ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D359/24 & D360/33

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File No. 004/2/07-09-2009-ECCC/OCIJ (PTC60)

THE PRE-TRIAL CHAMBER

Before: **Judge PRAK Kimsan, President**
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Date: **19 December 2019**
Original Language(s): **Khmer/English/French**
Classification: **PUBLIC**

CONSIDERATIONS ON APPEALS AGAINST CLOSING ORDERS

Co-Prosecutors

CHEA Leang
Brenda HOLLIS

Co-Lawyers for AO An

MOM Luch
Richard ROGERS
Göran SLUITER

Civil Party Lawyers

CHET Vanly
HONG Kimsuon
KIM Mengkhy
LOR Chunthy
SAM Sokong
SIN Soworn
TY Srinna
VEN Pov
Laure DESFORGES
Isabelle DURAND
Emmanuel JACOMY
Martine JACQUIN
Daniel MCLAUGHLIN
Lyma NGUYEN
Nushin SARKARATI

TABLE OF CONTENTS

TABLE OF ACRONYMS

Term	Abbreviation / Acronym
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	ECCC Agreement
Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (as amended)	ECCC Law
Extraordinary Chambers in the Courts of Cambodia	ECCC
Royal Government of Cambodia	RGC
International Criminal Court	ICC
International Criminal Tribunal for the Former Yugoslavia	ICTY
International Criminal Tribunal for Rwanda	ICTR
Special Court for Sierra Leone	SCSL
International Court of Justice	ICJ
Extraordinary African Chambers	EAC
International Law Commission	ILC
Vienna Convention on the Law of Treaties	Vienna Convention
International Covenant on Civil and Political Rights	ICCPR
Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity	Control Council Law No. 10
Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis	Nuremberg Charter
Charter of the International Military Tribunal for the Far East	Tokyo Charter

International Military Tribunal, Judgment of 1 October 1946, Trial of the Major War Criminals before the International Military Tribunal	Nuremberg Judgment
Convention on the Prevention and Punishment of the Crime of Genocide	Genocide Convention
Joint Criminal Enterprise	JCE
Written Record of Interview	WRI
Democratic Kampuchea	DK
Communist Party of Kampuchea	CPK
Revolutionary Army of Kampuchea	RAK
Documentation Centre for Cambodia	DC-Cam
Royal Government of National Union Kampuchea	RGNUK
People's Representative Assembly	PRA

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of three Appeals against the two conflicting Closing Orders—the National Co-Investigating Judge's Closing Order (Dismissal)[1] and the International Co-Investigating Judge's Closing Order (Indictment).[2] These three Appeals are:

(1) National Co-Prosecutor's Appeal against the International Co-Investigating Judge's Closing Order (Indictment), filed on 14 December 2018 ("National Co-Prosecutor's Appeal");[3]

(2) International Co-Prosecutor's Appeal of the Order Dismissing the Case against AO An (D359), filed on 20 December 2018 ("International Co-Prosecutor's Appeal");[4]

and

(3) AO An's Appeal against the International Co-Investigating Judge's Closing Order (Indictment), filed on 20 December 2018 ("AO An's Appeal").[5]

I. PROCEDURAL HISTORY

1. On 20 November 2008, the International Co-Prosecutor brought a disagreement before the Pre-Trial Chamber, pursuant to Internal Rule 71(2), reporting that the National Co-Prosecutor disagreed with prosecuting new crimes identified in additional submissions.[6] On 18 August 2009, the Pre-Trial Chamber issued considerations on this disagreement.[7]

---

[1] Case 004/2/07-09-2009-ECCC/OCIJ ("Case 004/2"), Order Dismissing the Case against AO An, 16 August 2018, notified in Khmer on 16 August 2018 and in English on 5 November 2018, D359 ("Closing Order (Dismissal) (D359)").
[2] Case 004/2, Closing Order (Indictment), 16 August 2018, notified in English on 16 August 2018 and in Khmer on 31 October 2018, D360 ("Closing Order (Indictment) (D360)").
[3] Case 004/2, National Co-Prosecutor's Appeal against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004/2, 14 December 2018, notified in Khmer on 17 December 2018 and in English on 28 January 2019, D360/8/1 ("National Co-Prosecutor's Appeal (D360/8/1)").
[4] Case 004/2, International Co-Prosecutor's Appeal of the Order Dismissing the Case against AO An (D359), 20 December 2018, notified in English on 21 December 2018 and in Khmer on 22 January 2019, D359/3/1 ("International Co-Prosecutor's Appeal (D359/3/1)").
[5] Case 004/2, AO An's Appeal against the International Co-Investigating Judge's Closing Order (Indictment), 19 December 2018, (filed on 20 December 2018), notified in English on 21 December 2018 and in Khmer on 23 January 2019, D360/5/1 ("AO An's Appeal (D360/5/1)").
[6] Disagreement 001/18-11-2008-ECCC/PTC, International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Doc. No. 1 ("International Co-Prosecutor's Written Statement for Disagreement (Doc. No. 1)").
[7] Disagreement 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009, D1/1.3.

2. On 7 September 2009, the Acting International Co-Prosecutor filed the Third Introductory Submission, requesting the Co-Investigating Judges to advance the judicial investigation against AO An, among others, in relation to a number of allegations of crimes against humanity, genocide and violations of the Penal Code of the Kingdom of Cambodia of 1956 ("1956 Penal Code").[8] Further allegations were submitted in six supplementary submissions filed on 15 June 2011,[9] 18 July 2011,[10] 24 April 2014,[11] 4 February 2015,[12] 4 August 2015[13] and 8 April 2016.[14]

3. Confidential disagreements between the Co-Investigating Judges were registered on 22 February 2013, 5 April 2013, 22 January 2015, 16 January 2017 and 12 July 2018. These disagreements were not brought before the Pre-Trial Chamber.

4. On 27 March 2015, the International Co-Investigating Judge charged AO An with violations of Articles 501 and 506 (premeditated homicide) of the 1956 Penal Code and crimes against humanity.[15] AO An made an initial statement and stated that he would exercise his right to remain silent and not answer any questions.[16]

5. On 14 March 2016, the International Co-Investigating Judge decided to charge AO An with additional crimes including genocide and additional crimes against humanity.[17] AO An waived his right to be present at the Further Appearance and his Co-Lawyers elected not to

[8] Case 004/20-11-2008-ECCC/OCIJ, Co-Prosecutors' Third Introductory Submission, 20 November 2008, D1 ("Third Introductory Submission (D1)").
[9] Case 004/07-09-2009-ECCC/OCIJ ("Case 004"), Co-Prosecutors' Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 15 June 2011, D27. *See also* Case 004, Decision on Co-Prosecutors' Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 30 June 2011, D27/3.
[10] Case 004, Co-Prosecutors' Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65.
[11] Case 004, Co-Prosecutors' Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191.
[12] Case 004, Response to Forwarding Order D237, 4 February 2015, D237/1.
[13] Case 004, Response to Forwarding Order and Supplementary Submission regarding Wat Ta Meak, 4 August 2015, D254/1.
[14] Case 004, Response to Forwarding Order dated 5 November 2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015, D272/1.
[15] Case 004, Written Record of Initial Appearance of AO An, 27 March 2015, D242 ("Written Record of Initial Appearance of AO An (D242)").
[16] Written Record of Initial Appearance of AO An (D242), pp. 5-6.
[17] Case 004, Written Record of Further Appearance of AO An, 14 March 2016, D303 ("Written Record of Further Appearance of AO An (D303)").

make observations on his behalf.[18] Subsequently, AO An was not given another opportunity to provide explanations regarding the allegations against him.

6. On 16 December 2016, the Co-Investigating Judges notified the parties that they considered the investigation against AO An to be concluded.[19] On the same day, they ordered the severance of the investigation from Case 004 and the creation of a new Case File 004/2.[20] The International Co-Investigating Judge further decided to reduce the scope of the investigation by excluding alleged facts pursuant to Internal Rule 66*bis*.[21]

7. On 29 March 2017, the Co-Investigating Judges issued a second notice of conclusion of the judicial investigation.[22]

8. On 19 May 2017, the Co-Investigating Judges forwarded the Case File to the Co-Prosecutors, pursuant to Internal Rule 66(4), inviting them to file their final submission within three months ("Forwarding Order").[23]

9. On 18 August 2017, the National Co-Prosecutor filed a final submission requesting all allegations be dismissed,[24] while, on 21 August 2017, the International Co-Prosecutor filed a final submission requesting AO An to be indicted and sent to trial[25] ("Final Submissions"). The Co-Lawyers for AO An ("Co-Lawyers") filed a Response to the Co-Prosecutors' Final Submissions on 24 October 2017 ("AO An's Response to Final Submissions").[26]

10. On 18 September 2017, the Co-Investigating Judges informed the parties that they considered separate and opposing closing orders to be generally permitted under the applicable

[18] Written Record of Further Appearance of AO An (D303), p. 2.
[19] Case 004, Notice of Conclusion of Judicial Investigation against AO An, 16 December 2016, D334 ("First Rule 66(1) Notification (D334)").
[20] Case 004, Order for Severance of AO An from Case 004, 16 December 2016, D334/1.
[21] Case 004/2, Decision to Reduce the Scope of Judicial Investigation pursuant to Internal Rule 66 *bis*, 16 December 2016, D337 ("Decision Reducing Scope of Investigation (D337)").
[22] Case 004/2, Second Notice of Conclusion of Judicial Investigation against AO An, 29 March 2017, D334/2.
[23] Case 004/2, Forwarding Order pursuant to Internal Rule 66(4), 19 May 2017, D351 ("Forwarding Order (D351)").
[24] Case 004/2, Final Submission concerning AO An pursuant to Internal Rule 66, 18 August 2017, D351/4.
[25] Case 004/2, International Co-Prosecutor's Rule 66 Final Submission, 21 August 2017, D351/5 ("International Co-Prosecutor's Final Submission (D351/5)").
[26] Case 004/2, AO An's Response to the Co-Prosecutors' Rule 66 Final Submissions, 24 October 2017, D351/6 ("AO An's Response to Final Submissions (D351/6)").

law ("Decision on Disclosure concerning Disagreements").[27] They registered a disagreement regarding the issuance of opposing closing orders on 12 July 2018.

11. On 16 August 2018, the International Co-Investigating Judge issued the Closing Order (Indictment), committing AO An to trial,[28] while the National Co-Investigating Judge issued the Closing Order (Dismissal).[29] The Closing Orders were respectively filed in English and Khmer only, with translations to follow.

12. On 5 September 2018, the Pre-Trial Chamber allowed the parties to file notices of appeal within fourteen days of translations of both Closing Orders being notified.[30]

13. On 5 October 2018, the Co-Lawyers filed a notice of appeal against the Closing Order (Indictment).[31]

14. On 30 October 2018 and 5 November 2018, respectively, the translations of the Closing Order (Indictment) and Closing Order (Dismissal) were notified.

15. On 8 November 2018, the Pre-Trial Chamber allowed the parties to file 100-page submissions on appeal within 45 days of the notification of translations of both Closing Orders.[32]

---

[27] Case 004/2, Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D355/1 ("Decision on Disclosure concerning Disagreements (D355/1)"), paras 13-16.
[28] Closing Order (Indictment) (D360).
[29] Closing Order (Dismissal) (D359).
[30] Case 004/2, Decision on Co-Prosecutors' Request for Extension of Deadlines for Notices of Appeal of Closing Orders in Case 004/2, 5 September 2018, D359/2 ("Decision on Extension for Notices of Appeal (D359/2)"). *See also* Case 004/2, Co-Prosecutors' Request for Extension of Deadlines for Notices of Appeal of Closing Orders in Case 004/2, 23 August 2018, D359/1.
[31] Case 004/2, Notice of Appeal against International Co-Investigating Judges' Closing Order (Indictment), 5 October 2018, D360/5.
[32] Case 004/2, Decision on Request for Extension of Time and Page Limit for AO An's Appeal against the Closing Order (Indictment), 8 November 2018, D360/7 ("Decision on Time and Page Extensions for Appeal Submissions (D360/7)"). *See also* Case 004/2, Request for Extension of Time and Page Limit for AO An's Appeal against the Closing Order (Indictment), 5 October 2018, D360/4; Case 004/2, Co-Prosecutors' Response to AO An's Request for an Extension of Time and Page Limit for His Appeal against the Closing Order (Indictment), 26 October 2018, D360/6.

16. On 12 November 2018, the International Co-Prosecutor and the National Co-Prosecutor filed notices of appeal against the Closing Order (Dismissal)[33] and the Closing Order (Indictment),[34] respectively.

17. On 17 December 2018, the National Co-Prosecutor filed her submissions on appeal against the Closing Order (Indictment) in Khmer ("National Co-Prosecutor's Appeal").[35] On 20 December 2018, the International Co-Prosecutor and the Co-Lawyers filed their submissions on appeal in English, respectively against the Closing Order (Dismissal) ("International Co-Prosecutor's Appeal")[36] and Closing Order (Indictment) ("AO An's Appeal").[37]

18. On 22 January 2019, the Pre-Trial Chamber authorised the parties to file 50-page responses within 30 days from the notification of translation of each appeal and to file 30-page replies within 15 days from the notification of translation of each response.[38]

19. The Khmer translations of the International Co-Prosecutor's Appeal and AO An's Appeal were notified on 22 January 2019 and on 23 January 2019, respectively, while the English translation of the National Co-Prosecutor's Appeal was notified on 28 January 2019.

20. On 20 February 2019, the Co-Lawyers responded to the International Co-Prosecutor's Appeal in English ("AO An's Response"),[39] while on 22 February 2019 and 27 February 2019, respectively, the International Co-Prosecutor responded to AO An's Appeal ("International Co-Prosecutor's Response to AO An's Appeal")[40] and the National Co-Prosecutor's Appeal

---

[33] Case 004/2, International Co-Prosecutor's Notice of Appeal against the [National Co-Investigating Judge]'s Order Dismissing the Case against AO An (D359), 12 November 2018, D359/3.
[34] Case 004/2, National Co-Prosecutor's Notice of Appeal against the [International Co-Investigating Judge]'s Closing Order (Indictment), 12 November 2018, D360/8.
[35] National Co-Prosecutor's Appeal (D360/8/1).
[36] International Co-Prosecutor's Appeal (D359/3/1).
[37] AO An's Appeal (D360/5/1).
[38] Case 004/2, 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, D359/3/3 and D360/5/3 ("Decision on Time and Page Extensions for Responses and Replies (D359/3/3 & D360/5/3)"). *See also* Case 004/2, AO An's Request for Extension of Time and Page Limits for His Response to the International Co-Prosecutor's Appeal of the Order Dismissing the Case against AO An (D359) and any Related Replies, 10 January 2019, D359/3/2; Case 004/2, International Co-Prosecutor's Extension Request for His Response and Reply relating to the Appeals in Case 004/2, 11 January 2019, D360/5/2.
[39] Case 004/2, AO An's Response to the International Co-Prosecutor's Appeal of the Order Dismissing the Case against AO An (D359), 20 February 2019, notified in English on 21 February 2019 and in Khmer on 19 March 2019, D359/3/4 ("AO An's Response (D359/3/4)").
[40] Case 004/2, International Co-Prosecutor's Response to AO An's Appeal of the Case 004/2 Indictment, 22 February 2019, notified in English on 25 February 2019 and in Khmer on 15 March 2019, D360/9 ("International Co-Prosecutor's Response to AO An's Appeal (D360/9)").

("International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal")[41] in English. The National Co-Prosecutor did not file any Response.

21. The Khmer translations of the International Co-Prosecutor's Response to AO An's Appeal and Response to the National Co-Prosecutor's Appeal were notified on 15 March 2019, while the Khmer translation of AO An's Response was notified on 19 March 2019.

22. On 1 April 2019, the Co-Lawyers replied to the International Co-Prosecutor's Response to AO An's Appeal ("AO An's Reply")[42] in English, and on 3 April 2019 the International Co-Prosecutor replied to AO An's Response ("International Co-Prosecutor's Reply")[43] in English. The Khmer translations of the International Co-Prosecutor's Reply and AO An's Reply were notified on 22 April 2019 and 23 April 2019, respectively.

23. On 3 June 2019, after having heard the parties,[44] the Pre-Trial Chamber issued a Scheduling Order setting a date for the Hearing on the Appeals.[45] Oral arguments on the Appeals were heard *in camera* on 19, 20 and 21 June 2019.[46]

II. JOINDER

24. As noted in the procedural history section, the Pre-Trial Chamber is currently seised of three Appeals against two Closing Orders concluding the investigation of Case 004/2.

---

[41] Case 004/2, International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal of the Case 004/2 Indictment, 27 February 2019, notified in English on 28 February 2019 and in Khmer on 15 March 2019, D360/10 ("International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10)").

[42] Case 004/2, Reply to the International Co-Prosecutor's Response to AO An's Appeal of the Case 004/2 Indictment, 1 April 2019, notified in English on 3 April 2019 and in Khmer on 23 April 2019, D360/11 ("AO An's Reply (D360/11)").

[43] Case 004/2, International Co-Prosecutor's Reply to AO An's Response to the Appeal of the Order Dismissing the Case against AO An (D359), 3 April 2019, notified in Khmer on 22 April 2019, D359/3/5 ("International Co-Prosecutor's Reply (D359/3/5)").

[44] Case 004/2, Pre-Trial Chamber's Notice to the Parties by Email), 7 May 2019, D359/4.1.1; Case 004/2, International Co-Prosecutor's Response to Pre-Trial Chamber's Instructions regarding the Hearing of the Appeals of Closing Orders in Case 004/2, 8 May 2019, D359/4; Case 004/2, AO An Defence Team's Memorandum to the Pre-Trial Chamber regarding the Pre-Trial Chamber's Instructions to the Parties in Case File N° 004/2/07-09-2009-ECCC/OCIJ (PTC60) dated 7 May 2019, 9 May 2019, D360/12; Case 004/2, National Co-Prosecutor's Response to Pre-Trial Chamber's Instructions regarding the Hearing of the Appeals of Closing Orders in Case 004/2, 9 May 2019, D360/13.

[45] Case 004/2, Scheduling Order for the Pre-Trial Chamber's Hearing on Appeals against Closing Orders, 3 June 2019, D360/14 & D359/5.

[46] Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625081-01625156, pp. 17-92; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625260-01625372, pp. 1-113; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625493-01625524, pp. 1-32.

25. Article 299 of the Cambodian Code of Criminal Procedure provides that "[w]hen the court has been seised with several related cases, it may issue an order to join them."

26. In the case at hand, the Pre-Trial Chamber is not seised with several related cases. Rather, the Chamber is seised of one case with conflicting Closing Orders, which created a number of different, but all related, Appeal proceedings. Considering the Chamber's power to issue an order to join several related cases and its obligation to ensure fair and expeditious administration of justice, the Chamber finds that a joinder in this case is inevitably called for.

27. Consequently, the Pre-Trial Chamber orders a joinder and will address the Appeals against both Closing Orders collectively in these Considerations.

III. STANDARD OF REVIEW

28. The determination of whether AO An was among those most responsible, and therefore falls within the personal jurisdiction of the ECCC, is a discretionary decision.[47] However, the discretion of the Co-Investigating Judges in making this determination is a judicial one that does not permit arbitrary action, but should rather be exercised in accordance with well-settled legal principles.[48] In this regard, the terms senior leaders and those who were most responsible represent the limits of the ECCC's personal jurisdiction.[49] While the flexibility of these terms inherently requires some margin of appreciation on the part of the Co-Investigating Judges, this discretion is not unlimited and does not exclude control by the appellate court. Accordingly, the Pre-Trial Chamber will review the Co-Investigating Judges' determination that AO An falls or does not fall under the Court's personal jurisdiction pursuant to the standard of review applicable to discretionary decisions.

---

[47] *See* Case 004/1/07-09-2009-ECCC/OCIJ ("Case 004/1"), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 ("Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20)"), para. 20 *referring to* Case 001/18-07-2007-ECCC/SC ("Case 001"), Case 001 Appeal Judgment (F28), paras 62-74, 79.

[48] *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20 *referring to* International Military Tribunal, Judgment of 1 October 1946, Trial of the Major War Criminals before the International Military Tribunal, Vol. I ("Nuremberg Judgment"), pp. 171-367, 256.

[49] *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20 *referring to Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, 6 June 2003, *entered into* force 29 April 2005 ("ECCC Agreement"), Art. 2(1); *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, 10 August 2001, NS/RKM/1004/006, as amended 27 October 2004 ("ECCC Law"), Art. 2*new*.

29. A discretionary decision may be reversed where it was: (i) based on an incorrect interpretation of the governing law (*i.e.* an error of law) invalidating the decision; (ii) based on a patently incorrect conclusion of fact (*i.e.* an error of fact) occasioning a miscarriage of justice; and/or (iii) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges' discretion and to force the conclusion that they failed to exercise their discretion judiciously. In other words, it must be established that there was an error or abuse which was fundamentally determinative of the Co-Investigating Judges' exercise of discretion.[50]

30. In the context of discretionary decisions, the Pre-Trial Chamber will normally remit the decision back to the Co-Investigating Judges for reconsideration,[51] and will substitute its decision only in exceptional circumstances.[52] In the specific case of appeals against closing orders, Internal Rule 79(1) suggests that the Pre-Trial Chamber has the power to issue a new or revised closing order that will serve as a basis for the trial.[53] Moreover, the Pre-Trial Chamber has previously decided that it fulfils the role of the Cambodian Investigation Chamber in the ECCC, which, when seised of a dismissal order as a consequence of an appeal, shall investigate the case by itself.[54]

IV. PRELIMINARY ISSUES

A. Pre-Trial Chamber Authority over the Investigative Stage

31. In this section, the Pre-Trial Chamber clarifies the nature and the extent of the review powers that it is called upon to exercise in the present case.

---

[50] *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 21 *referring to, inter alia,* Case 004 (PTC52), Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 February 2018, D365/3/1/5, para. 15.
[51] *See, e.g.*, Case 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC52), Decision on Appeal of Co-Lawyers for Civil Parties against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 16; Case 002 (PTC46), Decision on Nuon Chea's Appeal against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 28 July 2010, D300/1/7 ("Case 002 Decision on Nuon Chea's Appeal (D300/1/7")), paras 19, 26.
[52] Case 002 (PTC67), Decision on Reconsideration of Co-Prosecutors' Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes, 27 September 2010, D365/2/17, para. 67.
[53] *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 22 *referring to* Case 001 (PTC02), Decision on Appeal against Closing Order Indicting KAING Guek Eav *alias* "Duch", 5 December 2008, D99/3/42 ("Case 001 Decision on Closing Order Appeal (D99/3/42)"), para. 40.
[54] *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 22 *referring to* Case 001 Decision on Closing Order Appeal (D99/3/42), paras 41-42.

32. At the outset, the Chamber recalls that it has so far exercised diverse powers including: appellate review of alleged errors of law, fact and discretion;[55] determination of issues of general significance for the ECCC's jurisprudence and legacy;[56] inherent powers or inherent jurisdiction;[57] and an ancillary investigative power derived, in the case of *lacunae* in the ECCC Internal Rules, from the role of the Cambodian Investigation Chamber.[58] The Pre-Trial Chamber may use some or all of these different powers in the current proceeding.

33. In this regard, the Chamber stresses that the first three powers listed above are well-established in the Pre-Trial Chamber's and within the international criminal tribunals' jurisprudence. While the fourth power—the ancillary investigative power—had until now been used sparingly by the Chamber and in limited procedural contexts, the exceptional circumstances of this case justifies its broader use by the Chamber.[59]

---

[55] Case 002 (PTC145 & 146), Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15 & D427/3/15 ("Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15)"), paras 59-63, 86; Case 002 (PTC75), Decision on IENG Sary's Appeal against the Closing Order, D427/1/30, 11 April 2011 ("Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30)"), paras 44-47, 111-113; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 20-22, 25-27; Case 002 (PTC61), Decision on Defence Appeal against Order on IENG Thirith Defence Request for Investigation into Mr. Ysa Osman's Roles in the Investigations, Exclusion of Certain Witness Statements and Request to Re-Interview Certain Witnesses, 27 August 2010, D361/2/4, paras 15-16; Case 002 (PTC64), Decision on IENG Sary's Appeal against the Co-Investigating Judges' Order Denying Request to Allow Audio/Visual Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 22; Case 002 Decision on Nuon Chea's Appeal (D300/1/7), paras 14-15.

[56] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 73 *referring to* International Criminal Tribunal for Rwanda ("ICTR"), *Prosecutor v. Akayesu,* ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, paras 19, 23-24; International Criminal Tribunal for the Former Yugoslavia ("ICTY"), *Prosecutor v. Tadić,* IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, as amended by Corrigendum to Judgement of the Appeals Chamber of 15 July 1999, 19 November 1999 ("*Tadić* Appeal Judgment (ICTY)"), paras 247, 281, 316; ICTY, *Prosecutor v. Mucić et al,* IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para. 221.

[57] Case 002 (PTC73), Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4 ("Case 002 Decision on Civil Party Admissibility Appeals (D404/2/4)"), paras 106, 115; Case 002 (PTC03), Decision on Application for Reconsideration of Civil Party's Right to Address the Pre-Trial Chamber in Person, 28 August 2008, C22/I/68, paras 25-26; Case 003 (PTC03), Order Suspending the Enforcement of the "Order on International Co-Prosecutor's Public Statement regarding Case File 003", 13 June 2011, D14/1/2 ("Case 003 Order Suspending the Enforcement (D14/1/2)"), paras 4-5; Case 004/2, Decision on AO An's Urgent Request for Redaction and Interim Measures, 5 September 2018, D360/3 ("Case 004/2 Decision on AO An's Urgent Request (D360/3)"), paras 6-7, 12; Case 003 (PTC11), Decision on Requests for Interim Measures, 31 January 2014, D56/19/8, paras 15-16.

[58] Case 001 (PTC01), Decision on Appeal against Provisional Detention Order of KAING Guek Eav *alias* "Duch", 3 December 2007, C5/45 ("Case 001 Decision on Appeal against Provisional Detention (C5/45)"), para. 7; Case 001 Decision on Closing Order Appeal (D99/3/42), para. 41. *See also* Case 002 (PTC08), Third Decision on IENG Sary's Request for Investigation under Internal Rule 35 into the Actions of Dr. Craig ETCHESON of the Office of the Co-Prosecutors relating to *Ex-Parte* communication with the International Component of the Office of the Co-Investigating Judges, 1 October 2010 ("Case 002 Third Decision on IENG Sary's Request"), ERN (EN) 0611365-0611371, para. 4; Case 001 (PTC01), Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, C11/53 ("Case 001 Decision on Civil Party Participation (C11/53)"), para. 38.

[59] In another section, the Pre-Trial Chamber provides its reasons as to why it considers that the Co-Investigating Judges have violated, in the present case, the foundations of the ECCC legal framework by issuing two separate and conflicting Closing Orders. The Chamber finds that it exercises broad review powers to restore the legality

34. The standard of appellate review generally applicable to this proceeding is defined separately.[60] The current section serves principally to flesh out the powers that the Pre-Trial Chamber may deem necessary to use as a second-instance investigating court in this case. The clarifications thereby offered regarding the sources and the contours of this specific review function, derived from the appellate function exercised at the judicial investigation stage in domestic civil law legal systems, such as those in force in Cambodia and in France, will provide the necessary response to the concerns raised by the International Co-Investigating Judge[61] concerning what the Pre-Trial Chamber meant in its Case 004/1 Decision,[62] stating that the Chamber may serve, in certain circumstances, as the "control body at the judicial investigation stage". As part of its response to the International Co-Investigating Judge, the Pre-Trial Chamber further stresses that other international criminal appellate chambers also at times substitute themselves for lower bodies to reverse or confirm the findings of such bodies or assume their findings, in the very same way as a second-instance chamber would do.[63]

35. The Pre-Trial Chamber, while reiterating that it may play the role of the Cambodian Investigation Chamber in the ECCC legal system when the circumstances so require,[64] also recalls that "harmonious relations between an investigating judge and an Investigation Chamber necessarily require the respect of each party's prerogatives."[65] Against this backdrop, the Chamber deplores the Office of the Co-Investigating Judges' persistent practice of avoiding the Pre-Trial Chamber's intervention to settle disputes between the Co-Investigating Judges, in defiance of the ECCC legal system, [66] as well as their obstinacy in rejecting any control by the appellate court[67] by conflating, for example, appellate decisions and individual Judges'

---

and remedy the distortion of procedures caused by the Co-Investigating Judges' unlawful actions in this case. For details, *see infra* paras 88-124; *see also* paras 31-54.

[60] *See supra* paras 28-30.

[61] Closing Order (Indictment) (D360), para. 26.

[62] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20).

[63] ICTY, *Prosecutor v. Mladić*, Decision on the Defence Motions for Disqualification of Judge Theodor Meron, Carmel Agius and Liu Daqun, MICT-13-56-A, 3 September 2018, para. 82.

[64] Case 001 Decision on Appeal against Provisional Detention (C5/45), para. 7; Case 001 Decision on Closing Order Appeal (D99/3/42), para. 41. *See also* Case 002 Third Decision on IENG Sary's Request, ERN (EN) 0611365-0611371, para. 4; Case 001 Decision on Civil Party Participation (C11/53), para. 38.

[65] Christian GUÉRY, "*Les pouvoirs de la chambre de l'instruction et la liberté du magistrat instructeur*", Recueil Dalloz N°9 (2007) ("GUÉRY, *Les pouvoirs de la chambre de l'instruction et la liberté du magistrat instructeur* (2007)"), p. 603.

[66] *See infra* paras 88-124.

[67] *See* Closing Order (Indictment) (D360), paras 17-38.

joint opinions,[68] or an indictment and a finding of guilt.[69] Accordingly, this Chamber deems it necessary to articulate and affirm the legal basis for its role as the appellate body at the ECCC pre-trial stage. However, the Chamber considers it unnecessary to record in detail all the instances where due respect for its authority was unlawfully dispensed with by the Co-Investigating Judges.

36. Hence, the Pre-Trial Chamber finds that the Co-Investigating Judges' insistence on continuing their investigation practices in Case 004/2 despite the errors held in the Pre-Trial Chamber's Case 004/1 Decision, indicates that they were entirely misinformed as to what was required of their Office in conducting the judicial investigation. In this regard, the Chamber notes that the use of the term *per curiam* in the International Co-Investigating Judge's Closing Order (Indictment) illustrates an important misconception of the respective prerogatives of the Co-Investigating Judges and the Pre-Trial Chamber.[70] Such use also illustrates the inapposite importation of concepts irrelevant to the law applicable at the ECCC. It further unveils the particular attempts by the International Co-Investigating Judge to free himself not only from the rules of law but also from the control of their proper application by the appellate jurisdiction.

37. The Chamber will now articulate the powers it may use in this case as a second-instance investigating court while reviewing the actions and findings of the Co-Investigating Judges.

1. The Pre-Trial Chamber's Function as Second-Instance Investigative Body and Final Authority over the Investigation Stage

38. The Pre-Trial Chamber notes that, according to Article 12(1) of the ECCC Agreement, "[t]he [ECCC's] procedure shall be in accordance with Cambodian law." Furthermore, Article 12(2) of the ECCC Agreement stipulates that "[t]he Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the International Covenant on Civil and Political

---

[68] *See* Closing Order (Indictment) (D360), para. 34 ("it concluded its own opinion that the ordinary Cambodian courts retained jurisdiction over crimes that could not be tried before the ECCC in the disposition of its joint views") (emphasis added).
[69] *See* Closing Order (Indictment) (D360), para. 37(b)(iii) where the International Co-Investigating Judge based his argument on a reasoning applied to a finding of guilt and not an indictment ("Judge Eboe-Osuji summarised the issue in that: '[t]he finding of guilt [...] does not result from giving bloated significance to available evidence, in ingenious ways'") (emphasis added).
[70] *See* Closing Order (Indictment) (D360), paras 37(a), 37(b)(ii), 38.

Rights, to which Cambodia is a party."[71] With due regard to the ECCC's *sui generis* mechanism and mandate, the Pre-Trial Chamber considers that the judicial system and structure of the ECCC is, *inter alia*, clearly modelled along the lines of an inquisitorial system of criminal procedure, as provided for by the Cambodian Code of Criminal Procedure, which in turn draws its inspiration from the French Code of Criminal Procedure.

39. In this regard, the Chamber notes that Article 55 of the Cambodian Code of Criminal Procedure provides that "[t]here is a Chamber within the Court of Appeal which is called the Investigation Chamber" and that, as in many other inquisitorial systems,[72] the Investigation Chamber is an essential and integral part of the pre-trial stage of a proceeding.

40. As a body akin to the Cambodian Investigation Chamber, the ECCC Pre-Trial Chamber's power of review can be derived, under the ECCC legal system, from Article 261 of the Cambodian Code of Criminal Procedure, stating that:

> *[e]very time it is seized, the Investigation Chamber shall examine the regularity and assure itself of the proper conduct of the proceedings*. If the Investigation Chamber finds grounds for annulling all or part of the proceedings, it may, on its own motion, annul such proceedings. The Investigation Chamber shall act in compliance with Article 280 (Effect of Annulment) of this Code. (emphasis added)

Similar provisions can be found in numerous codes of criminal procedure in other inquisitorial systems, including France.[73]

41. Regardless of its designation – the second-instance Investigation Chamber, Accusation Chamber, or Pre-Trial Chamber – the present Chamber forms a final jurisdiction over the pre-trial stage at the ECCC. However, the Chamber differs in some respects from the other appellate bodies in the international criminal justice system, as, while the purpose of the latter

---

[71] ECCC Agreement, Art. 12(2).
[72] *See, inter alia*, Code of Criminal Procedure (*Code de Procédure Pénale*) [France] ("CCP"), Art. 191 ("*Chaque cour d'appel comprend au moins une chambre de l'instruction*"); CCP [Algeria], Art. 176; CCP [Ivory Coast], Art. 191; CCP [Guinea], Art. 191; CCP [Madagascar], Arts 30, 300; CCP [Mali], Art. 196; CCP [Senegal], Art. 185; CCP [Central Africa Republic], Art. 130.
[73] *See* CCP [France], Art. 206; CCP [Senegal], Art. 199 ("*La chambre d'accusation examine la régularité des procédures qui lui sont soumises*"); CCP [Algeria], Art. 191; CCP [Ivory Coast], Art. 206; CCP [Guinea], Art. 211; CCP [Mali], Art. 206. Code of Criminal Investigation (*Code d'Instruction Criminelle*) [Belgium], Art. 136 ("*La chambre des mises en accusation contrôle d'office le cours des instructions, peut demander des rapports sur l'état des affaires et peut prendre connaissance des dossiers.*"). *See also* CCP [France], Arts 202, 204; CCP [Central Africa Republic], Art. 138; CCP [Algeria], Art. 186; CCP [Ivory Coast], Arts 201, 202; CCP [Guinea], Arts 206, 207; CCP [Mali], Art. 203; CCP [Madagascar], Art. 310.

is mostly to review trial-level decisions, including judgments on guilt or innocence and sentences, this Chamber may operate as the second-degree court of investigation.[74]

42. In this regard, the Pre-Trial Chamber refers to eminent authors who notably stated:

> [t]he Investigation Chamber can be defined as an Appeal Court's Chamber [...] whose mission is not only to know about appeals against first instance jurisdiction's decisions, *i.e.* the investigating judges [...], but also to constantly monitor the regularity of investigation and to assume a supervisory role with the investigating judges, whose mistakes the Chamber shall remedy. In that sense, it may be considered as the high court for investigation.[75]

43. The Pre-Trial Chamber notes that other comparable oversight mechanisms exist in other hybrid courts, such as the *Chambre africaine extraordinaire d'accusation* within the Dakar Court of Appeals[76] and the Central African Republic's "Special Accusation Chamber [that] is part of the Special Criminal Court which decides on appeals against the Orders issued by the Office of Investigation".[77] The Chamber also notes that, although it belongs to a significantly different legal system, the ICC's "Pre-Trial Chamber has been created to, *inter alia,* exercise judicial oversight [over the Prosecutor's responsibilities] during the early stages of the proceedings",[78] which include in that system the investigation stage.

---

[74] *See, e.g.*, CCP [Madagascar], Art. 30 ("*La chambre d'accusation de la cour d'appel connaît: [d]e l'appel des ordonnances du juge d'instruction [...] [et] est en outre juridiction d'instruction du second degré en matière criminelle*"); CCP [Ivory Coast], Art. 206 ("*La Chambre d'Accusation examine dans tous les cas, y compris en matière de détention préventive, la régularité des procédures qui lui sont soumises*") located in the Chapter entitled "*De la Chambre d' accusation : Juridiction d'instruction du second degré*"; CCP [France], Arts 201 ("*La chambre de l'instruction peut, dans tous les cas, à la demande du procureur général, d'une des parties ou même d'office, ordonner tout acte d'information complémentaire qu'elle juge utile.*"), 206 ("*la chambre de l'instruction examine la régularité des procédures qui lui sont soumises.*") located in the Chapter entitled "*De la Chambre de l'instruction: Juridiction d'instruction du second degré*".

[75] Henri ANGEVIN, Jean-Paul VALAT, "*Chambre de l'instruction. – Composition. – Compétence. – Contrôle de l'activité des officiers et agents de police judiciaire*", Jurisclasseur Procédure pénale, LexisNexis, 8 November 2018 ("ANGEVIN and VALAT, *Chambre de l'instruction. – Composition* (8 November 2018)"), para. 13 (emphasis added); Jacques GUYÉNOT, "*Le pouvoir de révision et le droit d'évocation de la chambre d'accusation*", Revue de sciences criminelles et de Droit pénal comparé, Tome XIX (1964), pp. 559-603.

[76] Statute of African Extraordinary Chambers within the Courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990; Art. 11(2) *See also* CCP [Senegal], Art. 185.

[77] *Loi n°15.003 portant création, organisation et fonctionnement de la cour pénale spéciale*, 5 June 2015, JORCA/ ES n°05, Art. 12(1) (unofficial translation); *Loi n° 18.010 du 02 juillet 2018, portant règlement de procédure et de preuve devant la cour pénale spéciale de la République centrafricaine*, (JORCA/ES N°5), 1 August 2018, Art. 107A ("*La Chambre d'accusation spéciale statue en Chambre du conseil sur les appels des ordonnances rendues par les Cabinets d'instruction*").

[78] International Criminal Court ("ICC"), *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-68, Decision on the "Application for Judicial Review by the Government of the Union of the Comoros", Pre-Trial Chamber I, 15 November 2018, para. 93.

44. In light of the foregoing, the Pre-Trial Chamber specifies that the functions it may perform within the ECCC legal system include that of the Investigation Chamber, which comprises both appellate jurisdiction over the investigating judge's acts and decisions, and a second-instance investigating jurisdiction.[79]

2. The Pre-Trial Chamber's Power of Review as Second-Instance Investigative Body

45. The Pre-Trial Chamber has stressed the need for it to exceptionally exercise particularly broad powers of review in this case.[80] The Chamber notes that, independent of any exceptional circumstances, its jurisprudence is filled with examples of instances in which the Chamber has had to exercise, as other international judicial bodies, powers which are not necessarily explicitly stated, yet still compatible with functions entrusted to it by the ECCC legal texts.

46. Hence, in various instances, the Pre-Trial Chamber has found it "appropriate to exercise its inherent jurisdiction, as *the appellate body at the pre-trial stage and in the absence of specific disposition,* [...] *in the interests of justice*."[81] Further, "[t]he Pre-Trial Chamber could invoke its inherent jurisdiction on a case by case basis provided an appeal or a related request is not only related to fundamental issues but also that it has been properly raised".[82] In other instances, the Pre-Trial Chamber was called on to interpret its appellate jurisdiction in light of Internal Rule 21 to "safeguard the interests of a Charged Person and ensure legal certainty and 'fair and adversarial' proceedings."[83]

47. With respect particularly to the case at hand, the Pre-Trial Chamber notes that its power of review as a second-instance investigative chamber may comprise of (i) the Investigation Chamber's powers to purge any irregularities in the procedures it is seised of before sending

---

[79] Henri ANGEVIN, Jean-Paul VALAT, "*Chambre de l'instruction. – Pouvoirs de la chambre de l'instruction : révision, évocation, annulation. – supplément d'information. – décisions sur le fond*", Jurisclasseur Procédure pénale, LexisNexis, 15 February 2019 ("ANGEVIN and VALAT, *Chambre de l'instruction – pouvoirs de la chambre de l'instruction* (15 February 2019)"), para. 112.
[80] For details, *see infra* paras 49-54.
[81] Case 004/2 Decision on AO An's Urgent Request (D360/3), para. 6 (emphasis added). *See also* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 28 ("The Pre-Trial Chamber as the control body at the judicial investigation stage deems it necessary to address this issue").
[82] Case 003 (PTC01), Decision on Defence Support Section Request for a Stay in Case 003 Proceedings Before the Pre-Trial Chamber and for Measures Pertaining to the Effective Representation of Suspects in Case 003, 15 December 2011, ERN (EN) 00751589-00751596, para. 9.
[83] Case 004/1 (PTC19), Considerations on IM Chaem's Appeal against the International Co-Investigating Judges's Decision to Charge her *In Absentia*, 01 March 2016, D239/1/8 ("Case 004/1 Consideration on Decision to charge IM Chaem *In Absentia* (D239/1/8)"), para. 23; Case 003 (PTC21), Considerations on MEAS Muth's Appeal against Co-Investigating Judge Harmon's Decision to Charge MEAS Muth *In Absentia*, 30 March 2016, D128/1/9 ("Case 003 Considerations on Charging *In Absentia* (D128/1/9)"), para. 28.

the Case to trial; [84] (ii) the Investigation Chamber or the ECCC's Pre-Trial Chamber's power, in the instances it is seised, to entirely review and revise a case including to correct any of the investigating judges' erroneous legal qualifications and to note all the legal circumstances linked to the facts;[85] and (iii) *the right to review and revise the work of the investigating judges in proceeding to any necessary operations for the sake of the manifestation of the truth.*[86] In other words, the power of review enables such Chamber to holistically address all the acts related to the case that the prosecution or the investigating judge has or should have done for the instruction to be complete and legal.[87]

48. Finally, the Pre-Trial Chamber emphasises that when it is seised of the final investigation procedure, "the subject matter jurisdiction of the Investigating Chamber is general, as opposed to specific. The entire case is referred to it and not only the disposition of an order."[88] Consequently, the Investigation Chamber possesses a power of review allowing it to complete the investigation through supplementary investigative acts[89] and to assess the regularity of the procedure,[90] when the circumstances do so require. The Pre-Trial Chamber finds, for reasons provided in a distinct section,[91] that the necessary circumstances exist in the case at hand.

3. Extent of the Pre-Trial Chamber's Power of Review in the Present Case

49. The Pre-Trial Chamber recalls that it has previously stated that "the discretion of the Co-Investigating Judges in making this determination [on personal jurisdiction] is a judicial one and does not permit arbitrary action but should rather be exercised with well settled legal principles".[92] When the Pre-Trial Chamber reviews the legality of the related proceeding it is seised of, it aims to balance the high level of discretion afforded to the Co-Investigating Judges

---

[84] GUYÉNOT, *Le pouvoir de révision et le droit d'évocation de la chambre d'accusation* (1964), para. 3.
[85] GUYÉNOT, *Le pouvoir de révision et le droit d'évocation de la chambre d'accusation* (1964), para. 3.
[86] Frédéric DESPORTES, Laurence LAZERGES, *Traité de procédure pénale* (Economica, Corpus, 3rd Edition, 2013) ("DESPORTES and LAZERGES, Traité de procédure pénale (2013)"), para. 2144 (emphasis added).
[87] GUYÉNOT, *Le pouvoir de révision et le droit d'évocation de la chambre d'accusation* (1964), para. 3. *See also* Roger MERLE, André VITU, *Traité de droit criminel,* (Cujas, 5th Edition. 2001), para. 569.
[88] Christian GUÉRY, "*Effet dévolutif de l'appel et manifestation de la vérité: du prétendu pouvoir de révision de la chambre de l'instruction*", Droit pénal n° 5 (étude 8), LexisNexis, May 2014, para. 3 (unofficial translation).
[89] ANGEVIN and VALAT, *Chambre de l'instruction – pouvoirs de la chambre de l'instruction* (15 February 2019), para. 139.
[90] ANGEVIN and VALAT, *Chambre de l'instruction – pouvoirs de la chambre de l'instruction* (15 February 2019), para. 4 (emphasis added); DESPORTES and LAZERGES, Traité de procédure pénale (2013), para. 2145; GUÉRY, *Les pouvoirs de la chambre de l'instruction et la liberté du magistrat instructeur* (2007), pp. 603-607.
[91] *See infra* paras 49-54.
[92] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20.

by the law and the Pre-Trial Chamber's jurisprudence.[93] The Pre-Trial Chamber considers that when it acts as the ECCC's Investigative Chamber, it exercises the ultimate authority over the investigation phase. The Chamber recalls that one of the important purposes of the Pre-Trial Chamber is thus to assess the entirety of the investigation phase and to issue the final determinations in this regard.[94] The Pre-Trial Chamber retains broad substantive jurisdiction over matters of which it may be seised and holds expansive powers to assess the integrity of an investigation and the substance of the case in safeguarding the principle of impartiality.[95]

50. The Pre-Trial Chamber considers that the exercise of its review power as Investigation Chamber is intended, first and foremost, to ensure that the conditions for the issuance of the closing order and the preparatory investigation are in accordance with the ECCC Internal Rules 21 and 76, and Article 261 of the Cambodian Code of Criminal Procedure. Accordingly, in appeals against closing orders, there are many preliminary issues which the Pre-Trial Chamber may need to consider before addressing the merits of the parties' submissions, including what the Pre-Trial Chamber has identified over the years as issues of general significance for the ECCC's jurisprudence and legacy, and/or its inherent powers when considering a closing order.

51. In this regard, the Pre-Trial Chamber is, *inter alia*, and regardless of specific attributions set in Internal Rules 71 to 78, required to ensure that "[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations [are] interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings"[96] throughout the pre-trial stage. The Chamber thus has inherent jurisdiction to examine "due diligence displayed in the Co-Investigating Judge's conduct", where it constitutes "a relevant factor when considering victims' rights in the proceedings".[97] The Chamber also has inherent jurisdiction "to determine incidental issues which arise as a direct consequence of the procedures of which [it is] seised", in instances where statutory provisions do not expressly or by necessary implication

---

[93] *See, e.g.*, Case 004 (PTC26), Decision on International Co-Prosecutor Appeal concerning Testimony at Trial in Closed Session, 20 July 2016, D309/6, paras 19-20; Case 004, Decision on YIM Tith's Application to Annul the Investigative Material Produced by Paolo Stocchi, 25 August 2017, D351/1/4, para. 13.
[94] GUYÉNOT, *Le pouvoir de révision et le droit d'évocation de la chambre d'accusation* (1964), paras 2, 9, 35.
[95] French Court of Criminal Cassation, 20 Octobre 2015, n°15-84.671.
[96] Internal Rules of the Extraordinary Chambers in the Court of Cambodia (Rev.9), as revised 16 January 2015 ("Internal Rules"), 21(1).
[97] Case 003 (PTC01), Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant SENG Chan Theary, 28 February 2012, D11/1/4/2 (Opinion of Judges DOWNING and LAHUIS), para. 6.

contemplate its power to pronounce on a matter.[98] Such inherent jurisdiction is rendered necessary by the imperative need to ensure good and fair administration of justice.[99]

52. The Pre-Trial Chamber notes that the Chamber's power of review can be grasped in Internal Rule 76(7) which states that "[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation". This power of review is so important and determinative that "[n]o issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber". As a consequence, the Pre-Trial Chamber is responsible for ensuring, at the investigation stage, that the fundamental principles underlying the criminal procedure applicable before the ECCC are respected.

53. The Pre-Trial Chamber emphasises that it has always exercised its utmost prudence at the last investigative stage in which its jurisdiction intervenes. However, like in Case 004/1, the Pre-Trial Chamber must address in Case 004/2 numerous unprecedented issues, including the current issue regarding the Pre-Trial Chamber's jurisdictional authority which is hereby reiterated and clarified.

54. The Pre-Trial Chamber stresses that it has, to the best of the legal functions entrusted to it, attempted to provide legal certainty and justice in instances where the Co-Investigating Judges have resorted to complacent interpretations of the applicable law in their decisions,[100] resulting in a continued practice of blatant attempts to unreasonably broaden the scope of their discretionary powers and challenge the Pre-Trial Chamber's role as control body in appellate proceedings at the pre-trial stage. The Chamber considers that this, *inter alia*, illustrates a conspicuous violation of Article 1 of the Cambodian Code of Criminal Procedure which requires prudence and caution of any reasonable investigating judge. As discussed in another section,[101] the Co-Investigating Judges' challenge to the Pre-Trial Chamber's authority has

[98] Case 003 (PTC27), Decision on MEAS Muth's Request for the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals against the Closing Order & to Clarify the Procedure for Annulling the Closing Order, or Portions Thereof, if Necessary, 28 April 2016, D158/1, para. 11. *See also* Case 003 (PTC11), Decision on Co-Lawyers' Request to Stay the Order for Assignment of Provisional Counsel to MEAS Muth, 11 February 2014, D56/19/14, para. 16; Case 003 Order Suspending the Enforcement (D14/1/2), para. 4.
[99] Case 003 Order Suspending the Enforcement (D14/1/2), para. 4.
[100] *See, e.g.*, Closing Order (Indictment) (D360), paras 29-30.
[101] *See infra* paras 88-124.

culminated in this case with the unprecedented issuance of two separate and conflicting Closing Orders, in complete violation of the very foundations of the ECCC legal framework.[102]

B. Position of the ECCC Within the Cambodian Legal System

55. In their respective Closing Orders, the International Co-Investigating Judge noted the Pre-Trial Chamber's previous finding that ordinary Cambodian courts retain jurisdiction over Khmer Rouge-era crimes that could not be tried before the ECCC,[103] while the National Co-Investigating Judge maintained that the ECCC Law excludes any personal or subject-matter jurisdiction of ordinary Cambodian courts over crimes committed under the ECCC's temporal jurisdiction.[104] The Pre-Trial Chamber deems it necessary, as an appellate chamber, to address these opposite findings.

56. With regard to cases of which the ECCC is already seised, the Pre-Trial Chamber recalls that there is no referral procedure foreseen in the applicable law. Those cases cannot be transferred to domestic courts.[105] It has been clear since 2009 that there would be no further prosecutions after the conclusion of the remaining cases of which the ECCC is seised.[106]

57. With respect to other cases, the Pre-Trial Chamber considers that Cambodia has inherent jurisdiction over all Khmer Rouge-era cases of which the ECCC is not seised. Prior to the establishment of the ECCC, the Royal Government of Cambodia was not only free, but even had an obligation under international law, to prosecute senior leaders of DK or those alleged to be most responsible for international crimes, as a basic exercise of its jurisdiction. At the time of the ECCC's inception, Cambodian courts were indeed in the process of trying

---

[102] In addition to this paramount example of the Co-Investigating Judges' malpractice, the Pre-Trial Chamber also notes, by way of illustration, another of their numerous legally highly questionable decisions, that is, the Co-Investigating Judges notifying of a possibility to issue an order to stay the investigation, permanently preventing any re-opening of the investigation, because of budgetary issues, equalling to notify a possible dismissal on budgetary ground in violation of Internal Rule 67(3). *See* Case 003, Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004 and 004/2 and Related Submissions by the Defence for YIM Tith, 11 August 2017 (D249/6), paras 69, 80.

[103] Closing Order (Indictment) (D360), para. 34 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), p. 27.

[104] Closing Order (Dismissal) (D359), paras 434-449, *in particular* para. 447.

[105] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 74 *referring to* Case 001 Decision on Appeal against Provisional Detention (C5/45), para. 17; Case 001 Appeal Judgment (F28), para. 71.

[106] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 74 *referring to* ECCC Press Release, "Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions", 8 September 2009.

certain individuals who would meet (or could have met) the threshold for personal jurisdiction at the ECCC.[107]

58. In agreement with the United Nations, the Royal Government of Cambodia established the ECCC as a specialised court within the existing Cambodian court system[108] and only delegated jurisdiction over senior leaders of Democratic Kampuchea and those most responsible.[109] Articles 1 and 2(1) of the ECCC Agreement, mirrored by Articles 1 and 2*new* of the ECCC Law, expressly limit the personal jurisdiction of the ECCC to senior leaders of DK and those most responsible for certain crimes committed during the Khmer Rouge era. Nothing in the applicable law suggests that the ECCC would have exclusive jurisdiction over other Khmer Rouge-era cases. A close scrutiny of available records of the negotiation history supports the conclusion that the ECCC does not strip national courts of their jurisdiction.[110] The limitation of the ECCC's personal jurisdiction cannot be interpreted as reflecting an intention on the part of the drafters of the ECCC Law and Agreement that other perpetrators would necessarily escape justice.[111]

---

[107] Military Court, *Order to Forward Case for Investigation, Indictment of UNG Choeun*, No. 019/99, 9 March 1999 [ECCC Legal Compendium]; Military Court, *Second Order to Forward Case for Investigation, Indictment of Duch*, No. 029/99, 10 May 1999; Military Court, *Order to Forward Case for Investigation, Second Indictment of UNG Choeun and KAING Khek Iev*, No. 044/99, 6 September 1999; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 75.

[108] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 76 *referring to* ECCC Law, Art. 2*new*; ECCC Agreement, Preamble, para. 4.

[109] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 75.

[110] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 77. The Royal Government of Cambodia considered that the appropriate forum for trials against a limited category of high-level perpetrators would be a special court assisted by the international community, with an international component and a limited mandate, for reasons pertaining to capacity, legitimacy and legacy. *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 78 *referring to* "Debate and Approval of the Agreement between the United Nations and the Royal Government of Cambodia and Debate and Approval of Amendments to the Law on Trying Khmer Rouge Leaders", First Session of the Third Term of the Cambodian National Assembly, 4-5 October 2004, partial transcript printed in *Searching for the Truth (DC-Cam Magazine)*, Special English Edition (Third Quarter 2004) ("Cambodian National Assembly Debate"), pp. 28-30, 31-34, 45-46, 48; Royal Government of Cambodia, *Statement of Motivation for the Draft Law on the Establishment of Extraordinary Chambers within the Existing Cambodian Courts for Prosecution of Crimes Committed during Democratic Kampuchea*, Statement No. 01 SCN.KBC, 18 January 2000 [ECCC Legal Compendium], p. 3; Constitutional Council of Cambodia, *Decision No. 040/002/2001 (on ECCC Law)*, 12 February 2001 [ECCC Legal Compendium], p. 3; Royal Government of Cambodia, *Statement of Motivation for Draft Law on the Approval of the 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*, Statement No. 38.SCN.KBT, 16 June 2003 [ECCC Legal Compendium], p. 1; Case 004/1, Statement of Professor SCHEFFER, Annex A to Civil Party Co-Lawyers' Submission on the Position of the ECCC within the Cambodian Legal System, 6 September 2017, D308/3/1/9.2, paras 8-9; David SCHEFFER, "The Extraordinary Chambers in the Courts of Cambodia", in M. CHERIF BASSIOUNI (ed.), International Criminal Law, Vol. III (Martinus Nijhoff/Brill, 3rd Edition, 2008) ("SCHEFFER, "The Extraordinary Chambers in the Courts of Cambodia" (2008)"), p. 240.

[111] Cambodian National Assembly, *Law on the Outlawing of the "Democratic Kampuchea"*, Group, Royal Kram No. 01.NS.94, 14 July 1994, English translation based on the text published by the *Phnom Penh Post*, Vol. 3, No.

59. In light of the foregoing, the Pre-Trial Chamber reaffirms its unanimous finding in Case 004/1 that the ECCC's applicable law does not preclude national jurisdiction and that ordinary Cambodian courts inherently have full jurisdiction over matters of criminal justice.

C. Excessive Delay in Issuing the Closing Orders

60. The Pre-Trial Chamber considers that, in his Closing Order, the International Co-Investigating Judge attempted to shelter himself from the Chamber's judicial oversight with an incorrect reading of the fundamental principles recalled by the Chamber.[112]

61. The Pre-Trial Chamber recalls that Internal Rule 21(4) requires the proceedings be brought to a conclusion "within a reasonable time". The Chamber, as the reviewing court at the investigation stage,[113] considers that, while the Internal Rules do not set out a specific deadline for issuing a closing order, the Co-Investigating Judges are nevertheless obliged to issue closing orders within a reasonable time, since this principle, with its counterpart in Article 35 *new* of the ECCC Law, is a fundamental principle enshrined in Article 14(3)(c) of the International Covenant on Civil and Political Rights ("ICCPR").[114]

62. In the present case, the Pre-Trial Chamber finds that the Co-Investigating Judges failed to issue the Closing Orders within a reasonable time.

63. The Pre-Trial Chamber, in a separate case,[115] has previously affirmed the right to adequate time to prepare one's defence, by recalling that, under Internal Rule 66(1), the

---

14, 15-28 July 1994 [ECCC Legal Compendium]; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 78 *referring to* Ambassador Thomas HAMMARBERG, "How the Khmer Rouge Tribunal was Agreed: Discussions between the Cambodian Government and the UN", *Searching for the Truth (DC-Cam Magazine)*, Issue 21 (September 2001), p. 37. The debates before the Cambodian National Assembly rather suggest that the negotiating parties intended for cases involving Khmer Rouge-era crimes committed by those who were not the most responsible to remain within the jurisdiction of ordinary Cambodian courts. *See, e.g.*, Cambodian National Assembly Debate, p. 37.

[112] *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 28-31. Closing Order (Indictment) (D360), para. 18 (In particular, the Chamber notes his statement that "the PTC *per curiam* accused the CIJs of having violated Art 35*new* of the ECCC Law and Internal Rule 21(4)"). The Pre-Trial Chamber finds that the International Co-Investigating Judge's use of the term "accused" is both factually inaccurate since the Chamber in its determination, did not accuse the Co-Investigating Judges, but rather, judicially assessed the quality of the procedure undertaken by them, and legally inappropriate as a co-investigating judge should duly reserve this term for his assessment under Internal Rule 67.

[113] *See supra* paras 38-44.

[114] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S 407, entered into force 23 March 1976 ("ICCPR"), Art. 14(3)(c).

[115] Case 004 (PTC46), Decision on YIM Tith's Appeal against the Decision on YIM Tith's Request for Adequate Preparation Time, 13 November 2017, D361/4/1/10 ("Case 004 Decision on YIM Tith's Appeal (D361/4/1/10)"), paras 23-27.

deadline of fifteen days during which the parties may request further investigative action shall apply after "a *notification* of conclusion of the investigation, no matter whether the notification is the 'first', or a 'second' one issued after completion of supplementary investigations."[116]

64. The Pre-Trial Chamber observes the International Co-Investigating Judge's mere declaration in a footnote of his Closing Order:

> We did not consider it necessary to grant the parties in case 004 or 004/2 a further 15 days to request investigation action in light of the PTC's comments as we considered it unlikely that any party had suffered prejudice as a result of us not granting the further 15 days, and certainly not prejudice to the extent that would constitute an exceptional case warranting a reconsideration of our decision.[117]

65. In this regard, the Pre-Trial Chamber considers that the parties should have been granted 15 (fifteen) days from the date of the Co-Investigating Judges' Second Notice of Conclusion to review the newly collected evidence in accordance with Internal Rule 66(1).[118]

66. Moreover, the Pre-Trial Chamber recalls that, pursuant to Internal Rule 66(1), "*the parties shall* have 15 (fifteen) days to request further investigative actions. *They may* waive such period."[119] Accordingly, the Chamber finds that the Co-Investigating Judges are without authority to determine or provide their consideration as to whether or not such period is necessary and that, consequently and more significantly, such period is not for the Co-Investigating Judges to "grant". The Co-Investigating Judges may not deprive the parties of the time that is explicitly prescribed under Internal Rule 66(1) by their own erroneous and arbitrary interpretation. The Chamber further notes that the proceedings have not been expedited by this procedural error.

67. The Pre-Trial Chamber further observes that the Case File was forwarded to the Co-Prosecutors, for the purpose of issuing their final submission, on 19 May 2017,[120] *i.e.* two months after the disposal of the last investigation request, and not "immediately" in accordance with Internal Rule 66(4).

---

[116] Case 004 Decision on YIM Tith's Appeal (D361/4/1/10), paras 24-25 (emphasis added).
[117] Closing Order (Indictment) (D360), para. 9, footnote 25.
[118] Case 004 Decision on YIM Tith's Appeal (D361/4/1/10), para. 27.
[119] Internal Rule 66(1) (emphasis added).
[120] Forwarding Order (D351).

68. At this stage, the Pre-Trial Chamber recalls its commitment to legal certainty and transparency of proceedings,[121] and that a judicial investigation is not a discretionary exercise. The Co-Investigating Judges are obliged to conduct their judicial investigation within the ECCC legal framework in which the Chamber situates as a reviewing court and duly contributes with its jurisprudence. They are required to operate in accordance with the applicable law and to exercise their entrusted powers with caution. The Chamber emphasises that Article 23 *new* of the ECCC Law unambiguously dictates that the Co-Investigating Judges conducting the investigation "shall follow existing procedures in force"[122] and not at their leisure. The Chamber notes that the procedure of the Office of Co-Investigating Judges is governed by Cambodian law.[123] In this regard, Article 1 of the Cambodian Code of Criminal Procedure provides that "[t]he purpose of the Code of Criminal Procedure is to set out the *rules to be observed and to apply rigorously* in order to clearly determine the existence of a criminal offense" (emphasis added). Accordingly, the Code of Criminal Procedure, and the law applicable to the ECCC, is strictly interpreted.

69. The Chamber recalls that the ECCC, as a hybrid internationalised court, operates within the domestic judiciary of Cambodia, and notes that Internal Rule 66(4) reflects Article 246 of the Cambodian Code of Criminal Procedure, which provides that the investigating judge shall send the case file to the Prosecutor of the Kingdom "[t]wo days" after the notification that the judicial investigation is terminated. The Chamber finds that creation of a dossier and the diligence in the communication of the procedure, *i.e.* the investigating judge's timely preparation of the Case File with this procedure duly in mind, is a legal requirement specific to the inquisitorial system and, while common to the hybrid jurisdiction of this type,[124] one of the most extraordinary and singular characteristics of the ECCC, compared to other international Tribunals.[125]

---

[121] Internal Rule 21(1).
[122] ECCC Law, Art. 23*new*, para. 1.
[123] ECCC Agreement, Art. 12(1).
[124] *See, e.g.*, Law N° 18-010 Establishing the Rules of Procedure and Evidence of the Special Criminal Court in the Central African Republic, Art. 103 (a communication to the prosecutor as soon as the information appears to be completed at the investigating chamber); CCP [Senegal], Art. 169 (a period of three days before communication to the Public Prosecutor's Office); Extraordinary African Chambers ("EAC"), *Prosecutor v. HABRE et al.*, Order of Partial Dismissal, Indictment and Dismissal before the Extraordinary African Chamber of Assize, 13 February 2015, D2819 (The investigating judges in charge of the case Hissein HABRE communicated the file to the prosecutor's office on 5 January 2015, received the final indictment on 6 February 2015 and issued their order a week later).
[125] Robert PETIT and Anees AHMED, "A Review of the Jurisprudence of the Khmer Rouge Tribunal", *Northwestern Journal of International Human Rights*, Vol. 8, II (Spring 2010), p. 169.

70. The Pre-Trial Chamber notes that the International Co-Investigating Judge issued his Closing Order (Indictment) on 16 August 2018, thereby terminating the investigation against AO An more than 16 months after notifying, for the second time, the conclusion of the judicial investigations to the parties and their counsel on 29 March 2017.[126]

71. The Pre-Trial Chamber acknowledges that the drafting process for the Closing Order in Case 004/2 (16 months) had been shorter than that in Case 004/1 (18 months), while the complexity of the case and volume of the record in Case 004/2 is more significant. Nevertheless, the Chamber finds that this period remains excessive in comparison with the Closing Orders issued in Cases 001 and 002, with a period of three and eight months, respectively, after the closure of the investigations.

