evidence demonstrates that Ke Pauk appointed Ao An as Sector 41 Secretary sometime between late 1976 and February 1977,<sup>144</sup> and Ao An has not shown that greater specificity than this was required for the ICIJ to reasonably reach his factual findings on Ao An’s criminal liability and level of responsibility. The exact location of the meeting at which Ke Pauk appointed Ao An is of marginal relevance to the ICIJ’s findings, but in any event, the evidence shows it took place at Ke Pauk’s office in Kampong Cham town.<sup>145</sup> Moreover, the ICIJ makes it clear that Ao An—and all the other Southwest Zone cadres—were appointed to their new positions to “deal with” the alleged traitors in the Central Zone.<sup>146</sup>

59. Prak Yut’s and Pech Chim’s accounts of Ao An’s appointment by Ke Pauk are consistent and corroborative.<sup>147</sup> Ao An has failed to demonstrate that it was unreasonable to rely on them. Ao An also fails to engage with the overwhelming evidence of Ao An carrying out the functions of the Sector 41 Secretary subsequent to his appointment.

*iii. Ao An’s Receipt of Orders from the Central Zone Level*

60. Ao An asserts that the ICIJ erred in finding that he received orders from Ke Pauk to arrest and kill enemies in Sector 41,<sup>148</sup> despite the fact that Ao An himself admitted in a media interview that Ke Pauk ordered him to kill supporters of the Lon Nol regime (and that he told Ke Pauk that he had carried out those orders).<sup>149</sup> He attempts to undermine Nhem Chen’s

<sup>143</sup> D360/5/1 Appeal, para. 108.

<sup>144</sup> D351/5 ICP Final Submission, paras 9-15.

<sup>145</sup> D351/5 ICP Final Submission, para. 15, fns 33-34.

<sup>146</sup> D360 Indictment, para. 244.

<sup>147</sup> D360 Indictment, para. 245, fn. 598.

<sup>148</sup> D360/5/1 Appeal, paras 110-112.

<sup>149</sup> D103.1.39 Ao An Interview with VoA Khmer, *Atrocities Suspect Says He’s ‘Not Fearful’ of Tribunal, Hell*, 11 August 2011, EN 00750163. All Chambers of the ECCC as well as the CIJs have indicated that reliance on media interviews with suspects, charged persons, or accused, is permissible when appropriate caution is

evidence about meetings between Ao An and Ke Pauk on the basis that Nhem Chen sometimes described the meetings as occurring on a monthly basis and sometimes described them as occurring on an irregular basis<sup>150</sup>—a clearly unpersuasive reason to dismiss the evidence of Ao An’s bodyguard and driver on this point. He also claims that Ban Siek does not give evidence about Ao An attending meetings with Ke Pauk,<sup>151</sup> but Ban Siek’s evidence is that both Ke Pauk and Ao An were on the Central Zone “standing committee” which conducted secret meetings to make decisions about the purge.<sup>152</sup> The independent evidence that Ke Pauk appointed Ao An as Sector 41 Secretary further corroborates the evidence that Ke Pauk passed down orders and instruction to Ao An in a way consistent with the responsibilities of both of their positions. Taken as a whole, the evidence clearly supports the ICIJ’s finding that Ao An received orders and instructions from Ke Pauk.

*iv. Ao An’s Authority to Appoint District and Lower-Level Cadres*

61. Ao An also asserts that the ICIJ erred in finding that he had the power to appoint district and lower-level cadres. He claims that this error derives from the ICIJ’s reliance on “one non-credible witness, Prak Yut, whom he occasionally attempts to corroborate with statements from” a number of other witnesses, whose evidence, he asserts, does not in fact corroborate Prak Yut.<sup>153</sup> In particular, he characterises You Vann’s evidence that the order to replace existing commune chiefs must have come from Ao An as speculation,<sup>154</sup> but this is not accurate. You Vann’s evidence is that “[t]he order [to replace commune chiefs] must have come from Ta An because he was Sector Chairperson. Khom took Prak Yut to meet Ta An at the Sector level. When they returned, Khom told me they would arrange to have new commune chiefs.”<sup>155</sup> When a decision to take a particular course of action is announced immediately following a meeting with a superior, the conclusion that the decision came from that superior is not

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exercised and such evidence is evaluated in the context of all evidence in the cases. Case 004/1-**D308/3** Im Chaem Closing Order (Reasons), paras 136-139 [summarising use of statements given by suspects, charged persons, and accused to institutions other than the OCIJ]; Case 002-**D427** Closing Order, 15 September 2010, fns 935, 938, 982-983, 3681, 3747, 4308, 4760; Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, paras 57-59 [unanimously holding that Im Chaem’s media interviews are to be evaluated based on their “intrinsic value”], 294 [International Judges holding that Im Chaem’s media interviews can be relied on]; Case 002-**E313** Case 002/01 Judgement, Trial Chamber, 7 August 2014, paras 80, 938, fns 223, 233, 250, 410, 627, 1057, 1074, 1127; Case 002-**F36** Case 002/1 AJ, paras 358-359, fns 719, 851, 2400-2401, 2437.

<sup>150</sup> **D360/5/1** Appeal, fn. 243.

<sup>151</sup> **D360/5/1** Appeal, fn. 243.

<sup>152</sup> **D107/15** Ban Siek WRI, EN 00841965.

<sup>153</sup> **D360/5/1** Appeal, para. 113.

<sup>154</sup> **D360/5/1** Appeal, fn. 256.

<sup>155</sup> **D219/138** You Vann WRI, A45.

speculation; it is a reasonable and grounded inference that can be considered together with other evidence on the point.

62. Ao An also argues that Pov Sarom's evidence that Ao An appointed Prak Yut as Kampong Siem District Secretary is hearsay from Prak Yut and contends that "hearsay evidence from Prak Yut cannot be used to corroborate evidence from Prak Yut."<sup>156</sup> But as discussed above, it is clear that Pov Sarom's evidence refers to a conversation that took place during the DK period,<sup>157</sup> more than 30 years before the time Ao An claims that Prak Yut made up her evidence about him. This evidence is relevant and corroborative because it shows that Prak Yut's account of Ao An has been consistent for decades.

63. The CPK Statute also corroborates evidence of Ao An appointing subordinates, since appointing subordinates was a statutory function of sector secretaries.<sup>158</sup> Taken as a whole, the evidence clearly supports the ICIJ's finding that Ao An appointed district secretaries and other subordinates.

*v. Arrest and Removal of Three Named Cadres*

64. Ao An asserts that the ICIJ erred in finding that Ao An ordered the removal of Met Sop, Am, and Prak Yut from their positions in Sector 41.<sup>159</sup> With respect to Met Sop and Am, Ao An's submissions fail to show that no reasonable trier of fact could have relied on the direct evidence (with respect to Met Sop) and sourced hearsay from a declarant likely to know the relevant facts (with respect to Am) to find that Ao An ordered the arrests. With respect to Prak Yut, Ao An mischaracterises the ICIJ's findings—the ICIJ did not state that Ao An was the one who ordered Prak Yut's removal.<sup>160</sup> In any event, Ao An has not demonstrated that any of these findings was determinative of the ICIJ's conclusions that Ao An is responsible for crimes and that he falls within the personal jurisdiction of the ECCC. Even in the absence of these findings, the disposition of the Indictment would not have changed.

*vi. Ao An's Issuance of Orders to Subordinates to Identify, Arrest, Imprison, Torture, and Kill Enemies*

65. Ao An argues that the ICIJ erred in finding that he ordered district secretaries and other

<sup>156</sup> **D360/5/1** Appeal, fn. 256.

<sup>157</sup> **D117/24** Pov [Peou] Sarom WRI, A7.

<sup>158</sup> **D360** Indictment, para. 191.

<sup>159</sup> **D360/5/1** Appeal, paras 115-119.

<sup>160</sup> **D360** Indictment, para. 423.

subordinates to identify, arrest, torture, and kill various categories of enemies.<sup>161</sup> This argument relies primarily on his contention that Prak Yut is not a credible witness,<sup>162</sup> but as discussed above, Ao An has failed to discharge his burden of showing that no reasonable trier of fact could have relied on Prak Yut's evidence.<sup>163</sup> Indeed, the evidence of her prior consistent statements, as well as the corroboration of her account by the great majority of the other evidence on the Case File, demonstrates the opposite.

66. Ao An also greatly exaggerates the extent to which these findings depend solely on Prak Yut's evidence. The ICIJ relied on evidence from many other witnesses and civil parties regarding Ao An inciting or ordering subordinates to commit crimes, including Toy Meach,<sup>164</sup> Nhem Chen,<sup>165</sup> Penh Va,<sup>166</sup> Sat Pheap,<sup>167</sup> Seng Srun,<sup>168</sup> Ke Pich Vannak,<sup>169</sup> and You Vann.<sup>170</sup>

67. In addition, Ao An once again overlooks the way in which the entire body of evidence regarding Ao An's position, acts, and conduct provides consistent overall corroboration. In light of the 20 witnesses and civil parties who say Ao An was the Sector 41 Secretary, Ao An's own statement that he was the Sector 41 Secretary, and evidence of Ao An carrying out the functions of the Sector 41 Secretary, the only reasonable conclusion is that orders to commit crimes in Sector 41 had to come from or pass through Ao An. The evidence taken as a whole clearly supports the ICIJ's various factual findings about Ao An giving orders to his subordinates to commit crimes.