72. To conclude, the Chamber considers the Office of Co-Investigating Judges' inappropriate issuance of separate and conflicting Closing Orders in only one of the working languages of the ECCC without a reasonable showing of exceptional circumstances in violation of Article 7 of the Practice Directions on Filing of Documents before the ECCC ("Practice Direction on Filing of Documents"),[127] which precipitated an undue delay in the whole proceedings of Case 004/2. In this regard, the Chamber duly cautions the Co-Investigating Judges that their issuance of the Closing Orders, each over 400 pages, in only one of the working languages of the ECCC also has generated an avoidable undue delay in the proceedings in Case 004/2 as a whole.

D. Evidentiary Considerations

73. Both Co-Investigating Judges devoted sections of their Closing Orders to "evidentiary considerations" dealing with the reliability and probative value of categories of evidence.[128] The Pre-Trial Chamber recalls that this issue was thoroughly addressed in Case 004/1[129] and that, neither the ECCC Law, the Internal Rules, the Cambodian Code of Criminal Procedure nor the jurisprudence[130] envisage such evidentiary considerations at the current stage of the

[126] Case 004/2, Second Notice of Conclusion of Judicial Investigation against AO An, 29 March 2017, D34/2.
[127] *Practice Directions on Filing of Documents before the ECCC*, ECCC/01/2007/Rev.8, as amended 7 March 2012, Art. 7.
[128] Closing Order (Indictment) (D360), paras 35-38, 123-156; Closing Order (Dismissal) (D359), paras 485-491.
[129] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 41-63.
[130] In the Closing Orders in Cases 001 and 002, the Co-Investigating Judges did not address such evidentiary issues. Case 001, Closing Order Indicting KAING Guek Eav *alias* Duch, 8 August 2008, D99 ("Case 001 Closing Order (D99)"); Case 002, Closing Order, 15 September 2010, D427 ("Case 002 Closing Order (D427)").

proceedings.[131] Pursuant to Internal Rule 67, the sole duty of the Co-Investigating Judges is to issue a closing order of indictment or dismissal, depending on the content of the evidence in the Case File. In doing so, the Co-Investigating Judges have the duty to take into consideration all the evidence and cannot arbitrarily disregard or depreciate certain categories of evidence before they have been debated by the parties.

74. The Co-Investigating Judges' attempt to explain their methodology of hierarchisation of evidence is thus, in the Pre-Trial Chamber's view, superfluous, unnecessary and legally incorrect. This approach is contrary to the applicable legal framework and inconsistent with the established jurisprudence of the Court.

75. The Pre-Trial Chamber deems it necessary to examine (i) whether the Co-Investigating Judges erred in assessing the reliability and probative value of the evidence and (ii) whether they applied the correct standard of evidence.

1. Principle of Freedom of Evidence

76. As a hybrid jurisdiction, the ECCC is guided by its Internal Rules and Cambodian law. Internal Rule 87 clearly states that, "unless provided otherwise in these IRs, all evidence is admissible". This notion is reflected in Article 321 of the Cambodian Code of Criminal Procedure that clearly enshrines the principle of freedom of evidence and its corollary of the judge's personal conviction. The gathering of evidence at the ECCC is thus undoubtedly governed by the principle of freedom of evidence,[132] which is peculiar to most civil law systems.[133] As a consequence, and subject to any annulment proceedings, all evidence is admissible and generally has the same probative value.[134] In other words, only express

---

[131] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 42.
[132] Case 004 (PTC51), Decision on YIM Tith's Application to Annul the Requests for and Use of Civil Parties' Supplementary Information and Associated Investigative Products in Case 004, D370/1/1/6, 20 August 2018 ("Case 004 Decision concerning the Use of Civil Parties' Information (D370/1/1/6)"), para.17.
[133] With regards to the Cambodian approach towards evidence in the criminal procedure system, *see* Collectif, *Droit du Cambodge* (Bibliothèque de l'Association Henri Capitant,1st Edition, 2016), pp. 44-45; With regards to the French approach towards evidence in the criminal procedure system, *see* Jean PRADEL, *Procédure pénale* (Cujas, 14ème edition, 2008-2009), p. 364; Bernard BOULOC, *Procédure pénale* (Dalloz, 24ème edition, 2014), p. 122. The principle of freedom of evidence is mentioned in most of the criminal procedural system with inquisitorial inspiration. To quote a few of the Codes of Criminal Procedure from countries dealing with similar crimes: *Code of Criminal Procedure of the Kingdom of Cambodia* (7 June 2007) ("Cambodian Code of Criminal Procedure (2007)"), Art. 321; CCP [France] Art. 427); CCP [Senegal], Art. 141); CCP [Ivory Coast], Art. 418; CCP [Guinea], Art. 420; CCP [Mali], Art. 412.
[134] Case 004 Decision concerning the Use of Civil Parties' Information (D370/1/1/6), para.17.

provisions contained in the above-mentioned legal instruments would allow to derogate from this principle.

77. In addition, Article 23*new* of the ECCC Law indicates that the "Co-Investigating Judges shall conduct investigations on the basis of information obtained from any institutions". This provision excludes any subjective categorisation of evidence based on its provenance and emphasises that all evidence, unless prescribed specifically by the law, enjoy the same legal presumption of probative value, provided it has been legally collected.

78. Other hybrid jurisdictions have adopted a similar evidentiary approach. Indeed, at the EAC, the Pre-Trial Chamber affirmed that freedom of evidence, as provided by Article 414 of the Senegalese Code of Criminal Procedure,[135] is applicable at the pre-trial stage.[136] Recently, the Special Criminal Court in the Central African Republic also expressly prescribed, in the law establishing the Rules of Procedure and Evidence, the principle of freedom of evidence.[137]

79. In their evidentiary considerations, the Co-Investigating Judges disregarded the principle of freedom of evidence and arbitrarily established a pyramidal classification of evidence, when no relevant legal provision allows this. The evidence gathered by their Office was placed at the top of the pyramid and predominantly relied upon to issue the Closing Orders.[138] Indeed, the Co-Investigating Judges considered that it presents strong procedural safeguards and is thus entitled to a presumption of relevance and reliability,[139] while evidence collected by external entities do not enjoy such a presumption. In that respect, evidence such as interviews conducted by the Co-Prosecutor's Office, certain DC-CAM reports or documents and civil party applications, were granted less or no probative value. [140]

---

[135] CCP [Senegal], Art. 414 al.1 ("Unless provided differently by law, criminal offences can be established by any type of evidence and the judge rules based on his personal conviction") (unofficial translation).
[136] EAC, *Prosecutor v. Habre et. al.*, Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre Africaine Extraordinaire d'Assises, Chambre d'instruction, 13 February 2015, D2819 ("*Habre* Ordonnance de non-lieu partiel (EAC)"), p. 6.
[137] Law No. 18-010 establishing the Rules of Procedure and Evidence of the Special Criminal Court of the Central African Republic, Art. 161 ("The Court applies the general rules of evidence contained in the Rules and, in particular, the principle of freedom of evidence") (unofficial translation).
[138] Closing Order (Indictment) (D360), para. 123; Closing Order (Dismissal) (D359), para. 485.
[139] Closing Order (Indictment) (D360), para. 123 *referring to* the reliability of categories of evidence collected or prepared under the judicial supervision of the Office of the Co-Investigating Judges such as, written records of interviews and the list of S-21 prisoners; Closing Order (Dismissal) (D359), para. 485.
[140] Closing Order (Dismissal) (D359), paras 486-488; Closing Order (Indictment) (D360), paras 124-126 ("DC-CAM [statements or other evidence] were generated without the judicial guarantees and formalities that characterise WRIs, and thus enjoy no such presumption [...] interviews conducted by the Co-Prosecutors during their preliminary investigations, although prepared specifically for criminal proceedings, are not conducted under oath and are prepared by a party with an inherent interest in the outcome of the case. Such statements are, however,

80. In Case 004/1, the Pre-Trial Chamber recalled that "the entire Case File is under the judicial supervision of the Co-Investigating Judges, not only the evidence produced by their Office".[141] The Pre-Trial Chamber reaffirms that it is an error of law to make general assertions regarding the predetermined value of defined categories of evidence with regards to others, particularly when based on its provenance rather than on its essence.[142] At this stage, "[t]he only relevant criterion should be the impact that the substance of the evidence may have on the personal conviction of the Co-Investigating Judges regarding whether there is sufficient evidence for the charges".[143]

81. The Pre-Trial Chamber finds it particularly problematic to generally preclude civil party applications from any presumption of reliability and to afford them "little if any probative value" on the basis of the circumstances surrounding their recording.[144] In fact, victims and civil party applicants may have first-hand information about the relevant facts. The credibility of their evidence should be evaluated on a case-by-case basis and not automatically be considered as unreliable *per se*.[145] The fact that they have a personal interest in the outcome of the case should not automatically lead to the assumption that their evidence is less credible.[146] The Pre-Trial Chamber further recalls that such an interpretation limits the effectiveness of the victims' right of access to the courts[147] and is contrary to the Cambodian Code of Criminal Procedure, which, in its Article 137, clearly states that there is no form requested for the civil

---

collected for the purpose of a criminal trial and are therefore, in principle, afforded higher probative value than evidence not collected specifically for that purpose [...] Civil party applications enjoy no presumption of reliability and have been afforded little, if any, probative value [...]").

[141] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 50 and footnote 103 *referring to* Internal Rule 55(5) and the 2007 Code of Criminal Procedure, Art. 127.

[142] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 52. As a commentator put it in a different context: "aucune disposition légale ne permet au juge répressif d'écarter les moyens de preuve produits par les parties, au seul motif qu'ils auraient été obtenus de façon illicite ou déloyale ; il leur appartient seulement d'en apprécier la valeur probante" (unofficial translation: no legal provision allows a judge to exclude certain party evidence merely because this evidence may have been obtained in an illicit or improper manner; there is a responsibility to assess the probative value) *in* Martine RACT-MADOUX, "La loyauté de la preuve en matière pénale: la liberté des preuves", *Procédures,* No. 12 (December 2015).

[143] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 52.

[144] Closing Order (Indictment) (D360), para. 126; Closing Order (Dismissal) (D359), para. 488.

[145] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 55.

[146] *See* Göran SLUITER et al., *International Criminal Procedure - Principles and Rules* (Oxford University Press, 2013), pp. 1353-1354.

[147] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 56 *referring to* ECCC Law, Art. 33*new*; Internal Rule 21; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res. 40/34, 29 November 1985, A/RES/40/34 ("*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*"), *in particular* Annex, paras 4-5; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA RES. 60/147, 16 December 2005, A/RES/60/147, *in particular* Annex, paras 12-14.

party to intervene in the investigation. The interpretation of the Co-Investigating Judges is consequently baseless in law and senseless as it would, to ensure probative value, require them to interview every single civil party applicant,[148] which would exacerbate the delay in the proceedings.

82. The Pre-Trial Chamber considers that while the probative value of particular items of evidence in isolation may appear, *prima facie*, to be minimal, the very fact that they have some relevance means that they must be available for consideration.[149] The interviews conducted by the Co-Prosecutors, the civil party applications and the DC-CAM documents remain on the Case File despite the Co-Investigating Judges' findings on their limited probative value, and could be taken into consideration at the trial stage.[150]

83. The categorisation approach readopted by the Co-Investigating Judges in the present case not only departs from their prior standing jurisprudence,[151] but is incorrect and unsubstantiated in the inquisitorial investigating system. The Pre-Trial Chamber finds that this approach reveals serious flaws in the conduct of the judicial investigation pursuant to Internal Rule 55 and puts the legal legacy of the ECCC in jeopardy.

2. Standard of Evidence

84. The Pre-Trial Chamber recalls that the stage of the proceedings has an impact on the standard of the evidence. In accordance with Internal Rule 67, the test for issuing closing orders is the existence of "sufficient evidence" in link with the charges. In the Closing Orders, the Co-Investigating Judges relied on the jurisprudence of the Trial Chamber and the Supreme Court Chamber to establish principles for the evaluation of the evidence.[152] However, the Trial Chamber and the Supreme Court Chamber are bound by the standard of "beyond a reasonable

---

[148] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 55 ("Therefore, if they were to deny *prima facie* the presumption of reliability for civil party applications and afford them less weight than other evidence collected by their Office, the Co-Investigating Judges - either themselves or through rogatory letters - would be bound to hear every applicant as a witness, considering that they possess information conducive to ascertaining the truth.").

[149] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 53 and footnote 105 *referring to* Special Court for Sierra Leone ("SCSL"), *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, Fofana-Appeal against Decision Refusing Bail, Appeals Chamber, 11 March 2005, para. 23; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, Trial Chamber, 23 May 2005, para. 9.

[150] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 48.

[151] *See* Case 001 Closing Order (D99); Case 002 Closing Order (D427); Case 002, Dismissal Order, 14 September 2010, D420.

[152] Closing Order (Indictment) (D360), paras 123-136; Closing Order (Dismissal) (D359), paras 485-491.

doubt",[153] which is higher than that of "sufficient evidence". In the Closing Order in Case 002, the Co-Investigating Judges determined what they considered to be "sufficient charges":

> While it is obviously not required at this stage to ascertain the guilt of the Charged Person (given that only the Trial Chamber has such jurisdiction), it is clear that "probability" of guilt is necessary (i.e. more than a mere possibility). Accordingly, the assessment of the charges at this stage must not be confused with the "*beyond a reasonable doubt*" standard at the trial stage, yet the evidentiary material in the Case File must be sufficiently serious and corroborative to provide a certain level of probative force.[154]

85. The Pre-Trial Chamber considers that "[w]hile the notion of 'sufficient charges' that the Co-Investigating Judges must consider to indict or dismiss a case is difficult to objectify, it is clear that the legal requirements for judicial proceedings progress incrementally from a 'mere possibility' to a 'probability' or 'plausibility' of guilt during the investigation, to evidence of such guilt beyond reasonable doubt at the trial stage".[155] In similar circumstances, the Co-Investigating Judges of the EAC highlighted that, although it is necessary at the pre-trial stage to have more than mere *indicia* or suspicion to send a person to trial, the evidence gathered does not yet need to assert guilt with certainty.[156] The Pre-Trial Chamber finds that this is the correct and applicable interpretation in the instant case. Indeed, the Pre-Trial Chamber consistently considered that the notion of "sufficient charges" corresponds *a minima* to Internal Rule 55(4)'s "clear and consistent evidence", indicating that a person may be criminally responsible for the commission of a crime, when charging a suspect or indicting a charged person.

86. Bearing in mind the evidential standard applicable at the pre-trial stage of the proceedings, the Pre-Trial Chamber considers that it is unnecessary for the International Co-Investigating Judge to determine an accurate and precise number of victims[157] and to detail its methodology to do so.[158] While the number of victims is one of the elements taken into

---

[153] Internal Rule 87.
[154] Case 002 Closing Order (D427), para. 1323 (footnotes omitted).
[155] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 62 *referring to* Christian GUÉRY, *"Les paliers de la vraisemblance pendant l'instruction préparatoire"*, *La Semaine Juridique* (G. Ed. No. 24, 10 June 1998). As a consequence, it is certainly a serious error in law to declare that "the persons named in the Co Prosecutors' Introductory Submission are already considered the "charged persons", Closing Order (Dismissal) (D359), para. 5.
[156] *Habre* Ordonnance de non-lieu partiel (EAC), p. 5.
[157] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 214.
[158] Closing Order (Indictment) (D360), paras 137-154.

account to assess the gravity of the crimes, a specific number is not required[159] to establish the characterisation of most of them. The Chamber considers that a reasonable estimate of the number or the reference to "many killings" seems more adequate and that this does not preclude the conclusion that grave crimes were committed at a concrete place and at a concrete point in time.[160]

87. Whether the Co-Investigating Judges applied the appropriate standard of evidence will be examined under each ground of appeal, whenever relevant, and on a case-by-case basis.

E. The Simultaneous Issuance of Two Conflicting Orders

88. The International Co-Investigating Judge issued, on 16 August 2018, the Closing Order (Indictment) sending AO An to trial,[161] while the National Co-Investigating Judge issued, on the same day, the Closing Order (Dismissal) dismissing all charges against him.[162] As part of its appellate jurisdiction,[163] the Pre-Trial Chamber will determine whether the unprecedented simultaneous issuance of two separate and opposing Closing Orders in one single case is compliant with the ECCC legal framework.

89. For the reasons set out hereafter, the Pre-Trial Chamber finds that, by issuing split Closing Orders, the Co-Investigating Judges violated the ECCC legal framework, derogated from their highest duties and created an unprecedented legal predicament undermining the very foundations of their judicial office. The Chamber addresses in separate sections the impact of

---

[159] *See, e.g.*, ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Judgement, Trial Chamber II, 31 July 2003 ("*Stakić* Trial Judgement (ICTY)"), para. 201 (The Trial Chamber found that "it was not and will never be possible to identify case by case the direct perpetrator and his victim(s). This however is no impediment precluding the Trial Chamber from coming to the conclusion that killings were committed at a concrete place and at a concrete point in time despite not knowing the exact numbers of victims"); *See also* ICTR, *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, Judgment, Trial Chamber II, 22 January 2004, para. 698; ICTR, *Prosecutor v. Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, Trial Chamber I, 21 February 2003, paras 631, 635; *See* ICTR, *Prosecutor v. Akayesu*, ICTR-96-40-T, Judgment, Trial Chamber I, 2 September 1998 ("*Akayesu* Trial Judgment (ICTR)"), para. 282.

[160] *Stakić* Trial Judgement (ICTY), para. 201.

[161] Closing Order (Indictment) (D360).

[162] Closing Order (Dismissal) (D359).

[163] The Pre-Trial Chamber endorses the ICTY Appeals Chamber's conclusion that appellate jurisdiction comprises, under international law, the legal power "'to state the law' [...] in an authoritative and final manner" (ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 10; *see also* para. 11). Within the ECCC legal system, the Pre-Trial Chamber exercises this function as final arbiter of the law applying to the investigation stage of proceedings.

such fundamental errors on the legal status of each Closing Order[164] and the review powers it must exercise in these exceptional circumstances[165] to restore legality and remedy the distortion of procedures caused by the Co-Investigating Judges' unlawful actions in this case.

90. In this section, the Pre-Trial Chamber examines: (i) the law generally governing the issue at stake; (ii) the Co-Investigating Judges' flawed justification for issuing split Closing Orders; and (iii) how the disagreement settlement procedure should have been used in this case.

1. Applicable Law

91. First, the Pre-Trial Chamber notes the importance of the joint responsibility of the two Co-Investigating Judges in conducting judicial investigations at the ECCC, as Article 14*new* (1) of the ECCC Law, in relevant part, states that "[t]he judges shall attempt to achieve unanimity in their decisions." More specifically, Article 23*new* of the ECCC Law provides:

> All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, [...], and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

92. Regarding the issuance of closing orders by the Co-Investigating Judges, the Pre-Trial Chamber observes that Internal Rule 67, in relevant part, provides:

> Rule 67. Closing Orders by the Co-Investigating Judges
>
> (1) 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. The Co-Investigating Judges are not bound by the Co-Prosecutors' submissions.
>
> (2) The Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.
>
> (3) The Co-Investigating Judges shall issue a Dismissal Order in the following circumstances:
>
> (a) The acts in question do not amount to crimes within the jurisdiction of the

[164] *See infra* paras 170-302 (National Judges' Opinion) and paras 304-329 (International Judges' Opinion, Ground 1).
[165] *See supra* paras 31-54.

ECCC;

(b) The perpetrators of the acts have not been identified; or

(c) There is not sufficient evidence against the Charged Person or persons of the charges.

(4) The Closing Order shall state the reasons for the decision.

93. With respect to any disagreements between the Co-Prosecutors and the Co-Investigating Judges, the Pre-Trial Chamber observes that Articles 5(1), (4) and 7 of the ECCC Agreement, in relevant part, state:

Article 5: Investigating judges

(1) There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.

(4) The co-investigating judges shall cooperate with a view to arriving at a common approach to investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

Article 7: Settlement of differences between the co-investigating judges or the co-prosecutors

(1) In case the co-investigating judges or the co-prosecutors have made a request in accordance with Article 5, paragraph 4 [...], they shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

(2) The difference shall be settled forthwith by a Pre-Trial Chamber of five judges [...].

(3) Upon receipt of the statements referred to in paragraph 1, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

(4) A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.

94. Internal Rule 72 details the specifics of the disagreement settlement procedures as follows:

Rule 72. Settlement of Disagreements between the Co-Investigating Judges

(1) In the event of disagreement between the Co-Investigating Judges, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges.

(2) Within 30 (thirty) days, either Co-Investigating Judges may bring the disagreement before the Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Chamber and communicate the statements to its judges, with a copy to the other Co-Investigating Judge. [...] The written statement of the facts and reasons for the disagreement shall not be placed on the case file, except in cases [where the disagreement relates to a decision against which a party to the proceedings would have the right to appeal to the Chamber under these IRs]. The Greffier of the Co-Investigating Judges shall forward a copy of the case file to the Chamber immediately.

(3) Throughout this dispute settlement period, the Co-Investigating Judges shall continue to seek consensus. However, the action or decision which is the subject of the disagreement shall be executed, except for disagreements concerning:

a) any decision that would be open to appeal by the Charged Person or a Civil Party under these IRs;

b) notification of charges; or

c) an Arrest and Detention Order,

in which case, no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Chamber has been seised and the dispute settlement procedure has been completed, as appropriate.

(4) the Chamber shall settle the disagreement forthwith, as follows: [...]

d) A decision of the Chamber shall require the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Chamber, in accordance with Article 23 new of the ECCC law, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed. [...].

95. Lastly, the Pre-Trial Chamber notes that Article 12(1) of the Agreement and Internal Rule 2 mandate that the procedures before the ECCC must be in accordance with both Cambodian law and international standards. In this respect, Article 1(1) of the Cambodian Code of Criminal Procedure, in relevant part, provides that this Code "aims at defining the rules to be strictly followed and applied in order to clearly determine the existence of any criminal offense." Articles 20*new*, 23*new*, 33*new* and 37*new* of the ECCC Law also make it clear that

ECCC organs must follow all existing procedures in force. The Chamber finds that these provisions aim to guarantee the legality, fairness and effectiveness of ECCC proceedings.

2. The Co-Investigating Judges' Reasons for Issuing Split Closing Orders

96. The Pre-Trial Chamber notes that the Case 004/2 procedure has been subject to a number of confidential disagreements between the Co-Investigating Judges.[166] None of these disagreements were brought before the Chamber. As noted above, on 16 August 2018, the Co-Investigating Judges simultaneously issued two separate and conflicting Closing Orders. The filing of split Closing Orders evidences unresolved disagreements between the Judges over the issue of whether AO An falls within the ECCC's personal jurisdiction.

97. The reasons for the Co-Investigating Judges' issuance of separate and opposing Closing Orders are stated in two of their previous decisions, allowing the Co-Prosecutors to file two separate Final Submissions ("Decision on Disclosure concerning Disagreements")[167] and finding that the applicable law permits such filing ("Decision on Request for Clarification").[168] The Pre-Trial Chamber deems it useful to reproduce large excerpts of these decisions, starting with the Decision on Disclosure concerning Disagreements:

> 14. To pre-empt any future litigation of this point and in order to save the Parties time, we hereby state that we consider separate and opposing closing orders as generally permitted under the applicable law, for very much the same reasons which we found regarding opposing final submissions. [...]
>
> 15. We are aware of the problem this raises at the appeals stage. Internal Rule 77(13) only addresses the scenario of a joint dismissal or indictment; not that of split closing orders. However, this is no justification to argue that therefore split closing orders are prohibited. On the contrary, the Supreme Court Chamber in its appeal judgement in Case 001 explicitly acknowledges the scenario of the [Co-Investigating Judges] reasonably disagreeing over personal jurisdiction, for example, and that in the context of the disagreement procedure the investigation shall proceed.

---

[166] The Pre-Trial Chamber notes that the Co-Investigating Judges do not refer to the same disagreements in their respective Orders. *See* Closing Order (Indictment) (D360), para. 1 ("Disagreements between the CIJs in this case were registered on 22 February 2013, 5 April 2013, 22 January 2015, 16 January 2017, and 12 July 2018."). *See also* Closing Order (Dismissal) (D359), para. 22 ("On 9 June 2010, the CIJs registered a disagreement over the manner and approach of the judicial investigation."), para. 45 ("On 3 December 2012, the CIJs disagreed over a rogatory letter and response to the Co-Prosecutors' investigative requests."), para. 47 ("On 5 April 2013, the CIJs disagreed over the numbering of documents placed on the case file."), para. 49 ("On 1 December 2014, the CIJs disagreed over the conduct of witness confrontations."), para. 50 ("On 22 January 2015, the CIJs disagreed over the notification of charges to AO An.").

[167] Closing Order (Indictment) (D360), para. 14 *referring to* Decision on Disclosure concerning Disagreements (D355/1), paras 13-16.

[168] Case 004/2, Decision on AO An's Request for Clarification, 5 September 2017, D353/1 ("Decision on Request for Clarification (D353/1)").

> 16. We are of the view that the investigation stage ends at the very latest with the decision of the [Pre-Trial Chamber] on any appeal against the closing order. If there were to be no supermajority in the [Pre-Trial Chamber] for upholding one of the closing orders, both would appear to stand under the application of Internal Rule 77(13) [...].[169]

In their Decision on Request for Clarification, the Co-Investigating Judges stated with respect to the disagreement procedure:

> 23. As the filing of two final submissions evidences a disagreement between the Co-Prosecutors, the question of whether the Co-Prosecutors are obliged to use the full complement of disagreement settlement measures, in other words, whether the mechanisms in Internal Rule 71 are mandatory or discretionary, does [...] fall within [the Co-investigating Judges'] remit, as it relates to the admissibility of the final submissions. [...]
>
> 27. [...] We [...] consider that it is clear, [...], that under the ECCC Law and the Internal Rules the recording of disagreements between the Co-Prosecutors is discretionary. Therefore we do not consider that the Co-Prosecutors have an obligation to use the full complement of settlement measures [...].[170]

Regarding the lawfulness of filing multiple final submissions, the Co-Investigating Judges stated in the same Decision:

> 32. While we agree [...] that one reading of Internal Rule 66(5) envisages one final submission, the language does not require a joint final submission, nor does it exclude the filing of separate submissions [...]. While the Co-Prosecutors are required to work together to prepare indictments, that they may disagree is recognised in the [ECCC Agreement] which requires them to "cooperate with a view to arriving at a common approach to the prosecution" and, of course, in the fact that a disagreement resolution mechanism is provided for, which, in the [ECCC Agreement], explicitly envisages a disagreement on "whether to proceed with a prosecution".
>
> 33. A further consideration is that [...] [the Co-Investigating Judges] are not bound to accept the contents of any final submissions [...]. [...]
>
> 34. Regarding the submission that filing two final submissions effectively usurps the [Pre-Trial Chamber]'s "exclusive authority" to settle disputes [...], we do not consider that seising the [Pre-Trial Chamber] is mandatory, and accordingly, there is no exclusive authority to be usurped.[171]

98. At the outset, the Pre-Trial Chamber notes that the Co-Prosecutors' filing of two separate Final Submissions did not prevent the Co-Investigating Judges' issuance of a single

---

[169] Decision on Disclosure concerning Disagreements (D355/1), paras 14-16 (footnotes omitted).
[170] Decision on Request for Clarification (D353/1), paras 23, 27.
[171] Decision on Request for Clarification (D353/1), paras 32-34 (emphasis and footnotes omitted).

Closing Order in Case 004/1.[172] In this regard, the Chamber stresses as a preliminary matter the fundamental differences that exist, in function and authority, between the Parties' submissions and the judicial decisions issued by Judges, such as closing orders. Independent of the question of whether the filing of separate and opposing Final Submissions by the Co-Prosecutors is permitted within the ECCC legal system, the Pre-Trial Chamber finds that the Co-Investigating Judges committed a gross error of law in this case by finding that the ECCC legal framework authorises the issuance of separate and opposing Closing Orders.

99. Moreover, while one must presume that the Co-Investigating Judges may have committed this legal error in good faith, the Pre-Trial Chamber is unable to exclude that the Co-Investigating Judges may have wilfully intended to circumvent the application of the law in this case and create the current procedural stalemate. Indeed, it clearly appears from their above decisions that they deliberately ensured that any resolution of the matters over which they disagreed would have to be addressed only as part of appellate proceedings before the Pre-Trial Chamber rather than through the procedure specifically intended for by the ECCC legal framework to conclusively settle disagreements between the Co-Investigating Judges. The Co-Investigating Judges were aware of the difficulties their actions would cause.[173] Yet, they made sure to shield their relevant disagreements from the effective legal resolution mechanism prescribed by the ECCC Agreement, ECCC Law, and Internal Rules.

100. The Pre-Trial Chamber unequivocally denounces and condemns this grave violation of the ECCC legal system. The Chamber will now state the correct applicable law, prior to considering, in another section, the necessary practical implications of the Co-Investigating Judges' violation of the ECCC legal framework.

3. Discussion

101. Just like in any other legal system, the law governing the ECCC proceedings does not resolve all the legal uncertainties that may arise regarding procedural and substantive matters. Yet, this law contemplates that disagreements may arise in the ECCC hybrid context and enacts procedures to handle and/or settle such disagreement so as to avoid any procedural stalemates. Under the ECCC Agreement, the primary function entrusted to the Pre-Trial Chamber is

[172] In this regard, the Pre-Trial Chamber nevertheless considers that the Co-Prosecutors' issuance of two Final Submissions was indisputably the first procedural anomaly committed in the closing phase of the investigation.
[173] Decision on Disclosure concerning Disagreements (D355/1), para 15. *See also* para. 16.

precisely to provide for a mechanism to conclusively resolve disagreements between the Co-Prosecutors and between the Co-Investigating Judges. The Co-Investigating Judges in this case decided to evade this mechanism and, instead, issued separate and opposing Closing Orders with full knowledge of the problems that such action would cause within the ECCC legal system.

102. The Pre-Trial Chamber must determine whether this course of action complied with the ECCC legal framework. For the reasons expressed hereunder, the Chamber finds that the Co-Investigating Judges' issuance of split Closing Orders violated the very foundations of the ECCC legal system. The Chamber will discuss (a) the fundamental principles governing disagreements between the Co-Investigating Judges and (b) the existing procedures to settle disagreements between these Judges, and (c) will provide its conclusion on the Co-Investigating Judges' simultaneous issuance of two conflicting Closing Orders in this case.

a. Fundamental Principles Governing Disagreements between the Co-Investigating Judges

103. First, the Pre-Trial Chamber notes that the joint conduct of investigations by the National and International Co-Investigating Judges is a primary fundamental legal principle at the ECCC, as Article 5(1) of the ECCC Agreement states: "There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations."

104. The ECCC Law strengthens this fundamental principle by providing that "[t]he judges shall attempt to achieve unanimity in their decisions."[174] More significantly, Article 23*new* of the ECCC Law not only reiterates this principle, but also provides further indications on how the principle is to be implemented by explicitly requiring that "[a]ll investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force."[175] The Chamber finds that this provision means that the Co-Investigating Judges must conduct the investigations jointly and in accordance with the legal provisions applicable at the ECCC. The Chamber further notes that this provision mirrors Article 1 of the Cambodian Code of Criminal Procedure, providing that this Code "aims at defining the rules to be strictly

[174] ECCC Law, Art. 14(1).
[175] ECCC Law, Art. 23 (emphasis added).

followed and applied in order to clearly determine the existence of a criminal offense."[176]

105. The Pre-Trial Chamber previously recognised, as a matter of principle, the ability and validity of one Co-Investigating Judge to act alone, especially where his colleague has retreated from continuing the investigation.[177] The Chamber stated, with the utmost clarity, that "[t]he Agreement, the ECCC Law and the Internal Rules provide that one Co-Investigating Judge can validly act alone if the requirements of the disagreement procedure have been complied with."[178] The Chamber added that the "[ECCC] framework contains sufficient checks and balances to ensure that unilateral actions are taken in accordance with the law."[179]

106. In another ruling, the Chamber specified that "[t]he Co-Investigating Judges are under no obligation to seise the Pre-Trial Chamber when they do not agree on an issue before them" insofar as the Judges agree on a course of action that is "coherent" with the "default position" intrinsic to the ECCC legal framework, "being that the 'investigation shall proceed'".[180]

107. In this respect, the Pre-Trial Chamber notes that Article 23*new* of the ECCC Law reaffirms and specifies Article 5(4) of the ECCC Agreement, by stating that "[i]n the event of disagreement between the Co-Investigating Judges, [...] [t]he investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled". Paragraph (4)(d) of Internal Rule 72, which governs the settlement of disagreements between the Co-Investigating Judges by the Pre-Trial Chamber, reinforces this fundamental position by stating:

> (4) The Chamber shall settle the disagreement forthwith, as follows: [...]
>
> d) A decision of the Chamber shall require the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Chamber,

---

[176] Cambodian Code of Criminal Procedure (2007), Art. 1.
[177] Case 004/1 (PTC20), Decision on IM Chaem's Appeal against the International Co-Investigating Judge's Decision on Her Motion to Reconsider and Vacate Her Summons Dated 29 July 2014, 9 December 2014, D236/1/1/8 ("Case 004/1 Decision on IM Chaem's Appeal regarding Summons (D236/1/1/8)"), para. 30 ("the applicable rules are clear that a Co-Investigating Judge can act alone if the disagreement procedure is followed"). *See also* Case 004 (PTC09), Decision on IM Cheam's Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 15 August 2014, A122/6.1/3 ("Case 004 Decision on the Request to Stay the Execution (A122/6.1/3)"), para. 14.
[178] Case 004 (PTC16), Decision on TA An's Appeal against the Decision Rejecting his Request for Information concerning the Co-Investigating Judges' Disagreement of 5 April 2013, 22 January 2015, D208/1/1/2 ("Decision on AO An's Appeal of Rejection for Information (D208/1/1/2)"), para. 11. *See* Case 004 Decision on the Request to Stay the Execution (A122/6.1/3), para. 14; Case 004/1 Decision on IM Chaem's Appeal regarding Summons (D236/1/1/8), para. 24. *See also* Case 003 Considerations on Charging *In Absentia* (D128/1/9), para. 34.
[179] Case 004/1 Decision on IM Chaem's Appeal regarding Summons (D236/1/1/8), para. 31; Case 003 Considerations on Charging *In Absentia* (D128/1/9), para. 34.
[180] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 274.

> in accordance with Article 23 new of the ECCC law, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed. [...].

108. In this case, the Chamber must specify whether these legal principles permitted the Co-Investigating Judges to issue split Closing Orders under Internal Rule 67 instead of referring the matters over which they disagreed to the Pre-Trial Chamber pursuant to Internal Rule 72.

b. Settlement of Disagreements between the Co-Investigating Judges

109. At the outset, the Chamber considers that the issue of whether the Co-Investigating Judges are obliged to refer their disagreement to the Pre-Trial Chamber under Internal Rule 72 is governed by the overriding principle that ECCC proceedings must comply with the legality, fairness and effectiveness requirements under the ECCC legal framework. In this case, the requirement of effective criminal justice is worthy of particular attention by this Chamber.

110. The Pre-Trial Chamber has previously acknowledged that, by creating the ECCC, the Royal Government of Cambodia implemented at least part of its international law obligations to investigate and prosecute the Khmer Rouge-era crimes.[181] Both the Cambodian law and the international law applying to the ECCC require that the efforts to investigate and prosecute those crimes be genuine, meaning that ECCC organs must ensure the effective investigation and prosecution of crimes falling within the ECCC's jurisdiction by complying with all existing procedures in force.

111. One way in which the Royal Government of Cambodia and the United Nations secured effective justice in the ECCC context was by making sure that procedures were available not only to handle disagreements arising in the course of investigations and prosecutions, but also to conclusively resolve such disagreements in order to avoid procedural stalemates that would, *inter alia*, hamper the effectiveness of proceedings. These procedures are underlined and ultimately governed by the default position prescribed, *inter alia*, by Article 5(4) of the ECCC Agreement, unambiguously providing that when "the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests [...] that the difference shall be settled".

112. In this case, the Chamber considers that the issue of whether the Co-Investigating

[181] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 75.

Judges had the prerogative to issue split Closing Orders instead of referring their disagreement to the Pre-Trial Chamber, depends on whether their failure to follow the disagreement settlement procedure provided for by Internal Rule 72 has circumvented the practical effect of the default position underlying the whole ECCC legal system. In this respect, the Chamber stresses that a principle as fundamental and determinative as the default position cannot be overridden or deprived of its fullest weight and effect by convoluted interpretative constructions, taking advantage of possible ambiguities in the ECCC Law and Internal Rules to render this core principle of the ECCC Agreement meaningless. Concluding otherwise would lead to a manifestly unreasonable legal result, violating both Cambodian law and international law.

113. In light of the foregoing, the Pre-Trial Chamber will outline the diverse array of procedures available to the Co-Investigating Judges for handling and solving their disagreements in compliance with the ECCC legal framework. In this respect, the nature and severity of the disagreement between the Co-Investigating Judges should inform the most appropriate procedure to be followed, depending on the particular circumstances of each case. Hence, the courses of action available may range from the tacit toleration of an act or decision taken by the other Co-Investigating Judge, to the registration of a disagreement, or referral to seek the formal annulment of a contested act or decision in accordance with Internal Rule 72.

114. In any of these situations, the Chamber stresses that the Co-Investigating Judges' actions must be, at all times, within their individual capacity and performed in accordance with the cooperation principle stipulated by Article 5(4) of the ECCC Agreement, which also reflects the equal status of the National and the International Co-Investigating Judges within the ECCC hybrid system.[182] Further, the Chamber emphasises that the Co-Investigating Judges must, under the ECCC legal framework, continue to seek a common position during the disagreement process. The ECCC legal system has been carefully designed and is structured to ensure the joint conduct and execution of judicial investigations by the two Co-Investigating Judges. These Judges may thus reach an agreement at any stage of the investigation of cases of which they are seised. The crystallisation of any disagreements between them about such cases is also permissible, but only insofar as it complies with the existing procedures in force and remains coherent with the default position that is intrinsic to the ECCC legal system and which provides

[182] Agreement, Art. 5(1) combined with ECCC Law, Art. 27*new*.

an effective way out of any possible procedural impasses.

115. Specifically, the Chamber finds for instance that, under Article 23*new*(3) of the ECCC Law, stating that "[t]he investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions",[183] a Co-Investigating Judge may validly allow the action of his colleague to be carried out by not associating with such action while not registering any disagreement, thus allowing the investigation to proceed.

116. Where the disagreement concerns a serious issue, such as a matter that is at the core of the investigation, a Co-Investigating Judge may raise an objection against his colleague's action or decision by formally registering a disagreement.[184] The Chamber finds that the formalisation of disagreements pursuant to Article 23*new*(3) of the ECCC Law and Internal Rule 72(1), or the reaching of consensus over matters at issue, is recognised and permitted in the ECCC legal system. In such cases, "the Co-Investigating Judges, either one or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges" pursuant to Internal Rule 72(1). The Chamber considers that the disagreement is then contained between the Co-Investigating Judges and remains confidential. The Chamber further notes that Article 5(4) of the ECCC Agreement, Article 23*new* of the ECCC Law and Internal Rule 72(3) clearly indicate that, in such case, one Co-Investigating Judge may act without the consent of the other Judge where neither of them brings such formalised disagreement before the Pre-Trial Chamber within the prescribed time limit.[185] This Co-Investigating Judge may then proceed with the contested decision once the required time limit has elapsed.[186]

117. The Chamber notes that when the disagreement is so critical that one of the Co-Investigating Judges wishes to halt the implementation of his colleague's decision, this Judge's only available legal recourse is to bring the disagreement before the Pre-Trial Chamber, which is explicitly and specifically empowered to settle the differences between the Co-Investigating Judges. To trigger this effective disagreement resolution mechanism, the Co-Investigating

[183] ECCC Law, Art. 23*new*, para. 3.
[184] ECCC Law, Art. 23*new*, para. 3; Internal Rule 72(1) ("In the event of disagreement between the Co-Investigating Judges, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges").
[185] Case 004/1 Decision on IM Chaem's Appeal regarding Summons (D236/1/1/8), paras 24, 29-30.
[186] Case 004/1 Decision on IM Chaem's Appeal regarding Summons (D236/1/1/8), paras 24, 29-30.

Judge(s) must submit, in writing, a statement of the facts and reasons for the disagreement.[187] The ECCC's applicable laws endow the Pre-Trial Chamber with the necessary power to conclusively resolve the matters in dispute between the two equal Co-Investigating Judges and determine whether or not the disputed decision should be carried out. In cases where the Pre-Trial Chamber cannot achieve the supermajority vote to conclusively settle the disagreement, the ECCC legal framework provides that the matter is then resolved by the default position, stipulating that the investigation must proceed.[188]

118. The Chamber reiterates that the Co-Investigating Judges are obliged to continue to seek a common legal reasoning or mutually agreed course of action during the disagreement settlement period.[189] The use of the present tense in Internal Rule 72(3) leaves no doubt in this respect and clearly indicates that the Co-Investigating Judges have a reciprocal obligation in this sense under the ECCC legal framework.[190]

119. Conversely, the law applying at the ECCC clearly contemplates that, despite their genuine efforts to reach a compromise or find a consensus, the two equal National and International Co-Investigating Judges may still be unable to agree on a common position. The Chamber considers that, in such a case, and where the matter in dispute or the prolonged disagreement over an issue jeopardises the effectiveness of the judicial investigation, the ECCC legal framework does not permit that the disagreement between the Co-Investigating Judges be entrenched or be shielded from the dispute resolution mechanism. The Chamber therefore

---

[187] ECCC Law, Art. 23*new*, para. 4; Internal Rule 72(2).

[188] This is exactly what has been done in the case at hand when the International Co-Prosecutor raised the disagreement (*see* International Co-Prosecutor's Written Statement for Disagreement (D1). *See also* Disagreement 001/18-11-2008-ECCC/PTC, Corrigendum to the Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71 and Annex II, 31 August 2009, D1/1.2, p. 2. In this regard, the Chamber notes an error in the National Co-Investigating Judge's Dismissal Order, erroneously stating that the National Co-Prosecutor registered a disagreement to be brought before the Pre-Trial Chamber. *See* Closing Order (Dismissal) (D359), para. 15.

[189] Internal Rule 72(3).

[190] Internal Rule 72(3) ("3. Throughout this dispute settlement period, the Co-Investigating Judges shall continue to seek consensus. However the action or decision which is the subject of the disagreement shall be executed, except for disagreements concerning: a) any decision that would be open to appeal by the Charged Person or a Civil Party under these IRs; b) notification of charges; or c) an Arrest and Detention Order, in which case, no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Chamber has been seised and the dispute settlement procedure has been completed, as appropriate."); Règlement intérieur 72(3) ("3. Au cours de la période de règlement du désaccord, les co-juges d'instruction recherchent un consensus. Cependant, l'acte ou la décision qui a fait l'objet du différend est exécuté, sauf en cas de désaccord concernant : a) Une décision susceptible d'appel par la personne mise en examen ou la partie civile en application de ce Règlement ; b) La notification des chefs d'inculpation ; c) La délivrance d'un mandat d'arrêt, auquel cas, aucun acte relatif à la question litigieuse ne peut être accompli tant que la Chambre préliminaire n'a pas résolue le désaccord ou, si elle n'a pas été saisie, avant un délai de 30 (trente) jours, à moins que les co-juges d'instruction ne parviennent à un consensus").

finds that, where the existing disagreement settlement procedure in force emerges as the only remaining mechanism available to the Co-Investigating Judges to prevent the occurrence of a procedural stalemate and guarantee the legality, fairness and effectiveness of the judicial investigation, the Co-Investigating Judges have the obligation to trigger this mechanism by referring their disagreement to the Pre-Trial Chamber.

c. Conclusion regarding the Issuance of Split Closing Orders

120. In light of the above, the Pre-Trial Chamber finds that, in the case of disagreements related to matters that must be determined by a closing order under Internal Rule 67, the ECCC legal framework allows only two courses of action pursuant to Article 23*new* of the ECCC Law and Internal Rule 72(3). The Co-Investigating Judges are obliged either to reach a tacit or express consensus on those matters, or to refer their disagreement on such matters to the Pre-Trial Chamber. Further, while the Co-Investigating Judges enjoy discretion to consent, even implicitly, to acts in dispute, the formal referral of their disagreements to the Chamber becomes mandatory when they fail to reach, within a reasonable time, a common position on any matter that impacts the closing order, as they have in such case no other practical and legal means available to settle their dispute and avoid a procedural stalemate.

121. The Pre-Trial Chamber finds that the legal texts governing the ECCC proceedings, when seen in this light, contain no significant ambiguity. Internal Rule 67(1) clearly stipulates that "[t]he Co-Investigating Judges *shall conclude* the investigation by issuing *a* Closing Order, *either* indicting a Charged Person [...], *or* dismissing the case." The Glossary of the Internal Rules adds that a "Closing Order refers to *the* final order made by the Co-Investigating Judges or the Pre-Trial Chamber at the end of the judicial investigation, *whether* Indictment *or* Dismissal Order".[191] These provisions make it clear that a closing order of the Co-Investigating Judge is a single decision and offer no legal bases to contend that the ECCC legal framework allows the issuance of split closing orders. As such, the interpretative clause of Internal Rule 1(2) – indicating that, in the Rules, the singular includes the plural, and a reference to the Co-Investigating Judges "includes both of them acting jointly and each of them acting individually" – does not offer a sufficient legal basis to override or undermine core principles of the ECCC Agreement, such as the default position, or to claim a power to act when the

[191] Internal Rules, Glossary, p. 83 (emphasis added) *contra* International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 6-8. The argumentation related to translation or so-called specificities of the Khmer language submitted by the International Co-Prosecutor is, in the Chamber's view, vain in that respect.

effects of the exercise of such power would conflict with those principles. The rule on strict construction of penal statutes further prevents any arbitrary interpretations in this sense.

122. The Pre-Trial Chamber therefore rejects the Co-Investigating Judges' reasoning on the purported legal permissibility of issuing two separate and opposing closing orders at the ECCC.[192] In addition to the manifest errors of law upon which their reasoning is based, the Chamber finds that the Judges also conflated the distinctive character of a judicial decision with the filing of Parties' submissions. The judicial duty to pronounce, based on the law, a decision on a matter in dispute (*jurisdictio*) lies at the heart of a judge's highest responsibility and function.[193] As such, pronouncements adjudicating and settling matters in dispute enjoy a legal obligatory nature and effect (*imperium*), unlike the submissions made by parties.[194] However, the judge cannot refrain from adjudicating the matter before him or her and from arriving at a conclusion that effectively decides this matter. The Pre-Trial Chamber notes that, at the ECCC, the Co-Investigating Judges *jointly* assume such judicial office. When their disagreements prevent them from arriving at a common final determination of a case of which they are seised, the Judges must still perform their judicial duty and function by following the procedures available within the ECCC legal system to settle disagreements between them and ensure that a final determination of the matters falling within their jurisdiction is attained.

123. In conclusion, the Pre-Trial Chamber stresses that the errors committed by the Co-Investigating Judges in this case undermine the very foundations of the hybrid system and proper functioning of the ECCC. Despite the crucial and sensitive nature of the matter at stake, the Co-Investigating Judges have allowed themselves to issue the split Closing Orders with remarkably minimal reasoning to justify their action, recalling simply one of their prior

---

[192] *See* Closing Order (Indictment) (D360), para. 14 *referring to* Decision on Disclosure concerning Disagreements (D355/1), paras 13-16. *See also* Decision on Request for Clarification (D353/1), paras 32-37, 42.
[193] The Pre-Trial Chamber notes the three essential elements of the definition of a court's jurisdiction: (i) the dispute; (ii) the obligatory nature of the pronouncement; and (iii) the basis of the law, on which such nature of the pronouncement derives from. The Chamber particularly notes that the obligatory nature of the pronouncement is a consequence of the binding nature of the long-standing view of judge as a "mouth that speaks the words of the law". Robert KOLB, "Le degré d'internationalisation des tribunaux pénaux internationalisés", in Hervé ASCENSIO, Elisabeth LAMBERT-ABDELGAWAD and Jean-Marc SOREL (eds), *Les juridictions pénales internationalisée (Cambodge, Kosovo, Sierra Leone, Timor Leste)* (Société de Législation Comparée, 2006) ("KOLB, *Le degré d'internationalisation des tribunaux pénaux internationalisés*"), p. 48 ("On s'accorde pour dire qu'une juridiction est un organe qui tranche des différends par des décisions obligatoires fondées sur l' application du droit. En somme, il y a trois éléments qui sont censés essentiels dans la définition d'une juridiction: (1) le différend; (2) l'obligatoriété du prononcé; (3) le fait de statuer sur la base du droit").
[194] KOLB, *Le degré d'internationalisation des tribunaux pénaux internationalisés*, p. 48. It further reads: "le prononcé n'est obligatoire que parce qu'il dit le droit (qui est obligatoire) et il ne l'est que dans la mesure où il dit le droit" (the pronouncement is not only obligatory in nature because it states the law (which is binding) and it is so to the extent that it enunciates the law).

decisions.[195] The Chamber finds it especially disturbing that the split Closing Orders were issued on the same day, in one language only, with an explicit declaration by the two Judges that they agreed on the unlawful issuance of separate and conflicting Closing Orders. The Chamber considers that the Co-Investigating Judges' malpractice has in this case jeopardised the whole legal system upheld by the Royal Government of Cambodia and the United Nations. It is astonishing to observe that the Judges were fully "aware of the problem" that the issuance of split Closing Orders would cause, notably on appeal.[196] Yet, they nonetheless decided to shield their disagreements from the most effective dispute settlement mechanism available under the ECCC legal framework to ensure a way out of procedural stalemates. More than a blatant legal error, violating the most fundamental principles of the ECCC legal system, the Pre-Trial Chamber considers that the Co-Investigating Judges' unlawful actions may well amount to a denial of justice, especially since this Chamber is unable to exclude that the Co-Investigating Judges may have wilfully intended to defeat the purpose of the default position in this case and deliberately sought to frustrate the authority of the Pre-Trial Chamber.

124. After ten years of investigation into crimes among the most atrocious and brutal committed during the twentieth century, the Pre-Trial Chamber strongly deplores and condemns the unprecedented legal predicament which the Co-Investigating Judges' unlawful actions have precipitated upon the current ECCC proceeding. The Chamber notes with regret that never, to its knowledge, has there been any criminal case in the history of any national or international legal system that closed with the simultaneous issuance of two contrary decisions emanating from one single judicial office. The Chamber specifies in a distinct section the exceptional review powers[197] it is called upon to exercise in the face of such a grave disregard by the Co-Investigating Judges of the core principles underlying the ECCC legal system and failure to uphold the paramount duties entrusted to their Office under the ECCC legal framework. The Chamber also separately clarifies the impact that these fundamental errors have on the legal status of each Closing Order.[198]

---

[195] *See* Closing Order (Indictment) (D360), para. 14 *referring to* Decision on Disclosure concerning Disagreements (D355/1), paras 13-16. *See also* Decision on Request for Clarification (D353/1), paras 32-37, 42.
[196] Decision on Disclosure concerning Disagreements (D355/1), para. 15. *See also* para. 16.
[197] *See supra* paras 31-54.
[198] *See infra* paras 170-302 (National Judges' Opinion) and paras 304-329 (International Judges' Opinion, Ground 1).

V. ADMISSIBILITY

FORMAL ADMISSIBILITY

125. Consistent with Internal Rule 75 governing the required method and timelines for the filing of appeals before the Pre-Trial Chamber, the three Appeals against the two conflicting Closing Orders are formally admissible because the Notices of Appeal and Submissions were lodged within requisite time limits and pursuant to instructions.[199]

THE NATIONAL CO-PROSECUTOR'S APPEAL

126. The National Co-Prosecutor appeals the International Co-Investigating Judge's Closing Order (Indictment) under Internal Rules 67(5), 73(a) and 74(2).[200] The International Co-Prosecutor does not challenge the admissibility of this Appeal.[201]

127. The Chamber finds that pursuant to Internal Rule 67(5) and Internal Rule 74(2), the Closing Order (Indictment) is subject to appeal because the Co-Prosecutors may appeal against all orders by the Co-Investigating Judges.[202] Accordingly, the National Co-Prosecutor's Appeal is admissible.

THE INTERNATIONAL CO-PROSECUTOR'S APPEAL

128. The International Co-Prosecutor appeals the National Co-Investigating Judge's Closing Order (Dismissal) under Internal Rules 67(5) and 74(2).[203] The Co-Lawyers do not challenge the admissibility of this Appeal.[204]

129. The Chamber finds that pursuant to Internal Rule 67(5) and Internal Rule 74(2), the Closing Order (Dismissal) is subject to appeal because the Co-Prosecutors may appeal against

[199] Internal Rule 75; Decision on Extension for Notices of Appeal (D359/2); Decision on Time and Page Extensions for Appeal Submissions (D360/7); Decision on Time and Page Extensions for Responses and Replies (D359/3/3 & D360/5/3).
[200] National Co-Prosecutor's Appeal (D360/8/1), para. 6.
[201] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10).
[202] Internal Rules 67(5) and 74(2).
[203] International Co-Prosecutor's Appeal (D359/3/1), paras 4, 6.
[204] AO An's Response (D359/3/4).

all orders by the Co-Investigating Judges.[205] Accordingly, the International Co-Prosecutor's Appeal is admissible.

THE CO-LAWYERS' APPEAL

1. Submissions

130. The Co-Lawyers appeal the International Co-Investigating Judge's Closing Order (Indictment) pursuant to Internal Rules 67(5), 74(3)(a) and 21.[206] The Co-Lawyers allege three principle bases on which the Pre-Trial Chamber should find each ground admissible on appeal: (i) personal jurisdiction; (ii) subject matter jurisdiction; and (iii) fundamental principles of fair trial—including raising additional arguments on jurisdiction at the Appeals Hearing.[207] The International Co-Prosecutor does not challenge the admissibility of AO An's Appeal.[208]

131. First, concerning personal jurisdiction, the Co-Lawyers argue that Grounds 1-7, 10, 12, 14 and 16-17 are admissible under Internal Rule 74(3)(a) "as valid challenges to the [International Co-Investigating Judge's] confirmation of the Court's personal jurisdiction over AO An", in light of the Pre-Trial Chamber's "broad approach" to admitting the International Co-Prosecutor's jurisdictional challenges in Case 004/1.[209] Ground 1 addresses the simultaneous issuance of two Closing Orders; Grounds 2-7 concern errors of law and fact in the determination that AO An was among those most responsible for the charged crimes; and Grounds 10, 12, 14 and 16-17 are alleged as challenges to the contours of genocide, other inhumane acts and JCE in the Closing Order (Indictment).[210] The Co-Lawyers further argue that if the International Co-Investigating Judge had correctly defined these crimes and applied the law, AO An could not be amongst those most responsible.[211]

132. Second, under subject matter jurisdiction, the Co-Lawyers contend that Grounds 8-9, 11, 13 and 15 are admissible under Internal Rule 74(3)(a) as valid challenges to the Court's subject matter jurisdiction since they relate to the "existence of certain crimes and modes of liability

---

[205] Internal Rules 67(5) and 74(2).
[206] AO An's Appeal (D360/5/1), paras 1, 11.
[207] AO An's Appeal (D360/5/1), paras 1, 11; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625520-01625523, pp. 28:18 to 31:23.
[208] International Co-Prosecutor's Response to AO An's Appeal (D360/9).
[209] AO An's Appeal (D360/5/1), paras 12-13 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 20, 24-26.
[210] AO An's Appeal (D360/5/1), para. 13.
[211] AO An's Appeal (D360/5/1), para. 13.

and whether their application in Case 004/2 violates the principle of legality."[212] They assert that such "challenges may be raised against the legal existence of crimes or modes of liability in their entirety, or the existence of their chapeau elements."[213]

133. Third, in the context of a fair trial, the Co-Lawyers aver that Ground 1 (contesting the issuance of two Closing Orders) and Ground 18 (the "cumulative impact" of reasserted fair trial violations) are admissible pursuant to a broad interpretation of Internal Rule 74(3) in light of Internal Rule 21 because they violate AO An's fair trial rights and this must be addressed before the trial phase.[214] Turning to arguments at the Hearing on Appeals, *inter alia*, the Co-Lawyers assert further that the procedural differences between the parties under Internal Rule 74—*i.e.*, that the Co-Prosecutors enjoy open appellate avenues while the Co-Lawyers are confined to a limited basis—violates the principle of equality of arms.[215] Referencing their pending Appeal, the Co-Lawyers argue that "personal jurisdiction is intrinsically connected to all aspects of individual criminal responsibility"—thus, all challenges related to individual criminal responsibility are admissible.[216] The Co-Lawyers contend that this approach is consistent with the Chamber's findings in Case 004/1.[217]

2. Discussion

134. The legal foundations governing appeals admissibility are addressed and, then, challenges to: (i) subject matter jurisdiction under Internal Rule 74; (ii) personal jurisdiction under Internal Rule 74; and (iii) exceptional fair trial issues—examined case-by-case—which

---

[212] AO An's Appeal (D360/5/1), para. 14.
[213] AO An's Appeal (D360/5/1), para. 14 *referring to* Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 45-46; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), paras 60-61.
[214] AO An's Appeal (D360/5/1), paras 15-16 *referring to* Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 48-49; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), paras 71-73; Case 002 (PTC104), Decision on KHIEU Samphan's Appeal against the Closing Order, 21 January 2011, D427/4/15 ("Case 002 Decision on Closing Order Appeals (KHIEU Samphan) (D427/4/15)"), para. 18; Case 002 (PTC38), Decision on the Appeals against the Co Investigative Judges [*sic*] Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9 ("Case 002 JCE Decision (D97/15/9)"), paras 31-34; Case 002, Decision on IENG Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6 ("Case 002 Decision on Abuse of Process (D264/2/6)"), paras 13-14; Case 004/1 Considerations on Charging *In Absentia* (D239/1/8), para. 23.
[215] Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625520-01625521, pp. 28:18 to 29:11.
[216] Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625521-01625523, pp. 29:13 to 31:23.
[217] Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625522-01625523, pp. 30:7 to 31:9.

may merit the broadening of Internal Rule 74 in light of Internal Rule 21.

135. Chapter II of the ECCC Law outlines the personal, temporal and subject matter jurisdiction of the ECCC.[218] The notion of a jurisdictional challenge is generally understood to be a plea against the Court's competence *rationae personae, materiae, temporis* and *loci*.[219] Internal Rule 74(3) affords the Charged Person or Accused with a limited right to appeal only those orders and decisions specifically enumerated under the provision.[220] Relevant to the Appeal of the Accused is Internal Rule 74(3)(a) which provides that "[t]he Charged Person or the Accused may appeal against [...] orders or decisions of the Co-Investigating Judges: a) confirming the jurisdiction of the ECCC [...]."[221] It follows from this Internal Rule 74(3)(a) that the Closing Order (Indictment) is "clearly subject to appeal on jurisdictional issues decided by the Co-Investigating Judges."[222]

136. The scope of subject matter jurisdiction at the ECCC is limited to the crimes listed under Articles 3*new* to 8 of the ECCC Law. The Supreme Court Chamber has held that "in order for charged offences and modes of participation to fall within the ECCC's subject matter jurisdiction, they must: (i) "be provided for in the [ECCC Law], explicitly or implicitly"; and (ii) have existed under Cambodian or international law between 17 April 1975 and 6 January 1979."[223]

137. Further delineating subject matter jurisdiction, the Pre-Trial Chamber recalls that appeals which:

> 1) "challenge [...] the very existence of a form of responsibility or its recognition under [...] law at the time relevant to the indictment'; or 2) argue that a mode of responsibility was 'not applicable to a specific crime' at the time relevant to the indictment; and 3) demonstrate that its 'application would infringe upon the principle of legality' raise acceptable subject matter

[218] ECCC Law, Chapter II, Arts 2*new*-8; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 63.
[219] Case 004/1 Considerations on Charging *In Absentia* (D239/1/8), para. 22.
[220] Internal Rule 74(3); Case 002 Decision on Closing Order Appeal (KHIEU Samphan) (D427/4/15), para. 14.
[221] Internal Rule 74(3)(a).
[222] Case 002 Decision on Closing Order Appeal (KHIEU Samphan) (D427/4/15), para. 14 (footnote omitted). *See also* Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 44-45; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), paras 59-60; Case 002 JCE Decision (D97/15/9), paras 19, 21.
[223] Case 001 Appeal Judgment (F28), para. 98 (footnotes omitted).

> jurisdiction challenges that may be brought in the pre-trial phase of the proceedings.[224]

138. Appeal grounds contesting substantive crimes were found to raise admissible subject matter jurisdiction challenges "where there is a challenge to the very existence in law of a crime and its elements at the time relevant to the indictment, which if applied would result in a violation of the principle of legality".[225]

139. In contrast, in delineating the boundaries of subject matter jurisdiction, the Pre-Trial Chamber held that challenges relating to the specific contours of a mode of liability or substantive crime "are matters to be addressed at trial" and, therefore, inadmissible.[226] Thus, challenges relating to whether the elements of a crime or a mode of liability actually existed in reality—as opposed to legally at the time of the alleged criminal conduct—are matters to be addressed at trial.[227] Concerning alleged defects in the form of the indictment, such issues are "clearly non-jurisdictional in nature and are therefore inadmissible at the pre-trial stage of the proceedings in light of the plain meaning of Internal Rule 74(3)(a) and Chapter II of the ECCC

---

[224] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 45; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 60; Case 002 JCE Decision (D97/15/9), paras 23-24.

[225] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 46; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 61; Case 004/2 (PTC42), Decision on AO An's Appeal against the Notification on the Interpretation of "Attack against the Civilian Population" in the Context of Crimes Against Humanity with Regard to a State's or Regime's Own Armed Forces, 30 June 2017, D347.1/1/7, para. 11. *See also* Case 002 JCE Decision (D97/15/9), para. 23; Case 003 (PTC30), Decision on MEAS Muth's Appeal against the International Co-Investigating Judge's Decision on MEAS Muth's Request for Clarification concerning Crimes Against Humanity and the Nexus with Armed Conflict, 10 April 2017, D87/2/1.7/1/1/7 ("Case 003 Decision on MEAS Muth's Appeal against the International Co-Investigating Judge's Decision concerning Nexus (D87/2/1.7/1/1/7)"), para. 12.

[226] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 45-46; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), paras 60, 62.

[227] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 45-46; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), paras 60, 62; Case 002 JCE Decision (D97/15/9), para. 23. *See also* ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004 ("*Blaškić* Appeal Judgment (ICTY)"), paras 32-42 (ascertaining the contours of the mental element of "ordering" under Article 7(1) of the Statute); ICTY, *Prosecutor v. Milutinović et al.* IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, Trial Chamber, 22 March 2006, para. 23 (discussing the Trial Chamber's jurisdiction relating to contours of JCE responsibility); ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-AR72.5, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Appeals Chamber, 6 December 1996, para. 27 (holding that any dispute as to the substance of the crimes enumerated in Articles 2, 3, 4 and 5 of the Statute is a matter for trial not for pre-trial objections); ICTY, *Prosecutor v. Furundžija*, IT-05-17/1-T, Judgement, Trial Chamber, 10 December 1998, paras 172-186 (discussing the elements required to make a finding of rape under Article 75 of the Statute); ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-T, Judgement, Trial Chamber, 22 February 2001 ("*Kunarac et al.* Trial Judgment (ICTY)"), paras 436-460 (Trial Judgment ascertaining the contours of rape as a crime against humanity under Article 5(g) of the Statute).