*vii. Ao An's Receipt of Reports from Subordinates*

68. Ao An asserts that the ICIJ erred in finding that he received regular reports from his subordinates.<sup>171</sup> Contrary to Ao An's submissions, the ICIJ's finding was reasonable. As the ICIJ pointed out, "Sector committees were responsible for receiving reports about the situation

<sup>161</sup> **D360/5/1** Appeal, paras 120-125.

<sup>162</sup> **D360/5/1** Appeal, paras 120-122.

<sup>163</sup> See paras 35-38, *supra*.

<sup>164</sup> **D360** Indictment, paras 284, 295.

<sup>165</sup> **D360** Indictment, paras 287, 299, 301. Ao An has also challenged the credibility of Nhem Chen on the basis that he was young at the time and therefore his memories cannot be trusted, but he fails to explain how Nhem Chen's young age somehow caused him to give an account entirely consistent with the one he says Prak Yut invented in 2011 or 2012. See also para. 42, *supra*.

<sup>166</sup> **D360** Indictment, para. 293.

<sup>167</sup> **D360** Indictment, para. 294, 296.

<sup>168</sup> **D360** Indictment, para. 298.

<sup>169</sup> **D360** Indictment, para. 300.

<sup>170</sup> **D360** Indictment, para. 302.

<sup>171</sup> **D360/5/1** Appeal, paras 126-128.

and work of the districts” under the CPK Statute.<sup>172</sup> Even in the absence of corroborating witness evidence, this would be a reasonable basis on which to conclude that Ao An received reports from his subordinates. In addition, evidence from numerous witnesses indicates the reporting lines in Sector 41 were functioning in the way contemplated by the CPK Statute. As the ICIJ found, Prak Yut’s extensive evidence regarding subordinates meeting with and reporting to Ao An<sup>173</sup> is solidly corroborated by You Vann, Im Pon, Hong Heng, Nhem Chen, Put Kol, Sat Pheap, and So Saren.<sup>174</sup>

*viii. Ao An’s Authority over, and Presence at, Security Centres*

69. Ao An alleges that the ICIJ erred in finding that he had authority regarding security matters and that he visited and exercised control over the Sector 41 security centres.<sup>175</sup> There is no requirement to prove that a suspect was present at a security centre or other crime site in order to find that the suspect was responsible for crimes that occurred there. In the Case 002 Closing Order, the CIJs made no findings that the Accused in that case had visited S-21, but still found the evidence of their responsibility for crimes at that site sufficient to send them to trial for various charges related to that security centre.<sup>176</sup> In the present Indictment, no finding that Ao An was *ever* present at any of the security centres in Sector 41 would be required to conclude that he was responsible for crimes committed there or that he falls within the personal jurisdiction of the ECCC, and the ICIJ’s explicit findings that there is no evidence Ao An visited a number of the charged security centres and killing sites<sup>177</sup> makes it clear that he was not relying on an inference that Ao An must have visited all of them. The extensive evidence that Ao An was the Sector 41 Secretary, coupled with evidence that he issued orders to arrest and kill to his district secretaries, and that arrests and killings consistent with those orders were carried out in areas under his control, leave no reasonable inference other than that Ao An controlled the Sector 41 security centres in the same way he controlled almost everything else in Sector 41. This conclusion is further reinforced by the fact that sector secretaries in the DK generally were, as the ICIJ found, responsible for the identification, arrest, and killing of

<sup>172</sup> **D360** Indictment, para. 190 *citing* **D1.3.20.1** CPK Statute, art. 13(4), EN 00184042.

<sup>173</sup> *E.g.* **D219/120** Prak Yut WRI, A14-22 [Ao An led “monthly meetings of the Sector with participation of all the district committees” at which, among other things, orders to kill were handed down]. Hong Heng confirms that Ao An met with multiple district secretaries at the same time (*see* **D219/802** Hong Heng WRI, A61).

<sup>174</sup> **D360** Indictment, para. 263, fns 660-662.

<sup>175</sup> **D360/5/1** Appeal, paras 131-135.

<sup>176</sup> Case 002-**D427** Closing Order, paras 415-475, 1521-1542.

<sup>177</sup> **D360** Indictment, paras 384, 455, 535, 555.

enemies and had direct supervisory authority over sector security centres.<sup>178</sup>

70. That said, the evidence that Ao An *did* in fact visit some of the security centres, and issued orders or otherwise exercised authority while there,<sup>179</sup> further reinforces the conclusion that he had authority over security centres and is responsible for the crimes committed there. Different witnesses give accounts of Ao An's visits to each of the three security centres that the ICIJ found he visited, and their accounts—of him threatening killings at one security centre,<sup>180</sup> ordering killings at another,<sup>181</sup> and boasting about killings that had already taken place at a third<sup>182</sup>—are consistent in tone and support the finding that he had authority at the security centres and in Sector 41 generally.

*ix. Ao An's Authority Over the Sector 41 Military*

71. Ao An also asserts that the ICIJ erred in finding that he had authority over the Sector 41 military.<sup>183</sup> The ICIJ relied on numerous witnesses and civil parties to reach this finding, which in turn relied on evidence of multiple aspects of Ao An's authority over the Sector 41 military, such as appointing its commander, issuing orders, and receiving reports.<sup>184</sup> Ao An's piecemeal challenges to aspects of this evidence and unpersuasive attacks on the credibility of some of the witnesses fail to address the corroboration provided by multiple witnesses giving evidence about multiple aspects of Ao An's authority. He thus fails to discharge his burden of demonstrating that no reasonable trier of fact could find that Ao An had authority over the Sector 41 military.

*x. Ao An's Authority over Transportation Resources and Movement*

72. Ao An asserts that the ICIJ erred in finding that he controlled or managed various transportation and logistical resources and that he had the authority to approve travel within

<sup>178</sup> **D360** Indictment, paras 193-194.

<sup>179</sup> **D360** Indictment, paras 286-287, 491, 588-589.

<sup>180</sup> The ICIJ found that at Wat Ta Meak, Ao An threatened a group of approximately 300 cadres that a "soundless war" was about to begin in which more people would be killed than had been killed by the B-52 bombings (see **D360** Indictment, para. 293).

<sup>181</sup> The ICIJ found that Ao An visited Met Sop / Kor Security Centre on one occasion to issue orders to kill and on another occasion to follow up to be sure that orders to kill had been carried out (see **D360** Indictment, paras 286-287).

<sup>182</sup> The ICIJ found that Ao An spoke at a large meeting at Wat Au Trakuon that was attended by the Kang Meas District Secretary and the chief of the Wat Au Trakuon Security Centre. During the speech, "[Ao An] announced that the previous cadres had been 'smashed' or killed because they were cruel and disloyal to 'Angkar' and the revolution" (see **D360** Indictment, para. 491).

<sup>183</sup> **D360/5/1** Appeal, paras 136-140.

<sup>184</sup> **D360** Indictment, para. 258, fns 642-649.

the sector.<sup>185</sup> Once again, the evidence on these matters comes from multiple witnesses and pertains to multiple corroborative aspects of Ao An's role.<sup>186</sup> Ao An's unpersuasive assertions regarding the credibility of some of this evidence fail to discharge his burden of demonstrating that no reasonable investigating judge could have made these findings. In addition, Ao An has not demonstrated that any of these factual findings were determinative of the ICIJ's findings that he is responsible for crimes or that he falls within the personal jurisdiction of the ECCC. The disposition of the Indictment would in all likelihood have been the same without these factual findings.

*xi. Ao An's Role in the Genocide of the Cham*

73. Ao An asserts that the ICIJ erred in finding that he had a significant role in the genocide of the Cham and that he had the genocidal intent required for the crime.<sup>187</sup> This argument is based largely on Ao An's unpersuasive attacks on the credibility of Prak Yut and You Vann;<sup>188</sup> as discussed above, these witnesses' evidence is in fact credible and well-corroborated.<sup>189</sup>

74. Ao An also misstates the substance of Prak Yut's evidence. He incorrectly states that Prak Yut "only provide[s] information about Kampong Siem District" and that ICIJ "incorrectly and without basis" inferred that Ao An gave orders to all Sector 41 district secretaries regarding the killing of the Cham.<sup>190</sup> In fact, Prak Yut's evidence is unambiguous that Ao An ordered not just her, but all of the Sector 41 district secretaries, to smash the Cham in areas under their control. For example, Prak Yut stated in one WRI:

Q: Could you explain the content of the orders? What types of people did the orders involve?