[L]aw."[228] The Chamber recalls that nothing in ECCC Law "suggests that alleged defects in the form of the indictment raise matters of jurisdiction. As such, these arguments may be brought before the Trial Chamber to be considered on the merits at trial [...]."[229]

140. The ECCC's personal jurisdiction is confined to senior leaders and those who were most responsible for the crimes.[230] The Pre-Trial Chamber observes that although the term most responsible is not defined in the ECCC Agreement or Law, guidance for its interpretation can be discerned by looking to international jurisprudence, in light of the object and purpose of the Court's founding instruments.[231] As multiple Chambers of the ECCC have found, international jurisprudence establishes that the identification of those falling into this most responsible category includes a quantitative and qualitative assessment of both the gravity of the crimes (alleged or charged) and the level of responsibility of the suspect.[232]

141. The assessment of the gravity of the alleged or charged crimes relies on factors such as, *inter alia*: the number of victims; the geographic and temporal scope and manner in which they were allegedly committed; the number of separate incidents; their nature and scale; and their impact on the victims.[233] The evaluation of a suspect's level of responsibility includes

---

[228] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 47; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 63 *referring to* ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, Appeals Chamber, 6 June 2007, paras 21, 24 (finding that arguments alleging that the Prosecution failed to plead an element of a mode of liability properly; that provisions in the joint indictment were inconsistent; and that the Prosecution failed to plead any facts in support of the existence of an element of a crime constituted inadmissible allegations of defects in the form of the indictment); ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR72.1, Decision on Petković's Interlocutory Appeal against the Trial Chamber's Decision on Jurisdiction, Appeals Chamber, 16 November 2005, para. 13.

[229] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 47; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 63.

[230] ECCC Agreement, Art. 2(1); ECCC Law, Art. 2*new*.

[231] *See Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, *entered into force* 27 January 1980 ("Vienna Convention"), Art. 31(1)(2) (providing that the terms of an instrument shall primarily be interpreted in their context, which comprises, *inter alia*, the instrument's text, in light of its object and purpose); ECCC Agreement, Art. 12(1) (providing that, in the case of a lacuna in the applicable law, "guidance may also be sought in procedural rules established at the international level"); ECCC Law, Art. 23*new* (providing that the Co-Investigating Judges may seek guidance in procedural rules at the international level). *See also* Case 002 Decision on Civil Party Admissibility Appeals (D404/2/4), paras 58-60.

[232] *See, e.g.*, Case 001, Judgement, 26 July 2010, E188 ("Case 001 Trial Judgment (E188)"), para. 22 and accompanying footnotes; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321; Case 003, Decision on Personal Jurisdiction and Investigative Policy regarding Suspect MEAS Mut[h], 2 May 2012, D48 ("Case 003 Decision on Personal Jurisdiction (D48)"), para. 15 and footnote 25.

[233] Case 001 Trial Judgment (E188), para. 22; Case 003 Decision on Personal Jurisdiction (D48), para. 16; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 327; ICC, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-34, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, Pre-Trial Chamber I, 16 July 2015, para. 21.

considerations such as, but not limited to, his or her level of participation in the crimes, the hierarchical rank or position (including the number of subordinates and hierarchical echelons above), the permanence of his or her position and the *de facto* roles and responsibilities of the suspect.[234]

142. Moreover, in Case 004/1, the Co-Investigating Judges found that the ECCC did not have personal jurisdiction over the Charged Person.[235] The Pre-Trial Chamber held that when there is a prior finding of no personal jurisdiction, this may be reviewable; further, that "as an appellate chamber, [it] must be able to review the findings that led to it, including those regarding the existence of crimes or the likelihood [of the Accused's] criminal responsibility."[236] Here, contrary to the Co-Lawyers' submissions,[237] the Pre-Trial Chamber observes that in Case 004/1, distinguishable from the instant case, those findings were made in relation to an Appeal lodged under Internal Rule 74(2) by the International Co-Prosecutor who may appeal against all orders and decisions;[238] the issue did not involve the enumerated provisions under 74(3) for the Accused, as here.[239]

143. The Pre-Trial Chamber does not consider that a similar approach applies to appeals filed pursuant to Internal Rule 74(3)(a) challenging the personal jurisdiction over the Accused. Procedural differences between the appellate rights of the Co-Prosecutors and an Accused do not, *per se,* violate the principle of equality of arms.[240] The Pre-Trial Chamber previously found that, at the ECCC, the applicable rules set different procedural rights to appeal by each party: "the case-by-case examination of appeals for admissibility, under Internal Rule 21, is precisely aimed at safeguarding the rights of all parties."[241] The Pre-Trial Chamber considers that it was clearly the intent of drafters to provide differing procedural rights to appeal to the parties under Internal Rule 74. This provision articulating the enumerated rights would become meaningless

[234] Case 001 Trial Judgment (E188), para. 22; Case 003 Decision on Personal Jurisdiction (D48), para. 24; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 332.
[235] Case 004/1, Closing Order (Disposition), 22 February 2017, D308, paras 10-11, 14; Case 004/1, Closing Order (Reasons), 10 July 2017, D308/3 ("Case 004/1 Closing Order (Reasons) (D308/3)"), paras 312-325.
[236] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 26.
[237] Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625522-01625523, pp. 30:7 to 31:9; AO An's Appeal (D360/5/1), paras 12-13 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 20, 24-26.
[238] Internal Rule 74(2).
[239] Internal Rule 74(3); Case 002 Decision on Closing Order Appeals (KHIEU Samphan) (D427/4/15), para. 14.
[240] *Contra* Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625520-01625521, pp. 28:18 to 29:11.
[241] Case 004 Decision on YIM Tith's Appeal (D361/4/1/10), para. 19.

if an accused could challenge anything implicating "criminal liability", including the contours of crimes or modes of liability under the guise of personal jurisdiction.[242]

144. Moreover, the determination of personal jurisdiction requires a tailored scope of evidential scrutiny. Unlike the Trial Chamber considering the guilt or innocence of an accused by weighing the trial evidence in its totality, the Pre-Trial Chamber, faced with a personal jurisdictional challenge regarding those who were most responsible, should consider a limited scope of evidence which is strictly required to assess the express question of personal jurisdiction at the pre-trial phase. Consequently, in considering the instant issue, the Pre-Trial Chamber must limit its evaluation to matters material to the determination of personal jurisdiction—the gravity of crimes and/or the level of responsibility of the Accused.

145. The Pre-Trial Chamber accordingly concludes that a challenge to personal jurisdiction regarding those who were most responsible should be aimed at the gravity of crimes and/or the level of responsibility of the Accused. Challenges involving the criminal liability of the Accused beyond this limitation, including contours of crimes or modes of liability, cannot be framed as challenges to personal jurisdiction and are inadmissible.

146. In relation to an appeal lodged under Internal Rule 21, the Pre-Trial Chamber has held, in previous cases, that "in light of Article 33 (new) of the ECCC Law, which provides that 'trials are fair' and conducted 'with full respect for the rights of the accused', and of Article 14 of the ICCPR, which is 'applicable to all stages of proceedings before the ECCC, [...] [t]he overriding consideration in all proceedings before the ECCC is the fairness of the proceedings, as provided in Internal Rule 21(1)(a).'"[243] The Chamber noted "[t]herefore, where the facts and circumstances of an appeal require it, the Pre-Trial Chamber has found it has competence to consider grounds raised by the [Accused] that are not explicitly listed under Internal Rule 74(3) through a liberal interpretation of a Charged Persons' [*sic*] right to appeal in light of Internal Rule 21."[244] Further, it is at times appropriate to adopt a broad interpretation of the notion of

---

[242] *Contra* Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625521-01625523, pp. 29:13 to 31:2.

[243] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 49 *quoting* Case 002 Decision on Abuse of Process (D264/2/6), paras 13-14; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 71 *referring to* Case 002 Decision on Abuse of Process (D264/2/6), paras 13-14. *See also* Case 002 (PTC58), Decision on Appeal against OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action, 10 June 2010, D273/3/5, para. 10.

[244] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 49; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 71. *See also* Case 002 JCE Decision (D97/15/9), para. 30; Case 003 (PTC29), Considerations on MEAS Muth's Appeal against the International Co-Investigating Judge's Decision to Charge MEAS Muth with Grave Breaches of the Geneva

jurisdiction, especially in situations where the issue at hand is unforeseen in the Internal Rules and where immediate resolution is required to prevent a harmful impact on the proceedings.[245]

147. Still, the Pre-Trial Chamber has consistently emphasised that Internal Rule 21 does not open an automatic avenue for appeal even where an appeal raises fair trial issues;[246] the moving party must demonstrate that the particular circumstances require the Chamber's intervention at the stage where the appeal was filed to avoid irremediable damage to the fairness of the proceedings or to fundamental fair trial rights.[247] In the instant case, the Pre-Trial Chamber will consider on a case-by-case basis, whether the conditions require a broad interpretation of Internal Rule 74(3) in light of Internal Rule 21. Specifically, when appeals filed against an Indictment under Internal Rule 74 raises a matter which cannot be rectified by the Trial Chamber and denying an appeal would "irreparably harm the fair trial rights of the accused", Internal Rule 21 may warrant a broadening of Internal Rule 74 on a case-by-case basis.[248]

ADMISSIBLE GROUNDS OF APPEAL

148. The Pre-Trial Chamber finds that Grounds 1-9, 11, 12(i), 13, 15(i), 16(ii) and (iii) are admissible, setting out the respective reasoning below. Preliminarily, the Chamber notes that the Co-Lawyers make two separate arguments in Grounds 12 and 15, although not enumerated as such in their Appeal. For the sake of clarity in the following, the Pre-Trial Chamber considers that Ground 12(i) involves the existence in law of superior responsibility as a mode of liability, whereas 12(ii) revolves around its application and contours.[249] Ground 15(i) concerns the existence of forced marriage as an other inhumane act at the time relevant to the indictment, whereas Ground 15(ii) implicates its contours, including issues of the nature and gravity of

---

Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, D174/1/4, Opinion of Judges BEAUVALLET and BAIK ("Case 003 Considerations on Appeal against Charging Decision (D174/1/4) (Opinion of Judges BEAUVALLET and BAIK)"), para. 19; Case 004 (PTC05), 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, D121/4/1/4, Opinion of Judges CHUNG and DOWNING ("Case 004 Considerations on Appeal regarding Access to the Case File (D121/4/1/4)"), para. 4.

[245] *See, e.g.*, Case 004/1 Considerations on Charging *In Absentia* (D239/1/8), paras 22-23.

[246] *See, e.g.*, Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 73; Case 004/1 Considerations on Charging *In Absentia* (D239/1/8), para. 17; Case 003 Considerations on Charging *In Absentia* (D128/1/9), para. 20.

[247] *See, e.g.*, Case 004/1 Considerations on Charging *In Absentia* (D239/1/8), para. 17; Case 003 Considerations on Charging *In Absentia* (D128/1/9), para. 20; Case 003 Considerations on Appeal against Charging Decision (D174/1/4) (Opinion of Judges BEAUVALLET and BAIK), para. 19.

[248] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 48.

[249] AO An's Appeal (D360/5/1), para. 180 (this paragraph is Ground 12(i) and is admissible), para. 181 (this paragraph is Ground 12(ii) and is inadmissible).

forced marriage within crimes against humanity and distinction from arranged marriage.[250]

Ground 1 is Admissible

149. The Pre-Trial Chamber finds that Ground 1 is admissible under a broad interpretation of Internal Rule 74(3) in light of Internal Rule 21.[251] The issuance of two Closing Orders is a novel situation before the ECCC. The Chamber considers it necessary to adopt an expanded interpretation of Internal Rule 74(3) in light of Internal Rule 21 because the issuance of two Closing Orders is unforeseen in the Internal Rules and may require a resolution prior to trial to prevent irremediable impact on the fair trial rights of the Accused.[252] This includes consideration of an accused's ability to prepare and the overarching fairness of the trial proceedings.

Grounds 2-7 are Admissible

150. Under Internal Rule 74(3)(a), Grounds 2 and 3 are admissible personal jurisdictional challenges. The Pre-Trial Chamber considers that the scope of the International Co-Investigating Judge's discretion to determine personal jurisdiction (Ground 2) and the interpretation of those most responsible (Ground 3) each directly impact the Court's ability to exercise jurisdiction. Grounds 2 and 3 therefore constitute jurisdictional challenges.[253]

151. Under Internal Rule 74(3)(a), the Pre-Trial Chamber finds that Grounds 4-7 are admissible as personal jurisdiction challenges because the alleged improper "application of the standard of proof" (Ground 4), "hierarchy of evidence" (Ground 5), AO An's role within the CPK (Ground 6) and the sufficiency of gravity concerning charged crimes (Ground 7) are material in determining personal jurisdiction.[254]

---

[250] AO An's Appeal (D360/5/1), para. 192 (this paragraph is Ground 15(i) and is admissible), para. 193 (this paragraph is Ground 15(ii) and is inadmissible).
[251] *See, e.g.*, Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 49; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 71; Case 002 JCE Decision (D97/15/9), para. 30.
[252] Case 004 Decision on YIM Tith's Appeal (D361/4/1/10), para. 19; Case 004/1 Considerations on Charging *In Absentia* (D239/1/8), paras 17, 22-23; Case 003 Considerations on Charging *In Absentia* (D128/1/9), para. 20; Case 003 Considerations on Appeal against Charging Decision (D174/1/4) (Opinion of Judges BEAUVALLET and BAIK), para. 19; Case 004/2 (PTC44), PTC Decision on AO An's Appeal against Internal Rule 66(4) Forwarding Order, 6 September 2017, D351/2/3, para. 8.
[253] AO An's Appeal (D360/5/1), paras 39-54.
[254] AO An's Appeal (D360/5/1), paras 55-163.

Grounds 8-9, 11, 12(i), 15(i) are Admissible

152. The Pre-Trial Chamber finds that Grounds 8, 9, 11, 12(i) and 15(i) are admissible pursuant to Internal Rule 74(3)(a). The Pre-Trial Chamber notes preliminarily that the Co-Lawyers submit that Ground 12(i) (Superior Responsibility is not a mode of liability applicable to the ECCC) is an issue implicating personal jurisdiction;[255] however, the Chamber considers that Ground 12(i) does not concern personal jurisdiction but examines it as a matter implicating subject matter jurisdiction.

153. Grounds 8, 9, 11, 12(i) and 15(i) challenge the very existence in law of certain modes of liability and substantive crimes at the time relevant to the indictment. The Pre-Trial Chamber considers that Ground 8 generally challenges the International Co-Investigating Judge's alleged error in finding the existence of customary international law in violation of the principle of legality.[256] Grounds 9, 11 and 12(i) implicate the Court's jurisdiction over JCE, Planning and superior responsibility as modes of liability and Ground 15(i) challenges the Court's jurisdiction over forced marriage as an other inhumane act.[257] The Pre-Trial Chamber finds that Grounds 8, 9, 11, 12(i) and 15(i) constitute valid jurisdictional challenges as they challenge the Court's compliance with the principle of legality, a pre-requisite for establishing the ECCC's jurisdiction over the crimes and modes of liability in the ECCC Law. [258]

Ground 13 is Admissible

154. The Pre-Trial Chamber finds that Ground 13—arguing for the dismissal of national premeditated homicide charges due to the expiry of the statute of limitations[259]—is admissible as this issue falls squarely within a subject matter jurisdiction challenge under Internal Rule 74(3)(a). The Chamber recalls that "[t]he issue of the ability of the ECCC to prosecute national crimes, which are subject to a statute of limitations, is a jurisdictional matter."[260] Thus, Ground

[255] AO An's Appeal (D360/5/1), para. 13.
[256] AO An's Appeal (D360/5/1), paras 166-170.
[257] AO An's Appeal (D360/5/1), paras 171-174, 178-180, 192.
[258] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 69.
[259] AO An's Appeal (D360/5/1), paras 182-185.
[260] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 74-76 (finding that indicting a defendant for national crimes confirmed the ECCC's jurisdiction over those crimes, and an appeal ground raising the issue of whether the ECCC could prosecute national crimes, which are subject to a statute of limitations, is a jurisdictional matter which should be resolved at this stage); Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 67.

13 is an admissible appeal ground at this pre-trial stage of the proceedings.

Grounds 16(ii) and (iii) are Admissible

155. The Pre-Trial Chamber finds that Grounds 16(ii) and (iii) are admissible as personal jurisdiction challenges under Internal Rule 74(3)(a). Ground 16(ii) alleging that the International Co-Investigating Judge did not demonstrate that the Cham were positively identified and targeted "as such" implicates the gravity of crimes.[261] Ground 16(iii) challenging the International Co-Investigating Judge's application of the *mens rea* for genocide to the Accused, including specific genocidal intent, implicates AO An's responsibility for the crimes.[262] The Chamber, therefore, considers these Grounds admissible as proper personal jurisdiction challenges.

INADMISSIBLE GROUNDS OF APPEAL

Grounds 10 and 17 are Inadmissible

156. The Pre-Trial Chamber finds that Grounds 10 and 17 raise alleged defects in the form of the Indictment. In Ground 10, the Co-Lawyers assert that the International Co-Investigating Judge failed to properly plead and define, as a factual matter, the scope and contours of the JCE group—including expanding the JCE geographical scope or conflating the various common purposes of different JCE groups.[263] In Ground 17, the Co-Lawyers allege that the International Co-Investigating Judge failed to include genocide in the JCE group's common purpose.[264] The Pre-Trial Chamber finds the efforts to frame these Appeal Grounds as challenges implicating personal jurisdiction to be unpersuasive.[265] It considers that the alleged defects do not directly implicate the gravity of the alleged crimes or AO An's responsibility and, therefore, cannot constitute personal jurisdiction challenges. The Pre-Trial Chamber recalls that challenges to alleged defects in the form of the Indictment are clearly non-jurisdictional in nature.[266] This is evident in the Co-Lawyers' challenges to Ground 10

[261] AO An's Appeal (D360/5/1), paras 197-198.
[262] AO An's Appeal (D360/5/1), paras 199-202.
[263] AO An's Appeal (D360/5/1), paras 175-177.
[264] AO An's Appeal (D360/5/1), paras 203-205.
[265] Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625521-01625523, pp. 29:13-31:9; AO An's Appeal (D360/5/1), para. 13.
[266] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 47; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 63.

(vagueness of "other CPK cadres"[267] or improperly charged geographical scope[268]) and Ground 17 (failure to include genocide in delineating JCE's common purpose[269]). Thus, such defects in the form of the Indictment are inadmissible at this pre-trial stage of the proceedings.[270]

Grounds 12(ii), 14, 15(ii), 16(i) are Inadmissible

157. The Pre-Trial Chamber finds that Grounds 12(ii), 14, 15(ii) and 16(i) are inadmissible. These Grounds challenge the contours of crimes and modes of liability and their application in reality rather than their existence in law at the time relevant to the Indictment.

158. The Pre-Trial Chamber considers that Ground 12(ii) is inadmissible because it relates to the contours of superior responsibility; the Co-Lawyers allege that the International Co-Investigating Judge "misapplies the legal elements" of superior responsibility; this should be addressed at trial.[271] Grounds 14, 15(ii) and 16(i) challenge the contours of the elements of the substantive crimes of other inhumane acts (including forced marriage) and genocide.[272] The Pre-Trial Chamber finds the Co-Lawyers' attempt to frame these Appeal Grounds as personal jurisdiction challenges unpersuasive.[273]

159. In Ground 14, the Co-Lawyers contest the International Co-Investigating Judge's rejection of underlying criminality for other inhumane acts and its reliance on human rights law to establish that the conduct was of a similar nature and gravity.[274] In addition, the Co-Lawyers allege that the International Co-Investigating Judge failed to demonstrate that AO An possessed the requisite *mens rea* for other inhumane acts, including failing to specify the elements of conduct which amount to other inhumane acts and a failure to delineate how AO An intended to cause great suffering or serious injury through the underlying act of rape.[275] The Chamber finds that this argument embodies the exact issue that is to be excluded from jurisdiction—contours of elements of crimes and factual matters to be addressed in the trial

[267] AO An's Appeal (D360/5/1), para. 175.
[268] AO An's Appeal (D360/5/1), para. 176.
[269] AO An's Appeal (D360/5/1), para. 203.
[270] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 47; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 63.
[271] AO An's Appeal (D360/5/1), para. 181.
[272] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 46-47; AO An's Appeal (D360/5/1), paras 186-189, 193, 196.
[273] AO An's Appeal (D360/5/1), para. 13; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625522-01625523, pp. 30:7-31:9.
[274] AO An's Appeal (D360/5/1), paras 186-188.
[275] AO An's Appeal (D360/5/1), paras 186-191.

phase.

160. In Ground 15(ii), the Co-Lawyers allege that the International Co-Investigating Judge failed to demonstrate the similar nature and gravity of forced marriage and conflated forced marriage with rape to elevate gravity.[276] This constitutes a challenge to the contours of an element of the crime of other inhumane acts (similar nature and gravity) and its existence in reality as opposed to legally.

161. In Ground 16(i), the Co-Lawyers allege that the International Co-Investigating Judge erred in rejecting the contextual element of genocide, including the need to demonstrate the existence of a State policy or plan[277] or that conduct occurred within a manifest pattern of similar conduct.[278] The Pre-Trial Chamber considers that these implicate contours of the elements of crimes and do not constitute acceptable jurisdiction challenges.

Ground 18 is Inadmissible

162. The Co-Lawyers submit that the cumulative impact of fair trial violations undermines the integrity of proceedings in a manner so egregious and irreparable as to render a fair trial impossible and that the International Co-Investigating Judge erred or abused his discretion in failing to dismiss or stay the case to safeguard the fairness and integrity of proceedings and AO An's rights.[279] The Co-Lawyers argue that the supermajority voting rule undermined AO An's presumption of innocence.[280] Moreover, errors, omissions and malpractices breached AO An's fair trial rights, including his right to counsel,[281] right to be informed of the charges,[282] right to prepare an effective defence,[283] right to appeal[284] and violated the principle of equality of arms.[285] Further, the Co-Lawyers aver that the Court's budgetary crisis jeopardises AO An's

[276] AO An's Appeal (D360/5/1), para. 193.
[277] AO An's Appeal (D360/5/1), para. 196 *quoting* Closing Order (Indictment) (D360), para. 86 ("There is no requirement that the alleged conduct took place in the context of a manifest pattern of similar conduct. Similarly, the existence of a State (or other) policy or plan to commit genocide is not an element of the crime of genocide").
[278] AO An's Appeal (D360/5/1), para. 196.
[279] AO An's Appeal (D360/5/1), paras 5, 207-230; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625313-01625315, pp. 54:17 to 56:19.
[280] AO An's Appeal (D360/5/1), paras 5, 210-212; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625315-01625316, pp. 56:20 to 57:12.
[281] AO An's Appeal (D360/5/1), paras 5, 213-214.
[282] AO An's Appeal (D360/5/1), paras 5, 213, 215.
[283] AO An's Appeal (D360/5/1), paras 5, 213, 216-217.
[284] AO An's Appeal (D360/5/1), paras 5, 213, 218.
[285] AO An's Appeal (D360/5/1), paras 5, 213, 216-217.

rights and the integrity of the Court.[286] In light of these alleged cumulative errors, the Co-Lawyers submit that the only appropriate remedy is a permanent stay of proceedings or a dismissal of the case against AO An.[287]

163. First, the Pre-Trial Chamber finds that the Co-Lawyers' mischaracterisation of the supermajority voting rule of the Chamber as "presumption-of-innocence-defying" misapplies the principle and misunderstands the ECCC legal framework.[288] The Chamber recalls the impartial nature of the Co-Investigating Judges' mandate and the purpose of judicial investigation. Pursuant to Internal Rule 55(5), the Co-Investigating Judges are obliged to conduct their investigation impartially, "whether the evidence is inculpatory or exculpatory" to ascertain the truth.[289] The Chamber emphasises that the instant proceedings are in the pre-trial stage, which does not involve any determination of guilt or innocence.[290] The Pre-Trial Chamber finds that the presumption of innocence is sufficiently safeguarded as, pursuant to Internal Rule 98(4), a *conviction* at trial requires the affirmative vote of at least four judges, and without the required majority, "the default decision shall be that the Accused is acquitted."[291]

164. Second, the Pre-Trial Chamber summarily dismiss arguments concerning alleged violations of rights that have previously been litigated and rejected. Here, the Co-Lawyers raise fair trial issues that have already been litigated and, at this juncture, fail to provide sufficient basis for reconsideration. Specifically, alleged violations are reasserted, including the principle of equality arms, AO An's right to be informed of charges, to prepare effective defence and to appeal concerning the access to the Case File[292] and issues concerning non-audio recorded Written Records of Interviews,[293] malpractices of investigators[294] and the Office of the Co-Investigating Judges' decisions on requests for investigative action[295]—these have all been

---

[286] AO An's Appeal (D360/5/1), paras 5, 219-222.
[287] AO An's Appeal (D360/5/1), paras 228-229; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625316-01625318, pp. 57:20 to 58:14.
[288] AO An's Appeal (D360/5/1), para. 212.
[289] Internal Rule 55(5).
[290] Case 004/1 Considerations on Charging *In Absentia* (D239/1/8), Opinion of Judges BEAUVALLET and BWANA, para. 13.
[291] Internal Rule 98(4).
[292] Case 004 Considerations on Appeal regarding Access to the Case File (D121/4/1/4).
[293] Case 004/2 (PTC31), Decision on AO An's Application to Annul Non-Audio Recorded Written Records of Interview, 30 November 2016, D296/1/1/4.
[294] Case 004/2 (PTC37), Decision on AO An's Application to Annul Written Records of Interview of Three Investigators, 11 May 2017, D338/1/5 ("Decision on WRI Annulment (D338/1/5)").
[295] Case 004 (PTC24), Considerations on Appeal against Decision on AO An's Fifth Request for Investigative Action, 16 June 2016, D260/1/1/3; Case 004 (PTC07), Decision on TA An's Appeal against International Co-

previously litigated and dismissed by the Pre-Trial Chamber because no prejudice was demonstrated. Accordingly, the Pre-Trial Chamber finds that no intervention is necessary now to avoid irremediable harm to fair trial rights.

165. Third, the Pre-Trial Chamber notes that the Office of the Co-Investigating Judges' issuance of two Closing Orders may have created uncertainty surrounding the alleged Charges. The Chamber finds that this precise matter—concerning the simultaneous issuance of two Closing Orders—is admitted under Ground 1, under Internal Rule 74(3) in light of Internal Rule 21. No further discussion is merited here.

166. Fourth, with regards to the Co-Lawyers' argument regarding the "four and a half month delay" in the assignment of Mr. Richard ROGERS as AO An's International Co-Lawyer,[296] the Pre-Trial Chamber notes that the Accused was at all times represented by the Cambodian lawyer of his choosing, Mr. MOM Luch, and finds that the Accused fails to demonstrate any irremediable harm to his right to counsel.

167. Turning to the Co-Lawyers' allegation concerning the Court's financial uncertainty,[297] the Pre-Trial Chamber observes that the Co-Lawyers fail to sufficiently demonstrate that a fair trial driven by law is unlikely due to insufficient funding at this stage of the proceedings. Accordingly, the Chamber finds that the right of the Accused to procedural fairness at the present stage is not at risk to be irremediably infringed.

168. Lastly, without any demonstration of alleged fair trial right violations, the Pre-Trial Chamber finds that the Co-Lawyers' argument concerning the cumulative impact of fair trial rights violations and their request for a permanent stay or dismissal as a remedy is without merit. The Pre-Trial Chamber dismisses Ground 18 as inadmissible.

VI. MERITS

169. While the decision of the Pre-Trial Chamber in respect of the admissibility of the Appeals is expressed in the preceding paragraphs, the Chamber, upon deliberation, has not

---

Investigating Judge's Decision Denying Requests for Investigative Actions, 30 September 2014, D190/1/2 ("Decision on AO An's Appeal on Denial of Requests for Investigative Actions (D190/1/2)"); Case 004 Considerations on Appeal regarding Access to the Case File (D121/4/1/4).

[296] AO An's Appeal (D360/5/1), para. 214.

[297] AO An's Appeal (D360/5/1), paras 219-222; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625315, pp. 56:5 to 56:16.

attained the required majority of four affirmative votes to reach a decision based on common reasoning on the merits. Pursuant to Internal Rule 77(14), the Opinions of the various members of the Pre-Trial Chamber are attached to these Considerations.

VII. DISPOSITION

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

- **ORDERS** a joinder of the Appeals against both Closing Orders;
- **DECIDES** that the National Co-Prosecutor's Appeal is admissible;
- **DECIDES** that the International Co-Prosecutor's Appeal is admissible;
- **DECIDES**, in respect of the Co-Lawyers' Appeal for AO An, that Grounds 1 to 9, 11, 12(i), 13, 15(i), 16(ii) and 16(iii) thereof are admissible;
- **DECIDES** that the remaining Grounds in the Co-Lawyers' Appeal for AO An are inadmissible;
- **DECLARES** that the Pre-Trial Chamber may exercise authority over the review of investigative matters;

  DECLARES that, subject to the jurisdiction of the ECCC, the ordinary Cambodian courts have full jurisdiction over matters of criminal justice;
- **DECLARES** that the delay in issuing the Closing Orders after the conclusion of the investigation against AO An was unwarranted;
- **DECLARES** that the Co-Investigating Judges erred in assessing the reliability and probative value of the evidence;
- **DECLARES** that the Co-Investigating Judges' issuance of the Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC;
- **DECLARES** that it has not assembled an affirmative vote of at least four judges for a decision based on common reasoning on the merits;

In accordance with Internal Rule 77(13), the present Decision is not subject to appeal.

In accordance with Internal Rule 77(14), this Decision shall be notified to the Co-Investigating Judges, the Co-Prosecutors and the parties by the Greffier of the Pre-Trial Chamber.

Phnom Penh, 19 December 2019

President **Pre-Trial Chamber**

PRAK Kimsan **Olivier BEAUVALLET** **NEY Thol** **Kang Jin BAIK** **HUOT Vuthy**

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion.

Judges Olivier BEAUVALLET and Kang Jin BAIK append their opinion.

VIII. OPINION OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

170. After Cases 001 and 002, regarding the Appeals of Cases 003 and 004, the Co-Prosecutors and the Co-Investigating Judges must fully comprehend the challenges that hinder the establishment of the Extraordinary Chambers in the Courts of Cambodia. The Agreement, the ECCC Law, the Internal Rules and, in particular, the various Press Releases, provide irrefutable evidence that the Co-Prosecutors and the Co-Investigating Judges should have accepted; and they have the discretion to consider and to issue decisions, reflecting reality. With the omission of this evidence, issuing a decision deviates from reality, which disables the ECCC to conclude the Cases in compliance with judicial proceedings.

171. What are the issues with Cases 003 and 004? Cases 003 and 004 commenced to proceed in a different way from Cases 001 and 002—that is, the International Co-Prosecutor unilaterally [and] secretively selected a number of individuals for the preliminary investigation without informing the National Co-Prosecutor. Are the procedures implemented by the International Co-Prosecutor in compliance with the Agreement and the ECCC Law? In the investigation phase after concluding the investigation, the Co-Investigating Judges decided to issue two conflicting Closing Orders which has never happened before. These two Conflicting Orders became the subject of the three Appeals.

172. Therefore, the National Judges of Pre-Trial Chamber should seek to understand the history of bringing the Khmer Rouge to trial through the negotiations to reach the Agreement between the Royal Government of Cambodia and the United Nations, the ECCC Law, the Internal Rules, and various Press Releases.

A. HISTORY OF CASE 004

173. On 16 August 2018, the National Co-Investigating Judge issued a Closing Order (Dismissal) dismissing the case against AO An (notified in Khmer)[298] and the International Co-Investigating Judge issued a Closing Order (Indictment), charging and indicting AO An (notified in English).[299]

[298] Closing Order (Dismissal) (D359).
[299] Closing Order (Indictment) (D360).

174. On 14 December 2018, the Pre-Trial Chamber was seised of the National Co-Prosecutor's Appeal against the International Co-investigating Judge's Closing Order (Indictment) in Case 004/02 (notified in Khmer on 17 December 2018[300] and on 28 January 2019 in English).

175. On 20 December 2018, the Pre-Trial Chamber was seised of AO An's Appeal against the International Co-Investigating Judge's Closing Order (Indictment) in English[301] and notified on 22 January 2019 in Khmer.

176. On 20 December 2018, the Pre-Trial Chamber was seised of International Co-Prosecutor's Appeal of the Order Dismissing the Case against AO An (D359) in English[302] and notified on 21 January 2019 in Khmer.

177. Having been seised of various Appeals against the Closing Orders, in all cases, especially the present case with two opposing Closing Orders, the Pre-Trial Chamber should conduct an in-depth analysis and a search of all relevant documents in order to proceed further in whether to accept or reject any of the Closing Orders.

178. Cases 003 and 004 differ from Cases 001 and 002. In Cases 001 and 002, the National and the International Co-Prosecutors met and agreed to decide on suspects who are senior leaders and those most responsible, to initiate preliminary investigations and to create an Introductory Submission, forwarded to the Co-Investigating Judge.

179. In Cases 003 and 004, proceedings were initiated by the International Co-Prosecutor who secretively and unilaterally conducted preliminary investigations without notifying the National Co-Prosecutor. This International Co-Prosecutor's action contradicts the principle of "Co-". When it came to the issuance of the Second Introductory Submission 003/20-11-2008 and the Third Introductory Submission 004/20-11-2008, both Co-Prosecutors disagreed. The disagreement shall be settled in accordance with Rule 71 of the Internal Rules.

180. The disagreement between the two Co-Prosecutors centres on the personal jurisdiction, namely suspects named in the Second and Third Introductory Submissions whether they are senior leaders and those most responsible who shall be brought to trial according to the

[300] National Co-Prosecutor's Appeal (D360/8/1).
[301] AO An's Appeal (D360/5/1).
[302] International Co-Prosecutor's Appeal (D359/3/1).

Agreement between the Royal Government of Cambodia and the United Nations and the ECCC Law.[303]

181. The disagreement between the National Co-Prosecutor and the International Co-Prosecutor did not obstruct the investigations, in accordance with Rule 77.13 of the Internal Rules. If the required majority is not attained, that Introductory Submission shall stand. Consequently, the investigations into Cases 003 and 004 were carried out, based on the Introductory Submissions, in which only the International Co-Prosecutor secretively conducted preliminary investigations.

182. Controversial issues of this case continued until the National and International Co-Investigating Judges concluded the investigations and issued Closing Orders. The Office of the Co-Investigating Judges issued two separate Closing Orders and they are contradictory. Such a situation is new in the Court's history. At this time, three Appeals filed against the two Closing Orders arrived at the Pre-Trial Chamber. Therefore, in order for the Pre-Trial Chamber to decide on these Appeals, the National Judges of the Pre-Trial Chamber find that it is absolutely worthwhile reviewing, from the outset, the establishment of the ECCC and its real purpose.

B. PREAMBLE

1. The Agreement between the Royal Government of Cambodia and the United Nations

183. WHEREAS in the Resolution 57/228 of 18 December 2002 the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security.[304]

184. Therefore, the purpose of establishing ECCC is not only for justice but also for national reconciliation, stability, peace and security as well.

2. Internal Rules

185. The Preamble in the Internal Rules contains exactly the same meaning to the Preamble

[303] International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71.2, dated 20 November 2008 and National Co-Prosecutor's Response, dated 9 December 2008
[304] *Khmer Rouge trials,* GA Res. 57/228, 27 February 2003, UN Doc. A/RES/57/228.

in the ECCC Agreement.

C. HISTORY OF BRINGING THE KHMER ROUGE TO TRIAL

186. The history of Cambodia since the fall of the Khmer Rouge regime is complicated. It would be difficult to understand the rigorous process of moving towards accountability without a clear understanding of the historical events that covered this process. After the fall of the Democratic Kampuchea regime in April 1979, Cambodia has had to face tremendous challenges that need addressing. They include national reconciliation and a search for long-lasting peace and bringing the Khmer Rouge leaders to trial.[305]

187. This includes bringing the former Khmer Rouge leaders to trial, which led to the establishment of the Tribunal with the international standard; however, justice, peace and national reconciliation must be maintained for the victims who were subjected to torture during the Khmer Rouge regime as set out in the Preamble, the Agreement and the Internal Rules.

188. The two issues mentioned above required repeated diplomatic action, numerous negotiations, careful concessions from delegates of all parties, and interventions by the United Nations, the international community and the super powers involved in the conflicts in Cambodia. A large number of scenarios have been established and should not be overlooked; they must be considered.

189. Eight months after the fall of the Pol Pot regime, the Ministry of Justice of Cambodia arranged to prosecute Pol Pot and Ieng Sary, which was, however, rejected by the international community.[306]

1. The Cold War

1. The First Cold War: China and the United States together attacking the Soviet Union and its allies – Vietnam and Laos (1979);
2. The Second Cold War: Vietnam was supported by the Soviet Union fighting against China, the United States and Thailand;
3. In 1982, the international [community] voted to award the seat of Cambodia to the coalition government of Democratic Kampuchea (the Khmer Rouge and Son San

[305] Searching for The Truth, Public Forum, Issue 83 (November 2006) p. 47 (KH).
[306] Searching for The Truth, Public Forum, Issue 83 (November 2006) p. 48 (KH).

and Sihanouk).

190. In 1989, the Cold War came to an end when the Soviet economic aid dramatically plunged. The United Nations and a number of the major super powers were dealing with important affairs rather than prosecuting the Khmer Rouge. Once again, the international community felt that its support was absolutely vital for long-lasting peace in Cambodia and that discussions on the prosecution of the Khmer Rouge could undermine the peace process. Therefore, efforts to render justice to the victims of the crimes committed during the Khmer Rouge regime were set aside in the interests of maintaining peace in Cambodia.[307] Following desperate appeals from the Security Council, the four parties signed a peace plan on 23October 1991.

191. Despite numerous reports on the atrocities of the Khmer Rouge, the United Nations continued to support their resistance movements, as well as granting them political constitutionality to the collapsed Democratic Kampuchea regime. The Democratic Kampuchea Government held the seat at the United Nation until the Paris Agreement in 1991.

2. Formation of a Coalition Government

192. After the general election, a coalition government was formed and, five months later, a new constitution was ratified in November 1993.

3. U.S. Politics towards the Khmer Rouge

193. The U.S. politics toward the Khmer Rouge began in 1994. The U.S. Congress passed the Cambodian Genocide Justice Act, appealing to its government to support efforts to hold Khmer Rouge members responsible for the crimes committed between 1975 and 1979. Previously, they had no interests in this issue and even voted to award the seat of Cambodia to the coalition government of Democratic Kampuchea.[308]

4. The Commencement of the Negotiations on the Establishment of the ECCC and Mutual Concessions

194. From the outset, both parties had different views as to how this tribunal would be

[307] Searching for The Truth, Public Forum, Issue 83 (November 2006) p. 51 (KH).
[308] Searching for The Truth, Public Forum, Issue 83 (November 2006) p. 52 (KH).

established. The divergence [between the two parties] which remained almost at every stage of the tribunal creation showed through tough discussions concerning its category and jurisdiction.

5. Challenges of Establishing the ECCC

195. Efforts to hold the Khmer Rouge responsible were, however, hampered: the pardon was issued for the purpose of national reconciliation in September 1996. The King formally pardoned former Deputy Prime Minister Ieng Sary who had been sentenced to death by a court in 1979. The pardon was granted as he had withdrawn from the Khmer Rouge factions and defected to the newly-formed Royal Government (August 1996).

196. In 1996, the Khmer Rouge armed forces reached a breaking point (where Pol Pot was tried in June 1997 by a people's court in Anlong Veng on a charge of having executed the former Khmer Rouge Minister of Defense, Son Sen). In December 1998, two Khmer Rouge leaders, Khieu Samphan and Nuon Chea, defected from the Communist Party of Kampuchea. In March 1999, another Khmer Rouge leader, Ta Mok, was arrested. In January 2001, the National Assembly passed a draft law on the establishment of a tribunal in a form of extraordinary chambers, with the participation of national and international officials.

6. United Nations Withdrawal

197. In February 2002, the United Nations declared its withdrawal from the negotiations, which was perceived by critics as being equivalent to promoting impunity.[309]

7. United Nations Return

198. In a resolution endorsed by Japan and France in December 2002, the United Nations General Assembly delegated its Secretary General to resume negotiations with a view to establishing a tribunal. The United Nations member states welcomed the 2001 law and urged the United Nations Office of Legal Affairs to promptly resolve key issues; on 6 June 2003, the United Nations and the Royal Government of Cambodia signed an agreement establishing the Tribunal, which was to proceed within the legal framework of the 2001 law on the establishment of the Extraordinary Chambers in the Cambodian courts called "Extraordinary

[309] Searching for The Truth, Public Forum, Issue 84, (December 2006), p. 54 (KH).

Chambers in the Courts of Cambodia."

8. Concessions Made by the Royal Government of Cambodia and the United Nations

199. After years of negotiations, the United Nations and the Royal Government of Cambodia made concessions on a number of key issues relating to the establishment of the Tribunal to bring the Khmer Rouge to trial. Despite the concessions, the outcome of the negotiations regarding the Court's jurisdiction to which both parties agree is equivocal:[310]

200. The number of persons to be prosecuted proposed in the report prepared by United Nations experts in 1999 was 20 to 30, which was categorically rejected by the Cambodian side.

201. The number of persons proposed by Cambodia was only 4 to 5 (Ieng Sary was pardoned by the King).

202. There is, therefore, no agreement on the number of persons to be prosecuted and subsequent negotiations on this matter are kept confidential; even International Co-Investigating Judge requested for the written records of the negotiations from the United Nations, his request was turned down.[311]

9. Selection of the Number of Charged persons for Prosecution

203. Selecting such a small number of charged persons enables the Tribunal to proceed. The uncertainty is limited to the use of the terms "senior leaders and those most responsible" in both the Agreement and the ECCC Law. The disagreement between the United Nations and Cambodia over the number of persons to be prosecuted at the ECCC triggers the disagreement between the National and International Co-Prosecutors and between National and International Co-Investigating Judges in Cases 003 and 004. Thus, according to the Agreement, the ECCC Law and the Internal Rules, the aforesaid disagreement shall be settled pursuant to Rules 71 and 72 of the Internal Rules.

D. SENIOR LEADERS AND THOSE MOST RESPONSIBLE

204. None of the Articles of both the Agreement between the United Nations and the Royal Government of Cambodia and the ECCC Law specifically defines the terms "senior leaders and those most responsible" for the crimes and serious violations of Cambodian penal law,

[310] Searching for The Truth, Public Forum, Issue 84, (December 2006), p. 54 (KH).
[311] Searching for The Truth, Public Forum, Issue 84, (December 2006), p. 55 (KH).

international humanitarian law and custom and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

205. Therefore, the terms "senior leaders and those most responsible" should be reviewed.

206. First, let's review the terms "senior leaders."

207. In order to clearly understand the terms "senior leaders," the authority structure of the Democratic Kampuchea regime as written in the introductory submission dated 18 July 2007[312] should be reviewed.

1. Authority Structure of the Democratic Kampuchea Regime

208. The Co-Prosecutors stated that:

209. The CPK controlled the Democratic Kampuchea regime throughout the temporal jurisdiction of the ECCC. The Party exercised its authority and control over the country using three channels: the state organizations, the CPK administrative bodies and the Revolutionary Army of Kampuchea.[313]

210. The CPK Standing Committee members and senior CPK cadre exercised *de jure* and *de facto* authority throughout Democratic Kampuchea during the Democratic Kampuchea period, both when the CPK claimed that the Royal Government of National Union of Kampuchea (RGNUK) was the government and throughout the remainder of the period.[314]

211. From 17 April 1975 until 13 April 1976, the CPK maintained the illusion that the RGNUK was the government. Formally, the RGNUK participated in preparing the Constitution of Democratic Kampuchea promulgated on 5 January 1976, which established the state organisations of Democratic Kampuchea. Later, on 20 March 1976, GRUNK allegedly carried out elections to select and appoint the People's Representative Assembly of Kampuchea, to whose members RGNUK officials submitted their resignations on 6 April 1976.[315]

212. On 13 April 1976, the People's Representative Assembly (PRA) purportedly selected and appointed the government of Democratic Kampuchea. The members of the CPK Standing

[312] Case 002, Introductory Submission, 18 July 2007, D3 ("Case 002 Introductory Submission (D3)"), para. 17.
[313] Case 002 Introductory Submission (D3) para. 17.
[314] Case 002 Introductory Submission (D3) para. 18.
[315] Case 002 Introductory Submission (D3) para. 19.

Committee and other senior CPK cadre were appointed to the highest positions in all of the state organizations. While the PRA allegedly appointed the CPK leaders in April 1976, in reality the CPK Standing Committee had already appointed them to their posts at least by October 1975.[316]

213. According to a decision of the CPK Central Committee, it was the CPK that was responsible for setting up the constitution and carrying out the elections, as well as for establishing the PRA, the Presidium of State, and the government as state organizations totally of our Party. The Standing Committee of the CPK deemed the PRA to be worthless and no evidence exists of the PRA ever passing or promulgating any laws.[317]

214. The CPK was structured in a hierarchical fashion, which enabled the highest CPK administrative body, the Standing Committee of the CPK Central Committee, to create, formulate, direct, order and monitor CPK policies. The lower CPK administrative organs—the Zones, Sectors, Districts and Branches—would implement and report upon these policies throughout the entire territory of Democratic Kampuchea.[318]

215. The CPK employed the following methods to ensure their secrecy. CPK leaders adopted *noms de guerre*, and then referred to those aliases using numerical code-names, frequently changing both their aliases and numerical code-names. The top two leaders of the CPK were jointly known as the Organisation, or *Angkar*, although this term came to be used among the population at large to refer to any cadre who embodied the authority of the CPK. They identified geographical locations and institutions by alpha-numeric code-names such as 560 (the Northwest Zone), B-1 (the Ministry of Foreign Affairs, S-21, (the most important security centre), K-3 (an office of the Party Centre), and Po-1 (Calmette Hospital). In many cases, the CPK referred to the person in charge of a location or institution by the code number used to designate that location or institution.[319]

216. While the CPK Statute vested the highest power rights throughout the country in the hands of the CPK General Conference, which was to be convened every four years, the Statute identified the CPK Central Committee as "the highest operational unit throughout the country"

[316] Case 002 Introductory Submission (D3) para. 20.
[317] Case 002 Introductory Submission (D3) para. 21.
[318] Case 002 Introductory Submission (D3) para. 22.
[319] Case 002 Introductory Submission (D3) para. 23.

for the intervening four-year period. In practice, a sub-committee of the CPK Central Committee known as the CPK Standing Committee acted as *the highest and most authoritative unit within the CPK and in Democratic Kampuchea.*[320]

217. The CPK Standing Committee exercised the authority to create, direct, execute and monitor the implementation of all policies related to the CPK and State matters. Specifically, the Standing Committee controlled policies regarding internal and external security, foreign affairs, domestic affairs including finance, commerce, industry, agriculture, health and social affairs, propaganda and re-education, and CPK and State personnel and administrative matters. The Standing Committee discussed and ordered large-scale forced movements, discussed and ordered the use of forced labour, ordered the arrest and interrogation of "enemies", remained aware of inhumane living conditions throughout the country, and had the authority to order the summary execution of people at will.[321]

218. The following members of the CPK Central Committee constituted the members of its Standing Committee: POL Pot (CPK Secretary, deceased), NUON Chea (CPK Deputy Secretary), IENG Sary, VON Vet (deceased), SAO Phim (deceased), Ta Mok (deceased) and SON Sen (deceased).

219. The Standing Committee met frequently and regularly in whole or in part. Members of the CPK Central Committee who were not Standing Committee members, including KHIEU Samphan and other prominent CPK cadre, frequently joined in its meetings.[322]

220. Office 870 monitored the implementation of Standing Committee policies. Based in Phnom Penh, Office 870 acted as a secretariat for the CPK Standing Committee. Office 870 not only transmitted Standing Committee policy directives to the lower CPK administrative bodies, but also filed and distributed reports received from the Zones and other CPK administrative bodies and RAK bodies on the overall situation and Standing Committee policy implementation throughout Democratic Kampuchea.[323]

221. The Standing Committee and Office 870 worked closely with government ministries in implementing the policies of the Party. Under the leadership of members of the Standing and

[320] Case 002 Introductory Submission (D3) para. 24.
[321] Case 002 Introductory Submission (D3) para. 25.
[322] Case 002 Introductory Submission (D3) para. 26.
[323] Case 002 Introductory Submission (D3) para. 27.

Central Committees, the ministries functioned as operational arms of the CPK. For example, IENG Thirith as Minister of Social Affairs liaised directly with POL Pot, NUON Chea, KHIEU Samphan, and various Standing Committee Members.[324]

222. We may conclude that the Communist Party of Kampuchea ruled the country through the Democratic Kampuchea organisation, the party administration, and the Revolutionary Army of Kampuchea. The 1976 Democratic Kampuchea Constitution and the party statute vested the highest power rights to the Communist Party of Kampuchea Central Committee. In practice, however, a sub-committee of the Central Committee known as the "Standing Committee" acted as the highest and most authoritative unit with seven members:[325]

- POL Pot, CPK Secretary (deceased)
- NUON Chea, CPK Deputy Secretary
- IENG Sary, Member
- SAO Phim, Member (deceased)
- Ta Mok, Member (deceased)
- VON Vet, Member (deceased)
- SON Sen, Member (deceased)

223. These seven persons are considered senior leaders of the Democratic Kampuchea regime, but to date only NUON Chea who survives and is being tried at the ECCC. In particular, KAING Guek Eav is not a senior leader of the Democratic Kampuchea regime. Therefore, KAING Guek Eav definitely falls within the category of "those most responsible" for the crimes.

224. Based on the authority structure of the Democratic Kampuchea regime, its senior leaders are the Standing Committee members of the CPK Central Committee, including:[326]

- POL Pot, CPK Secretary (deceased)
- NUON Chea, CPK Deputy Secretary
- IENG Sary, Member (deceased)
- SAO Phim, Member (deceased)
- Ta Mok, Member (deceased)
- VON Vet, Member (deceased)

[324] Case 002 Introductory Submission (D3) para. 28.
[325] Case 002 Introductory Submission (D3) paras. 4-15.
[326] Case 002 Introductory Submission (D3) paras. 7-21.

- SON Sen, Member (deceased)

225. And the only surviving senior leader to date is NUON Chea. Those named in the Second and Third Introductory Submissions, including AO An, were neither senior leaders nor those most responsible in the Democratic Kampuchea regime.

226. The International Co-Prosecutor stated on the 19 June 2019 hearing day that as Samdech Sok An noted that the number could be limited, could be 30, or how they could be tried before they passed away. The International Co-Prosecutor added that it was limited to roughly four to ten persons, and now we had seven, eight persons, and one was already acquitted, etc.

227. The National Judges of the Pre-Trial Chamber find that the International Co-Prosecutor's submission is groundless and contrary to the evidence given in D360/10 in relation to the statement made by His Excellency Keo Remy.

E. THE PURPOSE OF ESTABLISHING OF THE ECCC

228. In order to show the main purpose of establishing the ECCC, the National Judges of the Pre-Trial Chamber wish to refer to the following Agreement between the Royal Government of Cambodia and the United Nations as well as the ECCC Law, the Internal Rules, and the Preamble:

1. Agreement between the Royal Government of Cambodia and the United Nations

229. According to a formal request for assistance dated 21 June 1997, the Royal Government of Cambodia and the United Nations signed an agreement on 6 June 2003 for the purpose of bringing to trial senior leaders and those who were most responsible for the crimes and serious violations of Cambodian and international laws, that were committed during the DK period from 17 April 1975 to 6 January 1979.

230. Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia provides that the purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period

from 17 April 1975 to 6 January 1979. The Agreement provides, *inter alia*, the legal basis and the principles and modalities for such cooperation.

231. Article 2 of the Agreement provides that the present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in "the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea" (hereinafter: "the Law on the Establishment of the Extraordinary Chambers"), as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia. The present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.

232. The present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended. The Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.

233. In case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties.

2. Law on the Establishment of the ECCC

234. Article 1 provides that the purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

235. Article 2 new provides that Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

236. Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as "Suspects".

3. Internal Rules (IRs)

237. Rule 1. Entry into Force and Interpretation

> 1. *These IRs shall enter into force upon official publication by the Office of Administration and no later than 10 (ten) days after adoption by the Plenary of identical versions in Khmer, English and French.*
>
> 2. *In the present document, the masculine shall include the feminine and the singular, the plural, and vice-versa. In particular, 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; and a reference in these IRs to the Co-Prosecutors includes both of them acting jointly and each of them acting individually, whether directly or through delegation, as specified in these IRs. This provision does not have any grammatical impact on the document in Khmer.*

238. Rule 2. Procedure Applicable in Case of *lacunae* in these IRs:

> *Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment of these IRs shall be submitted to the Rules and Procedure Committee as soon as possible.*

239. Rule 3. Amendments

> 1. *Requests for amendment of these IRs may be made to the Rules and Procedure Committee by a Judge, a Co-Investigating Judge, a Co-Prosecutor, the Head of the Defence Support Section, the Victims Support Section, the Civil Party Lead Co-Lawyers and the Director or Deputy Director of the Office of Administration.*

2. *Proposals for amendment received from the Rules and Procedure Committee shall be submitted to the Plenary Session for adoption in accordance with the procedure for adopting these IRs.*

3. *An amendment shall, unless otherwise indicated, enter into force upon official publication by the Office of Administration and no later than 10 (ten) days after adoption by the Plenary of identical versions in Khmer, English and French.*

4. National Assembly Sessions

240. In the minutes of the Cambodian National Assembly session of the draft law on the establishment of the ECCC (29 December 2000), His Excellency Sok An, Senior Minister, Minister in charge of the Office of the Council of Ministers, and Chairman of the Task Force stated in the plenary session that, "The circle of the competence we call the aspect of the competence of individuals is to define a target that is an objective of a trial by Extra-Ordinary Chambers. Only senior leaders and those most responsible, namely a small targeted group... Those who committed the most wrong acts. And in the concept of the first article, we find that the targeted group is not widespread; the concept is to define the targeted group distinctly and obviously to [prosecute] the smallest number."[327]

241. Other parliamentarians including His Excellency Cheam Yiep who also shared his view on the chapter of the competence of individuals, asserting that, "I call on people who used to serve the Democratic Kampuchea regime not to get confused...the contents of this draft law is to judge the crimes committed by the senior leaders of Democratic Kampuchea; I would like to appeal to civil servants, military officials, and soldiers who used to live under and serve the Democratic Kampuchea regime – after integration or defection to the Royal Government led by Samdech Prime Minister Hun Sen, not to worry...the purpose of the law is stated clearly: it is to judge only the senior leaders of Democratic Kampuchea."[328]

242. His Excellency Pen Panha stated that, "I agree on the general provisions. The first chapter, which consists of only one article, clearly determines the purpose and who will be

[327] Searching for The Truth, Public Forum, Issue 13, (January 2001), p. 58 (KH); Searching for The Truth, Public Forum, Issue 14, (February 2001), pp. 46-47 (KH).
[328] Searching for The Truth, Public Forum, Issue 14, (February 2001), p. 43 (KH).

judged…I am happy that we are trying to close down the black history of Cambodia."[329]

243. His Excellency Sok An concluded that: If we carefully considered all aspects, we saw that the legal, political and historical aspects were all interrelated and similar. If we relied solely on the law that we had or did not have and that we concluded that it was illegal, it would not work. If we referred only to the relevant provisions of this law and we considered it to be illegal, it would not be possible. This law presented a new formula of a new concept and constituted new fundamental principles. As I indicated, it reflected the four major phases of compromise:

244. We demanded a national court and let's stop talking about an international tribunal. Let's talk about an internationalised tribunal, i.e. a national tribunal with extraordinary chambers composed of national and international judges. This was a new principle unprecedented in the history of international law. It had to be new to us as well.

245. Second principle: The number of the national judges was agreed to be greater; however, this greater number was likely to be hindered. This was a new formula. A valid decision could only be made only when an international judge joined the majority. It was, therefore, an unprecedented principle.

246. Third principle: Appointment of Co-Investigating Judges.

247. Fourth principle: Two Co-Prosecutors had to find a consensus unanimously. However, the parties would disagree one day. We would have to create a new formula. The Pre-Trial Chamber would have to consider all aspects, i.e. legal, political and historical aspects that were interrelated. Another factor to be noted was that all international judges were appointed by a higher competent institution of Cambodia, i.e. the Supreme Council of the Magistracy.

248. It should be noted that the drafters of the draft law on the establishment of the ECCC know that there are numerous types of perpetrators and they will not be tried before the ECCC. In this regard, in order to get to know as much as possible about the parties' purposes in the Agreement on the Establishment of the ECCC, the International Co-Investigating Judge requested the United Nations Records and Archives Unit for the written record of the negotiations between the United Nations and the Cambodian government; however, the United Nations declined to disclose most of the documents on grounds of confidentiality.

---

[329] Searching for The Truth, Public Forum, Issue 14, (February 2001), pp. 43-44 (KH).

249. In the International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal of the Case 004/2 Indictment, the International Co-Prosecutor stated that His Excellency Keo Remy said in his last sentence that it was unfair if we tried only 3 or 4 people, (in response to His Excellency Sok An's statement). Clear evidence was given during the Cambodian National Assembly session to pass a draft law on the ECCC: His Excellency Sok An asserted that only three or four persons would be brought to trial at the ECCC. What His Excellency Keo Remy mentioned was for the purpose of creating the ECCC Agreement and Law.[330]

250. The evidence as described in the history of bringing the Khmer Rouge to trial until the National Assembly session of the draft law and the authority structure of Democratic Kampuchea, cited in D3, the Introductory Submission, dated 18 June 2007, in Case 002 makes it clear that the purpose of using the terms of senior leaders and those most responsible in the Agreement as well as the ECCC Law is to refer to only 4 to 5 people in Cases 001 and 002.

251. Bringing others to trial and creating Cases 003 and 004 are a violation of the Agreement and the ECCC Law, and the Cases cannot be concluded legally. Therefore, the preliminary investigation conducted unilaterally by the International Co-Prosecutor contradicts the principle of consensus. The Closing Order (Indictment) indicting and sending AO An to trial was prepared on the basis of the outcome of the illegal preliminary investigation is considered invalid.

F. PROCESS OF CASE 004

1. Preliminary Investigation by the Co-Prosecutors: Charges

252. **Rule 49. Exercising Public Action**

> 1. Prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint.
>
> 2. The Co-Prosecutors shall receive and consider all written complaints or information alleging commission of crimes within the jurisdiction of the ECCC.

---

[330] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), paras 11-12 *referring to* "Debate and Approval of the Agreement Between the United Nations and the Royal Government of Cambodia and Debate and Approval of Amendments to the Law on Trying Khmer Rouge Leaders", First Session of the Third Term of the Cambodian National Assembly, 4-5 October 2004, D359/3/1.1.45, ERN (EN) 01598762-01598764.

253. Article 16 of the Law on the Establishment of the ECCC provides that: "All indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors, one Cambodian and another foreign, hereinafter referred to as Co-Prosecutors, who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers."

254. The National Judges of the PTC find that public action – charges with crimes – is exercised only within the jurisdiction of the ECCC. Therefore, the Co-Prosecutors must exercise public action on the principle of consensus between the two Co-Prosecutors, which means that the National and International Co-Prosecutors must agree with each other – i.e. they cannot act secretively or unilaterally, nor do they charge any other persons with crimes outside the jurisdiction of the ECCC.

255. **Rule 50. Preliminary Investigations**

> The Co-Prosecutors may conduct preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses.

256. The National Judges of the Pre-Trial Chamber find that the preliminary investigation must go through a series of procedures before deciding to issue an Introductory Submission.

257. The National Judges of the Pre-Trial Chamber find that the Introductory Submission must specify other information attached with materials which are considered to be inculpatory and exculpatory evidence to which the National Co-Prosecutor agrees on the principle of consensus.

2. Practices of the Co-Prosecutors

258. The Co-Prosecutors do not have any clear legal principal in identifying persons to prosecute. The Pre-Trial Chamber must examine how the Co-Prosecutors exercised their discretion in order to determine whether or not their actions were properly implemented in accordance with factual and legal findings.

259. On 8 September 2009, the International Co-Prosecutor affirmed that, at the ECCC, the Acting International Co-Prosecutor was not planning to open further preliminary investigation into other suspects. By sending the five suspects to the Co-Investigating Judges for investigation, the Acting International Co-Prosecutor agreed with the International Co-

Prosecutor's statement dated 5 January 2009 that prosecution of future cases would result in greater responsibility for crimes committed during the Democratic Kampuchea period from 1975 to 1979.

260. The National Judges of the Pre-Trial Chamber previously considered the illegality of the preliminary investigation of the International Co-Prosecutor on 18 August 2009 as follows:

> 1. *The National Co-Prosecutor, in her response dated 22 May 2009, stated that in accordance with the Internal Rules the term "Co-Prosecutors" is used to refer to those persons in leading preliminary investigation and prosecutions. If one of the Co-Prosecutors acts on his/her own without delegation of power from other Co-Prosecutor, his/her action will be contrary to the provisions of the ECCC Internal Rules, which state that except for action that must be taken jointly under the ECCC Law and the Internal Rules, the Co Prosecutors may delegate power to of them by a joint written decision, to accomplish such action individually. Therefore, the work related to the Second and Third Introductory Submissions was done by the International Co-Prosecutor and his staff without a request from or discussion with the National Co-Prosecutor.*
>
> 2. *According to the ECCC Law, for prosecution to be conducted on legal merit, both Co-Prosecutors, namely the National Co-Prosecutor and the International Co-Prosecutor, must agree with each other to prosecute, whether at their own discretion or on the basis of a complaint. The Agreement and the ECCC Law specify that the ECCC shall have two prosecutors, known as the Co-Prosecutors, who must cooperate with each other in order to fulfil their duties. Therefore, it is seen that the National Co-Prosecutor did not participate in the International Co-Prosecutor's preliminary investigation to obtain evidence related to new suspects, nor did the National Co-Prosecutor delegate power to her staff to participate in such an investigation.*
>
> 3. *The National Co-Prosecutor and her staff never participated and/or supported the preliminary investigations aimed at identifying suspects for prosecution, as mentioned in the Second and Third Introductory Submissions carried out by the International Co-Prosecutor. It was only after the preliminary investigation had been conducted by the International Co-Prosecutor and his staff that there was unofficial information communicated about the fact that the international side had conducted preliminary*

investigations related to a number of affairs and that the investigations had already ended. After receiving this information, the National Co-Prosecutor went to meet with the International Co-Prosecutor. However, the International Co-Prosecutor was absent that day; so the National Co-Prosecutor went to meet with the International Deputy Co-Prosecutor, Mr William SMITH. When asked about the preliminary investigations, Mr William SMITH told the National Co-Prosecutor that preliminary investigations had indeed been conducted, as the National Co-Prosecutor had learned. Also, Mr William SMITH said "sorry" that the preliminary investigations were carried out unilaterally and promised to inform the National Co-Prosecutor if further investigations were to be conducted.

4. *It was the International Co-Prosecutor alone who decided to initiate this preliminary investigation. The National Co-Prosecutor was not aware of it. The International Co-Prosecutor, in his response dated 22 May 2009, asserted that the preliminary investigation pertaining to the First, Second and Third Introductory Submissions was principally done on the basis of an in-house analysis of documents collected from the Documentation Centre of Cambodia (DC-Cam) that were obtained prior to 18 July 2007, i.e. before the filing of the First Introductory Submission. Most of the authorisations for preliminary investigation, whenever given by any or both the Co-Prosecutors, were oral, which is permitted by law.*

5. *The Office of the Co Prosecutors commenced its operation on 10 July 2006. Based on information available to the Office at that time, its investigators had, by 21 July 2006 identified 16 potential suspects who, on the basis of publicly available evidence, were a list of involved in crimes within the jurisdiction of this Court, and who potentially fell within the personal jurisdiction of this Court. On that day, however, one of the potential suspects died. Consequently, the list of potential suspects was produced to 15, and, at the direction of the Co-Prosecutors, the Office launched preliminary investigations into 15 suspects.*

6. *By 20 September 2006, the Office had produced draft introductory submissions for these 15 suspects. These drafts submission were circulated and reviewed by the Co-Prosecutors. They determined that additional preliminary investigation would be required for 15 suspects. The Co-Prosecutors then made the decision to prioritise the suspects based on two independent criteria: (1) whether the Office had adequate*

evidence in hand to satisfy the "reason to believe" criterion for a particular suspect within a relatively brief time frame, and (2) the rank of the suspect in the Communist Party of Kampuchea hierarchy. This evaluation resulted in a list of 6 suspects who would be the subjects of the First Introductory Submission, and a list of 9 suspects with respect to whom preliminary investigations would be continued as time and resources permitted.