A19: Grandfather An gave an order to me to identify those who opposed the revolution, those who wanted to topple the revolution and those who were not satisfied with their living conditions, and to arrest those people to be smashed.

Q: Was that order carried out only in Vihear Thum Commune?

A20: This order was carried out not only in other communes in Kampong Siem District but *also in other four districts*.

Q: Were those orders related to the arrests of Cham people to be killed?

A21: Yes, it was the order to make arrests and smash at the same time, but we carried out execution of all the Cham people after we had already arrested people of other elements.

<sup>185</sup> D360/5/1 Appeal, paras 141-144.

<sup>186</sup> D360 Indictment, paras 256, 272, 288, 309; fns 636, 704-705, 748-749, 751, 828.

<sup>187</sup> D360/5/1 Appeal, paras 146-150.

<sup>188</sup> D360/5/1 Appeal, paras 146-148.

<sup>189</sup> See paras 35-39, *supra*.

<sup>190</sup> D360/5/1 Appeal, para. 147.

Q: How did you receive the orders to identify and arrest no-good elements to be smashed?

A22: I received the orders during monthly meetings of the Sector *with participation of all the district committees*. Written orders were not sent to me through messengers or other people.

Q: Did Grandfather An give any reason for the arrest of Cham people?

A23: No, he did not give any explanation at all, and *all the district committees present in the meeting* did not ask him for the reason.<sup>191</sup>

75. Prak Yut's evidence on this point is corroborated by the fact that mass killings of Cham did, in fact, take place in the other districts of Sector 41—especially Kang Meas District. As the ICIJ found, low-level cadres in Kang Meas District were aware of “a plan to exterminate all the Cham people”,<sup>192</sup> and a minimum of 6,443 Cham were killed there, many or most at Wat Au Trakuon.<sup>193</sup> Given the independent evidence that (i) Ao An was the Sector 41 Secretary, and therefore the superior of the Kang Meas District Secretary; (ii) Ao An gave instructions to all Sector 41 district secretaries to kill all the Cham; (iii) the Kang Meas District Secretary's subordinates were aware of a plan to exterminate all the Cham; and (iv) at a minimum, thousands of Cham were in fact killed in Kang Meas District, it clearly was reasonable for the ICIJ to conclude that Ao An ordered the genocide of the Cham not just in Kampong Siem District but throughout Sector 41. In fact, this was the only reasonable conclusion on the evidence taken as a whole.

76. In addition to failing to show that no reasonable trier of fact could have concluded that Ao An ordered the killing of Cham throughout Sector 41, Ao An has also failed to show that no reasonable trier of fact could have found (i) that Ao An received reports on the progress of the genocide of the Cham,<sup>194</sup> and (ii) that Ao An played a significant role in the transfer of Cham from the East Zone to the Central Zone.<sup>195</sup> His arguments regarding reporting are based on his unpersuasive arguments regarding the credibility of Prak Yut and other witnesses and conclusory statements regarding the insufficiency of corroboration. His arguments regarding transportation of Cham from the East Zone to the Central Zone are premised on the assumption that he has shown that no reasonable trier of fact could conclude that he served as secretary of

<sup>191</sup> **D219/120** Prak Yut WRI, A19-23 (emphasis added). See also **D219/702.1.94** Prak Yut, T. 18 January 2016, 15.50.42-15.56.42 (confirming that all Sector 41 district secretaries were present at the meeting at which Ao An gave the order to purge the Cham).

<sup>192</sup> **D360** Indictment, para. 610.

<sup>193</sup> **D360** Indictment, paras 469-475, 485-490, 651.

<sup>194</sup> **D360/5/1** Appeal, para. 148.

<sup>195</sup> **D360/5/1** Appeal, para. 149.

Sector 41, which is clearly not the case.

*xii. Ao An's Role in Forced Marriage and Rape*

77. Ao An argues that the ICIJ erred in finding he had a role in forced marriages and rapes in Prey Chhor and Kampong Siem districts,<sup>196</sup> but he has failed to demonstrate that no reasonable trier of fact could have made these findings. His arguments in this regard share the same flawed basis of many of his other arguments, resting on his unpersuasive contention that Ao An was not the Sector 41 Secretary and conclusory statements regarding the persuasiveness of evidence that fail to reach the standard required to demonstrate error.

*xiii. Significance of Ao An's Role as Sector 41 Secretary*

78. Ao An contends that, even if he were proved to be Sector 41 Secretary, he still would not be among those “most responsible” for DK crimes because of Sector 41’s limited size and his limited powers and role in making CPK policy.<sup>197</sup> His argument ignores the most important factors in determining whether an individual falls among those “most responsible”: the gravity of the crimes for which he is criminally responsible (including the high number of victims) and the extent of his role in the commission of the crimes.<sup>198</sup> Ao An also disregards the evidence that, in addition to serving as Sector 41 Secretary, he was also the Deputy Secretary of the Central Zone.

b. Ao An's Role as Deputy Secretary of the Central Zone

79. Ao An asserts that the ICIJ erred in finding that he was the *de jure* and *de facto* Deputy Secretary of the Southwest Zone,<sup>199</sup> but he has failed to demonstrate that no reasonable trier of fact could reach this conclusion.

80. At least seven witnesses and civil parties state that Ao An served as the Central Zone Deputy Secretary.<sup>200</sup> Their evidence is partially corroborated by Ao An’s own admission that

<sup>196</sup> **D360/5/1** Appeal, paras 151-154.

<sup>197</sup> **D360/5/1** Appeal, para. 145.

<sup>198</sup> Case 001-E188 *Duch* TJ, para. 22. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, para. 321; **D359** Dismissal Order, para. 424 [acknowledging this to be the applicable standard].

<sup>199</sup> **D360/5/1** Appeal, paras 93-105.

<sup>200</sup> **D360** Indictment, para. 252, fn. 620. **1. Im Pon: D117/50** Im Pon WRI, A29-32 [“Ta An was the deputy. He was Ta Pok’s deputy at the Zone. Q: Was he also a member of the Central Zone Committee? A: Yes. [...] Q: How did you know that Ta An was Ke Pok’s Deputy Secretary? A: Because he worked in Ta Pok’s behalf when Ta Pok was absent. [...] he always joined the meetings, and when the Zone Committee was absent, he managed the work.”], A75 [“Ta An was Zone Deputy. He travelled either when Ta Pok ordered

him or when Ta Pok was absent.”], A79 [“Q: As you observed and went with Ta An, sometimes he went to the districts or other sectors in order to oversee the work or to join meetings as Zone Deputy when Ke Pok was absent or when Ke Pok ordered him to work. Is that right? A: Yes.”]; **D219/813.1.1** Im Pon DC-Cam Statement, EN 01366574 [“Dany: Did Ta An ever go to attend meetings at the Zone level? Pon: Yes. He went. Dany: He went to the zone’s meetings, too? Pon: Yes. Dany: Where was the zone located at that time? Pon: It was in Kampong Cham, in Kampong Cham town.”], EN 01366575 [“Dany: Was Ke Pok the zone secretary? Pon: Yes. Dany: How about the deputy? Pon: That s Ta An.”], EN 01366577 [“Dany: While you were his driver did you often take him to the zone’s meetings? Pon: [That] was exactly the Central Zone. Dany: Yes! Went to meetings very often? Pon: Yes!”], EN 01366591 [“The sectors were different. But, Ta An was the Zone deputy at that time. [...] So, the Zone deputy could travel to sectors and anywhere he wanted.”]; **2. Saray Hean: D219/762** Saray Hean WRI, A22-26 [“Q: To be clear, I would like to clarify whether, at the congress, Ke Pork announced that when he was absent, a Sector Secretary was to be appointed to replace him as Central Zone Secretary; is that correct? A: That was just an acting arrangement when he was absent. For example, when Bang Pork was absent, he had Bang An be his replacement. Q: Did he specify the name? A: That of Bang An. Comrade An. Q: Did he mention other names? A: No. Only An. Q: Did Ta An say anything at the congress? A: They appointed him; he did not say anything. He [Ke Pauk] said, when he was not around, it would be Bang An. Everyone clapped their hands in recognition. Q: So, everyone clapped their hands to congratulate that when he [Ke Pauk] was absent, Bang An was to be his replacement, right? A: Yes.”]; **3. Ban Siek: D117/35** Ban Siek WRI, A15 [“To my knowledge, Ta An was deputy to Ke Pork on the Standing Zone Committee, whereas Oeun and Sim were Members.”]; **D6.1.386** Ban Siek WRI, EN 00360760 [“The Zone Committees were: Bang Ke Pork (deceased); Bang Sim (alive but unknown residence), the Sector 43 Secretary in Kampong Thom province; Oeun (deceased), the Sector 42 Secretary; and An (now lives his birthplace), the Sector 41 Secretary.”]; **D107/15** Ban Siek WRI, EN 00841965 [“The zone was controlled by Secretary Ke Pauk. He served as chief of the zone’s Standing Committee, which consisted of three sector committees- Ta An (from the Southwest Zone, secretary of Sector 41), Sim (from the Southwest Zone, secretary of Sector 43), Oeun (from the Central Zone, secretary of Sector 42) and the Zone Office Chief. To my knowledge, important decisions, for example, on a purge were made by the Standing Committee during its secret meeting.”]; **D219/702.1.75** Ban [Seak] Siek, T. 5 October 2015, 13.34.18-13.38.20 [“Ta An was a sector secretary. He was on the zone’s standing committee, and he either addressed the standing committee’s or the zone’s deputy secretary. And he was in charge of Sector 41. [...] Ta An was the secretary of Sector 41 and he was the deputy secretary of the zone and also of the zone’s standing committee.”]; **4. Pech Chim: D117/18** Pech Chim WRI, A2 [“Se was arrested three months after he arrived in the Central Zone. I did not know why he was arrested, but I think that it was an internal problem. During that time, Ke Pauk created the Central Zone by incorporating some territory of the North Zone. After Se’s arrest, I knew that Ta An remained as the only one deputy of Ke Pauk.”]; **D118/259** Pech Chim WRI, A162, 165 [“Ta An was the deputy of Ke Pauk [...] Q: Grandfather An was Ke Pauk’s deputy. Was Ta An in charge of all tasks or specific tasks? A: Ta An was the Deputy [Chairman] of the Central Zone. His primary position was the Sector 41 Chairman, and his core position was the Sector Secretary. Ke Pauk was in charge of the Zone Office where people were working.”], A208 [“Ta An had [a] higher position than me because he was the Deputy Chairman of the Zone, in charge of the sector, but Ta An did not have authority over my rubber plantation. Ke Pauk, the Zone Chairman, was in charge of the zone as a whole, including my rubber plantation.”]; **5. Suon Kanil: D6.1.707** Suon Kanil WRI, EN 00390076 [“After the Southwest Zone group had arrived, Ke Pauk was still the chairperson, Ta (grandpa) An (from the Southwest Zone) became the deputy”]; **D29** Suon Kanil WRI, EN 00716227 [“[Ao An] was a secretary of Sector 41; and he was also a deputy secretary of the Central Zone.”]; **D219/249** Suon Kanil WRI, A4 [“Q: Can you clarify the specific role of Ta An at the zone level? A: Yes, I can. Ke Pauk was the Zone Secretary. Ta An was the Deputy. Oeun and Sim were the members of the Zone Committee.”]; **D117/39** To Sem WRI, A14 [“When I first arrived, the organisational structure of the [Central] zone committee was as follows: Ke Pork was the chief, Ta An was the deputy, and Ta Sim was a member.”]; **6. Kuch Ra: D219/178** Kuch Ra WRI, A6 [“Q: Who was Zone Committee? A6: Ta An was Ke Pork’s deputy and a member of the Zone Committee. Chan was also a member of the Zone Committee.”]; **7. Ry Nha: D219/870** Ry [Ri] Nha WRI, A34, 37 [“Q: How did you know that Ta An was the zone deputy secretary? A: I knew it because he used to conduct the meetings at dam worksite of the sector. [...] Q: During the meeting, what made you believe that Ta An was a zone deputy chief? For example, did he say that he was the zone deputy chief? A: I heard it from the unit chief; he said that Ta An was the Zone Deputy Chief.”]. *See also* **D117/20** Lim Seng WRI, A11-12 [“Q: When Ke Pauk went to work outside the Zone, did he assign any deputy to take care of the affairs in the Zone for him? A: I did not know. Q: During the time Ke Pauk was absent from the Zone, was it possible that Ta An, who was a senior cadre, would travel to the different Sectors like Sectors 42 and 43 to make any decision on the

he was on the Central Zone Committee.<sup>201</sup>

81. All of this evidence is further corroborated by evidence of Ao An acting on matters of zone-level responsibility with respect to construction and military matters.<sup>202</sup> Although Ao An has challenged the sufficiency of this evidence,<sup>203</sup> he has failed to demonstrate that no reasonable trier of fact could rely on it, especially in the context of the evidence as a whole. Finally, the evidence of Ao An holding and acting in the position of Sector 41 Secretary further corroborates the evidence of Ao An serving as the Central Zone Deputy Secretary, since the Central Zone Deputy Secretary was likely to have been the secretary of one of the constituent sectors of the Central Zone and Ao An was therefore one of just three likely candidates for the position.

82. Ao An highlights the lack of evidence of specific instances of Ao An acting on Ke Pauk's behalf when he was absent from the zone,<sup>204</sup> but the number and frequency of the occasions on which Ao An was required to carry out Ke Pauk's duties as acting zone secretary are not dispositive of the question of whether Ao An held the position of Deputy Zone Secretary. The ICIJ made it clear that he took this factor into account in his assessment of whether Ao An was the deputy zone secretary,<sup>205</sup> and Ao An has not demonstrated that he accorded insufficient weight to it.

83. In summary, in light of the evidence taken as a whole, it was clearly reasonable for the ICIJ to find that Ao An was the deputy secretary of the Central Zone.

c. Ao An's Role in the Crimes and Implementation of CPK Policy

i. *Ao An's Role in the Charged Crimes at the Crime Sites*

84. Ao An argues that the ICIJ erred in finding that he is criminally responsible for the charged crimes.<sup>206</sup> Because this argument is based on other allegations of error that Ao An has failed to prove, he has also failed to demonstrate that no reasonable trier of fact could reach the

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Sectors' matters? A: Because Ta An was the most senior cadre, I thought, it was possible that he was in charge of that. But I did not recall any specific event which took place during that time."].

<sup>201</sup> **D191.2** Ao An DC-Cam Statement (Part 2), EN 01025313, 01025327.

<sup>202</sup> **D360** Indictment, paras 259-260.

<sup>203</sup> **D360/5/1** Appeal, paras 101-103.

<sup>204</sup> **D360/5/1** Appeal, paras 94-97.

<sup>205</sup> *E.g.* **D360** Indictment, paras 255, 262.

<sup>206</sup> **D360/5/1** Appeal, para. 155.

relevant findings.

*ii. Ao An's Role in the Purge of Incumbent Central Zone Cadres*

85. Ao An asserts that the ICIJ erred in finding that he “planned, orchestrated, and led a purge of former Central Zone cadres and civilians in late 1976 to February 1977.”<sup>207</sup> However, Ao An also acknowledges that there is evidence supporting the ICIJ’s finding,<sup>208</sup> and while he challenges the reliability of this evidence, he has not shown that no reasonable trier of fact could rely on it. For example, the ICIJ relied on the fact that Ao An himself acknowledged that he was told by Ta Mok the reason he was sent to the Central Zone was that “all the leaders in Kampong Cham became traitors, so they had to send me over there”.<sup>209</sup>

*iii. Ao An's Importance to the Implementation of CPK Policies*

86. Based on a number of factors, Ao An argues that the ICIJ erred in finding him to be “a major player in the DK structure” and a “willing and driven participant in the brutal and criminal implementation” of CPK policies.<sup>210</sup>

87. Ao An’s arguments are of marginal relevance to the question of whether he was among those “most responsible” for DK crimes. Most relate primarily to seniority rather than directly to Ao An’s level of responsibility for the crimes. While a charged person’s position in the hierarchy and role in formulating or interpreting policy can be relevant to the question of who is among the “most responsible”, the gravity of the crimes themselves and the charged person’s role in the crimes are the most important criteria.<sup>211</sup> Ao An played a critical role in the implementation of the CPK’s criminal policies by ordering his subordinates to commit crimes (including murder, extermination, and genocide) and monitoring their compliance with those orders. In light of this, it is simply not very relevant that Ao An did not happen to attend meetings with the Standing Committee or General Staff. Similarly, only a tiny fraction of the victims of DK crimes from the Central Zone were sent to S-21, so even if it were true that Ao An did not personally select the victims to be taken to S-21, this would have a marginal effect

<sup>207</sup> D360/5/1 Appeal, paras 88-92.

<sup>208</sup> D360/5/1 Appeal, para. 89, fn. 189.

<sup>209</sup> D360 Indictment, fn. 592 *citing* D219/847.1 Transcript of Ao An DC-Cam Statement (D191.2), EN 01373570.

<sup>210</sup> D360/5/1 Appeal, paras 83-87.

<sup>211</sup> Case 001-E188 *Duch* TJ, para. 22. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, para. 321; D359 Dismissal Order, para. 424 [acknowledging this to be the applicable standard].

on his overall level of responsibility.