7. *By the beginning of July 2007, the Office had developed an advanced draft of an introductory submission naming six suspects: NUON Chea, IENG Sary, IENG Thirith, KHIEU Samphan, Duch, and Vann Rith. On the very date of the proposed filing of the first introductory submission, the National Co-Prosecutor found that the evidence against suspect Vann Rith did not satisfy the "reason to believe" criterion.*

8. *After 18 July 2007, the Office resumed preliminary investigations on the remaining 10 suspects. In early 2008, however, the Office learned that one of the 10 suspects had recently died of accidental causes, leaving the Office seized with 9 suspects. In the course of further preliminary investigations during 2008, the Co-Prosecutors determined that crimes which may have been committed by 3 of the additional suspects either were not adequately severe to fall within the jurisdiction of the Court, or that evidence implicating these suspects in such crimes could not be developed within a reasonable time frame given the investigative resources available to the Office. Preliminary investigations continued on the remaining 6 suspects.*

9. *During the preliminary investigation conducted from July 2007 to November 2008, even though the National Co-Prosecutor was aware [of that], she expressed her unwillingness to carry out judicial investigation and at the same time did not seem to encourage her staff to be actively involved in the work. In October 2008 draft additional submissions charging new crimes and naming 6 suspects were prepared. Advance copies of those submissions provided, in Khmer, to the National Co-Prosecutor, who only on 18 November 2008, stated her unwillingness to forward them to the Co-Investigating Judges, hence crystallising this disagreement.*

10. *Furthermore, in the International Co-Prosecutor's Reply to the National Co-Prosecutor's Response to the Pre Trial Chamber's Directions to Provide Further Particulars, the International Co-Prosecutor stated: "The regularity of the preliminary*

investigation, as raised in paragraph 1(C) above, is not germane to the determination of this disagreement. The International Co-Prosecutor respectfully reiterated that the sole issue in these proceedings is whether the two new introductory submissions and one supplementary submission should be forwarded to the Co-Investigating Judges for judicial investigation. The issue of regularity of the preliminary investigation, if at all valid, lies only in the jurisdiction of the Investigating Judges who can grant the moving party the appropriate remedy of annulment under Rule 76. The Pre-Trial Chamber, therefore, at this stage and in these proceedings, lacks the jurisdiction to entertain this objection. In any event, the preliminary investigation leading to the new submissions was validly conducted."

11. *While the National Co-Prosecutor had not made a consequential argument, the International Co-Prosecutor assumed that she wished to argue that this unilateral preliminary investigation vitiates the new submissions and, consequently, they should be dismissed.*

12. *The International Co-Prosecutor reiterated the preliminary objection that the National Co- Prosecutor had raised this issue extremely late and as an afterthought. In any event, the International Co-Prosecutor submitted that the regularity of the preliminary investigation is not germane to the determination of these proceedings. The sole issue for determination here is whether the new submissions should be forwarded to the Co-Investigating Judges. The issue of regularity of the preliminary investigation, even if validly challenged, is in the jurisdiction of the Co-Investigating Judges who can grant the moving party the remedy of annulment under Rule 76. The Pre-Trial Chamber, therefore, at this stage and in these proceedings, lacks the jurisdiction to entertain this objection.*

13. *The scope of the proceedings is limited to the issues raised in the Statement of the claimant (here, the International Co-Prosecutor) and the Response Statement by the respondent (here, the National Co-Prosecutor). The International Co-Prosecutor submits that an arbitral tribunal determines the issues raised in the Statement and becomes functus officio upon such determination. Parties raising new issues at an advanced stage that are beyond the scope of the original disagreement have to cross a very high threshold for acceptance of those arguments or raise those issues as fresh disagreement. The International Co-Prosecutor observes that here the National Co-*

Prosecutor has raised fresh issues in her response to interrogatories by the Pre-Trial Tribunal and has not shown good cause why her fresh arguments should replace her Response Statement which raised none of them. He concludes that her new arguments should, therefore, be ignored or dismissed.

14. *Without prejudice to the preceding, the International Co-Prosecutor submits that the regularity of the preliminary investigation leading to the filing of the new submissions is beyond the scope of these disagreement proceedings.*

15. *Furthermore, he submits that the issue of regularity of the preliminary submission is not so inextricably linked to the issue of the New Submissions such that the determination of the Second may be contingent on the determination of the First. These are distinct issues amenable to independent determination. In any event, the regularity of any action during the investigation can be challenged by a party under Rule 76. Therefore, if a party can make a valid case that a "unilateral" preliminary investigation has vitiated the proceedings; it can seek annulment of any or all resultant actions.*

16. *The International Co-Prosecutor notes that most of the authorisations for preliminary investigation, whenever given by one or both the Co-Prosecutors, were oral, which is permitted by law. In any event, while the founding documents of this Court envisage a joint action by the Co-Prosecutors to effectuate their mandate, the International Co-Prosecutor submits that those documents also envisage that the Co-Prosecutors shall carry out their day-to-day functions jointly or severally. Assuming, therefore, that the preliminary investigation of the International Co-Prosecutor was indeed "unilateral" it is permissible under the Rules as long as the disagreement crystallised at the stage of the signing of the Introductory and Supplementary Submissions.*

17. *We are of the view that on the basis of the arguments by the Co-Prosecutors, there was no discussion or provision of information relevant to the preliminary investigation of the both Co-Prosecutors before drafting the Second and Third Introductory Submissions. We, therefore, find that the preliminary investigation was conducted unilaterally by the International Co-Prosecutor. In the meantime, the apology by Deputy Prosecutor William SMITH, which was not denied by the International Co-*

Prosecutor, is a more vivid manifestation of the failure to notify the National Co-Prosecutor about the preliminary investigation.

18. *Pursuant to Articles 16 of the ECCC Law and 6(1) of the Agreement, we are of the opinion that on the matter of the disagreement, the preliminary investigation is a significant starting point which validates the Introductory Submission. The International Co-Prosecutor's preliminary investigation without prior notification or discussion in terms of cooperation with the National Co-Prosecutor is a violation of the ECCC Law, Agreement and the Internal Rules. The consequences of such violation may exist in the proceedings that follow and shall not be taken into consideration in relation to the disagreement.*

Rule 67. Closing Orders by the Co-Investigating Judges

261. 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. The Co-Investigating Judges are not bound by the Co-Prosecutors' submissions.

262. The National Judges of the Pre-Trial Chamber find that the two Co-Investigating Judges have no choice other than jointly issuing a Closing Order after the conclusion of the investigation.

263. The National Judges of the Pre-Trial Chamber find that in the event of disagreement, the Co-Investigating Judges must exercise their discretion in accordance with the procedure – i.e. complying with Rule 72 of Internal Rules. The failure to comply with this Rule is a violation or an improper exercise of their discretion.

264. Rule 67.1 clearly states that upon the conclusion of the investigation, the Co-Investigating Judges shall issue only a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. Although the Rule does not prohibit the issuance of two opposing Closing Orders, according to legal principles, a case cannot have two opposing Closing Orders as in that of AO An. Despite the fact that the Agreement, the ECCC Law and the Internal Rules create co-officers (the Co-Prosecutors and the Co-Investigating Judges), Internal Rules define Rule 72 for the settlement of disagreements.

265. It should be noted however, the Co-Investigating Judges failed to enforce Rule 72 on

Disagreements, overlooking Rule 72 and issuing two opposing Closing Orders: the Closing Order (Dismissal) and the Closing Order (Indictment).

266. Should disagreements arise between the Co-Prosecutors before issuing an Introductory Submission, the disagreements shall be settled under Rule 71 of the Internal Rules.

267. In particularly, should disagreements arise between the Co-Investigating Judges before issuing a closing order (indictment or dismissal), the disagreements shall be settled under Rules 72 to 77.13 of the Internal Rules.

268. Should Rules 72 to 77.13 of the Internal Rules be opted out, the Agreement, the ECCC Law and the Internal Rules do not provide for and project proper solutions to the consequences of the opt-out. Thus, these are *lacunae* in law or the absence of law that should require proper solutions as provided for in Rule 2 on Procedure Applicable in case of *lacunae* in these Internal Rules.

269. Meanwhile, the National Co-Investigating Judge indicated in Paragraph 484 of the Closing Order (Dismissal) that "In conclusion, after reviewing the history of searching for justice before establishing the ECCC, the positions of the parties during the course of drafting the ECCC Law and Agreement, the narrow interpretation of the criminal law, the selective jurisdiction, the actual meaning of the ECCC Law and the position of parties, in particular, the national side before the establishment of the ECCC where it focused on national reconciliation and searching for justice, it requires the need to make a balance by concentrating on few senior leaders as narrow targets. The representative of the Royal Government showed such a position during the National Assembly debate on the legislation. The National and International Co-Investigating Judges previously confirmed their respect for the spirit of the negotiating parties for the establishment of the ECCC."

270. The National Judges of the Pre-Trial Chamber recall that paragraph 35 of the Closing Order in the case against IM Chaem, issued by the Co-investigating Judges on 10 July 2017, which stated that "This discrepancy, to iterate what was said above, was known during the negotiations by both the national and international sides. It is also a common feature of any international(ised) jurisdiction set up to bring judicial closure to post-conflict scenarios. [The selective approach to jurisdiction with a *de facto* negotiated impunity for virtually] the entirety of the former Khmer Rouge will appear unpalatable and indeed unfair to many. However, on

the one hand the informed political decision of the drafters must be respected by the judges of the ECCC and, on the other hand, this state of affairs must not and cannot equate to a presumption of guilt or, more to the point, to an automatic presumption of senior responsibility for those few who are brought before the court by allegations of the OCP."

3. The International Co-Investigating Judge Fails to Place AO An under Supervision

271. In Case 004/2 legal proceedings, the International Co-Investigating Judge erred in applying legal proceedings since the beginning, proceeding without complying with the principles, i.e. failing to place AO An under supervision. This is contrary to Article 126 of the Cambodian Criminal Procedure Code since it requires investigating judges to place under supervision of any persons specified in the introductory submission. This is a procedural error committed by the International Co-Investigating Judge.

4. International Co-Investigating Judge Erred in Applying the Procedure against Article 127 of the Criminal Procedure Code

272. In Case 004/2, the International Co-Investigating Judge was well aware of the disagreement between the National and International Co-Prosecutors and, in accordance with Article 127 of the Criminal Procedure Code, the International Co-Investigating Judge shall have the obligation to investigate for charging or acquitting. As a matter of fact, there is no evidence indicating that the Co-Investigating Judge investigated for acquitting, i.e. he only investigated the facts and ignored the National Co-Prosecutor's views on the personal jurisdiction. Thus, the Co-Investigating Judge failed to carry out his duty in a comprehensive manner.

5. Practices by the Co-Investigating Judges

A. Order Dismissing the Case by the National Co-Investigating Judge

273. The National Co-Investigating Judge declined to charge AO An.[331] The National Co-Investigating Judge centres on whether AO An falls under the personal jurisdiction of the ECCC. The specificity of the ECCC Agreement and the ECCC Law highlights selective jurisdiction. Facts forwarded by the International Co-Prosecutor are indeed objective; however, this Closing Order should be based on evidence derived from a legitimate investigation by the

[331] Closing Order (Dismissal) (D359), para. 1.

Office of the Co-Investigating Judges on all facts.[332]

274. The International Co-Prosecutor unilaterally opened the preliminary investigation while the principle of "Co-" in the judicial context of the ECCC has become legally binding even at the prosecutorial stage where the Co-Prosecutors are required to act jointly.[333] On 20 November 2008, the International Co-Prosecutor unilaterally filed the Introductory Submission in the present case alleging that AO An is responsible for crimes under the jurisdiction of the ECCC. The Introductory Submission did not prompt any immediate action from the Co-Investigating Judges as the National Co-Prosecutor registered a disagreement to be brought before the Pre-Trial Chamber. The Pre-Trial Chamber failed to reach a decision by the required majority. As a result, in compliance with the ECCC legal framework, the Introductory Submission stood. The Acting International Co-Prosecutor then forwarded the Introductory Submission to the Co-Investigating Judges, requesting a judicial investigation into the facts in Case 004. Subsequently, the case was severed into Case 004/2.[334]

275. On 27 March 2015, the International Co-Investigating Judge conducted the initial appearance, charging AO An. The National Co-Investigating Judge disagreed with the proceedings pursuant to Internal Rule 72(1).[335] The National Co-Investigating Judge does not agree to charge AO An as he is still of the view that, based on the investigation, it is still doubtful whether AO An falls within the personal jurisdiction of the ECCC. The issue of personal jurisdiction over AO An is a threshold issue that must be dealt with before other matters within the legal context of the ECCC's selective jurisdiction.[336]

276. A decision to open a judicial investigation is made at the Co-Investigating Judges' discretion.[337] Upon receipt of the Introductory Submission, the Co-Investigating Judges may initiate an investigation without having to charge someone immediately. A charged person may be summoned to appear before the Co-Investigating Judges. During this stage, the Co-Investigating Judges may issue a dismissal order. In principle, the Co-Investigating Judges will not issue an indictment without having to charge a person first since the charged person has not been notified of the charges so that he or she shall have time and means for the defence

[332] Closing Order (Dismissal) (D359), para. 2.
[333] Closing Order (Dismissal) (D359), para. 14.
[334] Closing Order (Dismissal) (D359), para. 15.
[335] Closing Order (Dismissal) (D359), para. 16.
[336] Closing Order (Dismissal) (D359), para. 17.
[337] Closing Order (Dismissal) (D359), para. 70.

against those charges. If such an indictment is issued, it will violate the right to a fair trial.[338]

277. The ECCC was established under the Agreement between the Royal Government of Cambodia and the United Nations. The ECCC is a special court whose jurisdiction is limited to two categories of persons only. For this reason, unlike national courts, the Co-Investigating Judges must first consider whether or not the person named in the Introductory Submission falls under the ECCC jurisdiction before charging him/her. The Co-Investigating Judges must undertake a thorough and complete analysis before charging any person. As such, as stated earlier, the Co-Investigating Judges have the discretion to decide independently and do not have to decide charges hurriedly.[339] The Co-Investigating Judges cannot indict a person and send him/her to trial before having charged him or her first. In respect of jurisprudence, France's Cour de Cassation has held that, "The Investigating Judge, before issuing a closing order that dismisses the case against a person, does not need to charge or interview that person if he finds that the person's guilt cannot be established."[340]

278. Failing to charge a person and eventually indicting and sending him/her to trial may violate these rights since the charged person has not been afforded an opportunity to exercise these rights and this would therefore result in an unfair trial. The decision to charge a charged person would move the criminal proceedings forward and the court would require time and resources to comply with legal procedures as required.[341]

279. Having presented AO An's role, authority, and participation, AO An's relation to KE Pauk and the authority KE Pauk had as the Zone Secretary, having compared Duch's authority, role and participation to AO An's, DK policies and authority structure and history and the intent of the parties to the Agreement and the ECCC Law, it is concluded that AO An's role was not officially appointed. The participation in the activities was shared according to the role and responsibility, without *de facto* authority. He acted upon orders from and instructions of KE Pauk, who led the Central Zone on a regular, direct or indirect basis, although he had missions in the East Zone occasionally or for a short period. KE Pauk had power and influence and was the only person at the zone level who survived in the context of the purges in the Central

[338] Closing Order (Dismissal) (D359), para. 71.
[339] Closing Order (Dismissal) (D359), para. 73.
[340] Closing Order (Dismissal) (D359), para. 74.
[341] Closing Order (Dismissal) (D359), para. 76.

Zone.[342]

280. AO An served as the Sector 41 Secretary of the Central Zone for a short period in the context of the Party purges in which cadres of all levels participated. Had he denied, he would not have escaped death. AO An's participation in the commission of crimes was non-autonomous, inactive, non-creative, and indirect, which is far different from Duch's active, direct and creative participation. Moreover, AO An did not participate in making CPK policies.[343]

B. Viewpoints of the National Judges of the Pre-Trial Chamber on the National Co-Investigating Judge's Closing Order (Dismissal)

281. The National Judges of the Pre-Trial Chamber have considered the decision on the International Co-Prosecutor's Appeal against the Closing Order in the case against IM Chaem (PTC50) that the ECCC is a special court that applies the indictment procedure and judicial investigation different from national courts. The indictment and judicial investigation by national courts are carried out only into facts, i.e. investigating judges are seised of cases with facts contained in prosecutor's introductory submissions.[344] On the contrary, at the ECCC, an indictment is possible only when the two criteria are satisfied: (i) facts: the crimes and serious violations of international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979 and (ii) individuals who were senior leaders of Democratic Kampuchea and those who were most responsible for the crimes.[345]

282. The National Judges of the Pre-Trial Chamber are of the view that the National Co-Investigating Judge carried out the judicial investigation in a comprehensive manner, on the basis of the disagreement between the Co-Prosecutors, and as a result of the investigation, AO An remains a suspect. Thus, the National Co-Investigating Judge's Closing Order (Dismissal) dismissing the case against AO An is legally justified and should be upheld.

C. Closing Order (Indictment) by the International Co-Investigating Judge

[342] Closing Order (Dismissal) (D359), para. 552.
[343] Closing Order (Dismissal) (D359), para. 553.
[344] Cambodian Code of Criminal Procedure (2007), Arts 44 and 125.
[345] ECCC Law, Art. 1; ECCC Agreement, Art. 1; Internal Rule 53.

283. In the Closing Order (Indictment) dated 16 August 2018, the International Co-Investigating Judge referred to the content of the ECCC Agreement and the ECCC Law and considered the terms "senior leaders and those who were most responsible" interpreted by the Supreme Court Chamber. In paragraphs 49 to 52, and noted that by adopting the definition laid out in its judgement in Case 001, the Supreme Court Chamber also implicitly held that there is no merit in any historical-political contention that the negotiations around the establishment of the ECCC led to a joint and binding understanding that only a certain finite number of (named) individuals were to be under the Court's jurisdiction. The selection of persons to be investigated and indicted was and is purely a matter for the discretion of the Office of the Co-Prosecutor and the Office of the Co-Investigating Judge and based entirely on the merits of each individual case.[346] Both the Office of the Co-Prosecutor and the Office of the Co-Investigating Judges would have been at liberty to reject this political accord as in any way fettering their discretion under the applicable law.[347]

284. The ECCC has personal jurisdiction over Ao An. He was a Khmer Rouge official during the time of the court's temporal jurisdiction and during the period when the alleged offences attributed to him occurred. While he was probably not yet at the rank of a senior leader, he was certainly one of the persons most responsible. It is thus unnecessary at this stage to resolve the issue of senior leadership fully for the purpose of determining personal jurisdiction.[348]

285. The abovementioned Closing Order (Indictment), paragraph 854, states that, "A further reason against ordering detention at this time is the procedural uncertainty resulting from the opposing closing orders, as a result of which it is unclear under Internal Rule 77(13) whether the indictment will stand should there be no super-majority upon appeal in the Pre-Trial Chamber..., based on the factual findings indicated in paragraphs 157 to 589, shall be punishable according to Articles 3 (new), 29 and 39 of the ECCC Law and Articles 501 and 506 of 1956 Penal Code."[349]

D. Viewpoints of the Pre-Trial Chamber on the International Co-Investigating Judge's Closing Order (Indictment)

[346] Closing Order (Indictment) (D360), para. 56.
[347] Closing Order (Indictment) (D360), para. 699.
[348] Closing Order (Indictment) (D360), para. 697.
[349] Closing Order (Indictment) (D360), para. 854.

286. The views of the International Co-Investigating Judge have left no precise definitions of the terms of senior leaders and those most responsible. In the meantime, there are no clear definitions in the International Co-Prosecutor's Written Statement of Facts and Reasons for Disagreement dated 20 November 2008 and the National Co-Prosecutor's Response dated 29 December 2008, specifically concerning the personal jurisdiction.

287. In the same document, point (D) senior leaders and those most responsible, paragraph 29 states that, however, while it is clear that the ECCC has jurisdiction over senior leaders and those most responsible, it is not clear about the meaning of those terms. Their definitions are not provided in the ECCC Law nor in Article 1 of the Agreement, in which very similar language is used. Also, the Internal Rules make no mention of the definition and no ECCC Chambers have ruled on the meanings of "senior leaders" and "those most responsible." However, the meanings of senior leaders and those most responsible may be derived from (i) history of ECCC negotiations and (ii) decisions made by other criminal tribunals that have interpreted such similar terms.

288. In the Closing Order, paragraph 699, the section of legal findings on personal jurisdiction, the last part states that, "In that sense, it is certainly correct to accept an influence of the political actors on the initial list of persons to be investigated at the beginning of the ECCC's existence; however, both the OCP and the CIJs would have been at liberty to reject this political accord as in any way fettering their discretion under the applicable law."

289. The National Judges of the Pre-Trial Chamber are of the view that the International Co-Investigating Judge's view that the Agreement between the United Nations and the Royal Government of Cambodia is a political accord is erroneous on the grounds that, from the drafting and discussion process until an agreement was reached, the legal experts representing the Royal Government of Cambodia and the United Nations have formulated legal instruments and standards in accordance with this Agreement which determines the scope of jurisdiction of the ECCC to make various laws. In this regard, the Agreement between the Royal Government of Cambodia and the United Nations is not a form of political accord as raised by the International Co-Investigating Judge[350] since the terms applied by the International Co-Investigating Judge are contrary to the original content of the Agreement as the term accord is

[350] Closing Order (Indictment) (D360), para. 699.

used in civil relations as opposed to the aforesaid Agreement.

290. Hence, both International Co-Prosecutor and International Co-Investigating Judge are required to strictly comply with the content of the Agreement. Moreover, the discretion of the International Co-Prosecutor and International Co-Investigating Judge to interpret, or broaden, and use the terms must be exercised in a narrow manner and with absolute legal terminologies (the last part of paragraph 699).

291. The International Co-Investigating Judge made use of a small part of the content of the negotiations which does not fully reflect the reality of the Agreement and the ECCC Law drafters' ideas and relies solely on facts without having considered the principles of prosecution and investigation as stipulated in the Agreement, the ECCC Law, the Internal Rules and the Preamble and eventually indicts and sends AO An to trial unlawfully.

292. Moreover, the International Co-Investigating Judge's Closing Order (Indictment) makes no mention of the result of the investigation into the personal jurisdiction and focuses only on facts; with such investigation, all the Khmer Rouge officials would become the subject of prosecution at the ECCC. But why are only AO An and the charged persons in Cases 003 and 004 brought to trial? Is such action in line with the spirit of the Agreement and the ECCC Law? The International Co-Investigating Judge's action contradicts the subject of the disagreement between both Co-Prosecutors on the personal jurisdiction, not on facts.

293. The action taken by the International Co-Investigating Judge is also contrary to the ideas of the law drafters, the administrative structure of Democratic Kampuchea, international jurisprudence and his previous assertions.[351]

294. In conclusion, the International Co-Investigating Judge's Closing Order (Indictment) sending AO An to trial erred in law and should be rejected.

G. LEGAL PRINCIPLE

1. *Lacunae* in Law

295. In this case, the Co-Investigating Judges issued two opposing Closing Orders and there is no law provided to resolve such a case. Hence, the Appeals against both Closing Orders fall

[351] Closing Order (Dismissal), (D359), para. 484.

within the *lacunae* in law or silence of law.

2. Principle of Interpretation of the Law

296. In order to guarantee the principle of legality, the law must be strictly interpreted and must not be extended by analogy. Article 5 of the Criminal Code provides that, in criminal matters, the law shall be strictly construed. A judge may neither extend its scope of application nor interpret it by analogy. In case of the silence of law or uncertainty in penal rules, judges may not interpret it by analogy.

297. In the event of the silence of law, judges should take into account the spirit of the drafters of the Internal Rules as to whether they had foreseen such a case where there may have had two closing orders and whether they had intended to leave *lacunae* in law behind or had not anticipated it. Apart from the intention of the drafters of the Internal Rules, we must also take into account the purpose of the ECCC establishment as stipulated in the ECCC purpose.

3. Principle of Legality

298. Justice Scalia,[352] former U.S. Supreme Court Judge, stated that law should be interpreted based on the original understanding of the authors at the time it was ratified, not based on dictionaries, vocabulary, or policies at that moment. In the event that law is not interpreted based on the intention of law drafters, the principle of legality is not satisfied. In the meantime, the fundamental principle that must be taken into consideration is the principle of *in dubio pro reo*.

4. Legal Certainty

299. Mr. Gustav Radbruch, a legal philosopher, regarded legal certainty, justice and purposiveness as the fundamental pillars of law. In European Union law, legal certainty is a requisite. Law must absolutely be certain to the extent that it allows people, if necessary and under the right direction, to foresee the consequences of their action. In this case, however, there is no legal certainty that allows the Charged Person to foresee his fate. Were we to allow the case to proceed forward by ignoring the Dismissal Order, it would mean that we are manifestly overlooking this principle.

---

[352] Justice Scalia and Interpretation of Theory of Originalism

5. Justice Delayed is Justice Denied

300. Introductory Submission concerning AO An (Case 004) was forwarded to the Co-Investigating Judges to open investigation after 18 August 2009. The investigation was carried out until 16 August 2018 when two separate Closing Orders were issued concurrently, namely:

- the International Co-Investigating Judge's Closing Order (Indictment) and
- the National Co-Investigating Judge's Closing Order (Dismissal Order).

301. The investigation took almost ten years but yields no specific results, which seriously affects AO An's rights. Thus, AO An remains in doubt, and according to general principles of law, the doubt shall benefit him.

CONCLUSION

CONSIDERATIONS OF THE NATIONAL JUDGES OF THE PRE-TRIAL CHAMBER

302. Considerations of the National Judges of the Pre-Trial Chamber:

- Considering the submissions by the parties;
- Considering all the evidence, including the debate on the ECCC draft law at the National Assembly;
- After legal deliberations;

THE NATIONAL JUDGES OF THE PRE-TRIAL CHAMBER ARE OF THE VIEW THAT:

i. The National Assembly debate session on the draft law provides additional testimony affirming the purpose of the drafters of the Agreement and the ECCC Law.

ii. The preliminary investigation by the International Co-Prosecutor was not conducted in line with the Agreement and the ECCC Law.

iii. The disagreements between both Co-Prosecutors in charging AO An and forwarding the case for judicial investigation relates only to personal jurisdiction over [senior] leaders and those most responsible.

iv. In the statement dated 8 September 2008, the Acting International Co-Prosecutor confirmed that there was no specific plan to conduct additional preliminary investigations on other potential suspects. Therefore, the preliminary investigations in Cases 003 and 004 conducted by the International Co-Prosecutor were not legally reasoned in accordance with the ECCC Law.

v. The fact that both Co-Investigating Judges issued Two Conflicting Closing Orders is a total violation of the ECCC legal framework.

vi. The fact that both Co-Investigating Judges avoided the Disagreement which is to be solved under Rule 72 of the Internal Rules creates a shrewd obstacle which cannot be solved in accordance with the law.

vii. Rule 77(13) of the Internal Rules had not projected or raised rules to settle the stalemate resulting from the existence of the two conflicting Closing Orders such as Case 004/2, and this is a *lacuna* or an absence of legal provision/law.

viii. In case of the absence of law and to close Case 004/2 in accordance with the existing law, the National Judges of the Pre-Trial Chamber are of the view that the most appropriate solution for the fact that either of the two closing orders cannot receive

majority votes, is that the Closing Order (Dismissal) is upheld under Rule 77(13) and the Closing Order (Indictment) is not effective.

ix. The Closing Order (Dismissal), which was done in accordance with the Agreement and the ECCC Law, shall be upheld.

x. The Closing Order (Indictment) was not done in line with the Agreement and the ECCC Law and shall be annulled.

FOR THESE REASONS, THE NATIONAL JUDGES OF THE PRE-TRIAL CHAMBER HEREBY DECIDE TO:

- **UPHOLD** the Closing Order (Dismissal);
- **ANNUL** the Closing Order (Indictment).

Phnom Penh, 19 December 2019

President PRAK Kimsan **Judge NEY Thol** **Judge HUOT Vuthy**

IX. OPINION OF JUDGES BAIK AND BEAUVALLET

303. The International Judges will set out below their considerations in relation to each of the three appeals.

AO AN'S APPEAL AGAINST THE CLOSING ORDER (INDICTMENT)

A. Ground 1: Issuance of an Indictment in Conjunction with a Valid Dismissal Order Was Based On An Error of Law

1. Submissions

304. On Appeal, the Co-Lawyers for AO An contend that "the issuance of an indictment in conjunction with a valid dismissal order was based on an error of law" and request the Pre-Trial Chamber to (i) declare the issuance of two Closing Orders to be unlawful and (ii) to "strike down" the Closing Order (Indictment) and "dismiss" the case.[353] Referring to the rules of interpretation set out in the Vienna Convention on the Law of Treaties (the "Vienna Convention"), the Co-Lawyers argue that the language of Internal Rule 67 unambiguously envisages a single closing order and, that, in light of the object and purpose of that rule to regulate for a clear and legally certain outcome for investigations, it could not have been the drafters' intention to permit a situation whereby a case can be both dismissed and indicted by two Co-Investigating Judges enjoying equal status and authority.[354] Other provisions of the ECCC legal framework, including Article 23*new* of the ECCC Law and Internal Rule 14(4), further confirm that a closing order must be the joint work product of both Co-Investigating Judges.[355] Issuing two Closing Orders at the conclusion of a single investigation is inconsistent with the ECCC as well as the Cambodian and international legal frameworks.[356]

305. Further, the Co-Lawyers argue that the issuance of two Closing Orders is unprecedented.

---

[353] AO An's Appeal (D360/5/1), paras 20, 36.
[354] AO An's Appeal (D360/5/1), paras 21-23; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625263-01625266, pp. 4:21 to 7:10.
[355] AO An's Appeal (D360/5/1), para. 24; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625265, pp. 6:15 to 6:19.
[356] AO An's Appeal (D360/5/1), para. 25.

This purportedly violates AO An's rights to equality before the law and courts,[357] and certain fair trial guarantees, including: the right to be presumed innocent, the right to be tried by a fair and competent tribunal, the right to be informed promptly and in detail of the nature and cause of the charges and the right to be tried without undue delay.[358] Moreover, the existence of contradictory Closing Orders constitutes an affront to the principle of legal certainty and "a mockery of justice"; an appellate review that results in the confirmation of both Closing Orders will only perpetuate this affront.[359]

306. The Co-Lawyers further aver that the issuance of two Closing Orders resulted from a disagreement between the Co-Investigating Judges and, as such, must be resolved using Internal Rule 72, which requires, in the absence of a Pre-Trial Chamber resolution, that the "default decision shall be that the order or investigative act done by one [Co-Investigating Judge] shall stand".[360] Since the Co-Investigating Judges did not refer their disagreement to the Pre-Trial Chamber, the Closing Order (Dismissal)—which has a lower document number, indicating that it was placed on the Case File before the Closing Order (Indictment)—must stand as the default decision.[361] Additionally, since the investigation has ended, "the presumption of continuation applicable during an open investigation no longer applies", and the only workable solution under Internal Rule 72 is to allow the Closing Order (Dismissal) to stand.[362]

307. Finally, and in the alternative, the Co-Lawyers submit that the two opposing Closing Orders created an impasse that is not contemplated by any ECCC, Cambodian or international rules of procedure.[363] Articles 5 and 7 of the ECCC Agreement and Article 23*new* of the ECCC Law were solely designed to regulate disagreements in the course of an ongoing investigation

---

[357] AO An's Appeal (D360/5/1), paras 26-27 *referring to Constitution of Cambodia* (24 September 1993), Art. 31; ICCPR, Art. 14. Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625263-01625264, pp. 4:23 to 5:3.
[358] AO An's Appeal (D360/5/1), paras 28-31; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625508, pp. 16:3 to 16:20; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625267-01625268, pp. 8:4 to 9:25.
[359] AO An's Appeal (D360/5/1), para. 32.
[360] AO An's Appeal (D360/5/1), para. 34 *referring to* Internal Rule 72(4)(d). Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625265, pp. 6:13 to 6:19.
[361] AO An's Appeal (D360/5/1), para. 34.
[362] AO An's Appeal (D360/5/1), para. 34; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625506, pp. 14:7 to 14:10.
[363] AO An's Appeal (D360/5/1), paras 33, 35-36; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625264, 01625269-01625270, pp. 5:4 to 5:11, 10:1 to 11:8.

rather than the present situation of two opposing Closing Orders following the investigation.[364] The logic of procedure at the ECCC requires a definitive conclusion of the investigation stage before the case can move forward and absolute clarity of the charges is necessary.[365] Consequently, any doubt should be resolved in AO An's favour, requiring the dismissal of the case.[366]

308. In the Response, the International Co-Prosecutor submits that the relevant law allows for the issuance of a conflicting indictment and dismissal order in a single case and requires that the Indictment prevails.[367] First, although the English text of Internal Rule 67(1) refers to the plural "Co-Investigating Judges", the Khmer version "can refer to either a single Co-Investigating Judge or both Co-Investigating Judges."[368] In light of this and Internal Rule 1(2), Rule 67(1) must be read as authorising the possibility of a single judge issuing a closing order.[369] Moreover, the words "either" and "or" in Rule 67(1) simply articulate the requirement that any closing order issued be dispositive of all facts and charges and "definitively conclude a case, either by indictment or dismissal (or by indictment on some charges and dismissal on others)".[370] That Rule does not preclude the issuance of two conflicting closing orders in a single case, as confirmed by the Supreme Court Chamber jurisprudence.[371] In addition, the International Co-Prosecutor asserts that the Co-Investigating Judges exercised their discretion by not sending the disagreement to the Pre-Trial Chamber, by which all parties have benefitted from two detailed Closing Orders setting out the Co-Investigating Judges' factual findings and reasoning.[372]

309. The International Co-Prosecutor further contends that the Co-Lawyers fail to show that

---

[364] Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625506-01625508, pp. 14:12 to 16:9.
[365] Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625505-01625506, pp. 13:11 to 14:10.
[366] AO An's Appeal (D360/5/1), paras 33, 35-36; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625264, 01625269-01625270, pp. 5:4 to 5:11, 10:1 to 11:8.
[367] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 5-15; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625320-01625329, pp. 61:18 to 70:5.
[368] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 6-8; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625321-01625322, pp. 62:11 to 63:11; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625496-01625497, pp. 4:25 to 5:10.
[369] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 8; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625497, pp. 5:11 to 5:19.
[370] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 9.
[371] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 9-10 *referring to* Case 001 Appeal Judgment (F28), para. 65.
[372] Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625495-01625496, 01625499-01625500, pp. 3:17 to 4:23, 7:3 to 8:17.

the issuance of two Closing Orders violated AO An's fair trial rights.[373] The Co-Lawyers' claim (that the unprecedented nature of two Closing Orders is unfair) ignores the fact that the Royal Government of Cambodia and the United Nations—determined to uphold international standards of justice and fairness—deliberately created a unique and unprecedented structure for the ECCC, with two investigating judges; thus, this situation could not have arisen elsewhere.[374] The issuance of an indictment by one Co-Investigating Judge also does not remove the presumption of innocence, which ensures the burden is on the Prosecution to prove an accused's guilt beyond a reasonable doubt at trial; that is not the burden of proof required for an indictment.[375] Additionally, the issuance of conflicting Closing Orders does not raise the possibility that Case 004/2 will be left in "unregulated limbo" since the future of proceedings is clear: if none of the Appeals against the Closing Orders is successful in the Pre-Trial Chamber, the Trial Chamber will be seised with the Closing Order (Indictment) pursuant to Internal Rule 77(13)(b).[376] Moreover, the International Co-Prosecutor submits that the principle of *in dubio pro reo* is primarily understood as a principle relevant to findings of fact and, therefore, does not require the Chamber to adopt the Co-Lawyers' position concerning the interpretation of the law.[377]

310. Finally, in relation to the Co-Lawyers' assertion that the Closing Order (Dismissal) must be deemed the only effective Closing Order because its lower document number indicates that it was filed before the Closing Order (Indictment), the International Co-Prosecutor argues that this approach is arbitrary, unprincipled and would have no basis in the merits of a given position or the legality of a given action; rather, the rights of charged persons and society's interest in achieving justice would be determined through a race to file.[378]

311. In the Reply, the Co-Lawyers submit that the International Co-Prosecutor's contention that Internal Rules 67 and 1(2) allow for a closing order to be signed by a single Co-Investigating Judge deflects from the crux of the Co-Lawyers' argument—that Internal Rule 67 provides for a single closing order.[379] The Co-Lawyers argue that while a closing order by

[373] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 11-13.
[374] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 11.
[375] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 12.
[376] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 13; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625500-01625502, pp. 8:19 to 10:6; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625327-01625329, pp. 68:18 to 70:5.
[377] Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625497-01625499, pp. 5:21 to 7:1.
[378] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 14-15.
[379] AO An's Reply (D360/11), para. 8.

a single Co-Investigating Judge is possible when a disagreement between the Judges has been settled by the Pre-Trial Chamber under Internal Rule 72, it is not permitted that each Co-Investigating Judge issue his own closing order.[380] Indeed, the International Co-Prosecutor's interpretation of Internal Rule 67 as articulating the requirement that a closing order adequately disposes of the facts and charges and "definitively conclude[s] a case" is self-defeating, considering that a valid indictment and dismissal in a single case is the very antithesis of a definitive disposition.[381] Moreover, the Supreme Court Chamber's *obiter dictum* in Case 001 does not apply because it was made while examining the application of the ECCC disagreement procedures under Internal Rule 72 and, thus, cannot be interpreted as a confirmation of the validity of two conflicting closing orders under Internal Rule 67.[382]

312. The Co-Lawyers further contend that the International Co-Prosecutor's argument that separate and opposing Closing Orders do not violate AO An's fair trial rights is unpersuasive.[383] In particular, the claim that the ECCC's "unique structure" was intended to uphold international standards does not immunise the Court from allegations of unfairness resulting from this structure; what matters is the prejudice actually caused to AO An's rights by the conflicting Closing Orders.[384] Moreover, the appointment of two investigating judges to a single case is not in fact unique to the ECCC; what is unique is the issuance of two separate conflicting Closing Orders.[385]

313. The Co-Lawyers argue that the existence of a special disagreement procedure in Article 7 of the ECCC Agreement and Internal Rule 72 attests to the fact that the parties never contemplated this possibility.[386] Additionally, contrary to the International Co-Prosecutor's assertion, at the ECCC, the Prosecution bears the burden of proof at every stage of the proceedings, from the Introductory Submission to the final appeal—only the standard of proof

[380] AO An's Reply (D360/11), paras 7-8; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625264-01625266, pp. 5:21 to 7:10.
[381] AO An's Reply (D360/11), para. 8.
[382] AO An's Reply (D360/11), para. 9 *referring to* Case 001 Appeal Judgment (F28), para. 65; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625265-01625266, pp. 6:20 to 7:3.
[383] AO An's Reply (D360/11), para. 10; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625367-01625368, pp. 108:12 to 109:1.
[384] AO An's Reply (D360/11), paras 11-12.
[385] AO An's Reply (D360/11), para. 11 *referring to, inter alia*, CCP [France], Arts 83-1, 83-2. The Co-Lawyers note that in France, one judge may disagree and refuse to sign the closing order but cannot issue a conflicting order. Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625266-01625267, pp. 7:18 to 8:3.
[386] AO An's Reply (D360/11), para. 11.

changes.[387] Accordingly, the Co-Lawyers submit that for the Co-Investigating Judges to indict AO An, the Prosecution must demonstrate in the Final Submission that the evidence is sufficiently serious and corroborative to provide a certain level of probative force; to send AO An to trial despite the existence of a valid dismissal would be a gross violation of, *inter alia*, his presumption of innocence.[388]

314. Finally, rather than seeking an unprincipled and arbitrary resolution to this unfair situation, the Co-Lawyers submit that they are merely asking the Pre-Trial Chamber to resolve the unfair situation by "applying the applicable rules."[389] The Co-Lawyers ask the Chamber to find that the ECCC legal framework and the ICCPR do not "allow for conflicting closing orders to be issued in the same case"; the Co-Lawyers submit that any case of doubt must be resolved in AO An's favour in accordance with Article 38 of the Cambodian Constitution.[390] The Co-Lawyers aver that the International Co-Prosecutor's request that the Closing Order (Indictment) be given primacy over the Closing Order (Dismissal) is in violation of the equality between judges, based on a misinterpretation of Internal Rule 77(13)(b) and inapplicable jurisprudence.[391] Therefore, the Closing Order (Dismissal) must prevail.[392]

2. Discussion

315. On 16 August 2018, the International Co-Investigating Judge issued the Closing Order (Indictment), sending AO An to trial,[393] while the National Co-Investigating Judge issued a Closing Order dismissing all charges against him.[394] The International Judges recall that the Co-Investigating Judges' agreement on the simultaneous issuance of conflicting Closing Orders amounts to an error in law.[395]

316. The International Judges observe that the Co-Investigating Judges erroneously vested themselves with authority to issue separate and contradicting Closing Orders on 18 September

---

[387] AO An's Reply (D360/11), para. 13.
[388] AO An's Reply (D360/11), para. 13.
[389] AO An's Reply (D360/11), para. 15.
[390] AO An's Reply (D360/11), paras 6, 15; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625503-01625505, 01625509-01625510, pp. 11:8 to 13:10, 17:3 to 18:1; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625264, 01625269-01625270, pp. 5:4 to 5:11, 10:1 to 11:8.
[391] AO An's Reply (D360/11), paras 14, 16.
[392] AO An's Reply (D360/11), paras 15-16.
[393] Closing Order (Indictment) (D360).
[394] Closing Order (Dismissal) (D359).
[395] *See* paras 88-124.

2017[396] and they recorded their disagreement concerning the filing of separate and opposite closing orders, almost a year later, on 12 July 2018.

317. The International Judges now turn to address the validity of each Closing Order. The International Judges consider that the divergence between the International Co-Prosecutor and the Co-Lawyers in their argumentation concerning the legality of the Co-Investigating Judges' simultaneous issuance of two conflicting Closing Orders, leading to their disparate conclusions as to which Closing Order prevails over another, stems from their erroneous reliance on a number of presumptions. The International Judges are not convinced that the Dismissal Order prevails for any of the arguments put forward by the Co-Lawyers. Neither are the International Judges persuaded by the International Co-Prosecutor's argumentation in reaching his conclusion.

318. The International Judges, for the reasons set out below, find that the two Closing Orders in question are not identical in their conformity with the applicable law before the ECCC and hold that only the Indictment is valid.

319. The International Judges first recall that one Co-Investigating Judge may validly issue an indictment by acting alone.[397] The International Judges further note Article 5(4) of the ECCC Agreement and Article 23*new* of the ECCC Law, which provide that in the event of a disagreement between the Co-Investigating Judges, "[t]he *investigation shall proceed*" unless the Co-Investigating Judges or one of them refers their disagreement to the Pre-Trial Chamber.[398]

320. The International Judges observe that this principle of continuation of judicial investigation governs the issue at hand. The International Judges are not persuaded by the Co-Lawyers' assertion that the investigation has ended and the presumption of continuation

---

[396] Decision on Disclosure concerning Disagreements (D355/1), paras 13-15.
[397] *See supra* para. 105; Internal Rule 1(2) ("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"). *See, e.g.*, Decision on AO An's Appeal of Rejection for Information (D208/1/1/2), para. 11; Case 004 Decision on the Request to Stay the Execution (A122/6.1/3), para. 14; Case 004/1 Decision on IM Chaem's Appeal regarding Summons (D236/1/1/8), para. 30.
[398] ECCC Agreement, Art. 5(4) ("The co-investigating judges shall cooperate with a view to arriving at a common approach to investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, *the investigation shall proceed* unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.") (emphasis added); ECCC Law, Art. 23*new*, para. 3 ("*The investigation shall proceed* unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions") (emphasis added).

applicable during an open investigation no longer applies.[399]

321. While the settlement procedure of disagreements between the Co-Investigating Judges provided by Internal Rule 72 may not be applied to the procedures *after* the issuance of a closing order, it does not preclude application to the procedure of *issuing* the closing order before the conclusion of the investigation.[400] As the Supreme Court Chamber properly noted,[401] in case one of the Co-Investigating Judges proposes to issue an indictment and the other disagrees, either or both of them can bring the disagreement before the Pre-Trial Chamber pursuant to Internal Rule 72.

322. In the case at hand, neither of the Co-Investigating Judges referred the disagreement to the Pre-Trial Chamber within 30 days[402] from the registration of the disagreement on 12 July 2018. Consequently, the investigation or prosecution shall proceed.[403] In this specific situation where one of the Co-Investigating Judges proposes to issue an indictment and the other Co-Investigating Judge disagrees, "the investigation shall proceed" means that the indictment must be issued as proposed.[404]

323. Furthermore, in examining the meaning of "the investigation shall proceed", the International Judges find that no one may reasonably interpret this language, in its ordinary meaning and in light of its object and purpose, to include the issuance of a closing order (dismissal).[405] First, in its ordinary meaning, a proposal to issue a dismissal order, the very antithesis of an indictment which makes the case move forward to trial, cannot be recognised as a separate investigative act. It is nothing more than a different characterisation of the National Co-Investigating Judge's disagreement on the issuance of the indictment, which must be resolved by the Internal Rule 72 disagreement settlement procedure. Second, the purpose of

---

[399] AO An's Appeal (D360/5/1), para. 34.
[400] Internal Rule 67(1) ("The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order").
[401] Case 001 Appeal Judgment (F28), para. 65 ("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'") (emphasis added).
[402] ECCC Agreement, Art. 5(4); ECCC Law, Art. 23*new*; Internal Rule 72(2).
[403] ECCC Agreement, Arts 5(4), 7(4); ECCC Law, Art. 23*new*.
[404] The International Judges are not convinced that Internal Rule 72(4)(d), which reads: "the default decision shall be that the order or investigative act done by one [Co-Investigating Judge] shall stand" is applied here as suggested by the Co-Lawyers (AO An's Appeal (D360/5/1), para. 34). Internal Rule 72(4)(d) applies when the Pre-Trial Chamber fails to reach a supermajority in the disagreement procedure. The disagreement in the instant case was not brought before the Pre-Trial Chamber.
[405] Vienna Convention, Art. 31(1) ("a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

the ECCC Agreement and the ECCC Law is to *bring to trial* senior leaders of DK and those who were most responsible for the crimes.[406] It is reasonably inferred from the language of Articles 5(4), 6(4) and 7 of the ECCC Agreement, Articles 20*new* and 23*new* of the ECCC Law and Internal Rules 13(5), 14(7), 71 and 72, that the key object of the disagreement settlement mechanism is to prevent a deadlock from derailing the proceedings from moving to trial.[407]

324. The International Judges, thus, find that the International Co-Investigating Judge's issuance of the Closing Order (Indictment), despite his erroneous agreement on the issuance of a simultaneous Closing Order (Dismissal) by his colleague, is procedurally in conformity with the applicable law before the ECCC, whereas the National Co-Investigating Judge's issuance of the Closing Order (Dismissal) has no legal basis.

325. The International Judges reaffirm that a closing order of the Office of the Co-Investigating Judges must be a single decision[408] and underline that a referral of disagreements between the Co-Investigating Judges before the Pre-Trial Chamber is mandatory and that they have no other means of settling their dispute when they fail to uphold their obligation to reach a common position concerning a closing order.[409] The issuance of the conflicting Closing Order (Dismissal) by the National Co-Investigating Judge without referral to the Pre-Trial Chamber is a brazen attempt to entirely circumvent this essential and mandatory requirement. This is by no means justifiable and thus has no legal effect.

326. Accordingly, the International Judges conclude that the National Co-Investigating Judge's issuance of the Closing Order (Dismissal) is *ultra vires* and, therefore, void; the International Co-Investigating Judge's Closing Order (Indictment) stands.

327. Turning to the purported violation of AO An's rights to equality before the law and courts, and certain fair trial guarantees, including: the right to be presumed innocent, the right

---

[406] ECCC Agreement, Art. 1; ECCC Law, Art. 1.
[407] The ECCC's negotiating history supports this interpretation. *See, e.g.*, SCHEFFER, "The Extraordinary Chambers in the Courts of Cambodia" (2008), p. 231 ("[...] In the absence of that supermajority vote, the investigation or recommendation to indict would proceed."); D. CIORCIARY & A. HEINDEL, Hybrid Justice (1st Edition, USA, The University of Michigan Press, 2014), D297.1, p. 31 ("To manage the risk of disagreement and deadlock between the Co-Prosecutors and Co-Investigating Judges, U S officials pushed for the establishment of a special judicial panel for that purpose. UN and Cambodian officials soon agreed to create a Pre-Trial Chamber composed of three Cambodian and two international judges empowered to block investigations or indictments only by supermajority vote."). The International Judges also note the Co-Lawyers' view that "when the PTC fails to reach a supermajority of votes, the default position for AO An's case is that the prosecution continues." (AO An's Appeal (D360/5/1), para. 210 and footnote 536).
[408] *See* paras 120-122.
[409] *See* paras 101-119.

to be tried by a fair and competent tribunal, the right to be informed promptly and in detail of the nature and cause of the charges and the right to be tried without undue delay and the principle of legal certainty,[410] the International Judges consider that these arguments presuppose the confirmation of both Closing Orders.[411] Having determined that only the Closing Order (Indictment) stands, the International Judges find no merit in these arguments.

328. In the same vein, the International Judges observe that there exists no ambiguity in this regard and consider that there is no need to examine further the Co-Lawyers' arguments relating to the principle of *in dubio pro reo*,[412] which is primarily a rule of proof and not of legal interpretation.[413]

329. In conclusion, Ground 1 is dismissed.

B. Ground 2: Erroneous Finding on Discretion to Determine Personal Jurisdiction

1. Submissions

330. The Co-Lawyers argue that the International Co-Investigating Judge erroneously held that he has unfettered discretion to decide whether AO An is within the ECCC's personal jurisdiction,[414] thereby following the Supreme Court Chamber's "flawed and obsolete position" granting the Co-Prosecutors and Co-Investigating Judges an inappropriately wide jurisdictional ambit effectively requiring the prosecution of almost all surviving Khmer Rouge cadres.[415] The International Co-Investigating Judge should instead have applied the Pre-Trial Chamber's jurisprudence in Case 004/1, holding that although the determination on personal jurisdiction is discretionary, this discretion is not unlimited and does not exclude appellate control.[416] The International Co-Investigating Judge's approach—precluding judicial scrutiny of the crucial question of personal jurisdiction—is also incompatible with the intentions and subsequent

[410] *See, inter alia*, AO An's Appeal (D360/5/1), paras 26-32.
[411] AO An's Appeal (D360/5/1), para. 32.
[412] AO An's Appeal (D360/5/1), paras 33, 35-36.
[413] Case 003 Decision on MEAS Muth's Appeal against the International Co-Investigating Judge's Decision concerning Nexus (D87/2/1.7/1/1/7), para. 65.
[414] AO An's Appeal (D360/5/1), para. 39 *referring to* Closing Order (Indictment) (D360), paras 54, 699.
[415] AO An's Appeal (D360/5/1), paras 39, 41 *referring to* Case 001 Appeal Judgment (F28), paras 61, 79; AO An's Response to Final Submissions (D351/6), paras 77-79.
[416] AO An's Appeal (D360/5/1), para. 40 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20.

practice of the parties to the ECCC Agreement, which are essential interpretive tools.[417]

331. In the Response, the International Co-Prosecutor submits that the International Co-Investigating Judge did not consider himself to have "unfettered discretion".[418] The Co-Lawyers base their argument to the contrary on a mischaracterisation of the Judge's paraphrase of a Supreme Court Chamber holding which was in fact discussing the review power of the Trial and Supreme Court Chambers with respect to the jurisdictional question, and in any event, he acknowledged that even in those Chambers the assessment would be subject to challenge for abuse of discretion.[419] Furthermore, in the International Co-Investigating Judge's own view—which incorporated by reference the discussion by both Co-Investigating Judges in the Case 004/1 Closing Order (Reasons)—the Co-Investigating Judges' discretion is more limited than the paraphrased Supreme Court Chamber jurisprudence suggests, and is in fact reviewable by other chambers.[420]

332. The Co-Lawyers do not reply to the International Co-Prosecutor's Response to this Ground, but they submit that this should not be interpreted as tacit acquiescence.[421]

2. Discussion

333. At the outset, the International Judges reiterate that although the determination on personal jurisdiction is a discretionary decision, the discretion of the Co-Investigating Judges in making this determination does not permit arbitrary action, especially since the terms senior leaders and those who were most responsible represent the limits of the ECCC's personal jurisdiction.[422]

334. In the Closing Order (Indictment), the International Co-Investigating Judge adopted the joint view expressed by the Co-Investigating Judges in the Case 004/1 Closing Order (Reasons) regarding the nature of this determination;[423] namely, that this exercise of discretion "entails a

---

[417] AO An's Appeal (D360/5/1), paras 41-42 *referring to* AO An's Response to Final Submissions (D351/6), paras 62-76.
[418] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 16-19.
[419] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 17.
[420] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 18-19 *referring to* Closing Order (Indictment) (D360), para. 54; Case 004/1 Closing Order (Reasons) (D308/3), paras 8-9.
[421] AO An's Reply (D360/11), para. 5.
[422] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20. *See also* ECCC Agreement, Art. 2(1); ECCC Law, Art. 2*new*.
[423] Closing Order (Indictment) (D360), para. 54 *referring to* Case 004/1 Closing Order (Reasons) (D308/3), paras 9-10.

wide but not entirely non-justiciable margin of appreciation for the [Co-Prosecutors] and [Co-Investigating Judges]."[424] The International Co-Investigating Judge therefore did not claim to have unfettered discretion to decide whether AO An is within the ECCC's personal jurisdiction, contrary to the Co-Lawyers' assertions under this Ground.[425] The Pre-Trial Chamber's Case 004/1 holding regarding the limits of this discretion,[426] summarised in the preceding paragraph, still holds true and is indeed reiterated in the standard of review section of the instant case.[427] Ground 2 is accordingly dismissed.

C. Ground 3: Overly Broad Interpretation of Those Most Responsible

1. Submissions

335. The Co-Lawyers submit that the International Co-Investigating Judge misunderstood the limits of personal jurisdiction by interpreting the meaning of those most responsible in an overly broad manner.[428] This error purportedly manifested itself in four ways.

336. First, the International Co-Investigating Judge failed to narrowly interpret the meaning of most responsible and erred in ignoring the Court's negotiation history, subsequent practice of the parties and views of the National Co-Prosecutor and National Judges when determining those most responsible.[429] Although originally restricted to the top CPK leadership at the Centre,[430] the ECCC's personal jurisdiction was widened to include those most responsible to enable the prosecution of Duch.[431] In this context, the correct narrow understanding of personal jurisdiction encompasses Khmer Rouge officials who were indispensable in setting and

---

[424] Case 004/1 Closing Order (Reasons) (D308/3), para. 9.
[425] The Co-Lawyers also claim the International Co-Investigating Judge held he has unfettered discretion in light of his statement that the Co-Prosecutors and Co-Investigating Judges in Case 001 "would have been at liberty to reject this political accord as in any way fettering their discretion under the applicable law". AO An's Appeal (D360/5/1), para. 39, footnote 59 *referring to* Closing Order (Indictment) (D360), para. 699. When this quote is read in context, however, it is clear the International Co-Investigating Judge was rather stating that any political accord as to the initial list of persons to be investigated at the commencement of the ECCC's activities could not fetter the legal discretion granted to the Co-Prosecutors and Co-Investigating Judges; this does not imply that their discretion is otherwise unlimited.
[426] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20.
[427] *See supra* paras 28-30.
[428] AO An's Appeal (D360/5/1), paras 43-44, 54; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625261, pp. 2:17 to 2:22, 01625271-01625272, pp. 12:20 to 13:8.
[429] AO An's Appeal (D360/5/1), para. 46; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625271-01625272, pp. 12:22 to 13:4.
[430] AO An's Appeal (D360/5/1), para. 46; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625272, pp. 13:5 to 13:6.
[431] AO An's Appeal (D360/5/1), para. 46 *referring to* AO An's Response to Final Submissions (D351/6), paras 82-92, 98.

implementing CPK policy and who had a comparatively more significant position in the CPK and role in the most serious crimes.[432] This excludes individuals like AO An.[433]

337. Second, in violation of *in dubio pro reo* and strict construction, the International Co-Investigating Judge failed to apply the narrowest definition of those most responsible in favour of AO An.[434]

338. Third, the Co-Lawyers allege that the International Co-Investigating Judge applied a "backward and artificial"[435] approach in the Closing Order (Indictment) which purportedly inflates AO An's role in the crimes and creates the illusion that he is amongst the most responsible.[436] Specifically, the International Co-Investigating Judge conflated the concept of personal jurisdiction with a mode of liability by incorrectly viewing most responsible through the lens of JCE I; this interpretation would potentially encompass the entire CPK chain of command and, thus, defeat the object of limiting the Court's personal jurisdiction.[437] The International Co-Investigating Judge wrongly bypassed the requirement for a proper assessment of personal jurisdiction by first assessing AO An's role in and responsibility for the genocide in the Central Zone, through the broad net of JCE I and, then, determining that this responsibility is equal to that required for personal jurisdiction.[438] Instead, the Co-Lawyers assert that the criteria to determine whether AO An falls under those most responsible should have been applied first and criminal responsibility examined only if a positive finding was made.[439]

339. Fourth, the Co-Lawyers allege that the International Co-Investigating Judge committed an error of law by conducting a limited comparison of AO An to only IM Chaem and Duch,

---

[432] AO An's Appeal (D360/5/1), paras 45, 47, 54; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625272, pp. 13:10 to 13:17.
[433] AO An's Appeal (D360/5/1), para. 47; *see also* paras 80-156 (containing AO An's arguments on Ground 6); Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625272, pp. 13:21 to 13:23, 01625366, pp. 107:18 to 107:21.
[434] AO An's Appeal (D360/5/1), para. 48; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625272-01625273, pp. 13:24 to 14:9.
[435] AO An's Appeal (D360/5/1), para. 50.
[436] AO An's Appeal (D360/5/1), paras 50-52.
[437] AO An's Appeal (D360/5/1), para. 49 *referring to* ECCC Agreement, Art. 2(1); Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625273-01625274, pp. 14:10 to 15:2; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625523, pp. 31:10 to 31:16.
[438] AO An's Appeal (D360/5/1), paras 50-52; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625273, pp. 14:11 to 14:15.
[439] AO An's Appeal (D360/5/1), para. 50.

excluding other members such as KE Pauk, *Ta* Mok and SAO Sarun.[440] No ECCC Law or jurisprudence restricts the comparative analysis required for assessing personal jurisdiction to only Khmer Rouge officials who have been investigated, prosecuted or convicted by the Court.[441] Had a genuine analysis in relation to level of responsibility and gravity of the charged crimes been conducted, the International Co-Investigating Judge could not have found AO An to be within the Court's jurisdiction as he did not have a more significant position or role compared to other Khmer Rouge officials.[442]

340. In the Response, the International Co-Prosecutor argues that the Co-Lawyers fail to demonstrate that the International Co-Investigating Judge interpreted the term most responsible in an overly broad manner.[443] Their first argument, that the Court was created to prosecute "only the top Khmer Rouge leadership",[444] is manifestly wrong given that the ECCC Agreement and Law are indisputably clear that the ECCC was established to bring to trial senior leaders of DK and those who were most responsible for the crimes and serious violations committed during the period.[445] Moreover, the assertion that the category of most responsible was added to enable the prosecution of Duch is contradicted by statements made by Deputy Prime Minister SOK An, Cambodia's chief negotiator to the Cambodian National Assembly at the time of the adoption of the ECCC Law.[446] According to the International Co-Prosecutor, the rest of the Co-Lawyers' submissions on this Ground are unsupported conclusory statements that should be summarily dismissed.[447]

341. Regarding *in dubio pro reo*, the International Co-Prosecutor argues that the International Co-Investigating Judge correctly acknowledged that the application of *in dubio pro reo* and strict construction is limited to doubts that remain after the application of standard rules of

---

[440] AO An's Appeal (D360/5/1), para. 53; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625274, pp. 15:3 to 15:10.
[441] AO An's Appeal (D360/5/1), para. 53; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625274, pp. 15:12 to 15:14.
[442] AO An's Appeal (D360/5/1), paras 53-54; *see also* paras 80-156 (containing AO An's arguments on Ground 6); Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625274, pp. 15:14 to 15:25.
[443] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 20.
[444] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 21 *referring to* AO An's Appeal (D360/5/1), para. 46.
[445] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 21; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625330-01625331, pp. 71:4 to 72:10; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625094-01625095, pp. 30:9 to 31:9, 01625096, pp. 32:20 to 32:22.
[446] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 22-23; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625096, pp. 32:7 to 32:19, 01625097, pp. 33:2 to 33:18, 01625108-01625109, pp. 44:12 to 45:8.
[447] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 24.

interpretation.[448] In light of the International Co-Investigating Judge's findings regarding AO An's "position and the nature, the geographical reach and the impact of his actions", there is no room to doubt that he falls within the personal jurisdiction of the ECCC, even at its narrowest reasonable construction.[449]

342. Concerning the purportedly "backward and artificial"[450] approach which improperly assessed AO An's responsibility through JCE I, the International Co-Prosecutor contends that it was not only appropriate but necessary for the International Co-Investigating Judge to assess AO An's criminal responsibility, including under JCE I, in evaluating whether he falls within the personal jurisdiction of the ECCC; the Pre-Trial Chamber has indicated it is of central relevance to the determination.[451] Furthermore, contrary to the Co-Lawyers' argument, the Closing Order (Indictment) does not find AO An to be among the most responsible solely because of his alleged membership in a JCE I; rather, a well-reasoned and thoroughly substantiated determination concludes that AO An was a "willing and driven participant in the brutal and criminal implementation of [the] inhuman policies" of the DK regime.[452]

343. Finally, concerning the Co-Lawyers' allegation that the International Co-Investigating Judge erred in failing to compare AO An to other Khmer Rouge Officials, the International Co-Prosecutor avers that the Co-Lawyers do not explain why an analysis of whether KE Pauk, *Ta* Mok, and SAO Sarun were among the most responsible would be necessary to make this determination regarding AO An.[453]

344. In the Reply, the Co-Lawyers argue that the International Co-Prosecutor fails to substantiate his arguments and, instead, cherry-picks pieces of the negotiating history in an attempt to broaden the ECCC's personal jurisdiction.[454] Contrary to his claims, the Co-Lawyers did not ignore the most responsible category but rather demonstrated, through a thorough

---

[448] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 25 *referring to* Closing Order (Indictment) (D360), para. 55; Case 004/1 Closing Order (Reasons) (D308/3), paras 26-36.
[449] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 26 *referring to* Closing Order (Indictment) (D360), paras 697-712.
[450] AO An's Appeal (D360/5/1), para. 50.
[451] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 27-28 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 26.
[452] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 29 *referring to* Closing Order (Indictment) (D360), para. 712; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625329-01625331, pp. 70:18 to 72:10, 01625332, pp. 73:14 to 73:20.
[453] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 30; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625331-01625332, pp. 72:11 to 73:20.
[454] AO An's Reply (D360/11), paras 17, 22.

examination of the negotiating history, that it was not intended as a catch-all category; conversely, the International Co-Prosecutor only cited to one political speech and ignored statements by the negotiating parties in his Response; thus, the International Co-Prosecutor provides no basis to request summary dismissal of the Co-Lawyers' arguments.[455]

345. Moreover, concerning the "backward and artificial"[456] analysis of personal jurisdiction through JCE I, the Co-Lawyers contend that the International Co-Prosecutor misunderstands the argument about the conflation of personal jurisdiction with JCE I; while criminal liability may be one factor in evaluating personal jurisdiction, it cannot be the only factor—personal jurisdiction cannot be solely based on alleged membership of a JCE I.[457] He further fails to show that the Co-Lawyers did not demonstrate the legal error in the International Co-Investigating Judge's restricted comparative analysis; indeed, the term of most responsible implies the need for comparative analysis between alleged perpetrators, whether they be alive or dead.[458]

346. Finally, concerning *in dubio pro reo*, the Co-Lawyers argue that the International Co-Prosecutor offers little to no explanation of how the International Co-Investigating Judge allegedly applied the narrowest reasonable construction of the most responsible category under the principles of *in dubio pro reo* and strict construction.[459]

2. Discussion

347. The International Judges find that the International Co-Investigating Judge did not err in the Closing Order (Indictment) by purportedly misinterpreting or misapplying the meaning of those most responsible. The International Judges recall that the determination of whether a person falls among those most responsible is a discretionary judicial decision; left in the hands of the Co-Investigating Judges, this discretion is properly exercised when executed in accordance with well-settled legal principles.[460]

---

[455] AO An's Reply (D360/11), para. 18; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625358, pp. 99:11 to 99:18.
[456] AO An's Appeal (D360/5/1), para. 50.
[457] AO An's Reply (D360/11), para. 20.
[458] AO An's Reply (D360/11), para. 21; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625370-01625371, pp. 111:24 to 112:7.
[459] AO An's Reply (D360/11), para. 19.
[460] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20.