### 3. Conclusion Regarding Ground 6

88. Ao An has failed to demonstrate that the ICIJ erred in his factual findings regarding Ao An's positions and his roles in the charged crimes. He has accordingly failed to demonstrate that the ICIJ erred in reaching the conclusion that Ao An was among those "most responsible" for the crimes of the DK regime.

#### **G. GROUND 7: AO AN'S LEVEL OF PARTICIPATION IN DK CRIMES MAKES HIM AMONG THOSE "MOST RESPONSIBLE"**

89. Ao An fails to show that the crimes he is charged with are not sufficiently grave to subject him to the personal jurisdiction of the ECCC as one of those "most responsible" for DK crimes.<sup>212</sup>

90. Contrary to Ao An's submissions, the size of the geographical area controlled by an individual does not determine his or her level of responsibility for crimes. As an example, the fact that S-21 comprised just a few square kilometres (and was therefore vastly smaller than Sector 41) did not preclude a finding that Duch was among those "most responsible" for DK crimes. Rather, it is the gravity of the crimes committed with the participation of the charged persons that is relevant, and as Ao An states in the Appeal, the crimes he is charged with amount to "the most serious criminal accusations known to humankind."<sup>213</sup> In addition, the ICIJ's approach to determining victim numbers was deliberative and conservative, resolving doubts in favour of lower numbers.<sup>214</sup> Finally, with respect to Cham victims of genocide in Sectors 42 and 43, the only reasonable inference on all the evidence is that the direct perpetrators committed genocide pursuant to orders passed down by Ke Pauk and other CPK cadres, all members of the JCE.<sup>215</sup>

#### **H. GROUNDS 8-13: AO AN'S ARGUMENTS ON THE SUBSTANTIVE LAW ARE WITHOUT MERIT**

91. In Grounds 8 through 12, Ao An alleges a number of legal errors regarding modes of liability and the elements of specific crimes.<sup>216</sup>

<sup>212</sup> D360/5/1 Appeal, paras 157-163.

<sup>213</sup> D360/5/1 Appeal, para. 227.

<sup>214</sup> D360 Indictment, paras 137-154.

<sup>215</sup> D360 Indictment, paras 180, 184, 195, 607-615, 623-628.

<sup>216</sup> D360/5/1 Appeal, paras 165-193.

92. In Ground 8,<sup>217</sup> Ao An makes general complaints about the way in which the ICIJ analysed customary international law (“CIL”) but fails to identify any specific, discernible legal errors or prejudice.<sup>218</sup> Rather, he sets out a general critique of the way in which the ICIJ approached his determination of CIL but without identifying its impact on any particular legal holding. Ground 8 should be summarily dismissed.

93. In Ground 9, Ao An fails to demonstrate that the ICIJ erred<sup>219</sup> in following the consistent jurisprudence of the Pre-Trial,<sup>220</sup> Trial,<sup>221</sup> and Supreme Court Chambers,<sup>222</sup> all of which have held that JCE I is applicable at the ECCC. Notably, these Chambers did not simply mechanically follow the jurisprudence of the *ad hoc* tribunals, but rather conducted detailed analyses of the relevant jurisprudence themselves—and indeed rejected the views of the *ad hoc* tribunals with respect to CIL support for the extended form of JCE. Ao An’s submissions do not demonstrate that the ICIJ erred in following these thorough and well-reasoned analyses. In addition, Ao An fails to establish that co-perpetration as set out in the Rome Statute (a treaty adopted in 1998) was part of CIL in the period from 1975 to 1979.

94. In Ground 10, Ao An alleges that the ICIJ erred in his findings regarding the membership, geographical scope, and common purpose of the JCE.<sup>223</sup> Contrary to Ao An’s assertions,<sup>224</sup> the category of Ke Pauk, Ao An, and other CPK cadres tasked with implementing CPK policies in the Central Zone<sup>225</sup> is sufficiently precise, and Ao An has therefore failed to demonstrate error. Should the PTC find otherwise, a detailed list of some of the cadres in this category who can

<sup>217</sup> **D360/5/1** Appeal, paras 166-170.

<sup>218</sup> In addition to failing to articulate discernible errors or prejudice, Ao An also fails to explain why it would have been appropriate for the ICIJ to take into account the Rome Statute—which was adopted in 1998 and entered into force in 2002—in making his determinations. He also misrepresents aspects of the work of the *ad hoc* tribunals by, for example, saying that the tribunals “maintained the express ability to depart from CIL” while neglecting to mention that the sole example he cites for this contention involved the question of whether the tribunals should adopt a *more restrictive* definition of crimes against humanity than required by CIL. In other words, the *ad hoc* tribunals “maintained the express ability to depart from CIL” only in a way that favoured the accused (*see* **D360/5/1** Appeal, para. 168, fn. 423; *Tadić* AJ, para. 296 [holding that the ICTY was not required by the Report of the Secretary-General to add an additional element of discriminatory intent to the CIL definition of crimes against humanity]).

<sup>219</sup> **D360/5/1** Appeal, paras 171-174.

<sup>220</sup> Case 002-**D97/15/9** Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, paras 36-102.

<sup>221</sup> Case 001-**E188** *Duch* TJ, paras 505-513; Case 002-**E100/6** Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, paras 22-38.

<sup>222</sup> Case 002-**F36** Case 002/1 AJ, paras 767-810.

<sup>223</sup> **D360/5/1** Appeal, paras 175-177.

<sup>224</sup> **D360/5/1** Appeal, para. 175.

<sup>225</sup> **D360** Indictment, paras 195, 824.

be specifically identified is included in the ICP's Final Submission.<sup>226</sup> Ao An has also failed to demonstrate error with respect to the geographical scope of the JCE.<sup>227</sup> First, contrary to Ao An's submissions, he is charged with crimes throughout the Central Zone—specifically, the genocide of the Cham.<sup>228</sup> Even if this were not the case, Ao An has not demonstrated that it is error to find that an accused participated in the implementation of a common criminal plan spanning a larger geographical territory than the one in which the crimes the accused is charged with occurred, provided that the accused cooperated with others responsible for the implementation of the plan in other areas. Finally, Ao An has failed to demonstrate error in the ICIJ's reliance on evidence of central CPK policies in determining the content of the common criminal plan,<sup>229</sup> given that Ao An and the other members of his JCE implemented those central policies in the areas under their control.<sup>230</sup>

95. In Ground 11, Ao An argues that the mode of liability of planning had no basis in CIL during the period 1975-1979,<sup>231</sup> but his arguments fail to demonstrate that the ICIJ erred in relying on Trial Chamber jurisprudence on planning or that the Trial Chamber's analysis was flawed.

96. In Ground 12, Ao An asserts that the ICIJ erred in relying on superior responsibility as a mode of liability because, he claims, it applies to civilian commanders only in the context of an international armed conflict and requires a demonstration of causation between a superior's failure to act and the resulting crime.<sup>232</sup> Following a thorough analysis of post-World War II cases, the PTC held that superior responsibility applies to both military and non-military superiors.<sup>233</sup> While the cases analysed by the PTC in fact related to a period of international armed conflict, Ao An has not demonstrated that the use of superior responsibility as a mode of liability in any of the cases depended on the existence of such a conflict or that they would have been decided differently in the absence of an international armed conflict. He has therefore failed to demonstrate a breach of the principle of legality. Ao An further fails to explain how the Rome Statute—which was adopted in 1998 and entered into force in 2002 and

<sup>226</sup> **D351/5** ICP Final Submission, para. 675.

<sup>227</sup> **D360/5/1** Appeal, para. 176.

<sup>228</sup> **D303** Written Record of Further Appearance, 14 March 2016, EN 01213485.

<sup>229</sup> **D360/5/1** Appeal, para. 177.

<sup>230</sup> *E.g.* **D360** Indictment, paras 212-217.

<sup>231</sup> **D360/5/1** Appeal, paras 178-179.

<sup>232</sup> **D360/5/1** Appeal, paras 180-181.

<sup>233</sup> Case 002-**D427/1/30** IS Closing Order Appeal Decision, paras 459-460.

does not, in any event, consistently reflect CIL<sup>234</sup>—reflects the requisite elements of CIL in the 1975-1979 period. Nor has he shown that the existence of a causation requirement for superior responsibility for grave breaches of the Geneva Conventions<sup>235</sup> demonstrates that such requirement existed under CIL as well, especially in light of the PTC’s thorough analysis of post-World War II jurisprudence.