348. Contrary to the Co-Lawyers' arguments, the International Judges hold that: (i) the International Co-Investigating Judge did not err by applying any "overbroad interpretation" of those most responsible or by "ignoring" certain factors[461] because the Co-Lawyers fail to substantiate the purported "narrow interpretation" of those most responsible; (ii) the International Co-Investigating Judge did not err concerning *in dubio pro reo* because this is primarily a rule of evidentiary proof (not legal interpretation) and the term most responsible is well-established. [462] Further, the International Judges are not persuaded that (iii) the International Co-Investigating Judge applied a "backward and artificial approach"[463] which inflates AO An's role through the lens of JCE I; instead, the International Co-Investigating Judge evaluated the actual contributions of AO An within the well-settled legal principles. The International Judges conclude that (iv) the International Co-Investigating Judge did not err in comparing AO An with certain Khmer Rouge members (but not others) and the Co-Lawyers fail to demonstrate that the International Co-Investigating Judge erred in assessing AO An's level of responsibility and/or the gravity of the crimes in the case-by-case analysis.

349. First, the International Judges are not persuaded that the International Co-Investigating Judge applied an overbroad interpretation of most responsible or erred in evaluating those most responsible by "ignoring" certain factors—negotiating history, subsequent party practice and views of the National Co-Prosecutor or National Judges. [464] The Co-Lawyers fail to demonstrate that those most responsible consists of the purportedly "narrow understanding" based on negotiating history, subsequent party practice or the views of certain parties.

350. The International Judges observe that although the term of those who were most responsible is not defined in the ECCC Agreement or Law, its proper interpretation—in light of the object and purpose of the Court's founding instruments—may be discerned by examining the relevant international jurisprudence.[465]

351. The International Judges note that the Co-Lawyers' suggested "narrow" interpretation is

---

[461] AO An's Appeal (D360/5/1), paras 43-44, 46-47.
[462] Case 003 Decision on MEAS Muth's Appeal against the International Co-Investigating Judge's Decision concerning Nexus (D87/2/1.7/1/1/7), para. 65.
[463] AO An's Appeal (D360/5/1), para. 50.
[464] AO An's Appeal (D360/5/1), paras 44, 46-47.
[465] *See* Vienna Convention, Art. 31(1)-(2) (providing that the terms of an instrument shall primarily be interpreted in their context, which comprises, *inter alia*, the instrument's text, in light of its object and purpose); ECCC Agreement, Art. 12(1) (providing that, in the case of a lacuna in the applicable law, "guidance may also be sought in procedural rules established at the international level"); ECCC Law, Art. 23*new* (same). *See also* Case 002 Decision on Civil Party Admissibility Appeals (D404/2/4), paras 58-60; Case 001 Appeal Judgment (F28), para. 66.

based on the ECCC's negotiation history and/or statements by the negotiating parties, these are only a supplementary means of interpretation under Article 32 of the Vienna Convention to be employed where the interpretation under Article 31 leaves the meaning ambiguous or obscure or leads to an absurd or unreasonable result.[466] This is not the case here. Otherwise, the Co-Lawyers do not provide any concrete evidence or meaningful examples to support the purported "subsequent practice" demonstrating the agreement of the parties on the "narrow" interpretation.

352. The International Judges uphold, as multiple ECCC Chambers have held, that international jurisprudence establishes that the identification of persons falling into those most responsible involves a quantitative and qualitative assessment of (i) the gravity of the crimes alleged or charged and (ii) the level of responsibility of the suspect.[467] The International Judges recall that there is no exhaustive list of factors to be considered in undertaking this review nor is there a filtering standard in terms of positions in the hierarchy[468] or a mathematical threshold for casualties. Rather, assessing personal jurisdiction requires a case-by-case assessment, taking into account the general context and the personal circumstances of the suspect.[469]

353. The International Judges affirm that the evaluation of a suspect's level of responsibility includes considerations such as, but not limited to, his or her level of participation in the crimes, his or her hierarchical rank or position, including the number of subordinates and hierarchical echelons above, the permanence of his or her position and his or her *de facto* roles and responsibilities.[470] The Co-Lawyers' "narrow understanding" of personal jurisdiction that only encompasses Khmer Rouge officials who were indispensable in setting and implementing CPK policy and who had a comparatively more significant position in the CPK and role in the most serious crimes, is too limited and wrongly diverges from the well-established approach.[471]

---

[466] *See* Vienna Convention, Arts 31-32.
[467] *See, e.g.*, Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321; Case 001 Trial Judgment (E188), para. 22 and accompanying footnotes; Case 003 Decision on Personal Jurisdiction (D48), para. 15 and footnote 25.
[468] *Contra* Case 004/1 Closing Order (Reasons) (D308/3), para. 39, *endorsed in* Closing Order (Indictment) (D360), para. 56, footnote 101.
[469] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321; *see also* paras 327-338.
[470] *See* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, paras 332-338; Case 001 Trial Judgement (E188), para. 22; Case 003 Decision on Personal Jurisdiction (D48), para. 24.
[471] AO An's Appeal (D360/5/1), paras 45-47, 54. *See also* AO An's Response to Final Submissions (D351/6), paras 81-98.

354. Second, turning to *in dubio pro reo*, the International Judges affirm that this principle is primarily a rule of evidentiary proof and not a rule of legal interpretation[472] and consider that the interpretation of the term most responsible is well-established and clear. [473] The International Judges thus find no merit in the Co-Lawyers' argument that the International Co-Investigating Judge should have applied the narrowest legal definition of those most responsible under *in dubio pro reo*.[474]

355. Third, concerning the purported error of considering those most responsible via JCE I, the International Judges are not convinced that the International Co-Investigating Judge erred by applying a "backward and artificial"[475] approach, inflating AO An's role through JCE I. The International Judges find that the International Co-Investigating Judge did not determine personal jurisdiction solely based on alleged membership of a JCE I. He exercised his broad discretion in determining personal jurisdiction over AO An and carefully examined a myriad of relevant factors within the landscape of evidence—including, *inter alia*, the criminal acts of AO An, including at differing crime sites, and through multiple other modes of liability (beyond JCE I).

356. In the Closing Order (Indictment), the International Co-Investigating Judge adopted various considerations in determining whether an individual falls within the jurisdiction of the Court.[476] After finding that AO An is among those most responsible because of the combination of his rank and scope of authority in the hierarchy of the DK and based on the character and magnitude of his crimes,[477] the International Co-Investigating Judge concluded that both the position and conduct of AO An mark him out clearly as a major player in the DK structure and as a willing and driven participant in the criminal implementation of its inhuman policies.[478]

---

[472] Case 003 Decision on MEAS Muth's Appeal against the International Co-Investigating Judge's Decision concerning Nexus (D87/2/1.7/1/1/7), para. 65.
[473] Case 003 Decision on MEAS Muth's Appeal against the International Co-Investigating Judge's Decision concerning Nexus (D87/2/1.7/1/1/7), para. 65.
[474] AO An's Appeal (D360/5/1), para. 48; Case 003 Decision on MEAS Muth's Appeal against the International Co-Investigating Judge's Decision concerning Nexus (D87/2/1.7/1/1/7), para. 65.
[475] AO An's Appeal (D360/5/1), para. 50.
[476] Closing Order (Indictment) (D360), para. 56 *referring to* Case 004/1 Closing Order (Reasons) (D308/3), paras 37-41 (including, *inter alia*, factors such as: "[t]he relative gravity of the person's own actions and their effects"; "the degree to which the offender was able to contribute to or even determine policies and/or their implementation"; "the ultimate definition of the content of policies and the means of their implementation rested with the top echelons"; whether "the lower cadres were given some leeway regarding the details of their implementation"; and that there is no finite number of named individuals within the Court's jurisdiction and the selection is based entirely on the merits of each case).
[477] Closing Order (Indictment) (D360), para. 699.
[478] Closing Order (Indictment) (D360), para. 712.

357. Although the International Co-Investigating Judge assessed genocide and provided his "very conservative" minimum of 17,115 Cham victims in the Central Zone through JCE I, he also considered other modes of liabilities in this regard[479]—the significant impact on the Cham community was one of the main considerations in assessing the nature and gravity of the crimes attributable to AO An.[480] The International Co-Investigating Judge also considered the other crime sites under AO An's control; these included the security centres and execution sites where his conservative minimum estimate was that 12,944 people were killed and worksites where thousands of people were compelled to work under extremely difficult conditions and the threat of death.[481] Therefore, the International Judges conclude that the International Co-Investigating Judge did not err by applying any "backward and artificial" approach or by conflating personal jurisdiction with a mode of liability, JCE I.

358. Fourth, turning to the purported error of the International Co-Investigating Judge in comparing AO An to IM Chaem and Duch, the International Judges find that the International Co-Investigating Judge did not err in assessing AO An's level of responsibility and/or the gravity of the crimes, including in the comparison with certain Khmer Rouge officials (and not explicitly others). The International Judges note that while the assessment of whether a suspect was among the most responsible may include comparison to other Khmer Rouge officials,[482] comparisons to every known Khmer Rouge official are not required or necessary.[483] Moreover, IM Chaem and Duch were Khmer Rouge officials whose personal jurisdiction issues as one of those most responsible were litigated before at the Chambers of the ECCC;[484] this thereby makes an objective analysis of the existence of crimes and the likelihood of criminal responsibility possible. The International Judges find no error in the International Co-

---

[479] The International Judges find that besides JCE, the International Co-Investigating Judge indicted AO An for Planning, Ordering and Instigating the genocide of the Cham of Kampong Cham Province and under superior responsibility for the genocide of the Cham in Sector 41. *See, e.g.*, Closing Order (Indictment) (D360), paras 835, 839, 843, 848-849.
[480] Closing Order (Indictment) (D360), paras 706-707.
[481] Closing Order (Indictment) (D360), para. 711.
[482] *See, e.g.*, Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 336 (noting IM Chaem's *de facto* roles and responsibilities exceeded those of the average district secretary).
[483] *See* Case 001 Trial Judgement (E188), para. 24 ("Due to the scale of crimes committed during the DK period, the ECCC Agreement and ECCC Law impose no obligation to try all potential perpetrators of crimes falling within its jurisdiction. [...] The fact that other individuals within DK during the indictment period may have shared these attributes does therefore not preclude the Accused from also being considered as one of those most responsible.") (footnote omitted).
[484] *See, e.g.*, Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, paras 321-340. *See also* Case 001 Trial Judgement (E188), paras 13-25; Case 001 Appeal Judgment (F28), paras 58-81.

Investigating Judge's comparative approach with regard to the two Khmer Rouge officials.

359. The International Judges further note that comparison to other Khmer Rouge officials is only one of a multitude of factors which the International Co-Investigating Judge properly considered. In the Closing Order (Indictment), the International Co-Investigating Judge concluded that AO An is "among those most responsible because, *inter alia*, of a combination of his rank and scope of authority in the hierarchy of the DK", his conduct "as a willing and driven participant in the brutal and criminal implementation of its inhuman policies" and "the character and magnitude of his crimes"; moreover, the International Co-Investigating Judge stated that AO An's position and the nature, the geographical reach and the impact of his actions clearly surpass those attributable to IM Chaem and Duch.[485] At best, the comparison to other Khmer Rouge officials is one of a myriad of factors within the assessment but not a compelling factor in the International Co-Investigating Judge's considerations.

360. Accordingly, the International Judges find no error and dismiss Ground 3.

D. Ground 4: Application of an Incorrect Standard of Proof

1. Submissions

361. The Co-Lawyers argue that the International Co-Investigating Judge failed to apply the correct standard of proof in determining whether AO An falls within the personal jurisdiction of the ECCC.[486] As the determination of personal jurisdiction is essential, this error creates a burden on the Defence and wastes judicial resources.[487] The Co-Lawyers aver that the International Co-Investigating Judge never defined the standard in the Closing Order (Indictment) and that "the standard applied is somewhere between *prima facie* and reasonable basis to believe – both of which are erroneous."[488] The Co-Lawyers assert that the correct standard requires the Co-Investigating Judges to assemble "evidence that is 'sufficiently serious and corroborative to provide a certain level of probative force' to establish more than a mere possibility that AO An was one of those most responsible for the charged crimes."[489] The Co-Lawyers conclude that had the International Co-Investigating Judge applied the correct

[485] Closing Order (Indictment) (D360), paras 699-712.
[486] AO An's Appeal (D360/5/1), para. 55.
[487] AO An's Appeal (D360/5/1), para. 56.
[488] AO An's Appeal (D360/5/1), para. 57.
[489] AO An's Appeal (D360/5/1), para. 55.

standard of proof, the ECCC would not exercise personal jurisdiction over AO An.[490]

362. In the Response, the International Co-Prosecutor submits that the Co-Lawyers' arguments are in part unfounded allegations of factual error[491] and in part unsubstantiated conclusory statements that fail to articulate a discernible error and should be dismissed.[492] The Co-Lawyers do not address these arguments in the Reply.

2. Discussion

363. The International Judges hold that the International Co-Investigating Judge did not err in purportedly failing to define or apply the correct standard of proof. The International Judges find that (i) the Office of the Co-Investigating Judges has repeatedly enunciated and upheld the correct standard in issuing various closing orders and (ii) this understanding is reasonably reflected in the instant Closing Order (Indictment), which demonstrates the application of the proper standard overall.

364. First, the International Judges recall that "pursuant to Internal Rule 67, the test for issuing closing orders is the existence of "sufficient evidence [...] of the charges".[493] At this pre-trial stage, it is sufficient for the International Co-Investigating Judge to present "serious and corroborative evidence".[494]

365. The International Judges observe that in the previous Closing Orders in Cases 001, 002 and 004/1, the Co-Investigating Judges never failed to address this applicable standard of proof at the pre-trial stage.[495] However, in the Closing Order (Indictment) at hand, the International

---

[490] AO An's Appeal (D360/5/1), para. 57.
[491] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 31.
[492] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 31.
[493] *See, e.g., supra* paras 84-87; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 61-62 ("Pursuant to Internal Rule 67, the test for issuing closing orders is the existence of "sufficient evidence [...] of the charges").
[494] *See, e.g., supra* para. 84; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 61, 305, 313.
[495] *See, e.g.*, Case 001 Closing Order (D99), para. 130 and p. 44 (The Co-Investigating Judges held that, in view of the facts set out, "there is sufficient evidence (*charges suffisantes*) to indict KAING Guek Eav *alias* DUCH and send him for trial" for certain enumerated charges, "[c]onsequently, as a result of the judicial investigation, there is sufficient evidence (*charges suffisantes*) that KAING Guek Eav *alias* DUCH, through his acts or omissions in Phnom Penh and within the territory of Cambodia [...] is responsible [...]" for certain alleged crimes). *See also* Case 002 Closing Order (D427), para. 1323 (where the Office of the Co-Investigating Judges concluded that "[w]hile it is obviously not required at this stage to ascertain the guilt of the Charged Person (given that only the Trial Chamber has such jurisdiction), it is clear that 'probability' of guilt is necessary (i.e. more than a mere possibility). Accordingly, the assessment of the charges at this stage must not be confused with the 'beyond a reasonable doubt' standard at the trial stage, yet the evidentiary material in the Case File must be sufficiently

Co-Investigating Judge, while trying to resurrect the evidence hierarchy denounced in Case 004/1 by the Pre-Trial Chamber,[496] did not explicitly address the standard nor did he cite the relevant part of the previous Closing Orders. This oversight is regrettable since it undermines the clarity of his judicial reasoning.

366. Nonetheless, the International Judges are not convinced that the International Co-Investigating Judge erred in his implementation of the correct standard of proof overall. While noting unusual allusions to evidence,[497] the International Judges have scrutinized each allegation of the Co-Lawyers and the Closing Order (Indictment) in its totality. Closer examination demonstrates that the International Co-Investigating Judge did not deviate from the established standard in overall implementation and, in fact, applied the correct standard of proof—the existence of "sufficient evidence [...] of the charges"[498]—in the Closing Order (Indictment).

367. For example, the Closing Order (Indictment) demonstrates appropriate application of the standard of proof in holding, *inter alia*, that: "[t]he testimony [...] may be sufficient to establish a fact where sufficiently reliable and probative";[499] "[t]here is sufficient witness evidence [...] to conclude that [...]",[500] "[t]here is also sufficient evidence to allow the conclusion that [...]",[501] certain witness accounts are "sufficient to reach the threshold"[502] and "[t]hese circumstances are sufficient evidence that [...]".[503] Ultimately, the International Co-Investigating Judge articulated that "[...] I have found that there are sufficient charges to commit A[O] An for trial [...]".[504]

---

serious and corroborative to provide a certain level of probative force") (footnotes omitted). *See also* Case 004/1 Closing Order (Reasons) (D308/3), para. 2 (where the Office of the Co-Investigating Judges (including the International Co-Investigating Judge in the instant matter) held that "[i]n this Closing Order (Reasons), the factual findings [...] are based on a probability standard required for a decision on an indictment, and not on the 'beyond reasonable doubt' standard required for a conviction following a trial", *referring to* and adopting jurisprudence concerning indictments in paragraph 2, footnote 2, citing Case 002 Closing Order (D427), paras 1323-1326, which held, *inter alia*, that the standard for evidence must be sufficiently serious and corroborative to provide a certain level of probative force).

[496] *See, inter alia, supra* paras 73-80; *infra* Ground 5(i); Closing Order (Indictment) (D360), paras 35-37, 123-154.

[497] *See, e.g.*, Closing Order (Indictment) (D360), paras 572, 587, 705 (referring to a purported preponderance of the evidence in discussions).

[498] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 61-62.

[499] Closing Order (Indictment) (D360), para. 130.

[500] Closing Order (Indictment) (D360), para. 422.

[501] Closing Order (Indictment) (D360), para. 705.

[502] Closing Order (Indictment) (D360), para. 815.

[503] Closing Order (Indictment) (D360), para. 752.

[504] Closing Order (Indictment) (D360), para. 853.

368. Having found the correct standard of proof applied in the Closing Order (Indictment) overall,[505] the International Judges are not persuaded by the Co-Lawyers' argument that the International Co-Investigating Judge "bends and stretches the standard of proof so that it is no longer recognisable."[506] Accordingly, the International Judges dismiss Ground 4.

E. Ground 5: Treatment of Evidence—Introduction

369. Ground 5 challenges the International Co-Investigating Judge's purportedly erroneous treatment of evidence. The Co-Lawyers submit that, had the International Co-Investigating Judge fully and properly assessed the substance of the evidence, he could not have found that the applicable standard of proof was satisfied or that AO An fell within the personal jurisdiction of the ECCC.[507] Under Ground 5, the Co-Lawyers develop five interrelated grounds, namely that the International Co-Investigating Judge failed to: (i) apply the Pre-Trial Chamber's holding in Case 004/1 (that evidence must be freely evaluated);[508] (ii) assess the credibility of key witnesses and civil party applicants;[509] (iii) consider the purportedly "dubious methods" used by the investigators of the Office of the Co-Investigating Judges to "extract" evidence;[510] (iv) provide corroborative evidence; [511] and (v) exercise caution in relying on hearsay evidence.[512] The International Judges will assess in turn the merits of each of these Grounds.

Ground 5(i): Alleged Failure to Apply the Pre-Trial Chamber's Holding in Case 004/1

1. Submissions

[505] *See further, inter alia*, Grounds 6, 7.
[506] AO An's Appeal (D360/5/1), para. 57 and footnote 102. The International Judges note that the Co-Lawyers provide two of the "most blatant examples" of the purported misapplication of the standard, which relate to the findings that AO An was the Deputy Secretary of the Central Zone and *de facto* Acting Central Zone Secretary. These are alleged errors of fact which will be comprehensively examined in Ground 6 of these Considerations (*see infra* Ground 6(iv)).
[507] AO An's Appeal (D360/5/1), para. 59.
[508] AO An's Appeal (D360/5/1), paras 60-61 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 52-59. AO An's Reply (D360/11), paras 24-27; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625275, pp. 16:8 to 16:19.
[509] AO An's Appeal (D360/5/1), paras 62-75; AO An's Reply (D360/11), paras 28-30; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625275-01625278, pp. 16:19 to 16:20, 17:13 to 19:14.
[510] AO An's Appeal (D360/5/1), para. 76; AO An's Reply (D360/11), paras 29, 32; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625278-01625279, pp. 19:15 to 20:19.
[511] AO An's Appeal (D360/5/1), para. 77; AO An's Reply (D360/11), para. 29; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625279-01625281, pp. 20:23 to 22:8.
[512] AO An's Appeal (D360/5/1), para. 78; AO An's Reply (D360/11), para. 35; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625281, pp. 22:9 to 22:22.

370. In Ground 5(i), the Co-Lawyers argue that the International Co-Investigating Judge ignored or misconstrued the Pre-Trial Chamber's holding in Case 004/1 and erred in applying his hierarchy of evidence based on origin and form.[513] The Co-Lawyers contend that "[i]t is the role of the [Co-Investigating Judges] to fully assess the substance, including the reliability, of the evidence at the Closing Order stage."[514] The Co-Lawyers assert that an assessment of reliability necessitates an examination of (i) the credibility of witnesses and civil party applicants and (ii) the circumstances in which evidence is obtained—which, in their view, the International Co-Investigating Judge failed to do in "choosing a form-over-substance approach with his hierarchy."[515]

371. In the Response, the International Co-Prosecutor submits that, although the International Co-Investigating Judge "took issue with some of the [Pre-Trial Chamber's] reasoning in Case 004/1," he did not apply a rigid hierarchy when assessing the evidence and, in practice, examined the evidence's intrinsic value, including credibility and other reliability issues.[516] The International Co-Prosecutor contends that the International Co-Investigating Judge approached statements taken by parties or under unknown circumstances with caution, relying on them when the information was corroborated by other sources.[517] In addition, instead of relying on "potentially questionable" civil party applications which had not been properly screened before being submitted, the International Co-Investigating Judge conducted formal interviews of those applicants which, in the International Co-Prosecutor's view, "reflects an appropriately careful approach to assessing the evidence."[518]

372. In the Reply, the Co-Lawyers contend that the International Co-Prosecutor (i) downplays the International Co-Investigating Judge's rejection of the Pre-Trial Chamber's holding on evidence assessment in Case 004/1 and (ii) overlooks the International Co-Investigating

---

[513] AO An's Appeal (D360/5/1), paras 58-61 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 52-59 *and* Closing Order (Indictment) (D360), paras 35, 37(a). AO An's Reply (D360/11), paras 23-27; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625271 & 01625275, pp. 12:5 to 12:10, 16:8 to 16:19.
[514] AO An's Appeal (D360/5/1), para. 61 and footnote 110.
[515] AO An's Appeal (D360/5/1), para. 61; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625275-01625276 & 01625281-01625282, pp. 16:19 to 16:20, 17:8 to 17:11, 22:23 to 23:1.
[516] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 33 *referring to* Closing Order (Indictment) (D360), paras 37(a)(i), 223, 229, 241, 261, 342, 368, 375, 378, 390, 404, 411, 529-530, 587, 621-622, 624. Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625136, pp. 72:8 to 72:11.
[517] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 33 *referring to* Closing Order (Indictment) (D360), footnotes 1009, 1011, 1079, 1108, 1602, 1734, 2108.
[518] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 33 *referring to* Closing Order (Indictment) (D360), para. 37(a)(v).

Judge's re-application of the same erroneous evidentiary hierarchy, placing his WRIs at the top and refusing to engage in their substance.[519] In rebutting the International Co-Prosecutor's examples of proper evidentiary engagement, the Co-Lawyers assert that the referenced examples are limited in number and fail in showing that the International Co-Investigating Judge examined the evidence's intrinsic value; in the Co-Lawyers' view, the examples demonstrate instead how the International Co-Investigating Judge "systematically rejected" exculpatory evidence and failed to engage with other substantive credibility issues.[520] Finally, the Co-Lawyers aver that the International Co-Prosecutor's assertion concerning the International Co-Investigating Judge's consideration of evidence from parties or civil party applicants is irrelevant and, in any event, would not demonstrate that he engaged in the substance of his WRIs.[521]

2. Discussion

373. The International Judges find that (i) the International Co-Investigating Judge erred in attempting to resurrect the evidence hierarchy denounced in Case 004/1 by this Chamber.[522] Notwithstanding, the International Judges conclude that (ii) the International Co-Investigating Judge merely reasserted the erroneous hierarchy—without implementing it in practice—and, in analysis, assessed the substance.

374. First, the International Judges consider that the International Co-Investigating Judge's largely abstract and ultimately unhelpful attempt to defend his hierarchy of evidence has no practical impact on the findings of the Closing Order (Indictment). The International Judges recall that the Co-Investigating Judges' effort in Case 004/1 to explain their methodology of evidence hierarchisation in the Closing Order (Reasons) was superfluous, unnecessary and legally incorrect.[523] Nonetheless, the International Co-Investigating Judge decided to repeat the

---

[519] AO An's Reply (D360/11), paras 23-24, 27 *referring to* Closing Order (Indictment) (D360), paras 123, 127, 130. Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625276, pp. 17:2 to 17:7.
[520] AO An's Reply (D360/11), para. 25 *referring to* International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 33, footnote 56. Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625276, pp. 17:2 to 17:7.
[521] AO An's Reply (D360/11), para. 26 *referring to* International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 33.
[522] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 42, 52.
[523] *See, inter alia*, paras 73-80. *See also* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 42, 52.

same error in the present case.[524]

375. While insisting on his evidentiary hierarchy (which is evaluated in the Preliminary Issues section of these Considerations),[525] the International Co-Investigating Judge simultaneously acknowledged that his approach to evidence assessment did not usurp proper assessment; he conceded that there was no intent "to create a theoretical hierarchy in the sense of largely overcome formal rules of evidence, nor was such a rigid hierarchy applied when assessing the evidence."[526] Thus, the International Judges must conclude that if the International Co-Investigating Judge's version of what constitutes a "principle" governing the evaluation of evidence was not applied in assessing the evidence, then it holds no practical function or importance.[527] The International Co-Investigating Judge's purpose to "take out" the "mathematical" common factor[528] is an approach divorced from the reality of a case-by-case assessment of evidence—without impact in the instant case.

376. Second, the International Judges are not persuaded that the International Co-Investigating Judge erred—in practice—by applying his evidentiary hierarchy in assessing the evidence. The International Judges find many examples in the Closing Order (Indictment) of appropriate evidence evaluation, including those which will be discussed in the subsequent Grounds 5(ii), (iii), (iv) and (v). Therein, the International Co-Investigating Judge, contrary to his assertions, engaged in a free and full evaluation of evidence—including scrutinizing the evidentiary substance, regardless of form or provenance,[529] and without referring to his unworkable hierarchy of evidence.

377. Accordingly, Ground 5(i) is dismissed.

---

[524] Closing Order (Indictment) (D360), paras 123-136.
[525] *See, inter alia*, paras 73-80.
[526] Closing Order (Indictment) (D360), para. 37(a)(i).
[527] Closing Order (Indictment) (D360), paras 37(a), 128.
[528] Closing Order (Indictment) (D360), para. 37(a)(i).
[529] *See, e.g.*, Closing Order (Indictment) (D360), paras 229 (assessing the substantive truthfulness of two witnesses' WRIs and testimony concerning forced marriages in Kampong Siem District in light of contradictory evidence of coercion, including physical violence, rape and murder), 375 (finding that although the witness' WRI stated that she received orders to arrest and kill former Lon Nol soldiers, in light of her lack of "direct involvement" in the killings at Kok Pring, it "cannot be concluded" that former Lon Nol soldiers were killed there), 411 (assessing witness' reliability and motives and discussing why the detailed and consistent evidence of AO An's former bodyguard was preferred), 621 (assessing the substantive credibility of witness' evidence denying knowledge about the killing of Cham in Kampong Cham Province in light of multiple other witnesses suggesting his involvement). *See also* the subsequent Grounds 5(ii)(iii)(iv) and (v), which address this issue of evidentiary treatment and expand on the International Co-Investigating Judge's assessment of the substance of evidence, regardless of source.

Ground 5(ii): Alleged Failure to Assess the Credibility of Key Witnesses and Civil Party Applicants

378. Under Ground 5(ii), the Co-Lawyers submit that the International Co-Investigating Judge erroneously overlooked the credibility issues affecting certain witnesses and civil party applicants whose WRIs provided material evidence supporting his personal jurisdiction findings. In essence, the Co-Lawyers contend that the International Co-Investigating Judge provided insufficient or no reasons addressing the credibility of nine key witnesses and civil party applicants[530] and erred in relying on the evidence of these individuals in making factual findings related to AO An's role and responsibility.[531] The alleged credibility issues include *inter alia*: "motives to cover up their own criminal activities, grave inconsistencies in their statements, underlying biases, and lack of corroborative evidence."[532] The International Co-Prosecutor disputes this, contending that the International Co-Investigating Judge properly assessed credibility issues and that the Co-Lawyers' efforts to discredit witnesses are based on "flawed analysis".[533]

379. In Ground 5(ii), the International Judges first set out the applicable standard of review. Then, in turn, concerning each of the nine impugned witnesses or civil party applicants, the International Judges lay out the Co-Lawyers' submissions and the International Co-Prosecutor's positions and address the substantive arguments accordingly.

Standard of Review

380. Before proceeding further, the International Judges deem it necessary to address the applicable standard of review. Although the Co-Lawyers present Ground 5(ii) as part of their general legal challenge against the International Co-Investigating Judge's hierarchised treatment of evidence,[534] the International Judges consider that certain aspects of this and the

[530] The challenged witnesses and civil party applicants are: PRAK Yut (Ground 5(ii)(a)); YOU Vann (Ground 5(ii)(b)); POV [PEOU] Sarom, PUT Kol and KEO Voeun (Ground 5(ii)(c)); NHEM Chen (Ground 5(ii)(d)); CHOM Vong (Ngauv) (Ground 5(ii)(e)); and PENH Va and NHIM Kol (Ground 5(ii)(f)). The International Judges will assess the particular challenges launched against these individuals in the subsequent sections below.
[531] AO An's Appeal (D360/5/1), para. 62; *see also* paras 63-75.
[532] AO An's Appeal (D360/5/1), para. 62.
[533] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 32, 34; *see also* paras 35-46.
[534] The International Judges note that a failure to provide (sufficient) reasoning amounts to an error of law. *See* ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Judgement, Appeals Chamber, 23 October 2001 ("*Kupreškić* Appeal Judgment (ICTY)"), para. 32; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, Appeals Chamber, 30 January 2015 ("*Popović et al.* Appeal Judgment (ICTY)"), paras 17, 133; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A-1389, Judgment, Appeals Chamber, 26 September 2013 ("*Taylor* Appeal Judgment

subsequent Grounds that follow raise an issue of fact.[535]

381. The International Judges recall that while alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct, alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue.[536] In the latter case, the burden is on the appellant to show that no reasonable trier of fact could have found and relied on the challenged evidence in the fact-finding.[537] Specifically as to witness evidence, the presence of inconsistencies does not *per se* require a reasonable trier of fact to reject the testimony as unreliable,[538] as a fact-trier can "reasonably accept certain parts of a witness's testimony and reject others" after having considered the whole of the testimony.[539]

382. The Co-Lawyers submit that the International Co-Investigating Judge failed, to varying degrees depending on the witness concerned, in providing explanations about credibility issues and also erred in his reliance on impugned witness evidence related to key personal jurisdiction issues.[540] The International Judges will apply the appropriate standard of review as outlined

---

(SCSL)"), paras 25, 29, 125. *See generally* Case 002, Appeal Judgement, 23 November 2016, F36 ("Case 002/1 Appeal Judgment (F36)"), paras 202-207.

[535] The International Judges observe that, in the Reply, the Co-Lawyers aver that they have demonstrated errors of fact and law in the International Co-Investigating Judge's assessment of the evidence. *See* AO An's Reply (D360/11), para. 33; *see also* para. 28.

[536] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 113; Case 002/1 Appeal Judgment (F36), paras 89-90; *see also* ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003 ("*Rutaganda* Appeal Judgment (ICTR)"), para. 353 ("Indeed, to the extent that the Trial Chamber was best placed to observe the witnesses first hand, the Appeals Chamber will only intervene in cases where the Appellant has demonstrated that evidence relied upon could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous."); ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgment (Reasons), Appeals Chamber, 1 June 2001, para. 129; SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, Appeals Chamber, 22 February 2008 ("*Brima et al.* Appeal Judgment (SCSL)"), para. 120 ("The Appeals Chamber will normally uphold a Trial Chamber's findings on issues of credibility, including its resolution of inconsistent evidence and will only find that an error of fact occurred when it determines that no reasonable tribunal could have made the impugned finding."). *See also* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, paras 259, 263, 282 (applying standard in assessing mixed errors of law and fact).

[537] *Rutaganda* Appeal Judgment (ICTR), para. 442; ICTR, *Prosecutor v. Setako*, ICTR-04-81-A, Judgement, Appeals Chamber, 28 September 2011, para. 31; *Popović et al.* Appeal Judgment (ICTY), para. 1228; *see also* paras 198, 201.

[538] *Kupreškić* Appeal Judgment (ICTY), para. 31. *See also Rutaganda* Appeal Judgment (ICTR), para. 353 ("It should also be stressed that with regard to the assessment of the credibility of a witness and the reliability of testimony, the Trial Chamber may accept a witness's testimony despite the existence of contradictory statements").

[539] *Popović et al.* Appeal Judgment (ICTY), para. 132. *See also* Case 002/1 Appeal Judgment (F36), para. 357 ("The Supreme Court Chamber considers that, depending on the circumstances of the case, it is not generally unreasonable for a trial chamber to accept certain parts of a person's testimony while rejecting others"); ICTR, Prosecutor v. *Muvunyi*, ICTR-2000-55A-A, Judgment, Appeals Chamber, 1 April 2011, para. 26.

[540] AO An's Appeal (D360/5/1), para. 62; AO An's Reply (D360/11), paras 29-30; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625276-77, pp. 17:12 to 18:3.

above where relevant in assessing the Co-Lawyers' challenges below.

a. PRAK Yut

i. Submissions

383. The Co-Lawyers submit that the International Co-Investigating Judge erred in failing to provide adequate reasons in assessing the credibility of PRAK Yut, the former Kampong Siem District Secretary. According to the Co-Lawyers, PRAK Yut is not credible on issues related to personal jurisdiction because her statements are: (i) inconsistent and often uncorroborated;[541] (ii) she is motivated to lie;[542] and (iii) investigators "fed" her inculpatory information in order to generate incriminating evidence against AO An.[543] The Co-Lawyers submit an Annex listing PRAK Yut's allegedly inconsistent statements on key issues, including, *inter alia*, whether AO An was PRAK Yut's superior in Sector 41, whether he had authority to arrange marriages and whether he issued orders to collect all Cham people.[544] In another Annex, the Co-Lawyers provide an illustration of how PRAK Yut's story has fluctuated over time, allegedly due to the influence of investigators and her attempts to "cover up her lies" and to blame AO An.[545]

384. The Co-Lawyers further aver that PRAK Yut was a "Khmer Rouge zealot"[546] and had close ties to *Ta* Mok.[547] She was actively involved in the charged crimes committed in the Central Zone[548] and is believed to have also killed her own husband when he lost faith in the

[541] AO An's Appeal (D360/5/1), para. 63 and footnotes 118-119; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625277, pp. 18:14 to 18:17, 01625289, pp. 30:4 to 30:6, 30:17 to 30:23, 01625290, pp. 31:1 to 31:19. In summary, the Co-Lawyers aver that PRAK Yut's inconsistencies across her 19 different statements are "too numerous to list" and further that those who worked near or with PRAK Yut in 1977-1979 do not corroborate many of her statements about AO An's alleged roles and responsibilities.
[542] AO An's Appeal (D360/5/1), para. 63 and footnote 120; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625277, pp. 18:9 to 18:12, 18:19 to 18:20, 01625359, pp. 100:1 to 100:12. In brief, the Co-Lawyers' position here is that PRAK Yut sought to protect herself and to minimise her and her family members' roles in the charged crimes by scapegoating AO An. Encouraged by the investigators "consistently feeding her inculpatory information", PRAK Yut further developed her "web of lies" to reduce her risk of prosecution.
[543] AO An's Appeal (D360/5/1), para. 63 and footnote 121; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625277, pp. 18:20 to 18:21.
[544] Case 004/2, Annex D (PRAK Yut's Inconsistent Statements Related to Personal Jurisdiction) to AO An's Appeal, D360/5/1.5 ("Annex D to AO An's Appeal (D360/5/1.5)"); Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625292, pp. 33:6 to 33:13.
[545] Case 004/2, Annex C (PRAK Yut's Ever-Changing Story) to AO An's Appeal, D360/5/1.4.
[546] AO An's Appeal (D360/5/1), para. 64 and footnote 123; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625277, pp. 18:9 to 18:12.
[547] AO An's Appeal (D360/5/1), para. 64 and footnote 124.
[548] AO An's Appeal (D360/5/1), para. 64 and footnote 125.

revolution.[549] Although the International Co-Investigating Judge briefly acknowledged PRAK Yut's credibility issues,[550] the Co-Lawyers maintain that he erred in failing to carefully assess PRAK Yut's credibility and in continuing to rely on her regardless for his personal jurisdiction findings.[551]

385. The International Co-Prosecutor considers that the Co-Lawyers' attempts to discredit PRAK Yut are unsuccessful. The International Co-Prosecutor notes that PRAK Yut, as AO An's former direct subordinate, has first-hand knowledge of the orders that AO An gave and how they were implemented.[552] Although PRAK Yut was a "reluctant witness who was clearly concerned about admitting mass crimes", the International Co-Prosecutor argues that AO An fails to demonstrate that the International Co-Investigating Judge abused his discretion or erred in relying upon parts of her evidence, having carefully considered it as a whole.[553] Indeed, the International Co-Investigating Judge acknowledged PRAK Yut's credibility issues and rejected some of her evidence as unreliable.[554]

386. The International Co-Prosecutor criticises the Co-Lawyers' claims of inconsistencies, stating that they are "based on snippets of evidence taken out of context".[555] For example, in respect of PRAK Yut's alleged inconsistency on who appointed her Kampong Siem District Secretary, the International Co-Prosecutor asserts that there are no material inconsistencies requiring explanation by the International Co-Investigating Judge.[556] In respect of the remaining claims of inconsistency, the International Co-Prosecutor avers that they similarly

[549] AO An's Appeal (D360/5/1), para. 64 and footnote 126.
[550] AO An's Appeal (D360/5/1), para. 63 and footnote 122 *referring to* Closing Order (Indictment) (D360), paras 229, 368, 454.
[551] AO An's Appeal (D360/5/1), para. 63 and footnote 117; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625277, pp. 18:4 to 18:12.
[552] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 35. *See also* Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625104, pp. 40:15 to 40:17, 01625121, pp. 57:7 to 57:12, 57:17 to 57:23, 01625122, pp. 58:6 to 58:10, 01625124, pp. 60:2 to 60:14, 01625128, pp. 64:5 to 64:17, 01625134-01625135, pp. 70:22 to 71:13, 01625149, pp. 85:20 to 85:23, Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625335, pp. 76:13 to 76:23, 01625336-01625337, pp. 77:22 to 78:21.
[553] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 35 and footnote 64. *See also* Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625138, pp. 74:7 to 74:17; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625338-01625339, pp. 79:19 to 80:16.
[554] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 38 and footnote 74 *referring to* Closing Order (Indictment) (D360), paras 229, 241, 368, 454.
[555] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 36.
[556] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 36 and footnotes 66-67. Contrary to the Co-Lawyers' claims that she fluctuated between AO An, KE Pauk or KANG Chap, the International Judges observe that PRAK Yut only ever identified AO An as the person who appointed her as District Secretary.

fail to show no reasonable trier of fact would have relied on PRAK Yut's evidence.[557]

387. In the Response to the allegation that PRAK Yut was "fed" information so that investigators could generate incriminating evidence against AO An, the International Co-Prosecutor recalls that this claim has already been unanimously rejected by the Pre-Trial Chamber.[558] Moreover, AO An's narrative that the Office of the Co-Investigating Judges, Office of the Co-Prosecutors and PRAK Yut together wove a "web of lies" to prosecute AO An at all cost is not only baseless but should be summarily dismissed.[559]

388. The International Co-Prosecutor, in addition, responds to the Co-Lawyers' assertion that PRAK Yut's evidence is uncorroborated (or corroborated only by her associates) by stating that (i) PRAK Yut's evidence is corroborated by many other witnesses and (ii) in their testimony, witnesses close to PRAK Yut do not cover up for her but implicate her.[560]

389. In the Reply, the Co-Lawyers assert that the International Co-Prosecutor's attempts to refute PRAK Yut's numerous material inconsistencies are unconvincing.[561] According to the Co-Lawyers, the International Co-Investigating Judge should have "fully explained why he principally relied on" PRAK Yut's evidence, despite the material inconsistencies and other credibility concerns, but he failed to do so.[562]

ii. Discussion

390. The International Judges observe, at the outset, that PRAK Yut's statements and testimony are relied upon to a large extent in the Closing Order (Indictment) and that both parties have addressed extensive arguments on the credibility and reliability of PRAK Yut's

---

[557] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 36 and footnote 68.
[558] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 37 and footnote 70 *referring to* Decision on WRI Annulment (D338/1/5), paras 21-22.
[559] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 37 and footnote 72; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625122-01625123, pp. 58:13 to 59:1.
[560] Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625337-01625338, pp. 78:23 to 79:17. Further, the International Co-Prosecutor argues that PRAK Yut's statements are corroborated by other witness accounts stating that the killings of the Cham in other districts in Sector 41 occurred per AO An's orders. *See* Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625339-01625340, pp. 80:18 to 81:3.
[561] AO An's Reply (D360/11), para. 30 and footnote 59; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625278, pp. 19:2 to 19:12, 01625358, pp. 99:20 to 99:25.
[562] AO An's Reply (D360/11), para. 30 and footnote 60; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625277, pp. 18:22 to 18:25.

evidence.[563] The International Judges first address PRAK Yut's alleged motivations to give untrue testimony and the allegation that investigators of the Office of the Co-Investigating Judges "fed" inculpatory information to her in the pursuit of incriminating evidence against AO An. The International Judges then address the Co-Lawyers' claims of material inconsistencies in PRAK Yut's evidence and whether the International Co-Investigating Judge provided sufficient reasoning in this regard as part of his credibility assessment.

391. The International Judges consider it evident that PRAK Yut does have motivations to minimise her role in the charged crimes, particularly given that she was once considered for prosecution in an Office of the Co-Investigating Judge investigative action report.[564] Yet such motivations to minimise her responsibility and potentially exaggerate AO An's duties do not mean she completely fabricated evidence regarding AO An's role, as she acted as his former subordinate and there is corroborative circumstantial and witness evidence regarding both his role and the orders that she received from him.[565] In light of PRAK Yut's motivations to downplay her responsibility and the general shift in her evidence upon receiving the letter of assurance from the Office of the Co-Investigating Judges,[566] the International Judges consider that her evidence should be given careful scrutiny and further observe that the International Co-Investigating Judge expressly considered the impact of this motive on the credibility of PRAK Yut's evidence.[567] On the other hand, in respect of the allegation that investigators consistently "fed" PRAK Yut information to generate incriminating evidence against AO An, the International Judges summarily dismiss this contention;[568] further, to the extent the Co-Lawyers argue that PRAK Yut's credibility and reliability were affected by the nature of the

[563] Although the International Judges will not address in detail each of the arguments submitted in respect of the credibility and reliability of PRAK Yut's evidence, the International Judges emphasise that they have carefully examined and considered the submissions of the parties regarding PRAK Yut's evidence.
[564] Case 004, Written Record of Acts of Investigation, 30 April 2012, D107/19, ERN 01109106.
[565] As discussed in Ground 6 *infra*, the International Judges consider that it is reasonable to conclude that AO An was the former Sector 41 Secretary and that PRAK Yut, as the former Kampong Siem District Secretary, was AO An's direct subordinate.
[566] Letter of Assurance to PRAK Yut, 12 June 2013, D117/71/1.
[567] *See, e.g.*, Closing Order (Indictment) (D360), paras 368, 454 (noting PRAK Yut's "motivation to downplay the severity of crimes occurring in her district" and concluding that her evidence concerning Tuol Beng Security Centre was not credible).
[568] As discussed in Ground 5(iii) *infra*, the International Judges summarily dismiss the Co-Lawyers' submissions concerning alleged improper investigative practices or bias. The International Judges recall that the Co-Lawyers previously raised the same challenges against PRAK Yut's interviews. *See* Case 004/2, Annex B (OCIJ Investigator Christian Baudesson) to Application to Annul Written Records of Interview of Three Investigators, D338/1/2.3 ("Annex B to Application for WRI Annulment (D338/1/2.3)"), entries 10, 56.

questions posed, the International Judges find this to be unsubstantiated.[569]

392. The International Judges next examine the various inconsistencies relating to personal jurisdiction issues that the Co-Lawyers have identified in PRAK Yut's statements.[570] In this regard, the International Judges find that PRAK Yut's evidence does contain some inconsistencies but also find that, where needed, the International Co-Investigating Judge provided sufficient reasoning in his credibility assessment. In some cases, the International Judges find that the Co-Lawyers misrepresent certain aspects of PRAK Yut's evidence or, otherwise, incorrectly suggest that these inconsistencies are relevant and material to the International Co-Investigating Judge's determination on personal jurisdiction.

393. Concerning PRAK Yut's alleged inconsistent statements on whether AO An travelled to the Central Zone together with PRAK Yut,[571] the International Judges find no material inconsistency in her evidence. PRAK Yut consistently states that she was accompanied by her relatives during her transfer to the Central Zone.[572] Reviewing PRAK Yut's evidence as a whole, her account appears to state that AO An accompanied PRAK Yut only after they had both arrived in the Central Zone and specifically when they were travelling within the Central Zone, from the Zone Office to the sector office in Prey Totueng.[573] In any event, whether AO An travelled alongside PRAK Yut to the Central Zone is not materially relevant to personal jurisdiction.

394. Concerning the alleged inconsistency on whether AO An was PRAK Yut's superior in

---

[569] As the Pre-Trial Chamber has previously noted, caution should be exercised in examining excerpts of interviews without considering them in the context of the overall evidence. *See* Decision on WRI Annulment (D338/1/5), para. 22. The International Judges do not consider that the Co-Lawyers have established that the probative value of PRAK Yut's evidence was compromised on account of the nature of the questions posed.

[570] The International Judges discuss some of the alleged inconsistencies in PRAK Yut's evidence under Ground 6 where relevant.

[571] Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597561-01597562.

[572] Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056215 (A8-A10) ("I was sent to the Central Zone along with my parents, 10 males and 4 females. They were all my relatives."); Written Record of Interview of PRAK Yut, 21 July 2009, D6.1.730, at ERN (EN) 00364081 ("There were 10 messengers of mine and other 30 people coming with me"); Written Record of Interview of PRAK Yut, 18 November 2009, D6.1.721, at ERN (EN) 00407797 (A5) ("At that time I took four or five of my relatives and my mother to go with me. If I left them behind, I was afraid they would be mistreated."); Written Record of Interview of PRAK Yut, 19 June 2013, D117/71, at ERN (EN) 01056224 (A15) ("I travelled with my parents and 10 male relatives and 4 female relatives of mine."); Case 002 Transcript of 26 January 2012 (PRAK Yut), D179/1.2.5, ERN (EN) 00774597, pp. 98:6 to 98:9 ("At that time, my whole family was transferred, no outsiders. And I don't think other people would like to go with me because they would be lonely. That's why I only took my whole family with me to Kampong Cham."); DC-Cam Interview of PRAK Yut, 13 August 2013, D219/234.1.2, at ERN (EN) 01064279 (Dany: So you went there alone? Yut: I went with my subordinates and relatives").

[573] Written Record of Interview of PRAK Yut, 19 June 2013, D117/71, at ERN (EN) 01056225 (A23).

Sector 41,[574] the International Judges find no inconsistencies and do not consider that PRAK Yut's failure to mention AO An's name in certain of her interviews contradicts her detailed evidence regarding AO An's role and authority. Although PRAK Yut supposedly did not recall AO An's name in her first interview with investigators,[575] her initial unwillingness to be forthcoming, perhaps for fear of revealing her full involvement in crimes and subjecting herself to prosecution as discussed above, can only be regarded as a minor inconsistency which does not seriously call into question the credibility of her remaining detailed evidence concerning AO An's role as Sector 41 Secretary. The International Judges find no error in the International Co-Investigating Judge's treatment and reliance on PRAK Yut's evidence on this point.

395. In respect of PRAK Yut's statements on whether AO An attended a planning meeting in Phnom Penh on the purge of incumbent Central Zone cadres,[576] the International Judges find no material inconsistencies here which would require explanation by the International Co-Investigating Judge. The Co-Lawyers' claims do not accurately reflect PRAK Yut's evidence;[577] she does not deny the existence of a meeting between senior cadres in Phnom Penh and consistently states she attended another meeting in Kampong Cham.[578] While the International Judges consider that PRAK Yut was not exactly forthcoming in her evidence concerning the Phnom Penh meeting between senior cadres,[579] the International Judges find that PRAK Yut's evidence on this matter remains credible. The International Judges find no

---

[574] Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597563-01597564.

[575] *See* Written Record of Interview of PRAK Yut, 21 July 2009, D6.1.730, at ERN (EN) 00364081. In any event, the International Judges note in her subsequent statement, contrary to the Co-Lawyers' contention, PRAK Yut does mention AO An, confirming that he was a member of the Sector 35 Committee and was later transferred to the Central Zone. *See* Written Record of Interview of PRAK Yut, 29 July 2009, D6.1.733, at ERN (EN) 00364075. The later statements referred to by the Co-Lawyers then go into more detail about AO An as PRAK Yut's superior, following relevant questioning from the investigators.

[576] Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597562.

[577] Contrary to the Co-Lawyers' submission that PRAK Yut initially claimed that she (but not AO An) attended the meeting in Phnom Penh, in the statement of 21 July 2009 to which they refer (D6.1.730), PRAK Yut states that she was told to prepare herself to go to Phnom Penh by KANG Chap's messenger and then, once in Phnom Penh, there was no meeting but a layover of two nights. She states that she attended a meeting later in Kampong Cham with KE Pauk. *See* Written Record of Interview of PRAK Yut, 21 July 2009, D6.1.730, at ERN (EN) 00364081.

[578] Across her statements, the International Judges observe that PRAK Yut remains consistent that she did not attend a meeting in Phnom Penh and instead had a two-day layover. She is also consistent on attending the separate meeting in Kampong Cham. *See* Written Record of Interview of PRAK Yut, 21 July 2009, D6.1.730, at ERN (EN) 00364081; Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056216 (A14); DC-Cam Interview of PRAK Yut, 13 August 2013, D219/234.1.2, at ERN (EN) 01064279; Written Record of Interview of PRAK Yut, 30 September 2014, D219/120, at ERN (EN) 01063619 (A62); Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95, ERN (EN) 01441071-01441072, pp. 62-63.

[579] *See* Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95, ERN (EN) 01441067-01441075; Written Record of Interview of PRAK Yut, 30 September 2014, D219/120, at ERN (EN) 01063619 (A62).

error.[580]

396. Regarding the alleged inconsistency on whether AO An had authority to arrange marriages,[581] the International Judges find that there are material inconsistencies in PRAK Yut's testimony but that the International Co-Investigating Judge provided sufficient reasoning in addressing PRAK Yut's credibility and explaining his reliance on certain parts of her evidence on this issue. PRAK Yut, for example, testifies that there were no large-scale wedding ceremonies in her district.[582] However, as the Co-Lawyers underline, she then states that AO An and herself participated in the wedding ceremony of ten couples.[583] While this is inconsistent, the International Co-Investigating Judge only relied on PRAK Yut's evidence in finding that AO An presided over a wedding of ten couples in Kampong Siem District in conjunction with corroborative evidence from YOU Vann.[584] Moreover, the International Co-Investigating Judge expressly explained, in rejecting PRAK Yut's testimony that marriages were consensual and that couples were not forced to consummate their marriage, that the "overwhelming evidence of coercion militates against the truthfulness" of her testimony on this point.[585] Lastly, the International Judges observe that, notwithstanding the above credibility issues, PRAK Yut remains consistent on the specific point that AO An had authority over marriages. The International Judges are thus satisfied that the International Co-Investigating Judge did not err in his credibility assessment and that his reliance on PRAK Yut's evidence was not unreasonable.[586]

---

[580] Although the International Judges reach this conclusion on the basis of their independent analysis, they note that similarly the Trial Chamber in Case 002/2 found PRAK Yut's evidence sufficiently credible to support its finding that a meeting occurred in Phnom Penh between POL Pot, NUON Chea and ten Southwest Zone cadres. *Cf.* Case 002/02 Judgement, 16 November 2018, filed 27 March 2019, E465 ("Case 002/2 Trial Judgment (E465)"), para. 1464 (further holding that PRAK Yut's poor recollection of details "may be attributed to evasiveness due to a wish to diminish her personal responsibility, or to the long passage of time").

[581] Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597566.

[582] Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95, ERN (EN) 01441061, pp. 52:9 to 52:12.

[583] Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95, ERN (EN) 01441062, pp. 53:5 to 53:9. *See also* Written Record of Interview of PRAK Yut, 21 July 2009, D6.1.730, at ERN (EN) 00364085 (stating that she organised a wedding of five couples upon their request).

[584] Closing Order (Indictment) (D360), para. 685(a). In addition, the International Co-Investigating Judge relied on PRAK Yut's evidence regarding the process by which marriages were arranged—that is, a formal request would be sent to the sector level, which generally approved the marriage, after which a wedding ceremony would be organised at the lower level. *See* Closing Order (Indictment) (D360), para. 318. The International Judges are satisfied that the level of corroboration and detail about the process of arranging marriages in YOU Vann's statements suggest that the factual evidence on this point is reliable.

[585] Closing Order (Indictment) (D360), para. 229.

[586] *Cf.* Case 002/2 Trial Judgment (E465), para. 3191 ("This is not the first time this witness later gave supplemental information, as even in her fifth WRI, she explains that she withheld information in her previous interviews because she was worried about her safety. PRAK Yut appeared to have a general tendency to attenuate incriminating evidence with regard to CPK Policies. PRAK Yut also minimised her own conduct and in particular

b. YOU Vann

i. Submissions

397. The Co-Lawyers assert that the International Co-Investigating Judge erred in not fully examining the substance and credibility of YOU Vann's evidence and in failing to explain his reliance on her for material facts related to personal jurisdiction.[587] For the Co-Lawyers, the International Co-Investigating Judge's heavy reliance on YOU Vann, PRAK Yut's former messenger, is an example of his failure to fully and objectively question PRAK Yut's credibility.[588] The Co-Lawyers, in particular, impugn the use of YOU Vann's evidence to corroborate PRAK Yut's statements and consider that YOU Vann lacks credibility because she may have been influenced by PRAK Yut.[589] In addition, YOU Vann's evidence is not reliable because she: (i) has been "fed" inculpatory information by investigators;[590] (ii) is inconsistent on key issues;[591] and (iii) often "regurgitates" information told to her by PRAK Yut.[592]

398. The International Co-Prosecutor submits that the Co-Lawyers have not satisfied their burden of demonstrating that the International Co-Investigating Judge erred in giving weight to YOU Vann's statements.[593] First, there is no reason to justify overturning the Pre-Trial Chamber's unanimous finding that there were no improper investigative practices.[594] Second, the allegation of inconsistency is unfounded.[595] Third, the Co-Lawyers' characterisation of YOU Vann's evidence as a regurgitation of PRAK Yut's evidence serves to emphasise how their accounts mutually corroborate each other; the fact that YOU Vann's recollection corroborates PRAK Yut's evidence demonstrates its reliability.[596] Finally, the International Co-Prosecutor considers that the assertion that YOU Vann's evidence "may have been influenced" by PRAK Yut is speculative.[597] Consequently, the Co-Lawyers have not discharged their burden to show that no reasonable trier of fact could have relied upon YOU

---

the role she played in relation to the orders she received about targeting the Cham. However, despite the aforementioned, the Chamber considers her testimony to have been otherwise detailed, consistent and generally credible, and notes that it is corroborated by the evidence of other witnesses such as YOU Vann.").

[587] AO An's Appeal (D360/5/1), paras 65-66.
[588] AO An's Appeal (D360/5/1), para. 65.
[589] AO An's Appeal (D360/5/1), para. 66 and footnote 129.
[590] AO An's Appeal (D360/5/1), para. 66 and footnote 130.
[591] AO An's Appeal (D360/5/1), para. 66 and footnote 131.
[592] AO An's Appeal (D360/5/1), para. 66 and footnote 132.
[593] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 39.
[594] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 39 and footnote 76.
[595] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 39 and footnote 77.
[596] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 39 and footnote 78.
[597] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 39 and footnote 80.

Vann's evidence.

ii. Discussion

399. The International Judges find no error in the International Co-Investigating Judge's assessment of YOU Vann's credibility or reliance on her evidence. In respect of alleged procedural defects in evidence collection, the International Judges summarily dismiss these arguments.[598] Nor do the International Judges consider that the Co-Lawyers have shown material inconsistencies in YOU Vann's evidence requiring explanation.[599] In respect of the argument that YOU Vann "regurgitates" information from PRAK Yut, the International Judges consider that this circumstance does not call into question YOU Vann's credibility but rather bolsters the reliability of her evidence—the fact that YOU Vann recalls contemporaneous statements from PRAK Yut and that this recollection is consistent with the substance of PRAK Yut's testimony serves to corroborate and reinforce the accounts.[600] Similarly, the International Judges do not find it to be unreasonable for the International Co-Investigating Judge to rely on YOU Vann's statements as corroborative evidence for material facts which PRAK Yut also testifies on.[601] Lastly, the Co-Lawyers' attempt to discredit YOU Vann's evidence on the basis

[598] *See infra* Ground 5(iii). The impugned statements were previously challenged by the Co-Lawyers. *See* Annex B to Application for WRI Annulment (D338/1/2.3), entry 4; Case 004/2, Annex D (OCIJ Investigator Andrea Ewing) to Application to Annul Written Records of Interview of Three Investigators, D338/1/2.5 ("Annex D to Application for WRI Annulment (D338/1/2.5)"), entry 1. Furthermore, the International Judges do not consider that the Co-Lawyers have established that the probative value of YOU Vann's evidence was compromised or that it was unreasonable for a trier of fact to rely on the impugned evidence.

[599] The Co-Lawyers point to two alleged inconsistencies on "key issues." In respect of the first, although YOU Vann's testimony on whether she delivered letters between PRAK Yut and AO An appears inconsistent, the International Judges are not convinced that this inconsistency concerns a "key issue" or material fact regarding personal jurisdiction requiring explanation. *Compare* Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059277 (A23), 01059278 (A25-A26) *with* Case 002 Transcript of 14 January 2016 (YOU Vann), D219/702.1.87, ERN (EN) 01438497-01438498, pp. 56-57. Regarding the second, the International Judges do not consider this evidence to be materially inconsistent but rather, this evidence reflects the vertical chain of communication between the sector, district and commune levels in implementing rules regulating marriage during the DK regime. *Compare* Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059292 (A80, A81) (AO An announced marriage rules) *with* Case 002 Transcript of 14 January 2016 (YOU Vann), D219/702.1.87, ERN (EN) 01438519-01438521, pp. 78-80 (both PRAK Yut and AO An announced rules). *See generally* Case 002 Transcript of 18 January 2016 (YOU Vann), D219/702.1.94, ERN (EN) 01431622-01431624, pp. 36-38 (after stating that PRAK Yut announced rules, YOU Vann explained why PRAK Yut did so: "Because the order came from the upper echelon above her; that's why she followed their instruction.").

[600] Although the International Judges reach this conclusion on the basis of their own appraisal of the evidence, they remark that the Trial Chamber in Case 002/2 took a similar position. The Trial Chamber, in assessing PRAK Yut's credibility and concluding that her testimony about targeting of the Cham was generally credible, similarly noted that PRAK Yut's evidence was "corroborated by the evidence of other witnesses such as YOU Vann". Case 002/2 Trial Judgment (E465), para. 3191.

[601] *Cf.* Case 002/2 Trial Judgment (E465), paras 3288, 3656 (relying on the corroborative evidence of PRAK Yut and YOU Vann).

that she "may have been influenced" by PRAK Yut is unfounded.[602] The International Judges accordingly conclude that YOU Vann's evidence relating to personal jurisdiction matters is generally credible.[603]

c. POV Sarom, PUT Kol and KEO Voeun

i. Submissions

400. The Co-Lawyers aver that the International Co-Investigating Judge's reliance on POV Sarom, PUT Kol and KEO Voeun's evidence without explanation is erroneous and that this is "evidence of the [International Co-Investigating Judge] constructing the case around PRAK Yut's lies."[604] The Co-Lawyers observe that these three witnesses are PRAK Yut's relatives and contend that they are "members of her clique" and have a motive to lie, "namely, to blame AO An to protect PRAK Yut and their family name."[605] In addition, the Co-Lawyers consider it likely that these witnesses have spoken with PRAK Yut about the investigation and, consequently, their evidence lacks credibility.[606]

401. The International Co-Prosecutor asserts that the Co-Lawyers' challenge of PRAK Yut's relatives fails to demonstrate that these witnesses blamed AO An to protect "their family name" or that the International Co-Investigating Judge abused his discretion.[607] The International Co-Prosecutor observes that the impugned evidence from these witnesses barely mentions AO An's role in crimes.[608] Moreover, where POV Sarom's evidence implicates AO An, it also implicates PRAK Yut and POV Sarom herself, thus, disproving the Co-Lawyers' allegation that the witnesses were falsely implicating AO An to protect their family name.[609] Finally, the International Co-Prosecutor maintains that the Co-Lawyers' allegations of impropriety are

---

[602] The Co-Lawyers have not substantiated the claim that YOU Vann was "influenced" by PRAK Yut, nor do the International Judges find any indication of PRAK Yut attempting to contact YOU Vann and manipulating her evidence to "support [PRAK Yut's] web of lies" as alleged. *Cf.* Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059301 (A114).
[603] The International Judges reach this conclusion based on their own appraisal of YOU Vann's evidence but also observe that the Trial Chamber adopted a similar position. *Cf.* Case 002/2 Trial Judgment (E465), para. 3579 (accepting YOU Vann's evidence that PRAK Yut announced that inter-ethnic marriages were forbidden and finding that "YOU Vann's testimony was sufficiently corroborated by other evidence and is therefore credible in this regard").
[604] AO An's Appeal (D360/5/1), para. 67 and footnote 133.
[605] AO An's Appeal (D360/5/1), para. 68 and footnotes 134-136.
[606] AO An's Appeal (D360/5/1), para. 68 and footnote 137.
[607] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 40-41.
[608] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 40 and footnotes 82-83.
[609] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 40 and footnote 84.

baseless speculation.[610]

ii. Discussion

402. The International Judges consider that the Co-Lawyers' attempts to discredit POV Sarom, PUT Kol and KEO Voeun fail in demonstrating error on the part of the International Co-Investigating Judge. The mere allegation that certain witnesses shared a close relationship does not in itself undermine the credibility of their evidence. Moreover, in reviewing the substance of the impugned statements, the International Judges are not convinced that the Co-Lawyers' credibility challenges are borne out. KEO Voeun makes no mention of AO An in her impugned evidence.[611] PUT Kol's evidence does not reveal a motive to protect PRAK Yut or blame AO An[612] and, in any event, some of her statements about AO An also concern PRAK Yut.[613] POV Sarom's evidence,[614] while it implicates AO An, also implicates PRAK Yut and herself in making arrest lists.[615] In addition, the Co-Lawyers' suggestion that these witnesses improperly colluded with PRAK Yut to falsely incriminate AO An is largely based on speculation.[616] Accordingly, the International Judges find that, notwithstanding their familial relationship with PRAK Yut, the evidence of POV Sarom, PUT Kol and KEO Voeun are generally credible and may reasonably be relied on in making personal jurisdiction findings.

---

[610] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 41 and footnote 85.
[611] *See* Written Record of Interview of KEO Voeun, 19 February 2015, D219/191, at ERN (EN) 01079867 (A47).
[612] *See* Written Record of Interview of PUT Kol, 25 September 2013, D117/26, at ERN (EN) 00977332 (A4) (stating that PRAK Yut's husband was arrested, without assigning blame), (A5) (simply recounting her journey from the Southwest Zone to the Central Zone).
[613] *See* Written Record of Interview of PUT Kol, 25 September 2013, D117/26, at ERN (EN) 00977333 (A13) (stating that AO An, who was the Chairman of Sector 41, met with PRAK Yut in Kampong Siem District, but the witness "did not dare to go near them to listen to their discussions").
[614] The International Judges are not persuaded that POV Sarom attempts to falsely blame AO An as alleged. *See* Written Record of Interview of POV Sarom, 9 April 2015, D219/284, at ERN (EN) 01098553 (A33) (POV Sarom states that PRAK Yut's husband was arrested in 1977 but does not mention or suggest that AO An ordered the arrest).
[615] In the referenced evidence, POV Sarom explains how she was asked by Nan, the chief of the Kampong Siem District Office, to prepare a list of names for arrest. *See* Written Record of Interview of POV Sarom, 9 April 2015, D219/284, at ERN (EN) 01098557-01098558 (A73, A76-A78). POV Sarom explains that AO An appointed PRAK Yut to be in charge of Kampong Siem District. In turn, PRAK Yut assigned POV Sarom as the Chief of Krala Commune. *See* Written Record of Interview of POV Sarom, 7 August 2013, D117/24, at ERN (EN) 00966963 (A11); Written Record of Interview of POV Sarom, 14 November 2013, D117/33, at ERN (EN) 00967004 (A3).
[616] Although the fact that PUT Kol was in contact with PRAK Yut before her interview raises a relevant consideration in assessing the witness' credibility, *see* Written Record of Interview of PUT Kol, 25 September 2013, D117/26, at ERN (EN) 00977336-00977337 (A29), the Co-Lawyers have not provided any particularised reasons in their Appeal to believe that the witnesses improperly coordinated their statements or any other substantiated concern that would require some explanation in the credibility assessment. Furthermore, in assessing the substance of the three witnesses' statements, the International Judges are not convinced that the witnesses tried to align their narratives.

d. NHEM Chen

i. Submissions

403. The Co-Lawyers assert that NHEM Chen is not a credible witness on issues about AO An's roles and responsibilities and that the International Co-Investigating Judge's reliance "without explanation" on NHEM Chen's evidence is an error of law.[617] In particular, the Co-Lawyers challenge the credibility of NHEM Chen's evidence as: (i) he was a "child" in 1977-1979 which negatively impacts the accuracy of his testimony, especially in light of "suggestive questioning" from investigators;[618] (ii) his evidence is based on speculation and hearsay and he lacks knowledge on the CPK structure and other important matters;[619] and (iii) his evidence is uncorroborated and inconsistent with others who worked with NHEM Chen at the time and none of them could confirm NHEM Chen's statements.[620]

404. The International Co-Prosecutor disputes that NHEM Chen is an unreliable witness. First, NHEM Chen was not a "child" but 17 years old when he began working for AO An in early 1977.[621] Second, the Co-Lawyers mischaracterise the investigator's questioning and, in any event, the Pre-Trial Chamber already held that no investigative improprieties occurred.[622] Third, the allegedly uncorroborated hearsay evidence from NHEM Chem is in fact corroborated in part by *inter alia* AO An himself.[623] For the International Co-Prosecutor, the Co-Lawyers' remaining challenges are unpersuasive and fail to discredit NHEM Chen's evidence or demonstrate error on the part of the International Co-Investigating Judge.[624]

ii. Discussion

405. The International Judges are not convinced that the International Co-Investigating Judge erred in assessing NHEM Chen's credibility and find that NHEM Chen is a generally credible witness. The International Judges observe that NHEM Chen was 17 years old when he was

[617] AO An's Appeal (D360/5/1), para. 70.
[618] AO An's Appeal (D360/5/1), para. 70 and footnotes 140-143.
[619] AO An's Appeal (D360/5/1), para. 70 and footnotes 144-147.
[620] AO An's Appeal (D360/5/1), para. 70 and footnotes 148-149.
[621] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 42 and footnote 87.
[622] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 42 and footnotes 88-89.
[623] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 42 and footnotes 90-91.
[624] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 42 and footnote 92.

assigned to work for AO An as his close protection bodyguard in early 1977;[625] further, the International Judges are unpersuaded that his recollection was affected by suggestive questioning.[626] The evidence indicates that NHEM Chen, as a close protection bodyguard for AO An, followed him all the time while other colleagues in the bodyguard unit had other assignments in different locations and only NHEM Chen and a driver were assigned to accompany AO An.[627] Contrary to the Co-Lawyers' suggestions that NHEM Chen lacked knowledge about the CPK,[628] much of NHEM Chen's evidence was based on speculative hearsay[629] or that NHEM Chen's statements are uncorroborated or inconsistent with others,[630]

---

[625] NHEM Chen was born on 6 November 1959. *See* Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374641; Written Record of Interview of NHEM Chen, 15 March 2016, D219/731, at ERN (EN) 01224103 (A6, A12).

[626] Although the Co-Lawyers contend that the investigators improperly suggested during NHEM Chen's interview in October 2016 that AO An was connected to a meeting at Wat Ta Meak, the International Judges observe that NHEM Chen previously discussed AO An's presence at the meeting in his prior interview in March 2016. *See* Written Record of Interview of NHEM Chen, 15 March 2016, D219/731, at ERN (EN) 01224111-01224112 (A87, A88).

[627] *See* Written Record of Interview of NHEM Chen, 15 March 2016, D219/731, at ERN 01224102 (A4, A5), 01224104 (A17), 01224105 (A28, A29). *See also* Written Record of Interview of PHAI Sal, 10 May 2016, D219/759, at ERN (EN) 01313227 (A21). In any event, the International Judges do not find any material inconsistencies here which would require explanation by a fact finder.

[628] The International Judges observe that NHEM Chen demonstrates an impressive recollection of individuals and their role in the DK hierarchy, whether they are currently alive and if so, their current whereabouts. *See* Written Record of Interview of NHEM Chen, 15 March 2016, D219/731, at ERN (EN) 01224104-01224105 (A21-A25), 01224107-01224109 (A50-A62) (recalling the names and backgrounds of the people in the chain of command responsible for authorising the killings at Met Sop (Kor) Security Centre, as well as the content of meetings regarding this security site), 01224112 (A93-A96), 01224114 (A107-A110), 01224115 (A114-A117); Written Record of Interview of NHEM Chen, 17 March 2016, D219/732, at ERN (EN) 01224089 (A54-A58). In addition, NHEM Chen's evidence explains that he went with AO An to Zone Committee meetings in Kampong Cham on four occasions and heard AO An, KE Pauk and others discuss the arrests of enemies among other plans (Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374643 (A5-A8), and 01374644 (A15-18)), justifying his knowledge of these matters. NHEM Chen sometimes stood close to AO An in meetings and was able to hear discussions (Written Record of Interview of NHEM Chen, 15 March 2016, D219/731, at ERN (EN) 01224106 (A34)), though NHEM Chen conceded that when the meeting was "extremely confidential", AO An did not bring him along (Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374643 (A6)). NHEM Chen also accompanied AO An to meetings in Kor and Wat Batheay (Written Record of Interview of NHEM Chen, 15 March 2016, D219/731, at ERN (EN) 01224106 (A33)) and personally witnessed the killing of prisoners at Wat Batheay (Written Record of Interview of NHEM Chen, 15 March 2016, D219/731, at ERN (EN) 01224109-01224110 (A67, A68)).

[629] Although the Co-Lawyers challenge NHEM Chen's hearsay evidence concerning AO An's receipt of killing orders from the Zone level, the Co-Lawyers have not shown that it was unreasonable to rely on NHEM Chen's evidence in this regard, especially considering NHEM Chen's explanation that he learned about the contents of the letters from KE Pauk's messenger. *See* Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374650-01374651 (A79-A86).

[630] The International Judges find that many of NHEM Chen's impugned statements are well corroborated by other evidence. *See, e.g.*, Closing Order (Indictment) (D360), para. 273, footnote 712 (The International Co-Investigating Judge relies on the Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374644 (A15-A19)) which describes attending a meeting with AO An where KE Pauk announced a plan to "starve the people" by reducing food rations. The International Co-Investigating Judge references corroborative statements of other witnesses describing the reduction of food rations to support the material finding that working conditions at worksites became significantly harsher after the arrival of AO An and the Southwest Zone cadres to the Central Zone, *e.g.*, Written Record of Interview of CHEAM Pao, 4 May 2015, D219/293, at ERN (EN) 01111816 (A7) ("The situation became worse after the arrival of the Southwest Zone cadres. By using

the International Judges consider that it was not unreasonable for a fact finder to accept NHEM Chen's detailed evidence relating to personal jurisdiction matters as probative and reliable.

e. CHOM Vong (Ngauv)

i. Submission

406. The Co-Lawyers argue that CHOM Vong lacks credibility on issues related to AO An's role and responsibilities and that the International Co-Investigating Judge erred in relying on CHOM Vong's evidence "without explanation" for essential facts supporting his personal jurisdiction findings.[631] Specifically, the Co-Lawyers assert that CHOM Vong's evidence is unreliable because: (i) as the former head of Met Sop Security Centre, he has motives to lie to avoid personal responsibility;[632] and (ii) investigators "fed" CHOM Vong inculpatory information by asking him closed questions and applying other "dubious methods".[633] According to the Co-Lawyers, the International Co-Investigating Judge took an "illogical approach" to this witness, as CHOM Vong was found unreliable on certain issues and yet his statements implicating AO An (but not his exculpatory statements) continued to be relied on.[634]

407. The International Co-Prosecutor responds that contrary to the Co-Lawyers' assertion, the International Co-Investigating Judge clearly explained which aspects of CHOM Vong's evidence he found not credible and why he accepted other evidence.[635] This was not in error; even if this explanation was not restated every time CHOM Vong's evidence was cited, the International Co-Investigating Judge adhered to these stated views.[636] For the International Co-Prosecutor, the other impugned findings are corroborated in whole or in part.[637] The Co-Lawyers thus fail to demonstrate that the International Co-Investigating Judge's "cautious

---

this term, I mean that the Southwest Zone cadres put people to work relentlessly, gave people insufficient food rations, and implemented strict regulations."); Written Record of Interview of SAT Pheap, 17 September 2015, D219/504, at ERN (EN) 01167908 (A123) ("*Ta* Aun told me to give them food twice per day because we were still poor and had to economise on food."); Written Record of Interview of BUM Ser, 27 May 2014, D117/52, at ERN (EN) 01076883 (A6) ("[T]here were some changes such as food rations, which were reduced, and the living conditions were more difficult. Some people became sick because of the shortage of food").

[631] AO An's Appeal (D360/5/1), paras 71, 73.

[632] AO An's Appeal (D360/5/1), para. 72 and footnote 151.

[633] AO An's Appeal (D360/5/1), para. 72 and footnote 152.

[634] AO An's Appeal (D360/5/1), para. 73 and footnotes 153-155.

[635] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 43 and footnote 94.

[636] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 43 and footnote 95.

[637] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 43 and footnote 96.

assessment" of CHOM Vong's evidence was unreasonable.[638]

ii. Discussion

408. The International Judges are not persuaded that the International Co-Investigating Judge erred by providing insufficient or illogical reasoning in his assessment of CHOM Vong's credibility. The International Judges observe that the International Co-Investigating Judge explained that CHOM Vong's statements regarding his duties at Met Sop Security Centre were not credible due to his motive to downplay his responsibility.[639] Moreover, in respect of CHOM Vong's statements concerning other matters, the International Co-Investigating Judge relied on CHOM Vong in connection with corroborative evidence from other witnesses.[640]

409. The International Judges do not find error[641] in the International Co-Investigating Judge's

---

[638] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 43.

[639] The International Judges note that the International Co-Investigating Judge provided express reasoning as to why CHOM Vong's statements regarding his position and duties at Met Sop are unreliable. *See* Closing Order (Indictment) (D360), para. 390 ("Ngov's claim not to have been the chief of Met Sop Security Centre is not credible in light of the volume and consistency of countervailing testimony, his own account of his actual duties related to the security centre, and his likely motivation to downplay his responsibility for the crimes carried out there."); *see also* Closing Order (Indictment) (D360), para. 404 (The International Co-Investigating Judge did not consider CHOM Vong's statement that he did not know what methods or torture were used during interrogations at Met Sop to be credible: "[T]his is not credible because, as the security centre chief, he necessarily would have known this information."); *see also* Closing Order (Indictment) (D360), para. 411 (The International Co-Investigating Judge explained why he found CHOM Vong's evidence regarding AO An's visits to Met Sop unreliable: "[...] Ngov's statements on meetings with Ao An are unreliable as he may be attempting to distance himself from the Sector Secretary's involvement in the killing operation at the site in order to minimise his own responsibility.").

[640] *See, e.g.*, Closing Order (Indictment) (D360), para. 272, footnote 706 (The International Co-Investigating Judge referenced in the preceding footnote three corroborative witness accounts describing the need for a travel permit within the sector. He also cited in the subsequent footnote other evidence which partly corroborates CHOM Vong's statements on requiring AO An's permission to transport prisoners between sectors. *See* DK Telegram, 29 March 1978, D6.1.764, ERN (EN) 00377841 (describing an incident in March 1978 when Sector 41 soldiers detained two combatants who were travelling through Sector 41 without a travel permit and requesting the Committee 870 to "inform by communicating with Comrade An" in order to receive these combatants back). The International Judges do not consider the International Co-Investigating Judge erred or abused his discretion in treating CHOM Vong's evidence regarding travel between sectors as credible); *see also* Closing Order (Indictment) (D360), para. 395, footnotes 1171-1177 (The International Judges note that CHOM Vong's evidence regarding the reporting system between Met Sop and AO An is partly corroborated by the evidence of NHEM Chen and SO Saren. *See* Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374650 (A75-A76) ("Sometimes, the security personnel would deliver them to him. Sometimes he had me fetch them when he did not trust the others to deliver them. Sometimes he had his messenger deliver them to him when the reports were not so important [...] The reports were collected from Ngauv to the security chairman."); Written Record of Interview of SO Saren, 19 July 2016, D219/800, at ERN (EN) 01331737 (A182), 01331738 (A184-A186) ("[AUN] asked me to deliver letters to various districts and to deliver the letters to Ngov at the security office [...] Bang Aun visited [Met Sop] once in a while [...] Upon arrival, he sat and chatted with Ngov."). The International Judges do not consider that relying on CHOM Vong's statements admitting conduct against his personal interest to downplay responsibility is contradictory to the reasoning given by the International Co-Investigating Judge concerning the unreliability of CHOM Vong's statements minimising his duties at Met Sop).

[641] As noted earlier, a fact-trier can "reasonably accept certain parts of a witness's testimony and reject others". *Popović et al.* Appeal Judgment (ICTY), para. 132. *See also* Case 002/1 Appeal Judgment (F36), para. 357 ("[I]t

reliance on CHOM Vong's evidence regarding: AO An's role in purging enemies and former cadres; his authority over travel, economics and the military in Sector 41; his control over sector security matters and centres; the reporting system in Sector 41 and to the zone level; and the issuance of arrest orders.[642] In assessing the evidence as a whole, the International Judges similarly find that CHOM Vong's evidence concerning these matters is generally credible.

410. Finally, in respect of the assertion that investigators "fed" CHOM Vong inculpatory information,[643] the International Judges summarily dismiss this contention. In light of the Co-Lawyers' failure to demonstrate that no reasonable trier of fact could accept CHOM Vong's evidence, especially when corroborated, the International Judges find no error in the International Co-Investigating Judge's assessment and reliance on CHOM Vong's evidence.

f. PENH Va and NHIM Kol

i. Submissions

411. The Co-Lawyers assert that the evidence of PENH Va and NHIM Kol—two civil party applicants—is not credible and that the International Co-Investigating Judge's reliance on them "without explanation" is erroneous.[644] In particular, the Co-Lawyers contend that (i) as civil party applicants, PENH Va's and NHIM Kol's interviews lack the same procedural safeguards that are in place for witness interviews[645] and that (ii) they provide inconsistent statements.[646] According to the Co-Lawyers, considering that civil party applicants have an interest in the

---

is within a trial chamber's discretion to evaluate the credibility of separate portions of a witness's testimony differently, without needing to set out in detail why it accepted some parts while rejecting others.").

[642] *See, e.g.*, Closing Order (Indictment) (D360), para. 214, footnote 489 (In addition to CHOM Vong's evidence, the International Co-Investigating Judge refers to multiple WRIs to support the finding that upon the arrival of the Southwest Zone cadres, the purge of incumbent cadres was conducted on all levels. *See* Written Record of Interview of TOUCH Chamroeun, 30 July 2015, D219/435, at ERN (EN) 01142992 (A65-A67) ("As for the base cadres who had been the former chairmen, they were removed [...] Some of previous chairmen disappeared.") & 01143001 (A140); Written Record of Interview of PENH Va, 11 March 2015, D219/226, at ERN (EN) 01088624 (A13) ("After the Southwest Zone cadres arrived, many former cadres of the sectors, whose names I do not recall, were purged. All of them had served as the unit chiefs")).

[643] *See infra* Ground 5(iii). The impugned statements were previously challenged by the Co-Lawyers. *See* Annex B to Application for WRI Annulment (D338/1/2.3), ERN (EN) 01388934, entry 9; Annex D to Application for WRI Annulment (D338/1/2.5), ERN (EN) 01364471, entry 4. In reviewing the substance of the interviews, the International Judges consider that the Co-Lawyers refer to excerpts of the WRI isolated from the context and, furthermore, do not consider the probative value of the evidence here to be compromised.

[644] AO An's Appeal (D360/5/1), paras 74-75.

[645] AO An's Appeal (D360/5/1), para. 75 and footnotes 157-161.

[646] AO An's Appeal (D360/5/1), para. 75 and footnotes 162-163.

case, their evidence concerning personal jurisdiction issues is therefore not credible.[647]

412. The International Co-Prosecutor submits that the Co-Lawyers have not met their burden of demonstrating that reliance on PENH Va's and NHIM Kol's evidence is unreasonable.[648] First, the Co-Lawyers' challenges relating to their civil applicant status contradict the Pre-Trial Chamber's jurisprudence.[649] Second, the Co-Lawyers have the burden to demonstrate any purported inconsistencies and, even if shown, that no reasonable trier of fact could treat their evidence as reliable in light of such inconsistencies.[650] For the International Co-Prosecutor, the Co-Lawyers' challenges regarding the inconsistencies in PENH Va's and NHIM Kol's statements are without basis and fail to show that the International Co-Investigating Judge erred in relying on such evidence.[651]

ii. Discussion

413. The International Judges find no error in the International Co-Investigating Judge's reliance on PENH Va's and NHIM Kol's evidence. The International Judges recall that "[a]ll evidence is admissible and generally enjoys the same legal presumption of reliability" and that "the credibility of [civil party applicants'] evidence should be evaluated on a case-by-case basis."[652] The International Judges hold that the status of PENH Va and NHIM Kol as civil party applicants does not render their evidence less credible and further find that the Co-Lawyers' allegations of inconsistency are unfounded. The International Judges observe that PENH Va is consistent in discussing the arrangement of two marriages in Sector 41;[653] further, the International Judges are unconvinced that NHIM Kol contradicted himself regarding meeting AO An as alleged.[654] Contrary to the Co-Lawyers' assertion, the International Judges

---

[647] AO An's Appeal (D360/5/1), para. 75.
[648] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 44-46.
[649] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 44 and footnote 98 *referring to* Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 51-56.
[650] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 44.
[651] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 45-46.
[652] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 51, 55.
[653] The International Judges observe that in the referenced statement "it was Comrade Meng not Comrade [AO] An who arranged marriages at that time", PENH Va was clarifying details regarding his own marriage in early 1976, as demonstrated in previous questions. *See* Written Record of Interview of PENH Va, 11 March 2015, D219/226, at ERN (EN) 01088627-01088628 (A29-A32, A34). PENH Va's later observations that "Comrade Aun, or An, arranged a marriage for Sot and Koan" refers to a different marriage after the arrival of the Southwest Zone cadres. *See* Written Record of Interview of PENH Va, 25 April 2015, D219/289, at ERN (EN) 01111781 (A8, A10). Here, the International Judges find no material inconsistency in PENH Va's evidence regarding the arrangement of marriages which would require explanation by a trier of fact.
[654] The alleged contradiction in NHIM Kol's statements that he does "not know what [AO An] looked like" and "I saw [AO An] once when he came by a jeep" is without merit because in his following answers, NHIM Kol consistently states that although he saw AO An leaving the vehicle, he did not look at his face. *See* Written Record

consider that PENH Va's and NHIM Kol's evidence relating to personal jurisdiction is generally credible.

Ground 5(iii): Alleged Reliance on Contaminated Evidence

1. Submissions

414. Under Ground 5(iii), the Co-Lawyers contend that the International Co-Investigating Judge relied on allegedly "contaminated" evidence, ignoring the purportedly dubious methods and circumstances through which statements were collected by investigators,[655] including: (i) feeding inculpatory information to witnesses and civil party applicants;[656] (ii) engaging in off-record conversations prior to taking WRIs;[657] and (iii) failing to question the witness or civil party applicant about the origin of the evidence.[658]

415. In the Response, the International Co-Prosecutor submits that the Co-Lawyers, in claiming that the International Co-Investigating Judge ignored improprieties in how statements were collected, are attempting to relitigate issues already decided against them.[659] According to the International Co-Prosecutor, the Co-Lawyers provide no reason for overturning the Pre-Trial Chamber's unanimous holding that no improprieties occurred in the collection of evidence and, consequently, fail to establish any error warranting appellate intervention; this argument should accordingly be summarily dismissed.[660] In the International Co-Prosecutor's view, statements were taken using proper investigative methods and the International Co-

---

of Interview of NHIM Kol, D219/422.4, 20 February 2012, at ERN (EN) 01136841 (explaining that "[a]t that time, we dared not to look at [AO An's] face [...] For me, I didn't met him in person. But I saw him."). In any event, the International Judges do not consider this alleged inconsistency in NHIM Kol's statements would prevent a reasonable fact finder from relying on his evidence.

[655] AO An's Appeal (D360/5/1), para. 76; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625275, pp. 16:21 to 16:22, 01625278, pp. 19:15 to 19:25, 01625361, pp. 102:14 to 102:17. *See also* AO An's Appeal (D360/5/1), para. 58 *referring to* AO An's Response to Final Submissions (D351/6), paras 130-182, 188-200, 212.

[656] AO An's Appeal (D360/5/1), para. 76 *referring to* Closing Order (Indictment) (D360), para. 633, footnotes 2152-2153. The International Judges observe that the Co-Lawyers only cite footnote 2152 in the Appeal but also refer to examples cited by the International Co-Investigating Judge in footnote 2153; all examples referenced by the Co-Lawyers have been duly taken into consideration by the International Judges.

[657] AO An's Appeal (D360/5/1), para. 76 *referring to* Closing Order (Indictment) (D360), para. 523, footnote 1727.

[658] AO An's Appeal (D360/5/1), para. 76 *referring to* Closing Order (Indictment) (D360), para. 255, footnote 632 *and* para. 252, footnote 620.

[659] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 47.

[660] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 47 *referring to* Decision on WRI Annulment (D338/1/5), paras 21-25.

Investigating Judge was reasonable to rely on them.[661]

416. In the Reply, the Co-Lawyers refute that they are re-litigating the issues, contending that the International Co-Prosecutor misrepresents the Pre-Trial Chamber's earlier Decision.[662] The Co-Lawyers underscore that the Pre-Trial Chamber, in addition to holding that the bias of investigators was not demonstrated, concluded that "[t]he circumstances in which evidence is obtained, including the reliability of the interviews in light of the nature of the questions asked to the witnesses and civil parties, will be fully assessed at the closing order stage, including eventually by the Pre-Trial Chamber."[663] Therefore, the issue of bias addressed in that Decision is different from the issue of evidence assessment and they are correctly raising credibility and reliability issues in a timely manner.[664]

2. Discussion

417. The International Judges find that re-litigation of identical challenges to alleged procedural defects in investigation is improper—this must be summarily dismissed. Beyond this, (i) the Co-Lawyers may challenge the evidentiary value accorded by the International Co-Investigating Judge to evidence at this stage. That being said, the International Judges find that (ii) the International Co-Investigating Judge did not err in his reliance on interview evidence.

418. Preliminarily, to the extent the Co-Lawyers raise arguments concerning alleged "dubious methods" or procedural defects in evidence collection, the International Judges summarily dismiss these challenges, which have already been litigated and rejected.[665] The Pre-Trial Chamber previously dismissed the Co-Lawyers' arguments concerning procedural defects and

---

[661] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 47.
[662] AO An's Reply (D360/11), para. 31.
[663] AO An's Reply (D360/11), paras 31-32 *referring to* Decision on WRI Annulment (D338/1/5), para. 25; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625279, pp. 20:2 to 20:7. *Contra* International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 37, footnote 70, para. 39, footnote 76, para. 42, footnote 89.
[664] AO An's Reply (D360/11), paras 23, 29, 32; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625279, pp. 20:7 to 20:22.
[665] *See* Decision on WRI Annulment (D338/1/5), paras 10, 23 and footnote 64. *See also* Case 004/2, Application to Annul Written Records of Interview of Three Investigators, 9 February 2017, D338/1/2, para. 22. The International Judges observe that the Co-Lawyers in this Appeal raise the same alleged investigative shortcomings as they asserted in their Application for WRI Annulment—including, *inter alia*: (i) feeding of inculpatory information; (ii) improper off-record conversations; and (iii) failing to question the basis or origin of the evidence. *See generally* Decision on AO An's Appeal on Denial of Requests for Investigative Actions (D190/1/2), paras 19-20 (noting that the Appellant merely "reiterates arguments that were already put forward" and holding that the Pre-Trial Chamber may dismiss an appeal or application "when it raises an issue that is substantially the same (in fact and law) as a matter already examined by the Chamber in respect of the same party").

found no improper practices on the part of the investigators.[666] This notwithstanding, the Pre-Trial Chamber affirmed then, as the Co-Lawyers point out, that the reliability of the interviews would be "fully assessed at the closing order stage, including eventually by the Pre-Trial Chamber."[667] Thus, in denying the Co-Lawyers' motion for annulment, the Pre-Trial Chamber left open the question of the probative value to be accorded to the evidence for assessment at this juncture.

419. First, the Co-Lawyers timely challenge the credibility and reliability of the evidence obtained by the investigators. The International Judges consider that the issue of whether the International Co-Investigating Judge erred in assessing the probative value of interview evidence is distinct from the issue raised previously by the Co-Lawyers—whether impugned sections of certain WRIs must be annulled due to alleged procedural defects.[668] Having held that these allegations were insufficient to warrant annulment of the impugned interviews, the International Judges stress that there is no reason to automatically discount the credibility or reliability of the evidence on account of alleged investigative improprieties in the instant case.

420. Second, turning to whether there is "sufficient evidence",[669] the International Judges find no error in the International Co-Investigating Judge's overall reliance on the interview statements. The Co-Lawyers fail to establish that the International Co-Investigating Judge's

---

[666] In particular, the Pre-Trial Chamber concluded that (i) the impugned interviews where inculpatory information was purportedly "fed" through leading or closed questions or pursuant to a preconceived narrative did not reveal any improper exercise of the investigator's discretion in the conduct of interviews, *see* Decision on WRI Annulment (D338/1/5), paras 21, 22; (ii) the off-record conversations (which were qualified as "screening" conversations) did not evince bias or evidence contamination, *see* para. 24; and (iii) the investigators' alleged absence of follow-up or exploration of the basis for inculpatory assertions was not established and did not demonstrate any bias or appearance of bias in those instances, *see* para. 23. The International Judges note that all of the specific examples of alleged investigative improprieties asserted in Ground 5(iii) of this Appeal were previously asserted by the Co-Lawyers in their Application for WRI Annulment. *See, e.g.*, Written Record of Interview of PRAK Yut, 21 August 2015, D219/484 (previously referenced in Annex B to Application for WRI Annulment (D338/1/2.3), entry 56); Written Record of Interview of YOU Vann, 8 January 2015, D219/138 (previously referenced in Annex D to Application for WRI Annulment (D338/1/2.5), entry 1); Written Record of Interview of PIN Pov, 4 December 2014, D219/116 (previously referenced in Case 004/2, Annex A to Application to Annul Written Records of Interview of Three Investigators, D338/1/2.2 ("Annex A to Application for WRI Annulment (D338/1/2.2)"), at ERN (EN) 01388910); Written Record of Interview of ORN Kim Eng, 18 February 2012, D107/5 (previously referenced in Annex A to Application for WRI Annulment (D338/1/2.2), at ERN (EN) 01388902); Written Record of Interview of BAN Siek, 1 April 2012, D107/15 (previously referenced in Annex A to Application for WRI Annulment (D338/1/2.2), at ERN (EN) 01388901). The International Judges will not revisit the Pre-Trial Chamber's determinations on the underlying allegations of improper investigative practices in respect of these re-asserted challenges. The International Judges will only assess whether the International Co-Investigating Judge acted unreasonably in reaching factual conclusions based on the challenged evidence.

[667] Decision on WRI Annulment (D338/1/5), para. 25.

[668] Decision on WRI Annulment (D338/1/5), paras 10, 15.

[669] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 60-62.

assessment of the credibility and probative value of interview evidence was unreasonable.

421. The International Judges observe that in the specific examples that the Co-Lawyers raise, the International Co-Investigating Judge did not simply rely on the interviews for the evidentiary propositions which may have been "contaminated"; instead, he demonstrated an express assessment of the probative value and credibility of the evidence.[670] In other instances, the International Co-Investigating Judge referred to the statements in conjunction with other corroborative material.[671] Accordingly, the International Judges find no error in the

---

[670] *See, e.g.*, Closing Order (Indictment) (D360), para. 523, footnote 1727 (The International Co-Investigating Judge relied on the WRI of PIN Pov (D219/116) as supporting evidence for the proposition that, after the Southwest Zone cadres arrived, killings at Wat Batheay Security Centre increased. Even assuming, as alleged by the Co-Lawyers, that the investigator failed to transcribe an off-record conversation wherein the investigator improperly "fed" information to the witness that "more than ten thousand people were killed" at Wat Batheay, the International Co-Investigating Judge did not rely on that interview as evidence for the actual number of killings at Wat Batheay. In fact, the International Co-Investigating Judge expressly discussed the credibility of PIN Pov's evidence (*see* para. 529) and plainly explained that this witness "cannot be considered credible on the type of victims and *number of killings at Wat Batheay* while he was in charge of the security centre" (*see* para. 530) (emphasis added). Although the International Judges note that the International Co-Investigating Judge inexplicably referenced PIN Pov later in footnote 1771 in support of the statement that "witnesses consistently observed that the victims [killed at Wat Batheay] numbered in the thousands," this apparent inconsistency does not undermine the reasonableness of the finding concerning the number of deaths at Wat Batheay given the many other supporting WRIs cited in the same footnote and in the subsequent paragraphs). *See also* Closing Order (Indictment) (D360), para. 633, footnote 2153 (The International Co-Investigating Judge relied on the WRI of PRAK Yut (D219/484) as supporting evidence that AO An ordered Kampong Siem District Secretary PRAK Yut to compile a list of the Cham in Kampong Siem District. Even assuming that the investigator's "feeding" of information regarding the number of the Cham families living in the district's villages was improper, the International Co-Investigating Judge did not rely on the impugned portion of the interview as evidence for the number of Cham killed in Kampong Siem District but, rather, to support his finding that AO An ordered a list of Cham to be compiled. As previously addressed in Ground 5(ii) *supra*, the International Co-Investigating Judge reasonably appraised the credibility of PRAK Yut's evidence. In addition, the International Judges observe that the International Co-Investigating Judge set out in Annex IV of the Closing Order (Indictment) the evidence supporting his calculation of the number of Cham victims killed in Kampong Siem District, which is based on the WRIs of other witnesses).

[671] *See, e.g.*, Closing Order (Indictment) (D360), para. 252, footnote 620 (The International Co-Investigating Judge relied on the WRI of BAN Siek (D107/15) as supporting evidence that AO An became the Deputy Secretary of the Central Zone after late 1977. Even assuming, as alleged by the Co-Lawyers, that the investigator's failure to question the basis of this knowledge was improper, this WRI is only one out of many other interviews of BAN Siek that is referenced by the International Co-Investigating Judge, including also the in-court testimony of BAN Siek given in Case 002/2. BAN Siek explains that he held positions as Sector 42 Commerce Chairman and Chamkar Leu District Deputy Secretary, among other positions, which justifies his knowledge of the Central Zone leadership structure. *See* Written Record of Interview of BAN Siek, 24 March 2014, D117/35, at ERN (EN) 00984872 (A10); Case 002/2 Transcript of 5 October 2015 (BAN Siek), D219/702.1.75, ERN (EN) 01409522. The International Co-Investigating Judge also referenced numerous interviews from other witnesses as evidence to support AO An's role as Deputy Secretary of the Central Zone. *See, e.g.*, Written Record of Interview of KUCH Ra, 5 February 2015, D219/178, at ERN (EN) 01077013 (A6) ("*Ta* An was KÈ Pork's deputy and a member of the Zone Committee"); Written Record of Interview of IM Pon, 23 May 2014, D117/50, at ERN (EN) 01059866 (A29) ("Yes, yes. *Ta* An was the deputy. He was *Ta* Pok's deputy at the Zone") & 01059875 (A75) ("*Ta* An was Zone Deputy. He travelled either when *Ta* Pok ordered him or when *Ta* Pok was absent"); Written Record of Interview of PICH Cheum, 28 February 2013, D117/18, at ERN (EN) 00903203 (A2) ("After Se's arrest, I knew that *Ta* An remained as the only one deputy of KÈ Pauk"). *See* Closing Order (Indictment) (D360), para. 633, footnote 2152 (The cited WRI of YOU Vann (D219/138) is corroborated by other material, including her testimony in Case 002/2, where she gave detailed testimony regarding the lists of Cham she was asked to prepare and AO An's role in instructing the lists to be prepared. *See* Case 002/2 Transcript of 14 January 2016 (YOU

International Co-Investigating Judge's approach and hold that his overall reliance on interview evidence was reasonable. Consequently, Ground 5(iii) is dismissed.

Ground 5(iv): Alleged Errors in Reliance on Uncorroborated Evidence

1. Submissions

422. The Co-Lawyers submit that the International Co-Investigating Judge erred in systematically relying on uncorroborated evidence to support material facts underlying his personal jurisdiction findings, an approach that fails to meet the requisite standard of proof.[672] Although there is no general rule that a finding must be supported by more than one piece of evidence, the Co-Lawyers contend that corroboration is important for determining the relevance and reliability of evidence in accordance with jurisprudence from the Supreme Court Chamber, international tribunals and civil law national jurisdictions.[673] The Co-Lawyers further assert that one must be "very cautious" with uncorroborated witness statements and that the International Co-Investigating Judge erred in not adopting this approach.[674]

423. In the Response, the International Co-Prosecutor replies that the International Co-Investigating Judge's reliance on purported "single, uncorroborated" accounts was legally sound.[675] The ECCC and other courts have recognised that corroboration of witnesses and evidence is not a legal requirement in international criminal law[676]—even for a conviction[677]—

Vann), D219/702.1.87, ERN (EN) 01438507-01438508, 01438513-01438515, 01438517. The International Co-Investigating Judge also referred to the evidence of PRAK Yut and NHIM Kol, which may reasonably be relied upon as credible sources of evidence as previously addressed under Ground 5(ii)). *See* Closing Order (Indictment) (D360), para. 255, footnote 632 (In addition to the cited WRI of ORN Kim Eng (D107/5), the International Co-Investigating Judge also referred to the WRI of KE Pich Vannak (D6.1.379) and WRI of IM Pon (D117/50). The International Judges acknowledge that the Co-Lawyers raise a specific challenge against the International Co-Investigating Judge's finding that AO An served as Acting Central Zone Secretary during periods when KE Pauk was absent from the zone and address this particular challenge under Ground 6(iv). For present purposes, the International Judges hold that the International Co-Investigating Judge did not err in relying on the WRI of ORN Kim Eng (D107/5) and duly considered the low probative value of this evidence. The Closing Order (Indictment) expressly compared ORN Kim Eng's statement (D107/5, at ERN (EN) 00787227 (A27) ("When KÈ Pauk was absent, his deputy, *Ta* An, who was also the Sector secretary, was in charge")) against ORN Kim Eng's contradictory statement made in his other WRI (D117/66, at ERN (EN) 01040461 (A13) ("I knew that *Ta* Moeun or Hèn replaced KÈ Pork when he was absent"))).

[672] AO An's Appeal (D360/5/1), para. 77 and footnote 167; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625279-01625280, pp. 20:23 to 21:4.

[673] AO An's Appeal (D360/5/1), para. 77 and footnotes 168-170; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625280, pp. 21:5 to 21:14.

[674] Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625280, pp. 21:15 to 21:23.

[675] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 48.

[676] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 48 and footnote 111.

[677] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 48 and footnote 112.

and is simply one of many potential factors to consider in assessing the evidence.[678] In any event, the International Co-Prosecutor considers that many of the accounts the Co-Lawyers impugn are "corroborated by and corroborative of" other evidence.[679] The International Co-Prosecutor further notes that corroboration does not require witnesses' accounts to be identical in all aspects but the "main question" is whether two or more credible accounts are incompatible.[680]

424. In the Reply, the Co-Lawyers maintain that the International Co-Investigating Judge overlooked the lack of corroboration [681] and criticise the International Co-Prosecutor's "fundamental misunderstanding" of the concept of corroborative evidence.[682] According to the Co-Lawyers, corroboration is "more likely to be required" where witnesses or civil party applicants lack credibility[683] and, thus, corroborative evidence should be required to support the evidence of non-credible witnesses. [684] Finally, because the standard of proof of "sufficiently serious and corroborative evidence" at the closing order stage places corroboration at the "centre of evidential analysis," [685] the Co-Lawyers contend that corroborative evidence may be required before accepting an individual fact as proven.[686]

2. Discussion

425. The International Judges find no error in the International Co-Investigating Judge's reliance on alleged uncorroborated evidence.[687] First, as a matter of law, the International Judges hold that corroboration of evidence is not required, though it is one of many important factors in assessing the reliability of evidence. Second, the Co-Lawyers fail in demonstrating that the International Co-Investigating Judge acted unreasonably in relying on purportedly uncorroborated witness evidence.

---

[678] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 48 and footnote 113.
[679] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 48 (emphasis omitted).
[680] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 48, footnote 114.
[681] AO An's Reply (D360/11), para. 29.
[682] AO An's Reply (D360/11), para. 38 and footnote 76. Although the Co-Lawyers make these arguments as part of their Reply under Ground 6, the International Judges consider it appropriate to address them here.
[683] AO An's Reply (D360/11), para. 39.
[684] AO An's Reply (D360/11), para. 39 and footnote 79.
[685] AO An's Reply (D360/11), para. 39.
[686] AO An's Reply (D360/11), para. 40.
[687] The International Judges, however, note that the International Co-Investigating Judge erred by imposing a hierarchy of evidence evaluation and potentially seeking corroboration for evidence other than WRIs generated by the OCIJ and ECCC trial transcripts. Closing Order (Indictment) (D360), para. 130.

426. First, the International Judges recall that "[a]ll evidence is admissible and generally enjoys the same legal presumption of reliability" and that the "only relevant criterion should be the impact that the substance of the evidence may have on the personal conviction of the Co-Investigating Judges regarding whether there is sufficient evidence for the charges."[688] The International Judges affirm that there is no legal requirement that a witness' evidence on material facts needs to be corroborated by evidence from other sources [689] and that uncorroborated evidence from a single witness may support a conviction even at the trial stage.[690] Although the Co-Lawyers point out that the standard of "sufficiently serious and corroborative evidence" itself refers to corroboration, the International Judges consider that the reference here to "corroborative evidence" addresses the concept of whether *an overall evidentiary basis exists to substantiate the underlying charges*, not whether each material finding is supported by two or more pieces of evidence. That being said, although corroboration is not *per se* required, the fact that witness testimony is corroborated by other evidence may be an important factor in evaluating its reliability.[691]

427. As the probative value of evidence depends on many factors, the International Judges decline to impose a blanket requirement that evidence from witnesses challenged as "non-credible" be corroborated as advanced by the Co-Lawyers.[692] In assessing the evidence, a Co-Investigating Judge may exercise his discretion on a case-by-case basis and find that additional corroborative evidence is needed before accepting that an individual fact is sufficiently

---

[688] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 51-52.
[689] The International Judges observe that Internal Rule 67 does not require corroboration of evidence in issuing an indictment. *See also* Case 002/1 Appeal Judgment (F36), para. 424 ("There is no general rule that a finding beyond reasonable doubt cannot be reasonably entered unless there is more than one item of evidence to support it"); *Taylor* Appeal Judgment (SCSL), para. 75; ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, Appeals Chamber, 28 November 2007 ("*Nahimana* Appeal Judgment (ICTR)"), footnote 1312 (collecting ICTR and ICTY cases holding the same).
[690] *Tadić* Appeal Judgment (ICTY), paras 65-66 (affirming conviction for murder of two policemen, which was based exclusively on the uncorroborated testimony of a single witness); ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgement, Appeals Chamber, 19 July 2010 ("*Haradinaj* Appeal Judgment (ICTY)"), para. 219 (finding that the Trial Chamber did not err in relying upon a witness's evidence without requiring corroboration, despite that the testimony was contradicted by the evidence of another witness).
[691] *See, e.g.*, *Kupreškić* Appeal Judgment (ICTY), para. 220; ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-A, Judgement, Appeals Chamber, 27 September 2007 ("*Limaj* Appeal Judgment (ICTY)"), para. 203; ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-A, Judgement, Appeals Chamber, 14 December 2011, para. 21; ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgement, Trial Chamber, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgment (ICTR)"), para. 80; ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007 ("*Lubanga* Confirmation of Charges Decision (ICC)"), paras 121-122.
[692] Moreover, as detailed below, the International Judges are not convinced that many of these accounts are "uncorroborated".

substantiated.[693] The International Judges now turn to the Co-Lawyers' specific challenges as formulated under Ground 5(iv).

428. Second, the International Judges are not persuaded that the Co-Lawyers demonstrate any error in the International Co-Investigating Judge's purported overreliance on uncorroborated evidence. Notwithstanding the Co-Lawyers' assertion that the International Co-Investigating Judge systematically relied on "single, uncorroborated" witness and civil party applicant accounts,[694] the International Judges find that many of the impugned statements are corroborated by other evidence in whole or in part.[695] In addition, the International Judges observe that some of the other accounts are provided by witnesses with a unique exposure to events[696] or demonstrate a high level of specific detail[697] such as to permit a reasonable trier of fact to make appropriate findings at the closing order stage. In light of the above and the Co-

---

[693] *See* ICTR, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Appeals Chamber, 7 July 2006 ("*Gacumbitsi* Appeal Judgment (ICTR)"), para. 115; *Limaj* Appeal Judgment (ICTY), para. 203.

[694] The International Judges note that some of the challenged witness and civil party applicant accounts—namely, that of NHEM Chen, PRAK Yut, PENH Va, YOU Vann, and CHOM Vong—were held to be generally credible in Ground 5(ii).

[695] The International Judges scrutinised each of the examples raised by the Co-Lawyers under Ground 5(iv) and find them without merit. Here, the International Judges provide an example of a statement which is corroborated or partly corroborated and then highlight in the subsequent footnotes the examples which fail for other reasons. *See, e.g.*, Closing Order (Indictment) (D360), para. 564, footnote 1907 (In addition to the cited WRI of TOY Meach (D219/582) stating that AO An's soldiers were stationed at Wat Ta Meak and that AO An ordered his subordinates to arrest and kill detainees, the International Co-Investigating Judge also referred to other evidence in the same paragraph to corroborate the finding that AO An exercised control over the Wat Ta Meak Security Centre, *e.g.*, Written Record of Interview of SAT Pheap, 17 September 2015, D219/504, at ERN (EN) 01167894 (A66) ("I think that *Ta* An was certainly involved in that because Sector-level soldiers were assigned to guard the [Wat Ta Meak] security office"); Written Record of Interview of SO Saren, 22 June 2016, D219/837, at ERN (EN) 01364061 (A66) (explaining that "[i]t can only have been *Ta* An" who ordered the witness's arrest at Wat Ta Meak); Written Record of Interview of PENH Va, 11 March 2015, D219/226, at ERN (EN) 01088624 (A12) ("It must have been Comrade An, because he was the Secretary of Sector 41 [...] this is how the chain of command went about during the regime").

[696] *See, e.g.*, Closing Order (Indictment) (D360), para. 271, footnote 702 (The International Co-Investigating Judge cited the evidence of TO Sem stating that AO An sent his former Deputy Secretary, Sim, to lead the construction of the 6th January Dam as an example of Sector 41 workers and resources being sent to dam worksites outside of Sector 41. As Sim's wife, it is not unreasonable to believe that TO Sem would have unique knowledge about Sim's work and responsibilities even if they lived separately and occasionally saw each other. *See* Written Record of Interview of TO Sem, 27 April 2014, D117/39, at ERN (EN) 01033103-01033104 (A10) ("According to what I knew, [Sim] led people to build dams, dig canals, and farm, so that people could have enough food. For example, he led people to build the 6-January dam").

[697] *See, e.g.*, Closing Order (Indictment) (D360), para. 680, footnote 2333 (The International Co-Investigating Judge referred to the evidence of TOUCH Chamroeun as an example of forced marriage in Prey Chhor District. The witness describes being taken to Sector 41 on a motorboat by two men armed with a B-40 rocket launcher and an AK rifle. The armed men brought TOUCH Chamroeun to AO An's office, where he saw AO An and was instructed by AO An to marry the logistics unit chief. AO An presided over the wedding the next day. TOUCH Chamroeun explains that he was "not pleased" but did not dare to refuse because he was afraid he would be killed. During the wedding ceremony, TOUCH Chamroeun's wife said nothing. *See* Written Record of Interview of TOUCH Chamroeun, 30 July 2015, D219/435, at ERN (EN) 01142987-01142988 (A29-A30), 01142989 (A37-A41), 01142994 (A77-A78), 01143013 (A226-A227), 01143014 (A230). The International Judges consider that it was not unreasonable for the International Co-Investigating Judge to rely on this detailed account).

Lawyers' failure to elaborate on the specific error in the International Co-Investigating Judge's assessment of this evidence, the International Judges conclude that the International Co-Investigating Judge did not err in this regard. The International Judges dismiss Ground 5(iv).

Ground 5(v): Alleged Errors in Reliance on Hearsay Evidence

1. Submissions

429. Under Ground 5(v), the Co-Lawyers argue that the International Co-Investigating Judge failed to exercise sufficient caution in relying on hearsay evidence—including from unknown sources[698]—in making factual findings concerning the ECCC's personal jurisdiction over AO An.[699] While the Co-Lawyers recognise that hearsay evidence may be admitted and considered, they assert that it should be given less probative value, and "extra caution is needed when assessing it."[700] In respect of double hearsay and hearsay from anonymous sources, the Co-Lawyers contend that the Supreme Court Chamber held that these types of evidence "cannot establish an element of crime or mode of liability beyond reasonable doubt."[701] The Co-Lawyers consider that, despite the lower standard of proof at the closing order stage, restraint similar to that exercised at the trial stage must be applied when determining the sufficiency of this type of evidence for personal jurisdiction or an indictment.[702]

430. In the Response, the International Co-Prosecutor avers that the International Co-Investigating Judge exercised appropriate caution in relying on hearsay evidence and expressly detailed the factors he took into account when assessing its probative value.[703] According to the International Co-Prosecutor, the Co-Lawyers' suggestion that hearsay should categorically be given less probative value is incorrect, as the weight assigned to hearsay hinges on the

---

[698] AO An's Appeal (D360/5/1), para. 78 *referring to* Closing Order (Indictment) (D360), para. 217, footnote 499, para. 256, footnote 633, para. 633, footnote 2155, para. 252, footnote 620.
[699] AO An's Appeal (D360/5/1), para. 78 *referring to* Closing Order (Indictment) (D360), para. 256, footnote 633, para. 256, footnote 636, para. 257, footnote 640, para. 258, footnote 642, para. 316, footnote 839, para. 633, footnotes 2152, 2156, 2157, 2159, 2161, para. 300, footnote 799, para. 259, footnote 653, para. 267, footnote 680, para. 330, footnote 906. *See also* Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625275 & 01625281, pp. 16:23 to 16:25, 22:9 to 22:22.
[700] AO An's Appeal (D360/5/1), para. 78.
[701] AO An's Appeal (D360/5/1), para. 78 *referring to* Case 002/1 Appeal Judgment (F36), paras 441-442.
[702] AO An's Appeal (D360/5/1), para. 78.
[703] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 49 *referring to* Closing Order (Indictment) (D360), paras 129-130.

substance of the evidence and the circumstances surrounding it.[704] The International Co-Prosecutor further contends that much of the hearsay evidence relied on by the International Co-Investigating Judge is sourced, first-degree hearsay and, in any event, even unsourced or second-degree hearsay can be relied on if done with caution.[705] Moreover, the International Co-Prosecutor submits that two of the Co-Lawyers' purported examples do not even contain the hearsay they describe,[706] while many of the remaining challenges would have no impact, as the hearsay evidence merely provides additional corroboration for other direct and circumstantial evidence that is sufficient to support the International Co-Investigating Judge's findings.[707]

431. In the Reply, the Co-Lawyers argue that the International Co-Prosecutor has misconstrued their argument regarding hearsay evidence, emphasising that although hearsay is admissible, it must be approached with caution.[708] According to the Co-Lawyers, the International Co-Prosecutor's position that hearsay evidence has equal probative value to direct evidence based on personal knowledge is contrary to the jurisprudence.[709] The Co-Lawyers reiterate the examples of where the International Co-Investigating Judge allegedly failed to exercise the requisite amount of caution.[710]

2. Discussion

432. The International Judges find that the Co-Lawyers fail in establishing errors in the International Co-Investigating Judge's overall approach to hearsay evidence. In reaching this

---

[704] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 49 *referring to Popović et al.* Appeal Judgment (ICTY), para. 1307; ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence, Appeals Chamber, 16 February 1999 ("*Aleksovski* Decision on Admissibility of Evidence Appeal (ICTY)"), para. 15.

[705] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 52, footnote 125 (discussing jurisprudence from the ICTY, ICTR, ICC, and the ECCC Supreme Court Chamber). The International Judges note that the International Co-Prosecutor makes these arguments as part of the Response to Ground 6 but consider it appropriate to address these submissions concerning hearsay here. The International Judges understand that "sourced" hearsay refers to out-of-court statements originating from an identified source, whereas "unsourced" hearsay are out-of-court statements from an unidentified source. "First-degree" hearsay refers to an out-of-court statement made by an individual who has personal knowledge of an asserted fact; whereas "second-degree" hearsay (also known as "double" hearsay) refers to assertions of others within a statement that is itself an out-of-court statement.

[706] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 49, footnote 117.

[707] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 49, footnote 118.

[708] AO An's Reply (D360/11), para. 35. Although the Co-Lawyers make these arguments as part of their Reply under Ground 6, the International Judges consider it appropriate to address them here under Ground 5(v).

[709] AO An's Reply (D360/11), para. 36 *referring to* International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 52, footnote 125 *and* AO An's Appeal (D360/5/1), para. 78, footnote 174.

[710] AO An's Reply (D360/11), para. 35.

conclusion, the International Judges first address the parties' legal arguments on assessment of hearsay evidence and, then, will proceed to examine the purported hearsay reliance errors committed by the International Co-Investigating Judge.

433. It is well-settled—and the parties do not dispute[711]—that hearsay evidence is admissible and may be relied on.[712] Indeed, the International Co-Investigating Judge has "broad discretion" to rely on hearsay evidence.[713] The probative value of hearsay, as with all forms of evidence, varies based on its nature and substance and will ultimately "depend upon the infinitely variable circumstances which surround hearsay evidence."[714] The International Judges hold that it is for the Co-Lawyers to demonstrate that no reasonable trier of fact could have relied upon the hearsay evidence in reaching a specific finding.[715]

434. Although the Co-Lawyers contend that the Supreme Court Chamber's case law bars the use of anonymous or double hearsay to establish a finding beyond reasonable doubt,[716] the International Judges recall, as the Co-Lawyers rightly concede,[717] that the standard of proof at the closing order stage is lower than at trial. In addition, the International Judges recall that "[a]ll evidence is admissible and generally enjoys the same legal presumption of reliability" and that the "only relevant criterion should be the impact that the substance of the evidence may have on the personal conviction of the Co-Investigating Judges regarding whether there is sufficient evidence for the charges."[718] The International Judges accordingly reject the Co-

---

[711] *See* AO An's Appeal (D360/5/1), para. 78; International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 49.
[712] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 44; Case 002/1 Appeal Judgment (F36), para. 302; *Aleksovski* Decision on Admissibility of Evidence Appeal (ICTY), para. 15; *Rutaganda* Appeal Judgment (ICTR), paras 34, 148; ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Mathieu Ngudjolo*, ICC-01/04-02/12-3-tENG, Judgment pursuant to Article 74 of the Statute, Trial Chamber II, 18 December 2012, para. 56.
[713] Case 002/1 Appeal Judgment (F36), para. 302; *Popović et al.* Appeal Judgment (ICTY), para. 1307; *Rutaganda* Appeal Judgment (ICTR), para. 34; ICTR, *Prosecutor v. Karera*, ICTR-01-74-A, Judgement, Appeals Chamber, 2 February 2009 ("*Karera* Appeals Judgment (ICTR)"), para. 39.
[714] Case 002/1 Appeal Judgment (F36), para. 302; *Aleksovski* Decision on Admissibility of Evidence Appeal (ICTY), para. 15; *Popović et al.* Appeal Judgment (ICTY), para. 1307; *Karera* Appeals Judgment (ICTR), para. 39; ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to Article 74 of the Statute, Trial Chamber II, 7 March 2014 ("*Katanga* Trial Judgment (ICC)"), para. 89.
[715] Case 002/1 Appeal Judgment (F36), para. 302 ("[I]t is for the appealing party to demonstrate that no reasonable trier of fact could have relied upon [hearsay evidence] in reaching a specific finding"); *Karera* Appeals Judgment (ICTR), para. 196 ("[I]t is for the appealing party to demonstrate that no reasonable trier of fact could have taken into account hearsay evidence in reaching a specific finding"); *Nahimana* Appeal Judgment (ICTR), para. 509 ("[I]t 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").
[716] AO An's Appeal (D360/5/1), para. 78 *referring to* Case 002/1 Appeal Judgment (F36), paras 441-442.
[717] AO An's Appeal (D360/5/1), para. 78.
[718] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 51-52.

Lawyers' submission to the extent it argues that anonymous or second-degree hearsay cannot, as a matter of law, support sufficient charges.[719] The International Judges now turn to evaluate whether the International Co-Investigating Judge erred in his general approach to hearsay evidence.

435. At the outset, the International Judges observe that the International Co-Investigating Judge expressly explained that he adopted a "cautious approach" to hearsay evidence and detailed the factors he took into account in relying on uncorroborated hearsay.[720] Although the Co-Lawyers have raised a series of examples of purported overreliance on hearsay evidence, the Co-Lawyers merely assert that they constitute errors; they do not meaningfully demonstrate that no reasonable trier of fact could have relied upon such evidence to support the factual findings at issue. The International Judges do not consider that general citations to instances where the International Co-Investigating Judge relied on hearsay evidence in the Closing Order (Indictment) establish an overall error in his approach to hearsay.[721]

436. Moreover, in carefully assessing the examples raised, the International Judges note that some examples do not rely on hearsay statements as alleged;[722] in others, the hearsay evidence is supported by direct and probative circumstantial evidence from other witnesses who mutually corroborate the facts at issue.[723] In yet other examples, the circumstances and

---

[719] *Cf.* Case 002/1 Appeal Judgment (F36), para. 302; *Gacumbitsi* Appeal Judgment (ICTR), paras 115, 133; ICTR, *Prosecutor v. Rukundo*, ICTR-01-70-A, Judgement, Appeals Chamber, 20 October 2010, para. 196.

[720] Closing Order (Indictment) (D360), paras 129-130.

[721] The International Judges further note that there were instances where the International Co-Investigating Judge made express reference to the hearsay nature of the evidence and declined to make a factual finding as suggested by the evidence. *See* Closing Order (Indictment) (D360), paras 399, 448.

[722] *See, e.g.*, Closing Order (Indictment) (D360), para. 217, footnote 499 (The International Co-Investigating Judge relied on NHEM Chen's evidence (D219/855) in finding that there was a substantial increase in arrests and killings in the Central Zone following the arrival of the Southwest Zone cadres and AO An. The cited evidence does not contain, nor does it refer to, the anonymous hearsay of an "unnamed bodyguard who was allegedly KE Pauk's nephew", as the Co-Lawyers assert. In any event, in the parts of NHEM Chen's WRI which refers to different factual matters, NHEM Chen identifies the bodyguard's name by his alias as Comrade Voeun. *See* Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374650 (A82)).

[723] *See, e.g.*, Closing Order (Indictment) (D360), para. 258, footnote 642 (The International Co-Investigating Judge relied on YOU Vann's evidence (D219/138) to support his finding that AO An exercised authority over the Sector 41 military. The Co-Lawyers challenge this evidence as hearsay since YOU Vann learned of this information from an individual named Ni. *See* Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059297 (A98). This evidence, while hearsay, is supported by the corroborative evidence of (i) NHEM Chen, a close protection bodyguard for AO An and who also worked as a bodyguard for Sok, the Sector 41 Military Chairman, *see* Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374642 (A4), 01374652 (A100-104) ("[AO An] ordered *Uncle* Sok's troops. He asked me to call *Uncle* Sok to meet him so that he could give him orders"), 01374665 (A250); (ii) PECH Chim, who held positions as *inter alia* Chairman of the Rubber Plantation Workers' Union in Kampong Cham, *see* Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000670 (A32), 01000680 (A112) ("[T]he sector military reported to the Sector Secretary"), 01000686 (A165) ("*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

substance of the hearsay at issue are sufficiently probative for a reasonable trier of fact to rely on the evidence to make a finding at the closing order stage.[724]

437. In light of the foregoing, the International Judges hold that the Co-Lawyers fail in demonstrating that the International Co-Investigating Judge erred in his approach to hearsay evidence. Ground 5(v) is accordingly rejected.

F. Ground 6: AO An's Position in the CPK and Role in the Crimes – Introduction

438. Ground 6 challenges the International Co-Investigating Judge's alleged errors in finding that AO An had a more significant CPK position and role in the most serious crimes than other known Khmer Rouge officials.[725] The Co-Lawyers submit that a substantive analysis of the evidence reveals that AO An: (i) did not determine or interpret CPK policy;[726] and (ii) was not instrumental in its implementation compared to other known Khmer Rouge officials.[727] The Co-Lawyers further challenge the International Co-Investigating Judge's factual findings pertaining to: (iii) AO An's role in the purge of the Central Zone cadres and civilians;[728] (iv) AO An's zone-level positions and authority;[729] (v) AO An's position and authority in Sector 41;[730] (vi) AO An's role in the genocide of the Cham;[731] (vii) AO An's role in the forced

---

Secretary"); and (iii) SAT Pheap, *see* Written Record of Interview of SAT Pheap, 17 September 2015, D219/504, at ERN (EN) 01167891 (A41), 01167892 (A52-53) (explaining that Sok reported to AO An, which the witness learned from his friend); among other witnesses.

[724] *See, e.g.*, Closing Order (Indictment) (D360), para. 330, footnote 906 (The International Co-Investigating Judge relied on TOUCH Chamroeun's evidence (D219/435) in finding that TOUCH Chamroeun gave reports on the quantity of rice distributed to Anlong Chrey Dam workers to his wife, who would then give the reports to AO An. The Co-Lawyers challenge this evidence as hearsay from the witness's wife and assert that the International Co-Investigating Judge failed to exercise caution. Putting aside the Co-Lawyers' failure to elaborate on how the International Co-Investigating Judge's reliance on this hearsay evidence automatically demonstrates error, the International Judges consider that the circumstances and substance of the hearsay at issue allow a reasonable trier of fact to assign probative force to this evidence. In particular, the witness used to be in charge of the warehouse at the Sector Office in Prey Totueng; the circumstance that the hearsay came from the witness's wife and that she was in charge of the logistics section at the Sector Office, about 200 metres apart from AO An's office; and the witness's detailed testimony on how the rice was calculated and how his wife prepared reports for AO An. *See* Written Record of Interview of TOUCH Chamroeun, 30 July 2015, D219/435, at ERN (EN) 01142990-01142991 (A45, A54), 01143007-01143010 (A185-190, A193, A196-197, A203), 01143014-01143015 (A236-239).

[725] AO An's Appeal (D360/5/1), paras 80-81, 156; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625282, pp. 23:10 to 23:15.

[726] AO An's Appeal (D360/5/1), para 82.

[727] AO An's Appeal (D360/5/1), paras 83-87.

[728] AO An's Appeal (D360/5/1), paras 88-92; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625283-01625284, pp. 24:10 to 25:12.

[729] AO An's Appeal (D360/5/1), paras 93-105; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625284-01625286, pp. 25:12 to 27:8.

[730] AO An's Appeal (D360/5/1), paras 106-145; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625287-01625291, pp. 28:2 to 32:24.

[731] AO An's Appeal (D360/5/1), paras 146-150; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625291-01625292, pp. 32:25 to 33:13.

marriages and rape in Prey Chhor and Kampong Siem Districts;[732] and (viii) AO An's role in the charged crimes at the crime sites.[733] The Co-Lawyers submit that without these purported errors, the International Co-Investigating Judge could not have found that AO An was criminally responsible for the charged crimes or that AO An fell within the personal jurisdiction of the ECCC.[734] The International Judges will assess in turn the merits of each of these Grounds.