97. The ICP does not wish to address Ground 13 of the Appeal. As stated in the ICP’s Final Submission, the ICP believes that Ao An’s criminal conduct is better described when legally characterised as the international crimes of genocide and crimes against humanity. Characterising this conduct as international crimes rather than national crimes could expedite proceedings if the case goes to trial.<sup>236</sup>

### **I. GROUNDS 14-15: THE ICIJ REASONABLY FOUND AO AN COMMITTED OTHER INHUMANE ACTS**

98. Ao An fails to show the ICIJ erred in law or fact in finding he committed “other inhumane acts” as a crime against humanity.<sup>237</sup>

#### **1. Ao An fails to show the ICIJ erred in law**

##### **a. Ao An’s arguments on underlying criminality should be summarily dismissed**

99. Ao An’s arguments regarding “underlying criminality” should be summarily dismissed, as he merely repeats arguments from his Final Submission Response<sup>238</sup> without demonstrating the ICIJ erred in rejecting them or in relying on SCC jurisprudence that also expressly considered and rejected substantially similar arguments.<sup>239</sup> Moreover, as in his Response submissions, Ao An premises his arguments on ICTY jurisprudence that either (1) has been overturned,<sup>240</sup> or (2) in fact supports the ICIJ’s conclusions.<sup>241</sup>

<sup>234</sup> *E.g. Katanga & Chui* Confirmation Decision, paras 506-508 (holding that it is “not relevant” whether a particular mode of liability set out in the Rome Statute is also part of customary international law).

<sup>235</sup> **D360/5/1** Appeal, fn. 460.

<sup>236</sup> **D351/5** ICP Final Submission, paras 636-638.

<sup>237</sup> *Contra* **D360/5/1** Appeal, paras 186-193.

<sup>238</sup> *Compare* **D360/5/1** Appeal, paras 187-189, 192 *with* **D351/6** Ao An’s Final Submission Response, paras 385-393.

<sup>239</sup> **D360** Indictment, paras 80-84; Case 002-F36 Case 002/1 AJ, paras 576-589.

<sup>240</sup> **D360/5/1** Appeal, fns 476, 478, 489 *citing* *Stakić* TJ, paras 719, 721 (*overturned proprio motu* by *Stakić* AJ, paras 313-317).

<sup>241</sup> **D360/5/1** Appeal, fns 476, 478 *citing* *Kordić & Čerkez* AJ, para. 117 (*see also* paras 472, 545-546, 573, 996, 1002, 1006 finding no violation of the *nullum crimen* principle where the elements for other inhumane acts were met, including for rape as a “serious attack on human dignity”) *and* *Kupreškić* TJ, paras 563, 618 (*see also* paras 566, 623, 818-822, 830-832 relying on international human rights standards to convict the accused).

100. In any event, as both the ICIJ and SCC have correctly held, “other inhumane acts” is *in itself* a crime under international law and was accepted as a residual category of crimes against humanity under customary international law as of 1975.<sup>242</sup> Contrary to Ao An’s unsupported claims,<sup>243</sup> there is no requirement to separately establish the “underlying criminality” or to specify the “elements” of any “sub-category”, including forced marriage.<sup>244</sup> Instead, the underlying conduct must be assessed “holistically” to determine whether it meets the legal elements of other inhumane acts, including whether “its nature and gravity was similar to that of enumerated crimes against humanity”.<sup>245</sup> As such, the ICIJ did not “conflate” forced marriage and rape – both of which may individually constitute other inhumane acts<sup>246</sup> – but properly assessed the collective conduct holistically to determine whether the elements of other inhumane acts were established.<sup>247</sup>

b. Ao An fails to show the ICIJ applied an incorrect *mens rea* standard

101. Ao An identifies no error in the *mens rea* standard applied by the ICIJ.<sup>248</sup> He merely quotes from the ICC Elements of Crimes and claims that the ICIJ failed to “consider the ICC law and jurisprudence” without pointing to any jurisprudence, *opinio juris* or state practice to show that the 2002 Elements of Crimes *mens rea* standard for other inhumane acts reflects

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of other inhumane acts).

<sup>242</sup> **D360** Indictment, para. 81; Case 002-**F36** Case 002/1 AJ, para. 576; Case 002-**D427/2/15** Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011 (“NC/IT Closing Order Appeal Decision”), para. 156. *Contra* **D360/5/1** Appeal, paras 187-189.

<sup>243</sup> Ao An cites *no* jurisprudence imposing such requirements. *See* **D360/5/1** Appeal, paras 187-189, 192.

<sup>244</sup> **D360** Indictment, para. 81; Case 002-**F36** Case 002/1 AJ, paras 584-585, 589. *See also* **D257/1/8** Considerations on Ao An’s Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage, 17 May 2016 (“PTC Forced Marriage Considerations”), Opinion on Merit of the Application, paras 9-17. *Contra* **D360/5/1** Appeal, paras 187-189, 192.

<sup>245</sup> Case 002-**F36** Case 002/1 AJ, paras 589-590; **D360** Indictment, para. 83. *See also* **D257/1/8** PTC Forced Marriage Considerations, Opinion on Merit of the Application, paras 16-17.

<sup>246</sup> *See, e.g.* Case 002-**D427** Closing Order, para. 1442 (forced marriage); Case 002-**D427/2/15** NC/IT Closing Order Appeal Decision, para. 154 (rape); Case 002-**D427/1/30** IS Closing Order Appeal Decision, para. 371 (rape); ICC *Ongwen* Decision, para. 95 (forced marriage); *Brima* AJ, paras 200, 202 (forced marriage).

<sup>247</sup> **D360** Indictment, paras 820-822. *Contra* **D360/5/1** Appeal, paras 189, 193.

<sup>248</sup> **D360** Indictment, para. 80. The only error in the ICIJ’s description of the *mens rea* element for Other Inhumane Acts is the requirement that the perpetrator intended or was aware that the act or omission was likely to cause serious bodily or mental harm or constitute a serious attack upon human dignity. Such a requirement is not supported by the SCC decision he cites (Case 002-**F36** Case 002/1 AJ, para. 580). The crime against humanity of Other Inhumane Acts is a residual category, and it would make no sense to include a *mens rea* element not found in other crimes against humanity (deportation and enslavement, for example, do not require proof that the perpetrator intended or was aware of the likely harm the deportation or enslavement would cause the victims). Further, such a requirement would lead to absurd results, as it would treat perpetrators intentionally committing the same act differently depending upon their own subjective view of the harm the act was likely to inflict (*e.g.* a forced marriage). However, since the ICIJ made express findings that the higher *mens rea* standard was met (*see* para. 102, *infra*), the ICIJ’s error had no consequence and is therefore irrelevant for this appeal.

customary international law between 1975 and 1979.<sup>249</sup>

## 2. Ao An fails to show the ICIJ erred in fact

102. The ICIJ reasonably found that Ao An shared the common purpose to implement the CPK policy of regulating marriage through the commission of the crime of other inhumane acts (forced marriages and rape).<sup>250</sup> He further found that Ao An was not only “fully aware” and “inten[ded]” that implementation was to be achieved through this crime, he was in fact “the primary person responsible for implementing” it in Sector 41.<sup>251</sup> In so concluding, he reasonably relied on evidence that (i) Ao An disseminated the policy to his subordinates and others through speeches at meetings, informing them that the desired population increase would be achieved by “marrying off” workers and requiring the couples to consummate their marriages to produce children;<sup>252</sup> (ii) Ao An actively arranged, approved, and presided over forced marriage ceremonies in Prey Chhor and Kampong Siem districts,<sup>253</sup> and (iii) Sector 41 was a pervasively coercive environment with severe consequences for those who refused orders to marry or consummate, rendering true consent impossible.<sup>254</sup> The ICIJ distinguished between family-arranged marriages during peacetime and forced marriages imposed by the CPK in the coercive environment of a widespread and systematic attack against the civilian population, and Ao An fails to show this was unreasonable.<sup>255</sup>

103. The ICIJ reasonably found that these forced marriages and rapes “were of a similar nature and gravity to other crimes enumerated under Article 5”, as they (1) “in and of themselves caused serious mental harm and suffering to the victims”; (2) constituted an attack on human dignity by “depriving victims of their fundamental human rights of autonomy and self-determination in deciding whom and when to marry, and of sexual autonomy and bodily integrity in their conjugal relationships”; and (3) were perpetrated deliberately, with awareness of the “severe gravity” of the acts, as well as intimate cultural knowledge of the inevitable suffering they would cause.<sup>256</sup> These conclusions were reasonably drawn from the underlying findings cited above as well as evidence that the acts caused great and lasting mental anguish

<sup>249</sup> *Contra* D360/5/1 Appeal, paras 190-191.

<sup>250</sup> D360 Indictment, paras 195, 824, 831.

<sup>251</sup> D360 Indictment, paras 826, 831 (*see also* para. 224).

<sup>252</sup> D360 Indictment, paras 314-316, 831.

<sup>253</sup> D360 Indictment, paras 224, 227-228, 317-319, 685, 831.

<sup>254</sup> D360 Indictment, paras 224, 227-229, 232, 314-316, 678-684, 686-691, 820, 831.

<sup>255</sup> D360 Indictment, paras 227-232, 693. *See also* Case 002-E1/529.1 Pronouncement of Judgment in Case 002/02, T. 16 November 2018, EN 01595967-68. *Contra* D360/5/1 Appeal, para. 193.