Ground 6(i): AO An's Role in Determining or Interpreting CPK Policy

1. Submissions and Discussion

439. Under Ground 6(i), the Co-Lawyers assert that AO An did not have the authority to determine CPK policies and how these policies were interpreted or implemented as he was not a member of the Standing Committee and General Staff in Phnom Penh.[735] The Co-Lawyers observe that neither the International Co-Investigating Judge nor the International Co-Prosecutor have provided any evidence to the contrary.[736]

440. In the Response, the International Co-Prosecutor submits that it is of marginal relevance that AO An did not happen to attend meetings with the Standing Committee or General Staff.[737] In the International Co-Prosecutor's view, this argument relates primarily to seniority rather than the question of who is amongst the most responsible for crimes committed during the Khmer Rouge regime. Although a charged person's role in formulating or interpreting policy can be relevant in determining his level of responsibility, the gravity of the crimes themselves and the charged person's role in the crimes are the most important criteria.[738]

441. The International Judges observe that it is undisputed that AO An was not a member of the Standing Committee or General Staff in Phnom Penh and, consequently, did not determine

---

[732] AO An's Appeal (D360/5/1), paras 151-154.
[733] AO An's Appeal (D360/5/1), para. 155; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625286, pp. 27:12 to 27:19.
[734] AO An's Appeal (D360/5/1), paras 80-81, 156; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625282, pp. 23:10 to 23:15.
[735] AO An's Appeal (D360/5/1), para. 82 and footnote 176; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625282, pp. 23:16 to 23:18.
[736] AO An's Appeal (D360/5/1), para. 82.
[737] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 87.
[738] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 87 and footnote 211 *referring to* Case 001 Trial Judgment (E188), para. 22; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321; Closing Order (Dismissal) (D359), para. 424.

or interpret CPK policies. This circumstance alone, however, is not sufficient to dispose of the question of whether AO An was among the "most responsible for the crimes [...] committed during the period from 17 April 1975 to 6 January 1979".[739]

Ground 6(ii): AO An's Role in Implementing CPK Policies Compared to Other Khmer Rouge Officials

1. Submissions

442. In Ground 6(ii), the Co-Lawyers aver that AO An did not play an instrumental role in implementing CPK policies as compared to Khmer Rouge officials like Duch, KE Pauk, *Ta* Mok and SAO Sarun.[740] AO An did not directly communicate with the Standing Committee or General Staff in Phnom Penh, was not the leader of an autonomous sector and did not determine which cadres from the Central Zone or Sector 41 would be sent to S-21 Security Centre.[741] The International Co-Investigating Judge also failed to provide sufficiently serious and corroborative evidence that AO An attended high-level Standing Committee meetings in Phnom Penh with senior leaders; instead, he purportedly overstated the evidence regarding a single stopover in Phnom Penh which would not, in any event, have meant AO An determined CPK policies or their means of implementation and dissemination.[742] In addition, the International Co-Investigating Judge failed to provide sufficient evidence that AO An conducted military, security or political trainings or meetings to disseminate or implement CPK policies in Sector 41 or the Central Zone; further, even if AO An was present, this would not have meant he was a key implementer of CPK policies or otherwise most responsible.[743] Finally, the Co-Lawyers add that even if AO An had spoken at meetings, these meetings would only have concerned economics and improving the living conditions for people and would not have concerned military, security or political matters.[744]

443. In the Response, the International Co-Prosecutor asserts that arguments relating to AO An's seniority or that he did not personally select victims to be sent to S-21 Security Centre—

[739] ECCC Law, Art. 1; ECCC Agreement, Art. 1. *See generally supra* Ground 3.
[740] AO An's Appeal (D360/5/1), para. 83; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625274, pp. 15:8 to 15:11, 01625282, pp. 23:16 to 23:18.
[741] AO An's Appeal (D360/5/1), paras 84-85 and footnotes 178-179.
[742] AO An's Appeal (D360/5/1), para. 86 and footnotes 180-182.
[743] AO An's Appeal (D360/5/1), para. 87 and footnote 183.
[744] AO An's Appeal (D360/5/1), para. 87 and footnote 184.

which account for only a tiny fraction of the victims from the Central Zone—are of marginal relevance to whether he was among the most responsible.[745] AO An played a critical role in implementing the CPK's criminal policies by ordering his subordinates to commit crimes and monitoring their compliance with those orders.[746]

2. Discussion

444. The International Judges consider that the Co-Lawyers' observations that AO An did not directly communicate with the Standing Committee or General Staff or that he was not a leader of an autonomous sector do not, in themselves, establish that AO An is outside the ambit of the ECCC's personal jurisdiction. In addition, the Co-Lawyers have not established why AO An's responsibilities would have necessarily included decisions on which cadres would be sent to S-21 Security Centre if he had played an instrumental role in implementing CPK policies. To the extent the Co-Lawyers submit that involvement with or decision-making power over S-21 crimes is necessary to bring an accused person within the ambit of the most responsible persons for purposes of the ECCC's jurisdiction, the International Judges reject this position. The International Judges furthermore recall that, in determining personal jurisdiction, there is no "filtering standard in terms of positions in the hierarchy"[747] and, as discussed above, that the International Co-Investigating Judge did not err in comparing AO An with certain Khmer Rouge members but not others.[748]

445. In respect of the sufficiency of evidence concerning AO An's attendance at meetings to disseminate or implement CPK policies, the International Judges hold that the Co-Lawyers have not satisfied their burden of showing that no reasonable trier of fact could have made the findings under challenge; their challenges, on the contrary, are limited to disagreements with the conclusions reached by the International Co-Investigating Judge or unsubstantiated alternative interpretations of the same evidence.[749] The International Judges, in particular, find that the evidence firmly supports AO An's role in conducting and delivering orders at various

[745] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 86-87.
[746] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 87.
[747] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321; *see also* para. 334 ("At the outset, the Undersigned Judges observe that the 'obvious initial filtering effect' of a person's formal position in the hierarchy, as applied by the Co-Investigating Judges, should not automatically exclude those at lower levels who are directly implicated in the most serious atrocities").
[748] *See supra* Ground 3 (finding, *inter alia*, that while the assessment of whether a suspect is among those most responsible may include comparison to other Khmer Rouge officials, comparisons to every known Khmer Rouge official are not necessary).
[749] *See* Case 002/1 Appeal Judgment (F36), para. 90.

meetings on political, security and military matters,[750] in addition to meetings concerning economic matters including on forced labour worksites.[751] The evidence also sufficiently supports AO An's attendance at a meeting in Phnom Penh with senior CPK leaders where POL Pot announced that Central Zone cadres were "traitorous" during AO An's transfer from the Southwest to the Central Zone.[752] Upon review of the evidence, the International Judges find that the International Co-Investigating Judge's conclusion that AO An was "a major player in the DK structure" and "a willing and driven participant in the brutal and criminal implementation of its inhuman policies"[753] is apt and well-founded.

446. Accordingly, the International Judges find no error and dismiss Ground 6(ii).

Ground 6(iii): AO An's Role in Planning and Leading the Purge of Incumbent Central Zone Cadres and Civilians

1. Submissions

447. Under Ground 6(iii), the Co-Lawyers assert that the International Co-Investigating Judge erred in finding that AO An planned, orchestrated or led a purge of former Central Zone cadres and civilians in late 1976 to February 1977.[754] The International Co-Investigating Judge ignored, in violation of the principle of *in dubio pro reo*, evidence from witnesses and civil

---

[750] The International Judges further note that much of the evidence challenged as "non-credible" by the Co-Lawyers here is provided by witnesses and civil party applicants which the International Judges have already found as generally credible witnesses in Ground 5(ii). *See, e.g.*, Written Record of Interview of NHEM Chen, D219/731, 15 March 2016, at ERN (EN) 01224107-01224108 (A51-A55) (discussing meeting at Met Sop Security Centre where AO An ordered killings in accordance with the "1977 plans", which required all enemies to be killed before 1978), 01224109-01224110 (A68-A70) (discussing meeting at Wat Batheay where AO An spoke about construction and food rations); Written Record of Interview of PENH Va, 11 March 2015, D219/226, at ERN (EN) 01088622 (A6) (discussing meeting in March 1977 at Wat Ta Meak where AO An accused the Central Zone cadres of betrayal).

[751] *See, e.g.*, Written Record of Interview of CHIN Sinal, 26 August 2011, D78, at ERN (EN) 00740734-00740735 (A1-A3, A11) (discussing meetings at Anlong Chrey Dam worksite where AO An spoke).

[752] *See* Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000674 (A60-A61), 01000675 (A64-A65, A70) (describing meeting in Phnom Penh where POL Pot described the Central Zone as "traitorous"); Case 002/2 Transcript of 22 April 2015 (PECH Chim), D219/702.1.99, ERN (EN) 01418925, p. 79 (testifying that at the Phnom Penh meeting, POL Pot stated "there were traitors in the Central Zone"); Case 002/2 Transcript of 14 January 2016 (YOU Vann), D219/702.1.87, ERN (EN) 01438489-01438490, pp. 48-49 ("Yes, Prak Yut, Ta An, Ta Mok, and Ta Chap attended the meeting [in Phnom Penh]"). While the International Judges agree with the Co-Lawyers that attendance at this Phnom Penh meeting alone would not suffice to establish an attendee as among the most responsible, the International Co-Investigating Judge did not appear to adopt such a position in his Closing Order (Indictment).

[753] Closing Order (Indictment) (D360), para. 712.

[754] AO An's Appeal (D360/5/1), para. 88 and footnote 185 *referring to* Closing Order (Indictment) (D360), paras 212-217, 242-245, 276; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625283, pp. 24:10 to 24:15.

party applicants that the purge occurred before AO An's arrival,[755] that KE Pauk and Oeun were the only ones left when the Southwest Zone cadres arrived[756] and that the Southwest Zone cadres were merely sent as replacements.[757] Moreover, the Co-Lawyers aver that the International Co-Investigating Judge relied on non-credible and inconsistent accounts or vague time references in support of the late 1976 to February 1977 date.[758] He therefore failed to provide sufficient evidence to support his finding. In addition, the Co-Lawyers submit that the International Co-Investigating Judge did not provide sufficient evidence to conclude that the reason for the Southwest Zone cadres' transfer was to conduct a purge.[759] Instead, he overstated a mere stopover in Phnom Penh as evidence of an alleged planning meeting for the purge[760] and erred in finding that AO An ordered, participated in or received orders concerning the purge.[761]

448. In the Response, the International Co-Prosecutor argues that the Co-Lawyers fail to demonstrate that no reasonable trier of fact could have reached the conclusion that AO An planned, orchestrated or led a purge of former Central Zone cadres or civilians in late 1976 to February 1977.[762] In challenging the reliability of the evidence, the Co-Lawyers recognise that there is evidence to support the International Co-Investigating Judge's findings.[763] Moreover, the International Co-Prosecutor is of the view that the International Co-Investigating Judge relied on sufficient evidence, including AO An's own acknowledgment of the reason for his transfer to the Central Zone.[764]

---

[755] AO An's Appeal (D360/5/1), para. 88 and footnote 186; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625283, pp. 24:16 to 24:19.
[756] AO An's Appeal (D360/5/1), para. 88 and footnote 187; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625283, pp. 24:19 to 24:21.
[757] AO An's Appeal (D360/5/1), para. 88 and footnote 188, para. 90 and footnote 194; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625283, pp. 24:21 to 24:22.
[758] AO An's Appeal (D360/5/1), para. 89 and footnotes 189-191; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625283-01625284, pp. 24:24 to 25:1.
[759] AO An's Appeal (D360/5/1), para. 90 and footnote 192 *referring to* Closing Order (Indictment) (D360), para. 214, footnotes 489-490; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625284, pp. 25:5 to 25:8.
[760] AO An's Appeal (D360/5/1), para. 91; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625284, pp. 25:1 to 25:4.
[761] AO An's Appeal (D360/5/1), para. 92 *referring to* Closing Order (Indictment) (D360), paras 275, 281-288, 293-298 and footnotes 718-719, 737-752, 765-791; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625284, pp. 25:9 to 25:13.
[762] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 85.
[763] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 85 and footnote 208 *referring to* AO An's Appeal (D360/5/1), para. 89, footnote 189.
[764] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 85 and footnote 209 *referring to* Closing Order (Indictment) (D360), footnote 592.

2. Discussion

449. The International Judges find sufficiently serious and corroborative evidence that KE Pauk and AO An, among others, devised a plan to purge cadres in the Central Zone in late 1976 to February 1977. Although the Co-Lawyers have referred to a number of witnesses stating that the purge of incumbent cadres occurred prior to the arrival of the Southwest Zone cadre group, the International Judges observe that the International Co-Investigating Judge took note of the contradictory evidence on this issue;[765] moreover, the International Judges observe that some of the witnesses that the Co-Lawyers rely on do not support their arguments.[766] The International Co-Investigating Judge, in finding that the transfer occurred sometime between "late 1976 and February 1977," recognised the indeterminate and sometimes inconsistent evidence on the Case File.[767] The International Judges can find no error warranting appellate intervention. The International Judges additionally note that the finding that the transfer occurred around late 1976 to February 1977 is consistent with the finding that AO An announced that he was the new Sector 41 Secretary at a meeting in Wat Ta Meak in March 1977 a month or so later.[768]

450. The International Judges similarly find that the evidence firmly establishes that the transfer of the Southwest Zone cadres to the Central Zone was in furtherance of the CPK policy to purge incumbent cadres perceived as "traitorous";[769] indeed, AO An himself stated that *Ta*

---

[765] *See* Closing Order (Indictment) (D360), footnote 783.

[766] Written Record of Interview of TEP Pauch, 4 March 2013, D117/19, at ERN (EN) 00901044 (A1), 00901045 (A8) (The witness states that he was assigned to Baray District Secretary in late 1978, three or four months before the arrival of the Vietnamese and therefore arrived much later than the late 1976 to February 1977 time period under discussion); Written Record of Interview of BAN Siek, 6 July 2009, D6.1.386, at ERN (EN) 00360752 ("All people who lived in the Central Zone were all purged by the Southwestern cadres"). *See also* Written Record of Interview of BAN Siek, 1 April 2012, D107/15, at ERN (EN) 00841965 (discussing AO An's presence at zone-level meetings related to the purge).

[767] The International Judges are satisfied that the International Co-Investigating Judge properly considered PRAK Yut's inconsistent statements concerning the time period when the Southwest Zone cadre group arrived in the Central Zone. *See* Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597561. The Closing Order (Indictment) does not rely on PRAK Yut's statements claiming that she was transferred in either March/April 1977 or mid-1977, as acknowledged in footnote 593 of the Closing Order, and justifies reliance on her testimony stating that the transfer occurred in January or February 1977 by citing various other witnesses attesting to the earlier time period. *See, e.g.*, Written Record of Interview of NHIM Kol, 19 February 2012, D107/7, at ERN (EN) 00787213. In any event, a discrepancy of approximately four months in estimating the date of events in 1977 is a minor inconsistency that does not detract significantly from the plausibility and reliability of the remainder of PRAK Yut's evidence.

[768] *See infra* Ground 6(v)(a).

[769] The International Judges do not consider that the Co-Lawyers' alternative interpretation of the evidence that the transfer of the Southwest Zone cadre was simply an administrative re-distribution to "undertake new work assignments" establishes an error in the International Co-Investigating Judge's analysis. *See also supra* Ground 6(ii) regarding the meeting in Phnom Penh where POL Pot announced that the Central Zone cadres were "traitorous."

Mok sent him to the Central Zone because "[a]ll the leaders in Kampong Cham became traitors, so they had to send me over there".[770]

451. Lastly, the Co-Lawyers have not elaborated on why no trier of fact could reasonably conclude that AO An ordered or participated in the purge of cadres and civilians in Sector 41.[771] In respect of PRAK Yut's statements on whether AO An conducted the purge of former Central Zone cadres,[772] the International Judges find material inconsistencies between her statements claiming that few or no cadres were present in her district upon her arrival and her statements admitting that she removed former cadres pursuant to instructions from the sector and zone levels. Despite the inconsistencies, the International Judges do not consider that it was unreasonable for the International Co-Investigating Judge to find that AO An ordered the purge of cadres at the district and commune levels in light of the corroborative evidence from other witnesses including NHIM Kol[773] and overall assessment of PRAK Yut's credibility.[774]

452. The International Judges dismiss Ground 6(iii).

Ground 6(iv): AO An's Positions and Authority in the Central Zone

1. Submissions

[770] DC-Cam Interview of AO An, 1 August 2011, D219/847.1, at ERN (EN) 01373570.
[771] The International Co-Investigating Judge referenced various probative witness accounts describing AO An's leading role in conducting the purge in Sector 41. *See, e.g.*, Written Record of Interview of TOY Meach, 2 September 2015, D219/582, at ERN (EN) 01179831 (A76), 01179832 (A77-A78, A83), 01179833 (A86, A88), 01179834-01179836 (A92-A108); Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374645-01374646 (A30-A36, A42), 01374647 (A46-A47, A53-A54), 01374648 (A56-A59), 01374648-01374649 (A63-A64, A71, A73), 01374650-01374651, (A79-A86), 01374654-01374655 (A138-A139); Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059282-01059283 (A43-A47) ("PRAK Yut held a meeting with former village and commune chiefs and told them she was not allowing them to continue as village and commune chiefs [...] The order must have come from *Ta* An because he was Sector Chairperson. Khom took PRAK Yut to meet *Ta* An at the Sector level. When they returned, Khom told me they would arrange to have new commune chiefs"), 01059297 (A98), 01059298 (A100-A101). *See also infra* Ground 6(v)(b)(4) (discussing *inter alia* evidence that AO An ordered district secretaries to execute civilians who complained about their working and living conditions).
[772] *See* Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597563.
[773] *See* Written Record of Interview of NHIM Kol, 11 February 2015, D219/171, at ERN (EN) 01076943-01076944 (A14-A15) ("I saw an arrest of a commune chairman once in early 1977. At that time, five persons from the Southwest Zone came to arrest him [...] I know about the arrests of other commune chairmen because we used to work together, but after PRAK Yuth arrived in Kampong Siem District, we never saw them at work again"). *See generally supra* Ground 5(ii) for credibility assessment of NHIM Kol.
[774] The International Judges observe a general shift in PRAK Yut's evidence on this issue after she received the letter of reassurance from the Office of the Co-Investigating Judges. *See generally supra* Ground 5(ii) for credibility assessment of PRAK Yut.

453. The Co-Lawyers allege that AO An did not hold significant zone-level positions or authority in the Central Zone. They submit that AO An was not the acting Secretary of the Central Zone when KE Pauk was absent and was not the *de jure* or *de facto* Deputy Zone Secretary.[775] Even if AO An had held these positions, given the short tenures of these positions, he could not be considered amongst those most responsible.[776]

454. First, the Co-Lawyers allege that the International Co-Investigating Judge's finding that AO An was the acting Secretary of the Central Zone in KE Pauk's absence is not based on serious, corroborative evidence as the witnesses relied on by the International Co-Investigating Judge are inconsistent, contaminated or have "motives" to lie.[777] There is no evidence of AO An actually acting in KE Pauk's absence[778] and the International Co-Investigating Judge ignored contrary evidence without explanation.[779] The evidence indicates that KE Pauk had absolute power at all times and that other cadres were in charge during KE Pauk's absences.[780]

455. Second, the findings that AO An was *de jure* or *de facto* Deputy Zone Secretary were similarly based on unsubstantiated, contaminated evidence and testimony merely stating that AO An held such a position. The International Co-Investigating Judge provided no evidence regarding AO An's appointment date, reason for a promotion and details of his duties and, also, failed to explain how to reconcile the conflicting evidence relating to AO An's tenure and regarding his zone-related activities, such as overseeing construction projects, providing resources to worksites throughout the zone and attending zone-level meetings.[781] The Co-Lawyers further argue that his alleged position as Deputy Zone Secretary was used to make several findings without providing any reasoned evidentiary basis.[782]

456. In the Response, the International Co-Prosecutor submits that the Co-Lawyers fail to demonstrate that no reasonable trier of fact could have concluded that AO An served as *de jure*

[775] AO An's Appeal (D360/5/1), para. 93; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625284-01625286, pp. 25:12 to 27:8.
[776] AO An's Appeal (D360/5/1), paras 93-94, 105; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625284-01625286, pp. 25:12 to 27:8.
[777] AO An's Appeal (D360/5/1), para. 94-95.
[778] AO An's Appeal (D360/5/1), para. 96; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625285, pp. 26:1 to 26:10.
[779] AO An's Appeal (D360/5/1), para. 97.
[780] AO An's Appeal (D360/5/1), para. 97; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625285, pp. 26:11 to 26:14.
[781] AO An's Appeal (D360/5/1), paras 98-103; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625285-01625286, pp. 26:14 to 27:24.
[782] AO An's Appeal (D360/5/1), para. 104.

and *de facto* Deputy Secretary of the Central Zone.[783] Indeed, at least seven witnesses and civil party applicants state that AO An held this position, AO An himself admitted he was on the Central Zone Committee, and there is evidence of him acting on matters of zone-level responsibility with respect to construction and military matters.[784] The International Co-Prosecutor further asserts that AO An's role as Sector 41 Secretary further corroborates the evidence of him serving as Deputy Secretary of the Central Zone since that position would likely have been filled by the secretary of one of the zone's three sectors.[785] The number and frequency of the occasions on which AO An was required to carry out KE Pauk's duties as acting Secretary of the Central Zone are not determinative of whether AO An was Deputy Zone Secretary.[786]

457. In the Reply, the Co-Lawyers assert that the International Co-Prosecutor ignores substantial exculpatory evidence indicating that AO An did not hold the *de jure* or *de facto* position of Deputy Secretary of the Central Zone.[787]

2. Discussion

a. Deputy Secretary of the Central Zone

458. The International Judges find that the International Co-Investigating Judge did not err in finding that AO An was the Deputy Secretary of the Central Zone from late 1977 until the end of the DK regime.

459. First, regarding the alleged reliance on unsubstantiated and contaminated testimony of two witnesses (BAN Siek and IM Pon) to support the finding that AO An was the Deputy Secretary of the Central Zone,[788] the International Judges find no improper practice from investigators[789] and consider that it was reasonable for the International Co-Investigating Judge

[783] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 79.
[784] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 80-81; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625144-01625145, pp. 80:19 to 81:12.
[785] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 81.
[786] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 79-83.
[787] AO An's Reply (D360/11), para. 42.
[788] AO An's Appeal (D360/5/1), para. 99, footnote 212 *referring to* accounts of BAN Siek and IM Pon allegedly made through closed questions and "feeding" of information. The International Judges observe that the statements were previously challenged by the Co-Lawyers. *See* Annex B to Application for WRI Annulment (D338/1/2.3), at ERN (EN) 01388928-01388933, entries 6, 7. In reviewing the substance of the interview, the International Judges do not consider the probative value of the evidence here to be compromised.
[789] *See supra* Ground 5(iii).

to rely on the two witnesses' accounts in finding that AO An was the Deputy Zone Secretary.[790] Furthermore, the International Co-Investigating Judge relied on the evidence of a substantial number of additional witnesses who attest to AO An as the Deputy Secretary of the Central Zone.[791] This finding is further corroborated by AO An's position as a member of the Central Zone Committee and by his role as Sector 41 Secretary.[792]

460. Second, in respect of AO An's appointment date as Deputy Zone Secretary,[793] the International Judges note that, while not specifying the exact date of AO An's appointment, the International Co-Investigating Judge found that AO An held the position of Deputy Secretary of the Central Zone from late 1977.[794] The International Judges consider that the Co-Lawyers fail to point out specific errors in the evidence supporting the finding that AO An held this position from late 1977[795] and observe that this approximate date suffices for the purpose of making a finding on personal jurisdiction.

---

[790] Closing Order (Indictment) (D360), para. 252 *referring to* Written Record of Interview of BAN Siek, 24 March 2014, D117/35, at ERN (EN) 00984873 (A15) ("To my knowledge *Ta* An was deputy to KÈ Pork on the Standing Zone Committee"); Written Record of Interview of BAN Siek, 26 May 2015, D219/355, at ERN (EN) 01116324 (A9) ("I just knew that [AO An] was responsible for the sector and was on the zone permanent committee. He was also a deputy of KÈ Pauk"); Written Record of Interview of BAN Siek, 6 July 2009, D6.1.386, at ERN (EN) 00360760 ("The Zone Committees were [...] and An [...] the Sector 41 Secretary"); Case 002/2 Transcript of 5 October 2015 (BAN Siek), D219/702.1.75, ERN (EN) 01409566-01409567, pp. 53-54 ("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"); Written Record of Interview of IM Pon, 23 May 2014, D117/50, at ERN (EN) 01059866 (A29), 01059873 (A68), 01059875 (A75) ("Yes, yes *Ta* An was the deputy. He was *Ta* Pok's deputy at the Zone. [...] *Ta* An was Zone Deputy"). IM Pon was AO An's driver. BAN Siek was the chief of Commerce for Sector 42 and Chamkar Leu District Deputy Secretary.

[791] *See, e.g.*, Written Record of Interview of PICH Cheum, 28 February 2013, D117/18 at ERN (EN) 00903203 (A2) ("After Sè's arrest, I knew that *Ta* An remained as the only one deputy of KÈ Pauk"); Written Record of Interview of SUON Kanil, 19 August 2009, D6.1.707, at ERN (EN) 00390076 ("After the Southwest Zone group had arrived, KÈ Pauk was still the chairperson, *Ta* [...] An [...] (from the Southwest Zone) became the deputy [...]"); Written Record of Interview of SUON Kanil, 10 June 2011, D29, at ERN (EN) 00716227 ("Q. Do you know Ta An [...] A. Yes, I do. He was as secretary of Sector 41; and he was also a deputy secretary of the Central Zone"); Written Record of Interview of TO Sem, 27 April 2015, D117/39, at ERN (EN) 01033104 (A14) ("the organisational structure of the zone committee was as follows: KÈ Pork [...] was the chief, *Ta* An was the deputy, and *Ta* Sim was a member"); Written Record of Interview of KUCH Ra, 5 February 2015, D219/178, at ERN (EN) 01077013 (A6) ("*Ta* An was KÈ Pork's deputy and a member of the Zone Committee").

[792] *See infra* Ground 6(v); Closing Order (Indictment) (D360), paras 250-251.

[793] AO An's Appeal (D360/5/1), para. 99, footnote 214.

[794] Closing Order (Indictment) (D360), paras 250, 252.

[795] The Co-Lawyers allege that the International Co-Investigating Judge merely stated that after KANG Chap was transferred to the New North Zone at an unknown date, AO An became the Deputy Secretary of the Central Zone. *See* AO An's Appeal (D360/5/1), para. 99, footnote 214. However, the International Co-Investigating Judge specified that Kang Chap was removed as Deputy Secretary of the Central Zone in late 1977 and AO An subsequently became the Deputy Secretary of the Central Zone. *See* Closing Order (Indictment) (D360), paras 250, 252. The Co-Lawyers do not challenge the underlying evidence of this finding and accordingly the International Judges consider it reasonable for the International Co-Investigating Judge to have relied on an estimated time of "late 1977".

461. Third, concerning the alleged failure to explain the conflicting evidence regarding the duration of AO An's tenure as Deputy Zone Secretary,[796] contrary to the Co-Lawyers' assertion, while the International Co-Investigating Judge relied on the evidence of IM Pon[797] and RY Nor[798] in finding that AO An held the position of Deputy Secretary of the Central Zone until the end of the regime,[799] he did take into consideration conflicting evidence from TO Sem[800] and provided sufficient reasons why he considered IM Pon's account more reliable.[801]

462. Finally, as regards to AO An's overall duties as Deputy Secretary of the Central Zone and zone-related activities,[802] the International Judges find no error in the International Co-Investigating Judge's finding that "as Deputy Secretary and member of the Central Zone Committee, AO An exercised aspects of zone level authority".[803] He specified further that AO An was involved in construction projects throughout the Central Zone, that AO An visited other sectors and worksites throughout the zone and provided workers and resources from Sector

---

[796] AO An's Appeal (D360/5/1), para. 99, footnote 216 *referring to* the statements of IM Pon and TO Sem.
[797] Closing Order (Indictment) (D360), para. 252, footnote 621 *referring to* Written Record of Interview of IM Pon, 23 May 2014, D117/50, at ERN (EN) 01059873 (A67-68) ("Q: As far as you know, did *Ta* An remain Zone Deputy until the end of the regime? A67: Yes, he did. Q: As far as you know, did he ever have disagreements with KÈ Pok? And was he later removed from this position? A68: It seems not. I do not know of anything. They did not remove him during that era").
[798] Closing Order (Indictment) (D360), para. 252, footnote 622 *referring to* Written Record of Interview of RY Nhor, 10 November 2016, D219/870, at ERN (EN) 01373687 (A41) ("Q: Did you say that *Ta* An became a zone deputy secretary at the end of the regime? A41: Yes, I did").
[799] Closing Order (Indictment) (D360), paras 252, 705.
[800] Closing Order (Indictment) (D360), para. 252, footnote 623 *referring to* Written Record of Interview of TO Sem, 27 April 2014, D117/39, at ERN (EN) 01033104 (A15) ("Q: During your stay in the Central Zone, did you see any change in the leadership of the Zone? A15: Yes, there was a change. At that time, KÈ Pork was still the chief, but *Ta* An was demoted to be a member, and *Ta* Sim was appointed as a deputy [...]"), 01033105 (A19) ("Q: Do you recall when *Ta* An was demoted to be a member and *Ta* Sim promoted as KÈ Pork's deputy? A19: This happened about six months before the Vietnamese came. [...]").
[801] Closing Order (Indictment) (D360), para. 252 (the International Co-Investigating Judge explained that he considered the evidence of AO An's driver, who worked closely with AO An, more reliable than the evidence of the wife of another sector cadre).
[802] AO An's Appeal (D360/5/1), paras 99-104. The International Judges note that they have "an inherent discretion to select which submissions merit a detailed reasoned opinion in writing" and that "arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed [...]". *See, e.g.*, Case 002, Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5 ("Case 002 Decision on Civil Party Applications (D250/3/2/1/5)"), para. 22. *See also* ICTY, *Prosecutor v. Gotovina and Markač*, IT-06-90-A, Judgement, Appeals Chamber, 16 November 2012, para. 14; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement, Appeals Chamber, 27 November 2017, para. 13.
[803] Closing Order (Indictment) (D360), para. 259.

41[804] and that AO An attended meetings in Phnom Penh[805] and in Kampong Cham to plan the purge and implementation of CPK policies.[806]

463. In addition, the International Co-Investigating Judge found that AO An's authority extended to zone military matters.[807] The Co-Lawyers challenge that this finding is not supported by direct, serious and corroborative evidence.[808] However, *inter alia*, the International Co-Investigating Judge, in asserting that AO An appointed the Commander and Deputy Commander of a zone-level RAK division, relied on the account of KUCH Ra.[809] The International Judges find that KUCH Ra's account is generally corroborated by other

[804] Closing Order (Indictment) (D360), para. 259. The Co-Lawyers challenge this finding, *see* AO An's Appeal (D360/5/1), para. 101, footnotes 220-226, on the basis that the evidence is either unsubstantiated and uncorroborated and that AO An would have merely led the Sector 41 forces at zone-level construction sites, that AO An did not control or manage the worksites and that he did not provide resources to these sites. The International Judges are unpersuaded and consider that the International Co-Investigating Judge did not err in relying on CHAN Sang or AO An's own statements and conclude that it was not unreasonable for the International Co-Investigating Judge to make these findings in light of the totality of evidence.

[805] Closing Order (Indictment) (D360), para. 259. The Co-Lawyers challenge this finding, *see* AO An's Appeal (D360/5/1), para. 86, footnote 180. The Co-Lawyers assert that the International Co-Investigating Judge relied on one uncorroborated witness, namely YOU Vann's Case 002/2 Trial testimony in which she "provides uncorroborated hearsay evidence from Prak Yut" because PRAK Yut told YOU Vann that she and AO An took monthly car-trips to attend meetings in Phnom Penh", *see* Case 002/2 Transcript of 14 January 2016 (YOU Vann), D219/702.1.87, ERN (EN) 01438499-01438500, pp. 58-59 ("[She] went to Phnom Penh, but [she] went by car with Ta An. [She] told me that [she] went for [...] a meeting"). The International Judges recall that they have found YOU Vann's testimony generally credible and recall their findings in Ground 5(v) regarding hearsay evidence. Here, the International Judges conclude that the International Co-Investigating Judge did not err in relying on YOU Vann's account in making this particular finding.

[806] Closing Order (Indictment) (D360), para. 259. The Co-Lawyers challenge this finding, *see* AO An's Appeal (D360/5/1), para. 103. The International Judges note that the International Co-Investigating Judge relied on multiple witnesses that have been found generally credible. *E.g.*, Written Record of Interview of NHEM Chem, 15 March 2016, D219/731, at ERN (EN) 01223106 (A36) ("Q: Did he go to meetings in Kampong Cham [...]? A36: "Yes, he went to have meetings with Ta Pork"), (A40) ("Q: Can you tell what you remember from the meetings? A40: I caught some of it, like about the enemy. We had to do whatever could be done to arrest all the enemies [...]"); Written Record of Interview of NHEM Chem, 27 October 2016, D219/855, at ERN (EN) 01374643 (A5) ("They held a comprehensive meeting once a month. I attended the meetings with [AO An] about four times"), 01374644 (A17, A21) ("At the meetings, they talked about the arrest of the enemy [...] [AO An] was from the Zone who was in charge of the sector, but he worked in the zone with Ta Pauk"), 01374645 (A29) ("[A]t that time [*Ta* Pauk] ordered action to be taken to arrest the enemy in the districts on a continuous basis"); Written Record of Interview of BAN Siek, 1 April 2012, D107/15, at ERN (EN) 00841965 ("[T]he zone's Standing Committee, which consisted of three sector committees – Ta An. [...] To my knowledge, important decisions, for example, on a purge were made by the Standing Committee during its secret meeting. KÈ Pauk's Central Zone Office was situated in Kampong Cham city"). *See supra* Ground 5(ii) and *infra* Ground 6(v).

[807] Closing Order (Indictment) (D360), para. 260.

[808] AO An's Appeal (D360/5/1), para. 103, footnotes 228-229.

[809] Written Record of Interview of KUCH Ra, 5 February 2015, D219/178 at ERN (EN) 01077012 (A3-A4) ("*Ta* An [...] appointed Hoeun [...] *Ta* An, the Zone Deputy, had the right to decide who would work in the new unit").

evidence[810] and is detailed on preceding events: the explosion in Kampong Cham town and the arrest of Division 174 commanders[811]—hence credible.

464. The International Judges, therefore, find that the Co-Lawyers have failed to demonstrate that no reasonable trier of fact could have found that AO An held the position of Deputy Secretary of the Central Zone from late 1977 until the end of the regime or that AO An exercised aspects of zone-level authority.

b. Acting Secretary of the Central Zone

465. The Co-Lawyers challenge the International Co-Investigating Judge's finding that "Ao An served as Acting Central Zone Secretary during periods when K[E] Pauk was absent from the Zone or indisposed."[812]

466. In the Closing Order (Indictment), the International Co-Investigating Judge held that "[*t*]*here is also evidence* that A[O] An served as Acting Central Zone Secretary during periods when K[E] Pauk was absent from the Zone or indisposed. [...] *The assertion* that A[O] An acted as *de facto* Central Zone Secretary is supported by a number of former cadres. [...] However, no witnesses identify *specific instances of when or how long he held such a role.*"[813] Further, the International Co-Investigating Judge concluded later in the personal jurisdiction section, that "[t]here is also sufficient evidence to allow the conclusion that A[O] An increasingly took over K[E] Pauk's functions as *de facto* Acting Central Zone Secretary due in some part to K[E] Pauk's engagement in the military war effort. It is however *unclear when exactly and how long* this *de facto* position was exercised; distinct instances of his use of that particular role *could not be identified,* either".[814]

467. First, the International Judges find that the International Co-Investigating Judge did not err in finding that AO An was the acting Secretary of the Central Zone from October 1978 in KE Pauk's absence. The International Co-Investigating Judge relied on SARAY Hean, who

[810] Closing Order (Indictment) (D360), para. 260, footnotes 657-658. *E.g.*, AO An attended regular zone-level military meetings.
[811] Closing Order (Indictment) (D360), para. 260, footnote 656 *referring to, e.g.*, Written Record of Interview of SOUN Kanil, 19 August 2009, D6.1.707, at ERN (EN) 00390080-00390081 ("KHUL Khin [...] [t]hey arrested him because of an incident in Kampong Cham, in which there was a big explosion that caused fire on some houses and broke many glass windows of the nearby buildings").
[812] AO An's Appeal (D360/5/1), para. 94, footnote 200 *referring to* Closing Order (Indictment) (D360), para. 255.
[813] Closing Order (Indictment) (D360), para. 255 (emphasis added).
[814] Closing Order (Indictment) (D360), para. 705 (emphasis added).

provides a vivid account of KE Pauk designating AO An as his replacement, specifying that this occurred during a meeting in Kampong Cham approximately three months before the end of the regime.[815] Furthermore, as corroborative evidence, AO An's former driver, IM Pon recounts that AO An worked on KE Pauk's behalf when KE Pauk was absent and that he arranged work at worksites in Kampong Cham.[816] The International Judges observe that this finding is based on sufficient evidence and hence not unreasonable.

468. Concerning the Co-Lawyers' argument that the International Co-Investigating Judge ignored contrary evidence without explanation, the International Judges recall "the presumption that the [International] Co-Investigating Judge [...] [has] evaluated all the evidence and need not mention every piece of evidence on the Case-File, as long as there is no indication that [he] completely disregarded any particular piece of evidence. This presumption may be rebutted when evidence which is clearly relevant to the findings is not addressed by their reasoning."[817]

469. Indeed, the International Co-Investigating Judge has identified inconsistent or conflicting evidence regarding this matter and made a reference to it in the Closing Order (Indictment),[818] which indicates that he conducted a credibility assessment of this evidence. The International Judges note that several witnesses refer to individuals other than AO An assuming certain responsibilities for KE Pauk in his absence. SUON Kanil, BAN Siek and PECH Chim state that the chief of the Zone Office ("Office Chief") was in charge when KE

[815] Written Record of Interview of SARAY Hean, 19 May 2016, D219/762, at ERN (EN) 01309793-01309794 (A18, A22-A26) ("[W]hen *Bang* Pork was absent, he had *Bang* An be his replacement [...] They appointed him [...] KÈ Pork said, when he was not around, it would be *Bang* An. Everyone clapped their hands in recognition"). In an earlier statement SARAY Hean explains "I knew that when the Zone Secretary was absent, a zone committee member below the secretary would be in charge". However, when asked whether AO An was the first member of the Zone Committee and therefore in charge of zone tasks in KE Pauk's absence, SARAY Hean answers "I didn't know this personally", *see* Written Record of Interview of SARAY Hean, 22 May 2015, D219/353, at ERN (EN) 01117710 (A4-A5).

[816] Written Record of Interview of IM Pon, 23 May 2014, D117/50, at ERN (EN) 01059867 (A31) ("Q: How did you know that *Ta* An was KÈ Pok's Deputy Secretary? A:31 Because he worked in *Ta* Pok's behalf when *Ta* Pok was absent."), 01059873 (A69) ("When Ta Pok was absent, he arranged the work at worksites and ministries in Kampong Cham").

[817] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 306 *referring to* ICTR, *Prosecutor v. Zigiranyirazo*, ICTR-01-73-A, Judgement, Appeals Chamber, 16 November 2009, para. 45; ICTY, *Prosecutor v. Perišić*, IT-04-81-A, Judgement, Appeals Chamber, 28 February 2013, para. 92.

[818] Closing Order (Indictment) (D360), para. 255, footnote 632 *referring to* Written Record of Interview of ORN Kim Eng, 18 February 2012, D107/5, at ERN (EN) 00787227 (A27) ("When KÈ Pauk was absent, his deputy, Ta An [...] was in charge"); Written Record of Interview of ORN Kim Eng, 27 August 2014, D117/16, at ERN (EN) 01040461 (A10) ("I remember only Moeun [...] and Hèn [...] who worked on behalf of KÈ Pork when KÈ Pork carried out his duties [somewhere else] or was absent from the Zone").

Pauk was absent, referring on two occasions to Moeun fulfilling this role.[819] In addition, as noted by the International Co-Investigating Judge as well, ORN Kim Eng states that Moeun and Hen worked on KE Pauk's behalf when KE Pauk carried out his duties elsewhere or was absent from the zone.[820] The International Judges consider that these accounts relate specifically to the management of the "Zone Office", not to the administration of the Central Zone by CPK in general.[821] Accordingly, the International Judges cannot conclude that the International Co-Investigating Judge disregarded evidence that is relevant to the finding.

470. Second, while the International Judges find that the International Co-Investigating Judge's assessment of evidence was not unreasonable, the International Judges note that AO An's role as acting Secretary in the Central Zone has extremely limited bearing on the determination of personal jurisdiction as the International Co-Investigating Judge has not presented any evidence of AO An performing functions in this *de facto* capacity.[822]

471. The International Judges recall that the identification of persons falling into those most responsible involves a quantitative and qualitative assessment of (i) the gravity of the crimes alleged or charged and (ii) the level of responsibility of the suspect and that there is no exhaustive list of factors to be considered in undertaking this review nor is there a filtering standard in terms of positions in the hierarchy.[823] The International Judges consider that while the International Co-Investigating Judge's determination that AO An falls within the personal jurisdiction of the ECCC should be established mainly through his responsibility as Sector 41

---

[819] *See, e.g.*, Written Record of Interview of SUON Kanil, 19 August 2009, D6.1.707, at ERN (EN) 00390075 ("In case KÈ Pauk was absent, people came to meet with the chairperson of the Central Zone office named Suor [...], Nhean [...] replaced him, [...] Sèn [...] took over. [...] After that, Moeun [...] became the chairman of this office"); Written Record of Interview of SUON Kanil, 10 June 2011, D29, at ERN (EN) 00716229 (Q: But when KE Pauk was not around, who was in charge? A: It was the chief of Zone office who was in charge in replacement of KE Pauk. Q: Who was that office chief? A: [...] I only remember that he was Moeun"); Written Record of Interview of BAN Siek, 1 April 2012, D107/15, at ERN (EN) 00841966 ("The person who could replace him during his absence was only his office chief, Moeun [...]"); Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000693 (A219) ("Q: When KE Pauk was absent from the zone office, who was the officer-in-charge? [...] A219: Chhăm who worked in KE Pauk's Zone Office was the officer-in-charge [...]"). The International Judges note that BAN Siek, in a later interview, states that he does not know who replaced KE Pauk. *See* Written Record of Interview of BAN Siek, 22 March 2014, D117/35, at ERN (EN) 00984877 (A37) ("I do not know who substituted for KÈ Pork when he was away from the Zone").

[820] Written Record of Interview of ORN Kim Eng, 27 August 2014, D117/66, at ERN (EN) 01040461 (A10) ("I remember only Moeun [...] and Hèn [...] who worked on behalf of KÈ Pork when KÈ Pork carried out his duties [somewhere else] or was absent from the Zone").

[821] *See, e.g.*, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000693 (A219) ("Q. When KE Pauk was absent from the **zone office**, who was the officer-in-charge? [...] A219. Chhăm who worked in KE Pauk's Zone Office was the officer-in-charge") (emphasis added).

[822] Closing Order (Indictment) (D360), para. 705.

[823] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321; *see also* paras 327-338.

Secretary and Deputy Secretary of the Central Zone, the alleged short tenure of these positions [824] is not a determinative factor in the holistic assessment of the personal jurisdiction.[825]

472. Accordingly, Ground 6(iv) is dismissed.

Ground 6(v): AO An's Position as Sector 41 Secretary

473. In Ground 6(v), the Co-Lawyers challenge the International Co-Investigating Judge's findings related to AO An's position, role and authority in Sector 41. They argue that AO An was not the *de jure* or *de facto* Secretary of Sector 41 and that he had no authority to decide the means of CPK policy dissemination or implementation in the Sector.[826] The Co-Lawyers allege that the International Co-Investigating Judge overstated and misrepresented the evidence in determining AO An's position, role, and authority in Sector 41.[827] The parties' detailed submissions are discussed under each Ground.

6(v)(a): AO An's Position as Sector 41 Secretary

1. Submissions

474. The Co-Lawyers submit that the International Co-Investigating Judge erred in finding that AO An was the *de jure* Secretary of Sector 41.[828] Specifically, they argue that there is no serious and corroborative evidence of KE Pauk appointing AO An as Sector 41 Secretary, nor of AO An's announcement that he held this position during a meeting in Wat Ta Meak in March 1977.[829] The Co-Lawyers allege that the International Co-Investigating Judge failed to provide an exact date or location for AO An's appointment or the reason for this appointment.[830] They

[824] AO An's Appeal (D360/5/1), paras 93, 105; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625284-01625286, pp. 25:12 to 27:8.
[825] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321.
[826] AO An's Appeal (D360/5/1), para. 106.
[827] AO An's Appeal (D360/5/1), para. 107; AO An's Reply (D360/11), para. 42; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625287, pp. 28:2 to 28:12.
[828] AO An's Appeal (D360/5/1), para. 108; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625287-01625288, pp. 28:23 to 29:1.
[829] AO An's Appeal (D360/5/1), para. 108; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625288, pp. 29:2 to 29:12.
[830] AO An's Appeal (D360/5/1), para. 108.

also challenge the International Co-Investigating Judge's reliance on the evidence of PRAK Yut, PECH Chim and PENH Va.[831]

475. In the Response, the International Co-Prosecutor submits that PRAK Yut's and PECH Chim's accounts of AO An's appointment are consistent and corroborative.[832] Moreover, the Co-Lawyers fail to show that a greater specificity is required regarding the date of AO An's appointment for the International Co-Investigating Judge to reach his findings on AO An's criminal liability and level of responsibility.[833] He further asserts that the exact location of the meeting is of marginal significance but, in any case, the evidence shows that the meeting took place at KE Pauk's office in Kampong Cham.[834] Finally, the International Co-Prosecutor argues that the International Co-Investigating Judge made it clear that AO An—and the other Southwest Zone cadres—were appointed to their new positions "to deal with" the alleged traitors in the Central Zone.[835]

2. Discussion

476. The International Judges find that the International Co-Investigating Judge did not err in finding that AO An was the *de jure* Sector 41 Secretary.[836] First, the International Co-Investigating Judge indicated that KE Pauk appointed AO An as Sector 41 Secretary during a meeting held in Kampong Cham[837] between late 1976 and February 1977.[838] The International Judges consider this sufficiently specific and observe that the International Co-Investigating Judge's reliance on PRAK Yut[839] and PECH Chim[840] is reasonable as both witnesses' mutually

---

[831] AO An's Appeal (D360/5/1), para. 108 and footnotes 237-238.
[832] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 59.
[833] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 58.
[834] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 58.
[835] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 58.
[836] Closing Order (Indictment) (D360), para. 245.
[837] Closing Order (Indictment) (D360), para. 245.
[838] Closing Order (Indictment) (D360), para. 243.
[839] The International Judges summarily dismiss the allegation that PRAK Yut's evidence is contaminated. *See supra* Ground 5(iii). The Co-Lawyers assert that part of the evidence attributed to PRAK Yut resulted from the investigator "feeding" her inculpatory information, *see* AO An's Appeal (D360/5/1), para. 108, footnote 237. The International Judges observe the statement was previously challenged by the Co-Lawyers. *See* Annex B to Application for WRI Annulment (D338/1/2.3), at ERN (EN) 01388963, entry 35.
[840] The International Judges find no error in the International Co-Investigating Judge's reliance on PECH Chim and consider that the inconsistency in his evidence concerning the date of his arrival in the Central Zone (and, therefore, the date of the meeting in Kampong Cham) is not material to his overall credibility (the witness initially states that he arrived in the Central Zone in February 1977 and later insists that this was February 1976). *See* Written Record of Interview of PECH Chim, 28 February 2013, D117/18, at ERN (EN) 00903203 (A1); Written Record of Interview of PECH Chim, 26 August 2009, D6.1.651, at ERN (EN) 00379304, 00379306. *Cf.* Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000687 (A169, A173). In light of

corroborative statements provide detailed evidence that KE Pauk appointed AO An as Sector 41 Secretary during this meeting.[841] Second, the International Co-Investigating Judge's finding, based on PENH Va's statement, that AO An announced he was the new Sector 41 Secretary at a meeting in Wat Ta Meak[842] is not unreasonable. The International Judges recall that PENH Va is a generally credible civil party applicant who provides a detailed account of this event.[843]

477. Finally, the International Judges consider that the Co-Lawyers' challenge has no merit in light of the evidence of numerous witnesses and civil party applicants who identify AO An as the Sector 41 Secretary,[844] as well as AO An's own admission that he held this position.[845] Moreover, as demonstrated in the subsequent 6(v)(b) – (v)(e) sections, the fact that AO An effectively exercised his statutory duties as Sector 41 Secretary further corroborates that AO An held this position.

---

further evidence concerning the arrival date of AO An and other Southwest cadres (*see also* Ground 6(iii)), the International Judges consider that it was not unreasonable for the International Co-Investigating Judge not to rely on the date of February 1976.

[841] *See, e.g.*, Written Record of Interview of PRAK Yut, 19 June 2013, D117/71, at ERN (EN) 01056224 (A15-A19) ("KE Pauk called all the Zone cadres to attend the meeting. [...] KE Pauk appointed *Grandfather* An to take over Sector 41"); Written Record of Interview of PECH Chim, 28 February 2013, D117/18, at ERN (EN) 00903203 (A1) ("Then KÈ Pauk took us to Kampong Cham province and held a meeting. During the meeting [...] *Ta* An was assigned as Sector 41 Secretary"). *See supra* Ground 5(ii)(a) (for the alleged inconsistency in PRAK Yut's account concerning AO An's position in Sector 41).

[842] Closing Order (Indictment) (D360), para. 247.

[843] *See supra* Ground 5(ii)(f). *See* Written Record of Interview of PENH Va, 11 March 2015, D219/226, at ERN (EN) 0108620 (A6) ("Q: When did you first see *Ta* An? A6: I first saw him when he arrived in March 1977. He called upon approximately 300 cadres from the sector level to attend a meeting at a pagoda that was situated in Chrey Vien Commune. Then he made an announcement that he was the new Secretary of Sector 41. The sector cadres comprised of those from the textile unit, the metal smelting unit, the garage, and the commerce unit of Sector 41").

[844] *See, e.g.*, Written Record of Interview of YOU Vann, 11 November 2013, D117/31, at ERN (EN) 00966989 (A12) ("Ta An stayed in Prey Chhor and he was the secretary of Sector 41"); Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059277, 01059279-01059280 (A23, A35) ("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 [...] because he announced it himself. [...] His official position, as addressed on envelopes, was Sector 41 Chief"); Written Record of Interview of POV Sarom, 7 August 2013, D117/24, at ERN (EN) 00966963 (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"); Written Record of Interview of POV Sarom, 9 April 2015, D219/284, at ERN (EN) 01098552-01098553 (A18, A19, A21) ("[...] 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, Yuth, worked with him. He told me no one was more superior than Ta An"); Written Record of Interview of TOY Meach, 2 September 2015, D219/582, at ERN (EN) 01179824 (A30) ("An, who was Sector Committee"); Written Record of Interview of HONG Heng, 21 July 2016, D219/802, at ERN (EN) 01331755 (A18) ("At that time, the Sector Com's given name was Ta An, but I do not know his surname").

[845] DC-Cam Interview of AO An, 1 August 2011, D191.2 (part 2), at ERN (EN) 01025312 ("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").

6(v)(b): AO An's Authority in Sector 41

478. The Co-Lawyers allege that the International Co-Investigating Judge failed to establish to the requisite standard that AO An had *de facto* authority as Sector 41 Secretary.[846] The International Judges address the International Co-Prosecutor's responses to each alleged error under the relevant sections.

479. As a preliminary matter, the International Judges consider that AO An's *de jure* position as Sector 41 Secretary is relevant in assessing the Co-Lawyers' remaining challenges pertaining to the exercise of his functions and authority in Sector 41. While the possession of *de jure* power does not in itself suffice to conclude that the individual, in fact, exercised the duties associated with that position,[847] the International Judges consider that this may constitute a reasonable basis for some findings and may serve to corroborate other evidence. In this light, the International Judges consider particularly relevant, within the landscape of the evidence, the International Co-Investigating Judge's uncontested findings on the powers of sectors in DK which are articulated in the CPK Statute,[848] such as the responsibility of sector committees for administering discipline, maintaining a system of reporting and implementing the work plans of the Central Zone Committee throughout the sector.[849] The statutory powers of sectors include the *de jure* authority of sector secretaries over district and commune-level cadres in their sector (including over their appointment and removal),[850] the responsibility for the administration of tasks conducted by the RAK, the secretaries' authority to instruct lower echelons to seek out enemies for re-education or "smashing", their authority to order the arrests and executions of particular individuals and their direct supervisory authority over security centres.[851] The International Judges address the factual challenges meriting a more detailed assessment below.

6(v)(b)(1): AO An's Authority to Receive, Implement or Report on Zone Level Orders

---

[846] AO An's Appeal (D360/5/1), para. 109; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625288, pp. 29:14 to 29:18.
[847] *See, e.g.*, ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para. 418 ("[a]ctual authority [...] will not be determined by looking at formal positions only. Whether *de jure* or *de facto*, military or civilian, the existence of a position of authority will have to be based upon an assessment of the reality of the authority of the accused").
[848] Closing Order (Indictment) (D360), paras 189-194.
[849] Closing Order (Indictment) (D360), paras 189-190.
[850] Closing Order (Indictment) (D360), para. 191.
[851] Closing Order (Indictment) (D360), paras 192-194.

1. Submissions

480. The Co-Lawyers allege that the International Co-Investigating Judge erred in finding that AO An received, implemented, and reported on orders from KE Pauk or from the Central Zone Committee to arrest and kill former cadres and enemies in Sector 41.[852] Specifically, the Co-Lawyers assert that there is little evidence of AO An communicating directly with zone level cadres as not one document records a meeting between AO An and KE Pauk or anyone else at the zone level[853] and that the International Co-Investigating Judge erred in relying on: (i) non-specific witness statements concerning AO An's monthly meetings with KE Pauk;[854] and (ii) uncorroborated, non-credible statements from NHEM Chen and PRAK Yut.[855] Finally, the Co-Lawyers argue that the International Co-Investigating Judge erroneously relied on AO An's *de jure* status to conclude that AO An reported to the zone level.[856]

481. In the Response, the International Co-Prosecutor submits that the evidence clearly supports that AO An received orders and instructions from KE Pauk,[857] arguing that AO An's own admission in a media interview shows that KE Pauk ordered him to kill supporters of the Lon Nol regime.[858] The International Co-Prosecutor further alleges that the Co-Lawyers' attempts to undermine NHEM Chen's and BAN Siek's evidence are unpersuasive[859] and evidence that KE Pauk appointed AO An as Sector 41 Secretary corroborates that KE Pauk passed down orders and instructions to AO An in a manner consistent with their positions.[860]

482. In the Reply, the Co-Lawyers argue that the International Co-Prosecutor leaves out a key part of AO An's media interview where he states that he did not implement KE Pauk's orders.[861]

---

[852] AO An's Appeal (D360/5/1), para. 110.
[853] AO An's Appeal (D360/5/1), para. 110; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625288, pp. 29:18 to 29:22.
[854] AO An's Appeal (D360/5/1), para. 111 and footnote 243 *referring to* statements from NHEM Chen, PECH Chim, PRAK Yut and BAN Siek.
[855] AO An's Appeal (D360/5/1), para. 111; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625288-01625289, pp. 29:24 to 30:11.
[856] AO An's Appeal (D360/5/1), para. 112.
[857] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 60
[858] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 60
[859] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 60.
[860] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 60.
[861] AO An's Reply (D360/11), para. 42 and footnote 84.

2. Discussion

483. The International Judges find that the Co-Lawyers fail to demonstrate that no reasonable investigating judge could have found that AO An reported on Sector 41 activities to the zone level, including to KE Pauk. This finding is reasonable given AO An's position as Sector 41 Secretary and the statutory duties of sector committees which included responsibility for "maintaining a system of reporting to the upper echelons on the situation and work within the sector".[862]

484. First, the International Judges recall that evidence gathering at the ECCC is ruled by the principle of freedom of evidence[863] and find no ground in the Co-Lawyers' contentions that the International Co-Investigating Judge's finding on meetings or communications between AO An and zone level cadres must be supported by documentary evidence.

485. Second, the International Judges consider that the International Co-Investigating Judge did not err in relying on, *inter alia*, NHEM Chen in finding: (i) that AO An attended monthly meetings with KE Pauk;[864] (ii) that KE Pauk gave AO An orders to make arrests at a meeting in Kampong Cham;[865] (iii) that KE Pauk, AO An and Zone Committee members devised a plan to purge cadres; [866] and (iv) that AO An received written kill orders from KE Pauk.[867] The Co-Lawyers fail to establish that NHEM Chen's evidence on these findings is either non-credible, inconsistent, misrepresented or uncorroborated and non-specific.[868] The International Judges observe that NHEM Chen is consistent across his statements, was present during some of these meetings and provides detailed information in his statements.[869] Moreover, the International

---

[862] Closing Order (Indictment) (D360), para. 189, footnote 403.
[863] *See supra* paras 73-80.
[864] AO An's Appeal (D360/5/1), para. 111 and footnote 243 *referring to* Closing Order (Indictment) (D360), para. 276, footnote 721.
[865] AO An's Appeal (D360/5/1), para. 111 and footnote 245 *referring to* Closing Order (Indictment) (D360), para. 277, footnotes 723-726.
[866] AO An's Appeal (D360/5/1), para. 111 and footnote 246 *referring to* Closing Order (Indictment) (D360), para. 278, footnotes 727-729.
[867] AO An's Appeal (D360/5/1), para. 111 and footnote 247 *referring to* Closing Order (Indictment) (D360), para. 277, footnote 726.
[868] Concerning the frequency of AO An's meetings with KE Pauk, the International Judges consider that there is no material inconsistency in NHEM Chen's account. NHEM Chen initially states that he did not know beforehand when there would be a meeting. In a later interview, he provides the frequency of these meetings. *See* Written Record of Interview of NHEM Chen, 15 March 2016, D219/731, at ERN (EN) 91224106 (A31) ("Whenever he needed me, he called me. I did not know when there would be a meeting"); Written Record of Interview of NHEM Chem, 27 October 2016, D219/855, at ERN (EN) 01374643 (A5) ("They held a comprehensive meeting once a month").
[869] *See supra* Ground 5(ii)(d). The International Judges found NHEM Chen a generally credible witness. NHEM Chen's account concerning meetings is detailed and consistent. *See, e.g.*, Written Record of Interview of NHEM

Judges note that NHEM Chen's account is corroborated, *inter alia*, by BAN Siek who states that important decisions, including on the purge, were made by the Zone Standing Committee.[870] While NHEM Chen admits that he was not always able to hear, attend, or listen to parts of zone-level meetings, the International Co-Investigating Judge did not err in relying on NHEM Chen for what he *did* hear, including about plans to purge the Cham.[871]

486. Third, the International Judges find no error in the International Co-Investigating Judge's reliance on PRAK Yut's evidence regarding consultations held between AO An and KE Pauk.[872] The Co-Lawyers' allegations that PRAK Yut is not credible on this point are unfounded as she is consistent across different statements.[873] Finally, the International Judges consider that the International Co-Investigating Judge reasonably took into account AO An's *de jure* position and the vertical reporting structure within DK in determining that AO An would have reported on the purge to the Zone Committee, especially considering that AO An himself was on this Committee and that the purge was discussed during the Zone Committee meetings.[874]

6(v)(b)(2): AO An's Authority to Appoint Cadres

1. Submissions

487. The Co-Lawyers allege that the International Co-Investigating Judge erred in finding that AO An had authority to appoint district secretaries and other cadres at sector, district and

---

Chem, 15 March 2016, D219/731, at ERN (EN) 01223106 (A36, A40) ("Q: Did he go to meetings in Kampong Cham [...]? A36: "Yes, he went to have meetings with Ta Pork [...] Q: Can you tell what you remember from the meetings? A40: I caught some of it, like about the enemy. We had to do whatever could be done to arrest all the enemies"); Written Record of Interview of NHEM Chem, 27 October 2016, D219/855, at ERN (EN) 01374643 (A5) ("I attended the meetings with [AO An] about four times"), 01374644 (A17, A21) ("At the meetings, they talked about the arrests of the enemy [...] [AO An] worked in the zone with Ta Pauk"), 01374645 (A29) ("[A]t that time [*Ta* Pauk] ordered action to be taken to arrest the enemy in the districts on a continuous basis").

[870] *See, e.g.*, Written Record of Interview of BAN Siek, 1 April 2012, D107/15, at ERN (EN) 00841965 ("[T]he zone's Standing Committee, which consisted of three sector committees – Ta An. [...] To my knowledge, important decisions, for example, on a purge were made by the Standing Committee during its secret meeting").

[871] *Contra* AO An's Appeal (D360/5/1), para. 111, footnote 244.

[872] AO An's Appeal (D360/5/1), para. 111 and footnote 248 *referring to* Closing Order (Indictment) (D360), para. 297, footnote 784.

[873] *See supra* Ground 5(ii)(a) (general assessment of PRAK Yut's credibility). *See* Written Record of Interview of PRAK Yut, 19 June 2013, D117/71, at ERN (EN) 01056227 (A39) (stating that AO An consulted with KE Pauk and afterwards requested her to replace all the old cadre); Written Record of Interview of PRAK Yut, 30 September 2014, D219/120, at ERN (EN) 01063616 (A51-A52) (stating that AO An consulted with KE Pauk, and they arranged to remove all the remaining commune chiefs).

[874] Written Record of Interview of BAN Siek, 1 April 2012, D107/15, at ERN (EN) 00841965.

commune levels.[875] Specifically, the evidence purportedly relates almost exclusively to Kampong Siem District and stems mainly from one non-credible witness, PRAK Yut.[876] The Co-Lawyers allege that, in an attempt to corroborate PRAK Yut's evidence, the International Co-Investigating Judge misrepresented and overstated evidence from other witnesses.[877] Finally, they assert that AO An's authority to delegate economic work to cadres is not based on sufficient evidence and, in any case, does not support the conclusion that AO An had authority to appoint key personnel.[878]

488. In the Response, the International Co-Prosecutor submits that the Co-Lawyers erroneously characterise YOU Vann's evidence as speculation[879] and that POV Sarom's alleged hearsay evidence from PRAK Yut can be used to corroborate PRAK Yut.[880] He further asserts that the CPK Statute corroborates AO An appointing subordinates, since this was a statutory function of sector secretaries.[881]

2. Discussion

489. The International Judges find that the Co-Lawyers fail to demonstrate that no reasonable investigating judge could have found that AO An appointed district secretaries and other subordinates. This finding is reasonable in light of the evidence presented and AO An's statutory duties as Sector Secretary such as his "*de jure* authority over the district and commune-level cadres in their sector, including the appointment of members of the sector and district committees"[882] and his authority to "appoint and demote other cadres at the sector, district, and commune level."[883]

---

[875] AO An's Appeal (D360/5/1), para. 113; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625289, pp. 30:13 to 30:23.
[876] AO An's Appeal (D360/5/1), para. 113, footnote 254 *referring to* Closing Order (Indictment) (D360), para. 246, footnote 600; Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597562-01597563.
[877] AO An's Appeal (D360/5/1), para. 113, footnote 255 *referring to* Closing Order (Indictment) (D360), paras 256, 423, footnotes 633, 1278 *referring to* statements from YOU Vann, POV Sarom, PENH Va, SOUN Kanil, and PRAK Ny.
[878] AO An's Appeal (D360/5/1), para. 114.
[879] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 61.
[880] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 62.
[881] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 63.
[882] Closing Order (Indictment) (D360), para. 191, footnote 409.
[883] Closing Order (Indictment) (D360), para. 191, footnote 410.