<sup>256</sup> D360 Indictment, paras 820-822. *Contra* D360/5/1 Appeal, para. 193.

often marked by serious distress, fear, anger, sadness, physical injury, and social stigmatisation.<sup>257</sup>

**J. GROUND 16: THE ICIJ CORRECTLY DEFINED AND APPLIED THE ELEMENTS OF GENOCIDE**

104. Ao An fails to show the ICIJ erred in law or fact in defining and applying the elements of genocide.

**1. The ICIJ properly rejected a “contextual element” requirement for genocide**

105. Ao An fails to show that a “contextual element” was a “CIL requirement” for genocide between 1975 and 1979<sup>258</sup> and thus fails to demonstrate the ICIJ erred in law by rejecting such a requirement. While he claims the ICIJ “fail[ed] to examine alternative sources of CIL” which purportedly establish this requirement,<sup>259</sup> he points to no state practice or *opinio juris* during the relevant time period. Instead, he relies solely on the ICC Elements of Crimes,<sup>260</sup> adopted in 2002, without explaining why this would demonstrate such a requirement existed between 1975 and 1979.<sup>261</sup> In any event, the ICIJ did consider the Elements of Crimes requirement via its express reliance on ICTY Appeals Chamber jurisprudence holding that it did not even reflect customary international law as of 1995.<sup>262</sup> Ao An identifies no error in the ICIJ’s reliance on consistent ICTY and ICTR Appeals Chamber jurisprudence rejecting a contextual element.<sup>263</sup>

**2. The ICIJ found that the Cham were positively identified and targeted “as such”**

106. The ICIJ expressly and repeatedly found that Ao An and the other JCE members targeted the Cham people based on their specific ethnic and religious identity as Cham.<sup>264</sup> Ao An’s claim that the ICIJ failed to make such findings is false.<sup>265</sup> The Indictment portions he cites simply demonstrate that the ICIJ also found that the JCE members labeled many people and

<sup>257</sup> See the evidence cited in fns 252-254, *supra*; **D360** Indictment, paras 229, 692-696.

<sup>258</sup> *Contra* **D360/5/1** Appeal, para. 196.

<sup>259</sup> **D360/5/1** Appeal, para. 196.

<sup>260</sup> ICC Elements of Crimes, adopted on 9 September 2002, entered into force on 9 September 2002.

<sup>261</sup> **D360/5/1** Appeal, para. 196. At fn. 496, Ao An also cites an ICC *Al Bashir* decision regarding conduct occurring between 2003 and 2008, but fails to explain its relevance to customary international law between 1975 and 1979.

<sup>262</sup> **D360** Indictment, para. 86 *citing* *Krstić* AJ, para. 224; *Popović* AJ, para. 436.

<sup>263</sup> **D360** Indictment, para. 86 *citing* *Krstić* AJ, paras 223-224; *Popović* AJ, paras 430, 436, 440; *Rutaganda* AJ, para. 525.

<sup>264</sup> See generally **D360** Indictment, paras 590-677, 812-819, *particularly* paras 614-615, 623, 633-637, 708, 817-819.

<sup>265</sup> *Contra* **D360/5/1** Appeal, paras 197-198.

groups as “enemies” – including the Cham – and targeted them with a variety of crimes.<sup>266</sup>

### 3. The ICIJ reasonably found Ao An possessed the specific intent for genocide

107. The ICIJ reasonably found that Ao An possessed the specific intent to destroy, as such, the Cham ethnic and religious group of the Central Zone of Kampong Cham Province,<sup>267</sup> based on direct evidence that Ao An “ordered Prak Yut and the other Sector 41 district committees to arrest and kill all the Cham” and then monitored the execution of these orders via detailed reports.<sup>268</sup> The ICIJ further relied on extensive corroborating evidence, including “the massive scale and pattern of the killing operation carried out on his orders” and Ao An’s later “redoubling of efforts” to identify any remaining Cham, demonstrating his continued “determination to annihilate” them.<sup>269</sup>

108. Ao An fails to show that no reasonable trier of fact could have found on this basis that the only reasonable inference was that Ao An possessed the specific intent to destroy the Central Zone Cham.<sup>270</sup> First, while knowledge alone may not establish intent,<sup>271</sup> “knowledge combined with continuing participation can be conclusive as to a person’s intent”.<sup>272</sup> Moreover, here, direct evidence establishes that Ao An did not simply “kn[o]w of” the purge, nor did he simply “continue to participate” in the common purpose – rather, he affirmatively ordered the purge and then ensured its implementation.<sup>273</sup> Second, specific intent does not require that Ao An be a senior leader or the progenitor of the genocidal policy, but rather that when he ordered his subordinates to purge the Central Zone of Cham, he intended they actually do so. Acting on superior orders is no defence.<sup>274</sup> The two cases on which Ao An relies are inapposite, as

<sup>266</sup> See **D360/5/1** Appeal, para. 198 citing **D360** Indictment, paras 205-206, 208, 220, 597-598, 608, 716.

<sup>267</sup> **D360** Indictment, paras 623, 708, 818-819, 824(iii), 826, 830. While EN 01580615 of the Indictment states that Ao An is indicted for genocide against the “Cham of Kampong Cham Province”, it is clear from the ICIJ’s findings at paras 824-826 and 829-830, as well as the underlying findings on which they are based, that Count 1 should be limited to the Cham of Kampong Cham Province in the Central Zone. The ICP suggests that it would be appropriate for the PTC to recharacterise the Indictment accordingly. See **D360/5/1** Appeal, para. 195. However, evidence of Ao An’s involvement in the East Zone genocide may still be relied upon insofar as it is relevant to remaining facts, including genocidal intent. See **D337** Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66 *bis*, 16 December 2016, paras 4 (Fact B), 11, 13.

<sup>268</sup> **D360** Indictment, paras 634-635 (citing *inter alia* **D219/484** Prak Yut WRI, A8-A9), 830. See also paras 633, 636-637, 826, 829.

<sup>269</sup> **D360** Indictment, para. 830.

<sup>270</sup> *Contra* **D360/5/1** Appeal, paras 199-202.

<sup>271</sup> **D360/5/1** Appeal, para. 202.

<sup>272</sup> *Krajišnik* TJ, para. 890 (*upheld at Krajišnik* AJ, para. 697); Case 002-F36 Case 002/1 AJ, para. 1075.

<sup>273</sup> See para. 106, *supra*. *Contra* **D360/5/1** Appeal, paras 200, 202.

<sup>274</sup> ECCC Law, Art. 29. See also *Boškovski & Tarčulovski* AJ, para. 167; Case 002-F36 Case 002/1 AJ, para. 1076. *Contra* **D360/5/1** Appeal, paras 200-201.

neither involves an accused who was the primary implementer of a genocidal policy in his area of control<sup>275</sup> or who directly ordered his subordinates to kill all of the targeted group.<sup>276</sup>

**K. GROUND 17: THE JCE MEMBERS' COMMON PURPOSE INVOLVED THE CRIME OF GENOCIDE**

109. Contrary to Ao An's claim, the ICIJ found the JCE's common purpose involved the crime of genocide.<sup>277</sup> A "common purpose 'involves' the commission of a crime if the crime is a *means* to achieve an ulterior objective".<sup>278</sup> Here, the ICIJ expressly found that Ke Pauk, Ao An and the other JCE members "shared the common purpose of implementing four CPK policies in the Central Zone [...] through the commission of" specified crimes, including the commission of genocide against the Cham to implement, in part, the CPK policy of targeting "specific groups".<sup>279</sup> The ICIJ further found that Ao An "was the primary person responsible for implementing CPK policy in Sector 41, was "fully aware" that implementation "was to be achieved through" these crimes, and significantly contributed to implementing this policy while sharing the requisite genocidal intent.<sup>280</sup>

110. In reaching these conclusions, the ICIJ reasonably relied<sup>281</sup> on *inter alia* Ke Pauk's and Ao An's Central Zone leadership positions;<sup>282</sup> Ke Pauk's instruction to East Zone cadres to "smash 100 per cent of the Cham" two days before thousands of East Zone Cham were relocated to the Central Zone and then killed;<sup>283</sup> Ao An's orders to his subordinates to kill all Cham in Sector 41 and perseverance in ensuring they did, and his involvement in transporting East Zone Cham to the Central Zone to be killed at Sector 41 crime sites;<sup>284</sup> and the "arrests, killings and disappearances" of Cham in "several consistent patterns throughout the Central Zone, demonstrating [...] a coordinated plan" at both the Sector 41 and Central Zone level "to

<sup>275</sup> See **D360** Indictment, para. 826.

<sup>276</sup> *Contra* **D360/5/1** Appeal, fns 508, 512.

<sup>277</sup> *Contra* **D360/5/1** Appeal, paras 203-205.

<sup>278</sup> Case 002-F36 Case 002/1 AJ, para. 808 (emphasis in original).

<sup>279</sup> **D360** Indictment, para. 824. See also paras 195, 218-221. Ao An identifies no error in the ICIJ first finding that JCE members shared the common purpose of implementing four CPK policies (paras 195, 218-221) and then later concluding – based on the conduct and statements of JCE members and their tools – that their common purpose involved genocide as a means to achieve one of those policies (paras 590-677, 812-819, 824-826, 829-830). *Contra* **D360/5/1** Appeal, fn. 517.

<sup>280</sup> **D360** Indictment, paras 826, 829-830.

<sup>281</sup> **D360** Indictment, para. 824 *referencing* Indictment Sections 6.1-6.4. *Contra* **D360/5/1** Appeal, para. 205.

<sup>282</sup> **D360** Indictment, paras 245, 250-252, 255, 259-263.

<sup>283</sup> **D360** Indictment, para. 612.

<sup>284</sup> **D360** Indictment, paras 633-637.

kill the Cham on a massive scale”.<sup>285</sup>

111. Ao An fails to show the ICIJ conflated different JCE groups or relied on non-JCE member evidence to find the genocidal intent of the JCE members.<sup>286</sup> He identifies no error in the ICIJ first making predicate factual findings on the overall CPK policy of targeting Cham,<sup>287</sup> and then finding that the JCE members implemented this policy through genocidal acts committed with the specific intent to destroy the Cham.<sup>288</sup> That the broader CPK policy may have emanated from Ao An’s superiors does not diminish the extensive evidence of the JCE members’ shared intent to destroy the Central Zone Cham.<sup>289</sup>

**L. GROUND 18: AO AN’S FAIR TRIAL RIGHTS HAVE BEEN PROTECTED THROUGHOUT THE PROCEEDINGS**

112. In Ground 18, Ao An argues that dismissal of the case against him is necessary in light of what he claims are violations of various fair trial rights and in order to protect the fairness and integrity of proceedings.<sup>290</sup> Ground 18 contains a number of subgrounds, which are addressed in turn below.

113. Ao An argues first that the presumption of innocence in his case has been violated by the application of the supermajority rule when the PTC ruled on the disagreement between the Co-Prosecutors. The lack of an agreement on a decision by the necessary number of judges allowed the investigation to proceed.<sup>291</sup> The argument misconstrues the basic concept of the presumption of innocence, which establishes the burden of proof at trial—specifically, that an accused person cannot be convicted of a crime unless and until his guilt is proven beyond a reasonable doubt. Ao An does not cite any authority for his contention that the presumption of innocence “means that a case may only proceed if the trier of fact agrees—either by majority or unanimity—with the merits of the prosecution’s case” at the investigative stage<sup>292</sup> and thus fails to demonstrate error.

114. Ao An has failed to show that there has been any violation of the presumption of innocence at this stage. In many legal systems, the decision to indict an individual is made by

<sup>285</sup> **D360** Indictment, para. 623. *See also* paras 624-629.

<sup>286</sup> *Contra* **D360/5/1** Appeal, para. 205.

<sup>287</sup> *Contra* **D360/5/1** Appeal, fn. 519 *citing* **D360** Indictment, paras 597-615.

<sup>288</sup> **D360** Indictment, paras 616-677, 812-819, 824-826, 829-830.

<sup>289</sup> *Contra* **D360/5/1** Appeal, para. 205.

<sup>290</sup> **D360/5/1** Appeal, para. 207-230.

<sup>291</sup> **D360/5/1** Appeal, paras 210-212.

<sup>292</sup> **D360/5/1** Appeal, para. 211.

the prosecution, or a single prosecutor, with no involvement of judges reviewing the merits of the case. Both Ao An and the prosecution have the right to expect that no judge will finally determine “the merits of the prosecution case” until they have heard all of the evidence at trial. In the Indictment, the ICIJ found the charges against Ao An to be proven by “clear and consistent” evidence. Ao An has not yet been tried for the charges in the Indictment, and therefore continues to enjoy the presumption of innocence unless and until his guilt is proven at trial beyond a reasonable doubt.

115. Ao An next asserts that a number of his procedural rights were violated in the course of the investigation.<sup>293</sup> With respect to his right to be represented by counsel of his choosing,<sup>294</sup> Ao An has not shown prejudice. Ao An was represented at all times by his Cambodian lawyer, Mr. Mom Luch, and therefore was always represented by at least one lawyer selected by him.<sup>295</sup> In this context, the delay in Richard Rogers’s appointment did not cause prejudice, particularly in light of the fact that Rogers has now served as Ao An’s international co-lawyer for a number of years during the most active phase of Case 004/2.

116. Ao An claims that his right to be informed of the nature and cause of the charges against him was violated by the fact that he was not given access to the Case File until March 2015.<sup>296</sup> This claim has been previously litigated, with the PTC failing to reach the required supermajority to render a decision as to whether this constituted error.<sup>297</sup> Ao An has not given any reasons to reconsider the matter and accordingly has failed to demonstrate discernible error—and, in any event, fails to show how he suffered any concrete prejudice from the decision.

117. Ao An also argues that his rights to prepare an effective defence and to equality of arms were violated in a number of ways.<sup>298</sup> Several of his claims in this regard have already been litigated, and he has not articulated sufficient grounds for reconsideration.<sup>299</sup> Ao An’s other

<sup>293</sup> **D360/5/1** Appeal, paras 213-218.

<sup>294</sup> **D360/5/1** Appeal, para. 214.

<sup>295</sup> **D360/5/1.1.127** Decision on the “Appeal against Dismissal of Richard Rogers’ Application to be Placed on the List of Foreign Co-Lawyers”, Pre-Trial Chamber, 6 February 2014, para. 3.

<sup>296</sup> **D360/5/1** Appeal, para. 215.

<sup>297</sup> **D121/4/1/4** Considerations of the Pre-Trial Chamber on Ta An’s Appeal against the Decision Denying his Requests to Access the Case File and Take Part in the Judicial Investigation, 15 January 2014.

<sup>298</sup> **D360/5/1** Appeal, paras 216-217.

<sup>299</sup> *E.g.* **D360/5/1** Appeal, para. 217; **D296/1/1/4** Decision on Ao An’s Application to Annul Non-Audio-Recorded Written Records of Interview, 30 November 2016, para. 26 (holding that Ao An’s “allegation of ‘systematic and pervasive problems within the judicial investigation with respect to appropriate interview technique and procedure’ is highly speculative and not capable of rebutting the presumption of reliability or

claims fail to articulate discernible errors or demonstrate prejudice. In addition, Ao An sometimes mischaracterises the record to support his claims.<sup>300</sup>

118. Ao An also submits that the ICIJ erred by failing to stay or dismiss this case due to concerns that future financial constraints and budgetary difficulties might render the ECCC incapable of providing a fair trial and appeal process.<sup>301</sup> This speculative claim is without merit. The ICIJ properly found that following the resolution of appeals of the closing orders, the Pre-Trial, Trial, and Supreme Court Chambers will assume the duty of ensuring Ao An's fair trial rights.<sup>302</sup> Ao An has given no reason to believe that they will not discharge this duty to the highest standard.

119. Finally, Ao An argues that the only remedy for the violations he alleges is dismissal or permanent stay of the case against him.<sup>303</sup> As most or all of Ao An's claimed infringements of his rights are unfounded, this request for relief is without merit. Should the PTC nevertheless find that any of the procedural challenges raised by Ao An do articulate a discernible error, the matter should be remanded to the ICIJ with instructions to craft an appropriate remedy short of the grossly excessive remedy of dismissal or permanent stay.

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establishing a procedural defect.”); **D338/1/5** PTC Annulment Decision, paras 21-25 (holding that Ao An failed to demonstrate any bias on the part of three investigators and that in fact some of the challenged practices “amount[] to an exculpatory practice, since it objectively results in challenging inculpatory evidence on the record”).

<sup>300</sup> For example, Ao An submits that the delay in granting him access to the Case File made it impossible for him to file timely investigative requests, and his investigative requests were then dismissed as being too late. But the first decision he submits in support of this proposition did not turn on the timing of the request at all—rather, it was dismissed because the requests were unnecessarily cumulative and unlikely to yield relevant evidence (*see* **D360/5/1** Appeal, para. 216, fn. 571; **D260/1** Decision on Ao An's Fifth Request for Investigative Action, 10 November 2015, paras 16, 22-23, 25).

<sup>301</sup> **D360/5/1** Appeal, paras 219-222.

<sup>302</sup> **D360** Indictment, paras 44-45.

<sup>303</sup> **D360/5/1** Appeal, paras 228-230.

### V. RELIEF SOUGHT

120. For all of the foregoing reasons, the ICP respectfully requests that the PTC dismiss Ao An's Appeal, find that Ao An was one of "those who were most responsible" for DK-era crimes, and send Case 004/2 for trial on the basis of the Indictment issued by the ICIJ.

Respectfully submitted,

Date	Name	Place	Signature
22 February 2019	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh 	