490. The Co-Lawyers fail to demonstrate that PRAK Yut's evidence is inconsistent[884] or contaminated[885] or solely relates to Kampong Siem District. The International Judges find no material inconsistencies in her account. PRAK Yut maintains that she attended a zone level meeting chaired by KE Pauk who assigned her to Sector 41 along with AO An and that AO An appointed her as Kampong Siem District Secretary during another meeting in the Sector 41 office.[886] Moreover, the Co-Lawyers do not demonstrate that the International Co-Investigating Judge erred by relying on other witnesses, including YOU Vann, POV Sarom and PENH Va for corroboration.[887] YOU Vann made a reasonable inference that AO An must have given the order to arrange new commune chiefs;[888] POV Sarom's recollection of PRAK Yut's statements is consistent with the substance of PRAK Yut's testimony;[889] and PENH Va's evidence corroborates that AO An, as Sector 41 Secretary, had the authority to appoint new cadres.[890]

491. Having found AO An's authority to appoint cadres, the International Judges will not address the Co-Lawyers' challenge concerning AO An's authority to "delegate" economic work to cadres.[891]

6(v)(b)(3): AO An's Authority to Remove, Replace or Punish Cadres

1. Submissions

---

[884] Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597561-01597566.
[885] The Co-Lawyers assert that part of the evidence attributed to PRAK Yut resulted from the investigator "feeding" her inculpatory information, including by "refreshing her memory". *See* Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597561-01597566. The International Judges summarily dismiss the allegation; *see supra* Ground 5(iii). The International Judges observe the statement was previously challenged by the Co-Lawyers. *See* Annex B to Application for WRI Annulment (D338/1/2.3), at ERN (EN) 01388934, entries 10-11.
[886] Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN 01056217 (A26) (stating that after the Zone meeting, AO An held another meeting at the Sector 41 office, assigning her to Kampong Siem District); Written Record of Interview of PRAK Yut, 19 June 2013, D117/71, at ERN (EN) 01056225 (A23) (stating that she was assigned by AO An to Kampong Siem District); DC-Cam Interview of PRAK Yut, 13 August 2013, D219/234.1.2, at ERN (EN) 01064283 ("Dany: *Ta* Pork held the meeting and then *Ta* An announced that you were assigned to Kampong Siem? Yut: *It was after we had a meeting at the Sector.* [...] We came from the Zone and *had another meeting* at our respective Sector") (emphasis added).
[887] AO An's Appeal (D360/5/1), para. 113, footnote 255.
[888] Written Record of Interview of YOU Vann, 18 January 2015, D219/138, at ERN (EN) 01059283 (A45) ("The order must have come from Ta An because he was Sector Chairperson. Khom took PRAK Yut to meet Ta An at the Sector level. When they returned, Khom told me they would arrange to have new commune chiefs").
[889] Written Record of Interview of POV Sarom, 7 August 2013, D117/24, at ERN (EN) 00966963 (A11) ("[...] *Ta An* appointed PRĂK Yut to be in charge of Kampong Siem District").
[890] Written Record of Interview of PENH Va, 11 March 2015, D219/226, at ERN (EN) 01088624-01088625 (A12-A13) ("Q. [...] Do you know who was entitled to make decisions and arrests, and could appoint new people to replace those who had been arrested? A12: It must have been Comrade An, because he was the Secretary of Sector 41 [...] this is how the chain of command went about during the regime").
[891] AO An's Appeal (D360/5/1), para. 114.

492. The Co-Lawyers allege that the International Co-Investigating Judge erred in finding that AO An had the authority to remove, replace and punish district secretaries, commune secretaries and other personnel.[892] Specifically, the Co-Lawyers allege that the International Co-Investigating Judge failed to provide sufficient evidence of AO An ordering or otherwise being involved in the removal of "key individuals", such as MET Sop, Am and PRAK Yut.[893] Moreover, his findings are allegedly based on hearsay or conflicting, speculative or misrepresented evidence.[894]

493. In the Response, the International Co-Prosecutor submits that the Co-Lawyers fail to show that no reasonable trier of fact could have relied on the underlying evidence concerning MET Sop and Am's removal; the Co-Lawyers purportedly mischaracterise the International Co-Investigating Judge's findings concerning PRAK Yut and, in any event, none of these findings are determinative of the International Co-Investigating Judge's conclusions that AO An is responsible for crimes or falls within the ECCC's personal jurisdiction.[895]

2. Discussion

494. The International Judges are unpersuaded that no reasonable investigating judge could have found that AO An ordered the removal of MET Sop and Am. First, the Co-Lawyers fail to establish that the International Co-Investigating Judge misrepresented evidence[896] when finding that AO An ordered the arrest and execution of MET Sop. TOY Meach clearly states that AO An arrested Sop and, *inter alia*, RY Nhor states that only AO An would have been able to order his arrest as AO An was the highest-ranking cadre who had the right to issue

[892] AO An's Appeal (D360/5/1), para. 115. The Co-Lawyers also allege that the International Co-Investigating Judge failed to explain whether to 'remove' refers to the transfer, dismissal and/or demotion of cadres or whether it refers to the execution, arrest, and/or punishment of cadres. They assert that the combination of these actions creates an illusion of AO An having significant authority. In addition, the Co-Lawyers assert that the International Co-Investigating Judge failed to distinguish between sector, district and commune cadres. The International Judges consider these allegations unfounded, unsupported by specific references to evidence or incapable of having any impact on the International Co-Investigating Judge's finding that AO An had authority over Sector 41. Accordingly, the International Judges will not address these arguments further.
[893] AO An's Appeal (D360/5/1), para. 116.
[894] AO An's Appeal (D360/5/1), paras 117-119.
[895] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 64.
[896] AO An's Appeal (D360/5/1), para. 117, footnote 261 *referring to* statements from TOY Meach, KHUN Saret, RY Nhor, SAT Pheap, SEOUNG Lim, KUNG Ting and DOUNG Sim.

orders.[897] The Co-Lawyers further admit that seven witnesses support the fact that CHOM Vong (Ngauv) replaced MET Sop.[898]

495. Second, the International Judges are not convinced that the International Co-Investigating Judge erred by failing to address conflicting evidence about the date of Am's arrest[899] or that the evidence concerning his arrest is solely based on hearsay, speculation and misrepresented evidence.[900] The Co-Lawyers' assertion that the International Co-Investigating Judge ignored PRAK Yut's evidence that the order to arrest Am was issued through a letter coming from the Southwest Zone, and not by AO An, is unpersuasive.[901] The International Judges consider that while general instructions to purge certain cadre may have come from the Centre or the Southwest Zone, AO An, as Sector 41 Secretary, would have ordered his subordinates to carry them out. This is not necessarily conflicting evidence. Accordingly, the International Co-Investigating Judge did not err.

496. Finally, the Co-Lawyers' challenge concerning PRAK Yut's arrest[902] is baseless because the International Co-Investigating Judge did not find that AO An was responsible for her removal.[903]

6(v)(b)(4): Authority to Issue Orders or Authorise Actions of Cadres

1. Submissions

---

[897] Written Record of Interview of TOY Meach, 2 September 2015, D219/582, at ERN (EN) 01179836 (A109); Written Record of Interview of RY Nhor, 10 November 2016, D219/870, at ERN (EN) 01373692 (A107-A108).
[898] AO An's Appeal (D360/5/1), para. 117, footnote 262 *referring to* statements from SAT Pheap, NAI Seu, KUNG Tin, DOUNG Sim, SEOUNG Lim, NHEM Chen and PRAK Yut. The International Co-Investigating Judge's mere statement that Ngauv was appointed as a security chief (*see* Closing Order (Indictment) (D360), para. 295) does not create ambiguity or permit a misleading inference about AO An's role, as alleged by the Co-Lawyers.
[899] AO An's Appeal (D360/5/1), para. 118, footnote 264 *referring to* Closing Order (Indictment) (D360), para. 296, footnote 777. The International Co-Investigating Judge has clearly taken conflicting accounts concerning the date of Am's arrest into consideration in finding the approximate date of mid-1977. Although he did not explain how he arrived at his determination, the date of arrest is immaterial given the fact it is established that AO An ordered the arrest.
[900] AO An's Appeal (D360/5/1), para. 118, footnotes 265, 266. The International Co-Investigating Judge's reliance on SAT Pheap's hearsay evidence is not unreasonable considering the witness' detailed account and AO An's *de jure* authority. *See* Written Record of Interview of SAT Pheap, 17 September 2015, D219/504, at ERN (EN) 01167911 (A135) ("Ta Am was detained and subjected to electric shocks in Prey Totueng, but I do not know where he was killed. Ta An ordered Ta Am's arrest. I was told this information by one of Ta Aun's messengers, whose name I have forgotten"). Regarding the probative value of hearsay evidence, *see* Ground 5(v).
[901] AO An's Appeal (D360/5/1), para. 118, footnote 267.
[902] AO An's Appeal (D360/5/1), para. 119.
[903] Closing Order (Indictment) (D360), para. 423.

497. The Co-Lawyers allege that the International Co-Investigating Judge erred in finding that AO An ordered district secretaries or subordinates to identify and target certain groups.[904] In particular, the Co-Lawyers challenge the International Co-Investigating Judge's "almost exclusive" reliance on PRAK Yut's evidence in making these findings,[905] claiming that her account is non-credible, inconsistent, contaminated and uncorroborated.[906] Moreover, the Co-Lawyers argue that the International Co-Investigating Judge failed to provide sufficiently serious and corroborative evidence that AO An ordered district secretaries to identify and execute people who complained about their living and working conditions,[907] or that AO An ordered PRAK Yut and others to arrest and kill all the Cham people.[908] Finally, the Co-Lawyers assert that the International Co-Investigating Judge misrepresented evidence when drawing links between AO An and other district secretaries, such as Kan and Phim[909] and in finding that AO An issued orders to subordinates, such as Aun, Sok, and CHOM Vong, regarding arrests, killing plans and interrogations at security centres.[910] They submit that AO An's general announcements to unknown people about unspecified topics are only supported by non-credible witnesses and are not sufficient to find that AO An gave orders to subordinates.[911]

498. In the Response, the International Co-Prosecutor argues that the Co-Lawyers have failed to discharge their burden to show that no reasonable trier of fact could have relied on PRAK Yut's evidence and that the Co-Lawyers "greatly" exaggerate the extent to which these findings depend solely on PRAK Yut.[912] He further asserts that the Co-Lawyers overlook the way in which the entire body of evidence with respect to AO An's position as Sector 41 Secretary and his acts and conduct support the International Co-Investigating Judge's various factual findings about AO An ordering his subordinates to commit crimes.[913]

2. Discussion

[904] AO An's Appeal (D360/5/1), para. 120; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625289-01625290, pp. 30:24 to 31:3.
[905] AO An's Appeal (D360/5/1), para. 120; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625290, pp. 31:4 to 31:5.
[906] AO An's Appeal (D360/5/1), paras 120-122.
[907] AO An's Appeal (D360/5/1), para. 122.
[908] AO An's Appeal (D360/5/1), para. 122.
[909] AO An's Appeal (D360/5/1), para. 123.
[910] AO An's Appeal (D360/5/1), para. 124.
[911] AO An's Appeal (D360/5/1), para. 125 and footnotes 286-288 *referring to* Closing Order (Indictment) (D360), paras 283, 294, 299, 301, 311, 636 and *referring to* statements from NHEM Chen and YOU Vann.
[912] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 65-66.
[913] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 67.

499. The International Judges find that the Co-Lawyers fail to demonstrate that no reasonable investigating judge could have found that AO An ordered his subordinates, *inter alia*, to identify and target certain groups. This finding is reasonable in light of the evidence presented and AO An's statutory duties as Sector 41 Secretary which included responsibility "for instructing the lower echelons and the people to seek out enemies for re-education or 'smashing'"[914] and his "authority to order the arrest and execution of particular individuals".[915]

500. First, contrary to the Co-Lawyers' contention that the International Co-Investigating Judge relied "almost exclusively" on PRAK Yut when finding that AO An gave orders to district secretaries,[916] this evidence is, in fact, corroborated by other witnesses.[917] Likewise, regarding the finding that AO An ordered district secretaries to identify and execute people who complained about their living and working conditions,[918] the Co-Lawyers fail to establish that PRAK Yut's account is uncorroborated or not credible on this point.[919] The International Judges will address the Co-Lawyers' challenge concerning the finding that AO An ordered PRAK Yut to arrest and kill the Cham people[920] later in Ground 6 (vi).[921]

501. In Annex D to the Co-Lawyers' Appeal, they further allege that PRAK Yut is inconsistent in her account concerning AO An's orders to arrest cadres, enemies and others.[922] The International Judges observe that there are inconsistencies in PRAK Yut's evidence on this issue.[923] However, recalling their earlier analysis, the International Judges consider that PRAK

---

[914] Closing Order (Indictment) (D360), para. 193.
[915] Closing Order (Indictment) (D360), para. 193.
[916] AO An's Appeal (D360/5/1), para. 120 and footnote 272 *referring to* Closing Order (Indictment) (D360), paras 302, 364, 429, 634, footnotes 805, 807, 1030, 1326, 2163.
[917] *See, e.g.*, Closing Order (Indictment) (D360), para. 302, footnote 805 *citing* Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059284-01059287 (A49-A58), 01059297-01059298 (A98-102); Written Record of Interview of NHIM Kol, 11 February 2015, D219/171, at ERN (EN) 01076943 (A13).
[918] AO An's Appeal (D360/5/1), para. 122 and footnote 277 *referring to* Closing Order (Indictment) (D360), para. 275, footnote 718.
[919] PRAK Yut is further corroborated by witnesses who provide details of the implementation of these orders. *See, e.g.,* Written Record of Interview of HOK Hoeun, 23 November 2008, D6.1.413, at ERN (EN) 00251304 ("if anyone made complaints [about insufficient food] they would be taken away").
[920] AO An's Appeal (D360/5/1), para. 122 *referring to* Closing Order (Indictment) (D360), para. 634, footnote 2163.
[921] *See infra* Ground 6(vi).
[922] Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597565.
[923] For example, the International Judges observe that PRAK Yut initially states that she never received orders from AO An but that he may have given orders to her deputy Sy. Later on, in the same interview, PRAK Yut states that there were killings in Kampong Siem and that she received the orders from AO An to arrest the Cham and Lon Nol soldiers. *See* Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056218-01056219 (A37-A39, A43-A45) ("I never received orders from *Grandfather* An to arrest anyone [...] I would like to clarify that *Grandfather* An did not order me to arrest those people, but I am not sure if Grandfather An give direct orders to *Grandfather* Sy [...], my deputy to do this work"), and later (A43-A45) ("I admitted that

Yut's initial denial that AO An gave her orders to arrest various groups of people must be seen in light of the general shift in her evidence and fear of revealing her involvement in the crimes.[924] After this shift,[925] PRAK Yut maintains consistency in her account that AO An ordered the arrest of "enemies" and, therefore, the International Judges find that it was not unreasonable for the International Co-Investigating Judge to have made this finding on the basis of, *inter alia*, PRAK Yut's evidence. Furthermore, the Co-Lawyers' allegation that PRAK Yut was "fed" information is unfounded.[926]

502. Second, the International Judges are unpersuaded that PRAK Yut's knowledge is limited only to Kampong Siem District and that her accounts of other district secretaries receiving orders are inconsistent[927] or result from "the [Office of the Co-Prosecutors] refreshing her recollection."[928]

503. Third, the International Judges are not convinced that the International Co-Investigating Judge erred by allegedly misrepresenting evidence when drawing links between AO An and

---

there were killings in Kampong Siem, and I received the orders from *Grandfather* An. [...] Yes I received an order to from *Grandfather* An to collect *Cham* people and LON Nol soldiers [...] *Grandfather* An gave the orders during the monthly meetings. During the meetings *Grandfather* An gave the same orders to other district secretaries").

[924] *See supra* Ground 5(ii)(a). *See also, e.g.*, Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056219 (A47) ("I did not say everything in my previous interviews [...] I was worried about my safety").

[925] *See supra* Ground 5(ii)(a).

[926] *See supra* Ground 5(iii). In Annex D, the Co-Lawyers assert that part of the evidence attributed to PRAK Yut resulted from the investigator "feeding" her inculpatory information, including by "refreshing her memory". *See* Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597565. The International Judges observe the statement was previously challenged by the Co-Lawyers. *See* Annex B to Application for WRI Annulment (D338/1/2.3), at ERN (EN) 01388934-01388936, 01388939-01388942, entries 10, 12, 14.

[927] AO An's Appeal (D360/5/1), para. 121, footnote 275. The International Judges observe that PRAK Yut first states that she "was not sure" or "did not know" whether other district secretaries received the order to kill the Cham. However, when confronted with her prior statements PRAK Yut testifies that she received the order during sector meetings where all of the district heads were called to attend. *See* Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95, ERN (EN) 01441019-01441020, pp. 10:16 to 11:16. Recalling that refreshing a witness' memory with prior statements constitutes a legitimate practice, the International Judges consider that it was not unreasonable for the International Co-Investigating Judge, based on PRAK Yut's subsequent answer ("Referring to the meeting convened by the sector where all the district heads were called to attend, indeed, I attended the meeting. And, of course, the matter happened a long time ago, so sometimes my recollection is not that accurate. However, what you have raised actually refreshed my memory. So indeed, we all attended that meeting"), and her prior statements (*see* Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056219 (A45) ("Grandfather An gave the orders during the monthly meeting. During the meetings, Grandfather An gave the same orders to other district sectaries"), to find that the other district secretaries also received the order to "smash" the Cham.

[928] AO An's Appeal (D360/5/1), para. 121, footnote 275 *referring to* Case 002 Transcript of 18 January 2016 (PRAK Yut), D219/702.1.94; Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95. The Co-Prosecutors engaged in the legitimate practice of using earlier WRIs to refresh PRAK Yut's memory during her testimony. *See* Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95, ERN (EN) 01441018, pp. 9:5 to 9:6 ("Now, you testified *yesterday* that you received an order from the sector to purge the Cham") (emphasis added). *See also supra* Ground 5(iii).

district secretaries other than PRAK Yut[929] and consider that this link is sufficiently established, *inter alia*, through AO An's *de jure* authority over the various districts and by further evidence that AO An and District Secretary Kan convened a meeting in Kang Meas District where they told villagers that there were "enemies" among the people, after which arrests accelerated.[930] Moreover, the International Judges are unpersuaded that a proper examination of the evidence reveals that AO An did not order subordinates, such as Aun, Sok, and CHOM Vong[931] on various matters, including on executing arrests or a killing plan.[932] The International Judges consider that announcements and instructions given by AO An during meetings corroborate the finding that AO An gave orders and exercised authority in Sector 41[933] and that the Co-Lawyers' challenges to the underlying evidence fail to establish that these findings rely on uncorroborated evidence or are based on inconsistent testimony, or that the witnesses have questionable knowledge about the content of these meetings.[934]

6(v)(b)(5): Authority to Receive Reports from Cadres

1. Submissions

504. The Co-Lawyers allege that the International Co-Investigating Judge erred in finding that AO An was aware of all CPK activities in his sector through a rigorous system of communication and reporting, enabling him to monitor the progress of killing operations.[935] They assert that the International Co-Investigating Judge failed to provide sufficient and corroborative evidence of AO An's receipt of reports from district secretaries, subordinates or lower echelons. Specifically, the Co-Lawyers challenge the International Co-Investigating Judge's reliance on evidence of reporting stemming from PRAK Yut[936] and CHOM Vong.[937]

---

[929] AO An's Appeal (D360/5/1), para. 123 *referring to* Closing Order (Indictment) (D360), para. 463.
[930] *See, e.g.*, Closing Order (Indictment) (D360), paras 463, 465 (concerning Kan).
[931] AO An's Appeal (D360/5/1), para. 124 *referring to* Closing Order (Indictment) (D360), paras 279, 282, 287, 427.
[932] The Co-Lawyers challenge NHEM Chen's and YOU Vann's evidence alleging that their accounts are uncorroborated, non-credible, hearsay and contaminated. In Ground 5, the International Judges rejected the same arguments and held that these witnesses are generally credible. *See* Ground 5(v)(ii)(b) and (d).
[933] AO An's Appeal (D360/5/1), para. 125 *referring to* Closing Order (Indictment) (D360), paras 283, 294, 299, 301, 311, 636.
[934] The Co-Lawyers challenge NHEM Chen's evidence, *inter alia*, because his knowledge of the content of meetings "is questionable" because of his age and YOU Vann because of her "inconsistent testimony". *See* AO An's Appeal (D360/5/1), para. 125. The International Judges refer to their assessment of NHEM Chen's and YOU Vann's overall credibility in Ground 5(ii)(b) and (d) and consider that these arguments are unfounded.
[935] AO An's Appeal (D360/5/1), para. 126; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625289-01625290, pp. 30:24 to 31:19.
[936] AO An's Appeal (D360/5/1), paras 126-127.
[937] AO An's Appeal (D360/5/1), paras 127-128.

They allege that PRAK Yut's evidence of the existence and content of these reports is: (i) not credible; (ii) inconsistent; and (iii) supported only by hearsay evidence of YOU Vann[938] and misrepresented statements from other witnesses or civil party applicants.[939] The Co-Lawyers further challenge the International Co-Investigating Judge's reliance on CHOM Vong and NHEM Chen in finding that CHOM Vong reported to AO An on executions at Met Sop Security Centre and attended meetings during which he would have reported to AO An or Aun.[940]

505. In the Response, the International Co-Prosecutor asserts that the CPK Statute which foresees a reporting structure provides a reasonable basis to conclude that AO An received reports from his subordinates, and that evidence from numerous witnesses indicates that the reporting lines in Sector 41 were functioning as contemplated by the CPK Statute.[941] In addition, he asserts that PRAK Yut's evidence on reporting is corroborated by other witnesses.[942]

506. In the Reply, the Co-Lawyers submit that the International Co-Prosecutor misrepresents evidence when stating that PRAK Yut's account is "solidly" corroborated by other witnesses. The Co-Lawyers allege that these other witnesses merely speak about meetings instead of reporting, and often do not know the subject matter of these meetings.[943]

2. Discussion

507. The International Judges find that the Co-Lawyers fail to show that no reasonable investigating judge could have found that AO An received reports, including on arrests and killings. This finding is reasonable in light of the evidence presented and further corroborated by AO An's statutory duties as Sector 41 Secretary which included responsibility for "receiving reports about the situation and work of the districts."[944]

---

[938] AO An's Appeal (D360/5/1), paras 127, footnote 297.
[939] AO An's Appeal (D360/5/1), paras 127, footnote 298 *referring to* statements from POV Sarom and NHIM Kol; Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597565-01597566.
[940] AO An's Appeal (D360/5/1), para. 128.
[941] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 68.
[942] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 68 and footnote 174 *referring to* statements from YOU Vann, IM Pon, HONG Heng, NHEM Chen, PUT Kol, SAT Pheap and SO Saren.
[943] AO An's Reply (D360/11), para. 42.
[944] Closing Order (Indictment) (D360), para. 190, footnote 406.

508. First, the International Co-Investigating Judge did not err in relying on PRAK Yut's evidence.[945] The Co-Lawyers fail to establish that PRAK Yut's evidence is inconsistent or non-credible on this particular point.[946] PRAK Yut's evidence concerning the reporting structure in Sector 41 is, in fact, corroborated by other witnesses.[947] The Co-Lawyers' argument that these witnesses cannot corroborate PRAK Yut because they merely refer to meetings and not reporting, or because they do not know the subject matter of the meetings,[948] fails in light of evidence that reporting, in fact, also occurred during meetings.[949] Second, the Co-Lawyers fail to show that the International Co-Investigating Judge erred in relying on the evidence of YOU Vann for corroboration[950] or on its own[951] or by failing to explain why contradictory evidence from YOU Vann is discounted.[952] Finally, the International Judges find that the International

---

[945] AO An's Appeal (D360/5/1), paras 126-127 *referring to* Closing Order (Indictment) (D360), paras 257, 263, 266, 285, 396, 431.

[946] In Annex D, the Co-Lawyers point to alleged inconsistencies in PRAK Yut's evidence concerning reporting to AO An. *See* Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597565-01597566. The International Judges find no inconsistency. *See* Written Record of Interview of PRAK Yut, 30 September 2014, D219/120, at ERN (EN) 01063611: *compare* (A26-A28) (stating that "when the orders were fully carried out, all the commune chiefs reported personally to me. Then [...] I made a report to be sent to *Grandfather* An at the Sector level" and further stating that she "listed the names of people arrested and reasons for their arrest, for their detention, or their release, and for their execution") *with* (A30) (merely stating that AO An never came to verify the number of people arrested, detained, or smashed but occasionally came to meet PRAK Yut). The Co-Lawyers' further allegations of "feeding" have been addressed in Ground 5(ii)(a). In addition, the Co-Lawyers allege that the International Co-Investigating Judge acknowledged inconsistencies in PRAK Yut's evidence but continued to rely on her. *See* AO An's Appeal (D360/5/1), para. 127 *referring to* Closing Order (Indictment) (D360), para. 635. This allegation is unfounded, the fact that PRAK Yut states that she does not remember the precise content of reports in her Case 002 testimony does not constitute an inconsistency.

[947] *See, e.g.*, Closing Order (Indictment) (D360), para. 263, footnotes 660-662 *referring to* statements from YOU Vann, IM Pon, HONG Heng, SO Saren, NHEM Chen, PUT Kol, SAT Pheap.

[948] AO An's Reply (D360/11), para. 42.

[949] *See, e.g.*, Written Record of Interview of CHOM Vong (Ngauv), 3 August 2015, D219/442, at ERN (EN) 01434539 (A118, A120) ("The military reports would have been sent directly to the sector secretary [...] I knew they could contact Ta An via written reports or *oral reports made in meetings*") (emphasis added).

[950] *See, e.g.*, AO An's Appeal (D360/5/1), para. 126, footnote 291 (the Co-Lawyers challenge the International Co-Investigating Judge's reliance on YOU Vann to corroborate PRAK Yut's evidence concerning reporting to AO An because YOU Vann "merely" refers to reports on economic work). This argument fails. While YOU Vann refers to letters concerning cooperative work and work results, she also mentions that reports concerned marriage arrangements. *See, e.g.*, Closing Order (Indictment) (D360), para. 263, footnote 622 *referring to* Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059277-01059278 (A23-A27) (explaining that she delivered letters from AO An to PRAK Yut and *vice versa*, and that these reports mentioned, *inter alia*, the number of people married). In addition, this evidence clearly corroborates the existence of a reporting system regardless of the substance of reports that YOU Vann may have been privy to.

[951] AO An's Appeal (D360/5/1), para. 126, footnotes 291, 297. The International Judges recall their finding in Ground 5(ii)(b) and 5(v) where they held that YOU Vann is generally credible even when her accounts include hearsay.

[952] The International Co-Investigating Judge has identified the potentially conflicting evidence and made a reference to it indicating that he assessed and weighed the evidence but found that the evidence did not prevent him from arriving at the actual findings. *See, e.g.*, Closing Order (Indictment) (D360), para. 297, footnote 783. While the International Co-Investigating Judge referred to Written Record of Interview of YOU Vann, 11 November 2013, D117/31, at ERN (EN) 00966989 (A14) ("[...] the former cares had been removed before we arrived there"), he also cited six other pieces of evidence to demonstrate that reporting of the purge to AO An occurred.

Co-Investigating Judge did not err in relying on NHEM Chen and CHOM Vong[953] when finding that CHOM Vong sent reports to and held meetings with AO An.[954]

6(v)(b)(6) Authority to Lead Sector-level Meetings

1. Submissions and Discussion

509. The Co-Lawyers assert that the International Co-Investigating Judge erred in finding that AO An led sector-level meetings or trainings about politics, security or military matters.[955] The International Judges have already determined *supra* that no error transpired in the International Co-Investigating Judge's findings concerning meetings presided over by AO An and will not discuss this further here.[956]

6(v)(c) Authority over Security matters and Centres in Sector 41

1. Submissions

510. The Co-Lawyers argue that the International Co-Investigating Judge erred in finding that AO An exercised authority over security matters, including through control over security centres in Sector 41.[957] Specifically, they assert that there is no serious and corroborative evidence demonstrating that AO An (i) visited security centres; (ii) gave orders to security centre chiefs; (iii) received reports on security matters; or (iv) authorised the transport of prisoners.[958]

511. In the Response, the International Co-Prosecutor submits that there is no requirement to prove that a suspect was present at a crime site to find him or her responsible for the crimes

---

[953] NHEM Chen's and CHOM Vong's overall credibility was addressed in Ground 5(ii)(d) and (e). Regarding these particular findings, NHEM Chen provides a detailed account of how he was ordered by AO An and personally went to collect reports from Met Sop Security Centre and that AO An received reports that his orders were carried out from CHOM Vong. *See* Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374648 (A58-A59), 01374649 (A74), 01374650 (A75-A76). The Co-Lawyers' allegation that NHEM Chen merely speculates about the substance of these reports fails. While NHEM Chen states that the envelopes were sealed, he also says that he knew "it was the reports of the killings", because he was next to AO An when the latter said "[s]everal people have already been taken to attend study sessions. Soon our plan will be achieved".

[954] AO An's Appeal (D360/5/1), para. 128 *referring to* Closing Order (Indictment) (D360), paras 279, 285, footnotes 733, 742.

[955] AO An's Appeal (D360/5/1), para. 129; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625290-01625291, pp. 31:20 to 32:1.

[956] *See supra* Ground 6(ii).

[957] AO An's Appeal (D360/5/1), para. 131.

[958] AO An's Appeal (D360/5/1), para. 131; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625291, pp. 32:3 to 32:14.

there.[959] Viewing the extensive evidence, the only reasonable inference is that AO An controlled the Sector 41 security centres, a conclusion that is reinforced by the fact that he visited some of the security centres and issued orders and otherwise exercised authority while there.[960]

2. Discussion

512. The International Judges find that the Co-Lawyers fail to show that no reasonable investigating judge could have found that AO An had authority over security matters including security centres in Sector 41. This finding is reasonable in light of the evidence presented and supported by AO An's statutory authority as Sector 41 Secretary, including that "sector security centres were under the direct supervision of the respective sector secretary."[961]

513. First, the International Co-Investigating Judge reasonably found that AO An visited three security centres: Met Sop,[962] Wat Au Trakuon,[963] and Wat Ta Meak.[964] The International Judges consider that AO An's presence at security centres is not required to establish AO An's authority or control over these sites, but evidence that AO An did visit these sites may serve to further support that AO An indeed had authority over security matters and security centres in Sector 41.

---

[959] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 69.
[960] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 69-70; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625122, pp. 58:6 to 58:10.
[961] Closing Order (Indictment) (D360), para. 194, footnote 416.
[962] AO An's Appeal (D360/5/1), para. 132, footnote 309. The Co-Lawyers allege that the International Co-Investigating Judge erred: (i) in finding IM Pon's account (that he never drove AO An to Met Sop) unreliable; (ii) by ignoring other evidence (contradictions in NHEM Chem's evidence); and (iii) by inexplicably finding CHOM Vong's statement (that he did not see or know of AO An visiting Met Sop) unreliable. The International Judges observe that the International Co-Investigating Judge properly explained that IM Pon's evidence does not necessarily conflict with that of NHEM Chen because they worked with AO An during different time periods and why he considered CHOM Vong's evidence unreliable on this point. *See also* Ground 5(ii)(d) and (e).
[963] AO An's Appeal (D360/5/1), para. 132, footnote 309. The Co-Lawyers allege that the International Co-Investigating Judge insufficiently relied only on two witnesses for this site: NHEM Chen (who fails to provide details) and SENG Srun (whose evidence is insufficient to find that AO An exercised authority over the centre) and assert that the International Co-Investigating Judge ignored exculpatory evidence (from IM Pon, THONG Kim Khun and SAY Doeun). The International Judges consider that the International Co-Investigating Judge did not err in relying on NHEM Chen or SENG Srun who provide a detailed and credible account of AO An's presence at a meeting at Wat Au Trakuon and do not consider IM Pon, THONG Kim Khun and SAY Doeun, who merely state that they never saw or met AO An at this site, as necessarily conflicting or exculpatory evidence.
[964] AO An's Appeal (D360/5/1), para. 132, footnote 309. The Co-Lawyers challenge the finding regarding this site because the International Co-Investigating Judge relied on PENH Va (whose evidence is speculative), NHEM Chen (who states that AO An was present at meetings in Wat Ta Meak, but that these meetings concerned economics) and SO Saren (who states that AO An was present, but that he did not listen to the content of the meeting). The International Judges consider that the evidence relied on clearly supports the finding that AO An was present in Wat Ta Meak on several occasions.

514. Second, the International Judges find no error in the International Co-Investigating Judge's reliance on NHEM Chen's evidence concerning killing orders and the transport of prisoners between security centres.[965] The Co-Lawyers' argument that NHEM Chen's evidence is uncorroborated[966] or non-credible[967] has no merit.

515. Third, the International Judges recall its previous findings concerning AO An's role in Sector 41, including his authority to give orders and the reporting structure in Sector 41[968] and consider that the remaining challenges to the AO An's authority over reports on security matters or killings[969] are unpersuasive.

6(v)(d) Authority over the Sector 41 Military

1. Submissions

516. The Co-Lawyers allege that the International Co-Investigating Judge erred in finding that AO An had authority over the Sector 41 military. Specifically, the International Co-Investigating Judge's related findings are not based on sufficiently serious and corroborative evidence as he relied mainly on four witnesses (YOU Vann, CHOM Vong, SO Saren and NHEM Chen), who: (i) do not provide details about AO An's role in the sector military; (ii) do not mention AO An in their statements; and (iii) provide uncorroborated or contaminated evidence.[970] Furthermore, the Co-Lawyers allege that the International Co-Investigating Judge failed to provide sufficient evidence of a reporting system within the sector military,[971] that AO An convened meetings with the sector military,[972] that AO An ordered the arrest and execution

---

[965] AO An's Appeal (D360/5/1), paras 133-135, footnotes 314, 319, 321.
[966] The International Judges recall that there is no requirement for corroboration (*See* Ground 5(iv)), and that they found NHEM Chen a generally credible witness (*See* Ground 5(ii)(d)). NHEM Chen provides a detailed account of the killing orders and the transportation of prisoners to various security centres and execution sites, witnessing this himself. *See, e.g.*, Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374647 (A47-A48) (stating that he saw trucks transporting people every day to security centres/execution sites, further stating that *Ta* Aun (who could not do anything without AO An's authorisation) decided where the cadres were to be sent).
[967] The International Judges observe that various aspects of NHEM Chen's account are in fact corroborated or partially corroborated by the witnesses cited by the International Co-Investigating Judge, including by PENH Va (concerning the fact that Sector 41 vehicles were used to transport prisoners). *See* Written Record of Interview of PENH Va, 11 March 2015, D219/226, at ERN (EN) 01088626 (A21).
[968] *See infra* Ground 6(v)(b)(4) and 6(v)(b)(5).
[969] AO An's Appeal (D360/5/1), para. 134, footnotes 317-320.
[970] AO An's Appeal (D360/5/1), para. 136.
[971] AO An's Appeal (D360/5/1), para. 137.
[972] AO An's Appeal (D360/5/1), para. 137.

of Hum (replacing him with Sok),[973] that AO An ordered the Sector 41 military, among others, to arrest specific groups and to transport people[974] and that Sok, the Sector Military Chairman, was AO An's right hand.[975]

517. In the Response, the International Co-Prosecutor argues that the Co-Lawyers fail to discharge their burden of demonstrating that no reasonable trier of fact could find that AO An had authority over the Sector 41 military.[976] He alleges that AO An's piecemeal challenges to aspects of this evidence fail to address the corroboration offered by multiple witnesses giving evidence on AO An's authority.[977]

2. Discussion

518. The International Judges find that the Co-Lawyers fail to show that no reasonable investigating judge could have found that AO An held authority over the sector military. This finding is reasonable in light of the evidence presented, reinforced by AO An's statutory authority as Sector 41 Secretary, including that "the sector committee was [...] responsible for the administration and implementation of tasks conducted by the RAK" and that "each sector had a military unit which reported directly to the sector secretary."[978]

519. First, the Co-Lawyers' allegations that the witnesses do not provide details about AO An's role in the sector military are inaccurate and irrelevant. At least two witnesses, YOU Vann and TOUCH Chamroeun directly point to AO An exercising authority over the sector military.[979] Several witnesses confirm that the Sector Secretary was in charge of the military.[980] Second, concerning the alleged failure to provide sufficient evidence of a reporting system

[973] AO An's Appeal (D360/5/1), para. 138.
[974] AO An's Appeal (D360/5/1), para. 139.
[975] AO An's Appeal (D360/5/1), para. 140.
[976] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 71.
[977] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 71.
[978] Closing Order (Indictment) (D360), para. 192.
[979] Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059297 (A98) ("[...] if Ta An ordered people taken to be killed, Sector Military referred this order to District Military to conduct the arrests"); Written Record of Interview of TOUCH Chamroeun, 30 July 2015, D219/435, at ERN (EN) 01143009 (A197) ("The military side had commanders and controllers of their own, but they were also under Ta An").
[980] *Contra* AO An's Appeal (D360/5/1), para. 136, footnote 325. *See, e.g.*, Written Record of Interview of PECH Chim, 19 June 2014, D118/259, at ERN (EN) 01000680 (A112) ("the sector military reported to the Sector Secretary"); Written Record of Interview of RY Nhor, 10 November 2016, D219/870, at ERN (EN) 01373688 (A49) ("The sector secretary was in charge of only those in the sector, including the military [...] I knew only that AO An had the highest position").

through the sector military,[981] AO An's meetings with the sector military,[982] his orders to arrest specific groups and his involvement in the transportation of people,[983] the Co-Lawyers challenge the International Co-Investigating Judge's reliance on witnesses PRAK Yut, YOU Vann, NHEM Chen and CHOM Vong, whose credibility on these issues has been extensively examined and upheld.[984] The International Judges find no merit in these repetitive challenges.

520. Third, regarding the arrest of Sector 41 Military Chairman Hum and his replacement with Sok, YOU Vann, NHEM Chen and SO Saren provide detailed evidence that is mutually corroborative, attesting that AO An ordered the arrest of Hum.[985] Concerning the appointment of Sok, the International Co-Investigating Judge properly relied on NHEM Chen's evidence.[986] Finally, the International Judges will not address the Co-Lawyers' remaining challenges,

---

[981] AO An's Appeal (D360/5/1), para. 137 *referring to* Closing Order (Indictment) (D360), paras 258, 431. YOU Vann's and CHOM Vong's accounts are consistent and corroborative, *inter alia*, stating that reports would be made verbally or in writing. *See* Written Record of Interview of CHOM Vong (Ngauv), 3 August 2015, D219/442, at ERN (EN) 01434539 (A118, A120) ("The military reports would have been sent directly to the sector secretary [...] I knew they could contact Ta An via written reports or oral reports made in meetings"); Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059299 (A106-A107) ("Ni reported back to him verbally or in writing via Sector military [...] All the list were sent back to the District Military through Sector Military"). The Co-Lawyers aver that the International Co-Investigating Judge ignored evidence indicating that military cadres did not report through the normal channels in the Central Zone (*see* AO An's Appeal (D360/5/1), para. 137, footnote 332). However, the alleged witnesses OUM Seng and KHUM Kim testify about reporting structure which does not strictly relate to Sector 41.

[982] AO An's Appeal (D360/5/1), para. 137 *referring to* Closing Order (Indictment) (D360), paras 258, 589; Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374651-01374652 (A93, A103) ("Q: [...] Where was that military meeting held? A93: It was held at the military sector, which was also next to Wat Tameak Pagoda. The meeting was also held at Wat Tameak Pagoda [...] A103: [AO An] got the plan from the meetings in Kampong Cham that he attended; and, when he came back from those meetings, he would convene further meetings at Wat Tameak Pagoda"). A number of witnesses state that when sector-level meetings were held, the military attended. *See, e.g.*, Written Record of Interview of SO Saren, 22 September 2016, D219/837, at ERN (EN), 01364056 (A24-A29) ("[Ta An] mostly held meetings at the sector office location [...] Q: For the most part, each time there was a meeting, which Coms were there? A27: Mostly from the military side and Aun himself").

[983] AO An's Appeal (D360/5/1), para. 139 *referring to* Closing Order (Indictment) (D360), para. 303, footnote 811; Written Record of Interview of NHEM Chen, 17 March 2016, D219/732, at ERN (EN) 01224087 (A35) ("I was there personally when Ta An ordered the military"). YOU Vann provides evidence that the district army was involved in the arrest, that the district army communicated with the sector army. *See, e.g.*, Case 002 Transcript of 18 January 2016 (YOU Vann), D219/702.1.94, ERN (EN) 01431628, pp. 42:7 to 42:13.

[984] *See supra* Ground 5(ii)(a), (b), (d), (e).

[985] Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374667 (A276) ("Q: Did you know who ordered for the arrest of Hum? A276: Uncle An did, because he had committed a moral misconduct"); Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059301 (A111) ("Ta An took Hum to be imprisoned and killed because he had committed a moral offense with a female medical practitioner"); Written Record of Interview of SO Saren, 19 July 2016, D219/800, at ERN (EN) 01331736 (A173-A175) ("[b]ut later, the sector arrested [Hum] and put him in jail [...] because he committed a moral offense with Ta An's little sister-in-law").

[986] Closing Order (Indictment) (D360), para. 258. *See* Written Record of Interview of NHEM Chen, 27 October 2016, D219/855, at ERN (EN) 01374665 (A250) ("Q: Who assigned Sok to be the commander of sector army? A250: Uncle An did. He had worked with Uncle An from the beginning"). The International Judges consider that the specific location or date of the appointment is not determinative for the finding.

related to AO An's orders at Wat Phnom Pros (a zone-level execution site)[987] and whether Sok, the Sector Military Chairman, was AO An's "right hand"[988] as they are incapable of impacting the International Co-Investigating Judge's finding that AO An had authority over the Sector 41 military.

6(v)(e) Authority over Logistics and People's Movement in Sector 41

1. Submissions

521. The Co-Lawyers allege that the International Co-Investigating Judge erred in finding that AO An had authority over logistical and transportation resources or people's movement in Sector 41.[989] Specifically, they argue that the International Co-Investigating Judge failed to provide sufficiently serious and corroborative evidence that AO An: (i) managed the movement of personnel and supplies;[990] (ii) coordinated logistical infrastructure and authorised vehicles to transport prisoners between security centres;[991] (iii) oversaw the transport of the Cham from the East Zone to the Central Zone;[992] and (iv) had authority to issue travel permits.[993]

522. In the Response, the International Co-Prosecutor argues that the evidence concerning AO An's authority over transportation and logistical resources and his authority to approve travel within the sector, stems from multiple witnesses and pertains to multiple corroborative aspects of AO An's role. The International Co-Prosecutor submits that the Co-Lawyers' challenges concerning the credibility of the witnesses are unpersuasive.[994] He further asserts that the Co-Lawyers have not demonstrated that these factual findings were determinative of the International Co-Investigating Judge's assessment that AO An is responsible for crimes or that AO An falls within the ECCC's personal jurisdiction.[995]

2. Discussion

---

[987] AO An's Appeal (D360/5/1), para. 139, footnote 347.
[988] AO An's Appeal (D360/5/1), para. 140. This is a mere description from one witness. *See* Closing Order (Indictment) (D360), para. 562.
[989] AO An's Appeal (D360/5/1), para. 141.
[990] AO An's Appeal (D360/5/1), para. 141.
[991] AO An's Appeal (D360/5/1), para. 142.
[992] AO An's Appeal (D360/5/1), para. 143.
[993] AO An's Appeal (D360/5/1), para. 144.
[994] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 72.
[995] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 72.

523. First, concerning the management of personnel and supplies throughout Sector 41,[996] the Co-Lawyers' challenges to the credibility of, *inter alia*, PRAK Yut and YOU Vann[997] fail. They are found credible on this point.[998] Moreover, close examination of the alleged contradictory evidence[999] reveals that the evidence does not, in fact, conflict with the findings pertaining to AO An's authority over the management of resources, since this evidence either addresses AO An's role as a supervisor or simply does not mention AO An.

524. Second, the International Co-Investigating Judge's finding that AO An coordinated the logistical infrastructure to transport prisoners between security centres has been addressed previously.[1000] In light of this, the International Judges consider it inconsequential whether the vehicles used to transport prisoners and the vehicles used by AO An to go to meetings, were the same;[1001] hence, they will not address the matter. Third, contrary to the Co-Lawyers' allegations,[1002] the International Co-Investigating Judge did not err in finding that AO An coordinated and oversaw operations to transport people from the East Zone to the Central Zone, including to Sector 41, and onwards to security centres. The International Judges observe that the International Co-Investigating Judge reasonably relied on the account of, *inter alia*, NHEM Chen, who is held credible.[1003]

---

[996] AO An's Appeal (D360/5/1), para. 141 and footnotes 352, 356 *referring to* Closing Order (Indictment) (D360), paras 256, 272, footnotes 636, 704.
[997] *E.g.*, The Co-Lawyers allege that there are inconsistencies PRAK Yut's statements concerning the construction of the dam in Prey Chhor. *See* AO An's Appeal (D360/5/1), para. 141, footnote 353; Case 002 Transcript of 25 January 2012 (Prak Yut), D179/1.2.4, ERN (EN) 00774127-00774128, pp. 94:19 to 95:8 ("And the sectorial level built a dam, but in Prey Chhor district. [...] The dam was built by the sector level. [I] only engaged in sending some people to help them"); In a later interview PRAK Yut merely states that she does not remember this. *See* Written Record of Interview of PRAK Yut, 30 September 2014, D219/120, at ERN (EN) 01063623 (A89) ("Q: Do you recall the construction of Sector 41 Dam in Prey Chhor district? A89: I do not recall it"). In light of corroborative evidence of YOU Vann who provides detailed statements (*see* Written Record of Interview of YOU Vann, 8 January 2013, D219/138, at ERN (EN) 01059289 (A70) ("PRAK Yut assigned me to mobilise people from villages and send them to build the dam in Prey Chhor District. The request for labour forces to build the dam was from the Sector level")), and the fact that AO An also states that he was involved in the construction of various dams (including the dam in Prey Chhor) and sent Sector 41 forces to work on them (*see* DC-Cam Interview of AO An, 1 August 2011, D219/847.1, at ERN (EN) 01373582-01373583), the Co-Lawyers' challenge fails.
[998] *See supra* Ground 5(v) and Ground 5(ii)(a) and (b).
[999] AO An's Appeal (D360/5/1), para. 141, footnote 356 *referring to* statements from TOUCH Chamroeun, SAT Pheap, KIM Koeun, KHEANG Thai, YOU Vann and PENH Va.
[1000] *See supra* Ground 6(v)(c).
[1001] AO An's Appeal (D360/5/1), para. 142.
[1002] AO An's Appeal (D360/5/1), para. 143, footnotes 366-368 *referring to* Closing Order (Indictment) (D360), para. 309, footnote 828.
[1003] *See supra* Ground 5(ii)(d). NHEM Chen provides extensive evidence on the transfer of cadres from the East Zone and AO An's involvement therein. *See* Closing Order (Indictment) (D360), para. 309, footnote 828.

525. Fourth, the International Co-Investigating Judge's finding that AO An oversaw the issuance of travel permits within Sector 41 and between other sectors[1004] is reasonable. The International Judges find no error in the International Co-Investigating Judge's reliance on CHOM Vong's evidence concerning AO An's authority over travel.[1005] Moreover, contrary to the Co-Lawyers' allegations,[1006] a credible civil party applicant,[1007] PENH Va supports this finding by stating that Sreng, one of the Sector Committee members, issued him a travel permit.[1008]

6(v)(f) Impact on the personal jurisdiction

1. Submissions and Discussion

526. The Co-Lawyers allege that even if AO An was the Sector 41 Secretary, he would not be considered amongst those most responsible because of Sector 41's small geographical size, AO An's limited number of direct subordinates and his restricted decision making powers concerning the implementation of CPK policies.[1009] In the Response, the International Co-Prosecutor submits that the Co-Lawyers ignore the most important factor in determining whether an individual falls among those most responsible: the gravity of the crimes and the extent of AO An's role in the commission of the crimes.[1010]

527. The International Judges note that the Co-Lawyers' argument regarding the alleged "small geographical area" of Sector 41 is addressed and dismissed in Ground 7(i).[1011] AO An's role in the implementation of CPK policies has been addressed in Ground 6(ii).[1012] The International Judges reaffirm that the identification of persons falling into those most responsible involves a quantitative and qualitative assessment of (i) the gravity of the crimes

---

[1004] AO An's Appeal (D360/5/1), para. 144, footnotes 369-370 *referring to* Closing Order (Indictment) (D360), paras 256, 272, footnotes 637, 705.
[1005] *See* Ground 5(ii)(e). *See* Written Record of Interview of CHOM Vong (Ngauv), 3 August 2015, D219/442, at ERN (EN) 01434539 (A133-A136) (stating that permission letters were signed by the sector secretary and that for formal travel the sector secretary had to know, high level cadre had to inform AO An).
[1006] AO An's Appeal (D360/5/1), para. 144, footnote 371.
[1007] *See supra* Ground 5(ii)(f).
[1008] Written Record of Interview of PENH Va, 11 March 2015, D219/226, at ERN (EN) 0108620 (A14) ("Comrade Sreng, one of the sector committee members, issued me a travel permit").
[1009] AO An's Appeal (D360/5/1), para. 145; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625291, pp. 32:12 to 32:19.
[1010] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 78.
[1011] *See infra* Ground 7(i).
[1012] *See supra* Ground 6(ii).

charged and (ii) the level of responsibility of the accused.[1013] While the Co-Lawyers' alleged factors could be considered as one of the multiple factors in this holistic assessment, the International Judges are not persuaded that those factors are determinative here.

528. Accordingly, Ground 6(v) is dismissed.

Ground 6(vi): AO An's Role in the Genocide of the Cham

1. Submissions

529. The Co-Lawyers allege that the International Co-Investigating Judge failed to provide sufficiently serious and corroborative evidence that AO An had a role in the genocide of the Cham.[1014] They assert that AO An did not significantly contribute to the CPK policy allegedly targeting Cham people, share or have the specific intent to commit genocide, or plan, order or instigate genocide. [1015] In particular, the Co-Lawyers argue that the International Co-Investigating Judge—relying almost exclusively on uncorroborated, non-credible statements of PRAK Yut and YOU Vann—erred in finding: that AO An ordered subordinates such as district secretaries to identify, list, arrest and kill Cham people; that he monitored and managed the progress of these orders through reports; and that he was involved in the transfer of Cham people from the East Zone to the Central Zone.[1016]

530. In the Response, the International Co-Prosecutor asserts that the Co-Lawyers fail to demonstrate that no reasonable trier of fact could have made these findings. He alleges that the Co-Lawyers' arguments are based on unpersuasive attacks on the credibility of PRAK Yut and YOU Vann.[1017] Moreover, the Co-Lawyers misstate the substance of PRAK Yut's evidence when alleging that she "only provides information about Kampong Siem District" when her evidence is unambiguous on this point and corroborated by the fact that mass killings of Cham took place in other districts, especially in Kang Meas.[1018] Finally, the International Co-Prosecutor asserts that the Co-Lawyers' arguments regarding the transportation of the Cham

---

[1013] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321; *see also* paras 327-338.
[1014] AO An's Appeal (D360/5/1), para. 146; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625292, pp. 33:1 to 33:6.
[1015] AO An's Appeal (D360/5/1), para. 146; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625292, pp. 33:1 to 33:6.
[1016] AO An's Appeal (D360/5/1), paras 146-150. Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625292, pp. 33:7 to 33:14.
[1017] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 73, 76.
[1018] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 74-75.

from the East Zone to the Central Zone are premised on allegations of error regarding AO An's position as Sector 41 Secretary, which the Co-Lawyers have failed to prove.[1019]

2. Discussion

531. The International Judges find that the Co-Lawyers fail to demonstrate that no reasonable investigating judge could have found that AO An ordered, *inter alia*, district secretaries to identify, arrest and kill the Cham people[1020] or that he monitored the progress of these killings through reports and lists.[1021] The Co-Lawyers' challenges to PRAK Yut's credibility are ultimately unpersuasive.[1022] While PRAK Yut initially denies ever having received arrest orders from AO An,[1023] she later details that AO An ordered her and other district secretaries to identify, arrest and kill the Cham.[1024] The International Judges consider that these inconsistencies may have emanated from PRAK Yut's fear of revealing her involvement in the crimes[1025] and observe that PRAK Yut's later statements are consistent and detailed. Accordingly, it was not unreasonable for the International Co-Investigating Judge to rely on PRAK Yut's evidence here.[1026]

532. In respect of further alleged inconsistencies,[1027] the International Judges observe that PRAK Yut's initial failure to mention AO An does not constitute an inconsistency. In fact,

---

[1019] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 76.
[1020] AO An's Appeal (D360/5/1), para. 147 *referring to* Closing Order (Indictment) (D360), paras 302-303, 633-637.
[1021] AO An's Appeal (D360/5/1), para. 148 *referring to* Closing Order (Indictment) (D360), paras 303, 633, 635.
[1022] AO An's Appeal (D360/5/1), paras 146-148. The International Judges have previously addressed the alleged inconsistencies in PRAK Yut's evidence concerning the existence of a reporting system. *See supra* Ground 6(v)(b)(4).
[1023] Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056218 (A37) ("I never received orders from *Grandfather* An to arrest anyone").
[1024] *See, e.g.*, Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056219 (A44) ("I received an order from *Grandfather* An to collect [the] Cham people").
[1025] *See supra* Ground 5(ii)(a). *See also* Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056219 (A43) ("After you revealed what happened, it made me recognize and admitted it although I was in a difficult situation because *Grandfather* An is still alive. I admitted that there were killings in Kampong Siem, and I received the orders from *Grandfather* An").
[1026] Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056219 (A44) ("I received an order from *Grandfather* An to collect [the] Cham people"); Written Record of Interview of PRAK Yut, 19 June 2013, D117/71, at ERN (EN) 01056228 (A48) ("During a monthly meeting, *Grandfather* An ordered me to identify Cham people"); Written Record of Interview of PRAK Yut, 21 June 2013, D117/72, at ERN (EN) 01056235 (A6) ("*Grandfather* An did not tell me any reason. He just told me to target Cham people"); Written Record of Interview of PRAK Yut, 30 September 2014, D219/120, at ERN (EN) 01063608-01063609 (A14) ("[W]e had a meeting at the Sector level, and the Sector level gave an order to smash Cham people"), 01063610 (A19-A23) ("*Grandfather* An gave an order to me to identify those who opposed the revolution [...] and to arrest those people to be smashed [...] 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").
[1027] Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597564-01597565.

PRAK Yut mentions the Sector 41 Committee, which would have necessarily included AO An.[1028] Second, the International Judges observe that PRAK Yut is forthcoming in stating that she does not know whether AO An received orders from the upper echelon and, in any event, consider that this is not inconsistent with PRAK Yut's account that she and other district secretaries received orders directly from AO An.[1029] Moreover, AO An's agreement to spare a Cham girl living under PRAK Yut's care[1030] is not inconsistent with PRAK Yut's evidence that AO An ordered her to arrest and kill all other Cham; PRAK Yut clearly indicates that AO An ordered her to list all other Cham and that no other Cham were spared.[1031] Finally, the assertion that PRAK Yut's evidence resulted from "feeding" by investigators is dismissed.[1032]

533. Contrary to the Co-Lawyers' assertions that PRAK Yut's evidence is not corroborated,[1033] the International Co-Investigating Judge relied, *inter alia*, on corroborative details from YOU Vann who provides credible evidence that AO An ordered PRAK Yut directly or through the Sector and District Militaries to arrest the Cham.[1034] Concerning reporting, the International Judges observe that PRAK Yut's evidence is corroborated by NHIM Kol who gives detailed and credible information on the reporting system at the village, district and sector levels.[1035] Finally, YOU Vann provides credible evidence that she personally

---

[1028] Written Record of Interview of PRAK Yut, 21 July 2009, D6.1.730, at ERN (EN) 00364082 ("At first, we had a meeting with the Sector 41 com and took the plan set in the meeting [...] The sector level held a meeting once a month, and the district level held a meeting once ha[l]f a month").
[1029] *See, e.g.*, Written Record of Interview of PRAK Yut, 27 October 2013, D117/73, at ERN (EN) 01056240 (A15) ("I am not sure if Ta An initiated the orders or he received the orders from the upper level"); Written Record of Interview of PRAK Yut, 19 June 2013, D117/71, at ERN (EN) 01056228 (A48) ("During a monthly meeting, *Grandfather* An ordered me to identify Cham people").
[1030] Closing Order (Indictment) (D360), para. 620, footnote 2096 *referring to* Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95, ERN (EN) 01441025-01441026; Written Record of Interview of PRAK Yut, 27 October 2013, D117/73, at ERN (EN) 01056238 (A4-A5) ("[AO An] ordered me to list the names of all Cham people in my district [...] When I saw the letter, I was shocked to spot Phea's name in it. I contacted Uncle An [...] Uncle An agreed not to have Phea listed because she was the only Cham who worked and lived with me").
[1031] Closing Order (Indictment) (D360), para. 620, footnote 2097 *referring to* Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95, ERN (EN) 01441026, pp. 17:18 to 17:20 ("I had pity for Pheap, and her life was spared. However, no other Cham people were spared, nor did I ask to spare any other Cham to Ta An"). *See also* Written Record of Interview of PRAK Yut, 27 October 2013, D117/73, at ERN (EN) 01056238 (A5) ("Uncle An agreed not to have Phea listed [...] But he ordered me to list other Cham people").
[1032] Annex D to AO An's Appeal (D360/5/1.5), at ERN (EN) 01597564. *See supra* Ground 5(iii). The impugned statements were previously challenged by the Co-Lawyers. *See* Annex B to Application for WRI Annulment (D338/1/2.3), at ERN (EN) 01388934-01388940, entries 10-12. The International Judges further recall that refreshing the memory of a witness with his or her prior statement or testimony is a legitimate investigative practice.
[1033] AO An's Appeal (D360/5/1), paras 147, 148, footnotes 375, 378.
[1034] Closing Order (Indictment) (D360), para. 302 *referring to* Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059297-01059298 (A98-A100).
[1035] Closing Order (Indictment) (D360), para. 303 *referring to* Written Record of Interview of NHIM Kol, 11 February 2015, D219/171, at ERN (EN) 01076940 (A2) ("The meetings were held at the commune office with village chiefs once a week, or sometimes not that frequently. The village chiefs would report to Rom directly [...] The reports were made regularly. Voeun [...] and I also attended meetings. I was also responsible for keeping

compiled a list of Cham, that she gave the list to PRAK Yut and that PRAK Yut delivered this list to AO An.[1036] While YOU Vann's account concerning a second list is not corroborated,[1037] the International Judges consider that the International Co-Investigating Judge's reliance on her evidence was not unreasonable.[1038] The assertion that YOU Vann's evidence resulted from "feeding" by investigators is dismissed.[1039]

534. In addition, the International Judges are unpersuaded by the Co-Lawyers' contention that PRAK Yut's evidence relates to Kampong Siem District only.[1040] PRAK Yut's evidence is that AO An ordered her *and the other district secretaries* to arrest and smash the Cham people and that these orders were carried out *in the four other districts*.[1041] Contrary to the Co-

---

records and statistics of people, cattle, and rice. The statistics included the numbers of births and deaths, including those taken to be killed. Each village had to provide data to me four times a month. After collecting all information, I gave it to Rom. Then Rom sent it to Ta Nan [...] who was in charge of the district [...] All communes were required to provide statistics. I knew this because Ta Nan called all the commune chiefs, including me, to attend the meetings to receive the order. At that time, Ta Nan gave all the forms to us to complete"), 01076942-01076943 (A12) ("At that time, the commune chairmen in Kampong Siem District were arrested except for one [...]. The District Committee took action on their own when they had to arrest other committees, but as for ordinary people, the village chiefs had to report to the district or the commune first before they went to make an arrest").

[1036] Case 002 Transcript of 14 January 2016 (YOU Vann), D219/702.1.87, ERN (EN) 01438507-01438508, pp. 66:2 to 67:5 ("the list was made based on the reports from village chiefs that sent to us so that reports indicated how many peoples that we belonged to the three groups I mentioned earlier [...] Khom told me that Prak Yut sent the names to Ta An"); Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059285-01059286 (A55). The International Judges recall Ground 5(v) regarding hearsay and after examining the substance of the interview find that the International Co-Investigating Judge did not err in relying on YOU Vann's evidence when making these findings.

[1037] AO An's Appeal (D360/5/1), para. 147, footnote 375.

[1038] *See supra* Ground 5(ii)(b) and 5(iv). The International Judges observe that YOU Vann is a generally credible witness. After review of the substance of her evidence on this point, the International Judges find that the International Co-Investigating Judge did not err in relying on her evidence to support this finding. *See* Case 002 Transcript of 14 January 2016 (YOU Vann), D219/702.1.87, ERN (EN) 01438512-01438515; Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059284 (A48).

[1039] *See supra* Ground 5(iii). The impugned statements were previously challenged by the Co-Lawyers. *See* Annex B to Application for WRI Annulment (D338/1/2.3), at ERN (EN) 01388971, entry 45; Annex D to Application for WRI Annulment (D338/1/2.5), at ERN (EN) 01364467, entry 1. The International Judges further recall that refreshing the memory of a witness with his or her prior statement or testimony is a legitimate investigative practice.

[1040] AO An's Appeal (D360/5/1), para. 147, footnote 375.

[1041] Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056219 (A44-A45) ("I received an order from *Grandfather* An to collect Cham people [...] *Grandfather* An gave the order during the monthly meetings. During the meetings, *Grandfather* An gave the same orders *to other district sectaries*") (emphasis added); Written Record of Interview of PRAK Yut, 30 September 2014, D219/120, at ERN (EN) 01063610 (A19-A23) ("Grandfather An gave an order to me to identify those who opposed the revolution [...] and to arrest those people to be smashed [...] *this order was carried out not only in other communes in Kampong Siem District but also in other four districts* [...] 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 [...] I received the orders during monthly meetings of the Sector with participation of all the district committees") (emphasis added); Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95, ERN (EN) 01441019-01441020, pp. 10:16 to 11:16 ("Referring to the meeting convened by the sector where all the district heads were called to attend, indeed, I attended the meeting").

Lawyers' assertions, this evidence is further corroborated by SAY Doeun and SENG Srun who provide evidence on lists and killing orders in Kang Meas District.[1042]

535. Finally, in light of AO An's role and authority as the Sector 41 Secretary and the Deputy Zone Secretary,[1043] it was not unreasonable for the International Co-Investigating Judge to conclude that AO An played a role in the operation to transfer the Cham from the East Zone to the Central Zone. Contrary to the Co-Lawyers' assertions,[1044] the International Co-Investigating Judge based this finding on AO An's position as the Sector 41 Secretary and the Deputy Zone Secretary, and evidence that "AO An was involved in the planning of the purge of the East Zone, during which Cham were killed" and that "resources from Sector 41 (boats and trucks) [were used] to transport some of the Cham from the East Zone to the Central Zone".[1045]

536. The International Judges find that the Co-Lawyers fail to demonstrate that no reasonable trier of fact could have made the impugned factual findings. Accordingly, Ground 6(vi) is dismissed.

Ground 6(vii): AO An's Role in the Forced Marriages and Rape in Prey Chhor and Kampong Siem Districts

1. Submissions

537. The Co-Lawyers allege that the International Co-Investigating Judge failed to provide sufficient evidence that AO An significantly contributed to the CPK policy on marriage and increased population or that he planned, ordered, instigated or participated in the marriages or

---

[1042] Case 002 Transcript of 12 January 2016 (SAY Doeun), D219/702.1.85, ERN (EN) 01474964-01474966, pp. 70:19 to 72:5 ("I made arrest of Cham people for one time only [...] it was a verbal order [...] it was the wife of the district committee [Pheap] [...] she said the orders came from the upper echelon to the commune level and then she relayed those orders to us [...] the order was to arrest all the Chams within that village [...] [the list of names] came from the commune <committee>"); Written Record of Interview of SENG Srun, 9 December 2009, D6.1.700, at ERN (EN) 00423723-00423724 (A8, A10-A12) ("[U]nit chairman Nauy [...] made a list of the Cham who worked in the Cheung Prey work site. About two or three months later, the Cham minority were arrested at once. Nauy said that is was upper echelon, but he did not say their names. [...] the letter said to compile the names of the Cham minority [...] the letter was signed by Pheap"); Case 002 Transcript of 14 September 2015 (SENG Srun), D219/702.1.88, ERN (EN) 01406855-01406856, pp. 56:19 to 57:5 ("Regarding the letter for the compilation of the statistics of the Cham people, I know about the compilation but I did not read the letter [...] the person <who> actually read the letter to Nauy told me that the instruction was to compile lists of Cham men and Cham women").

[1043] *See supra* Ground 6(iv) and 6(v)(a), (b).

[1044] AO An's Appeal (D360/5/1), para. 149, footnote 380.

[1045] *See supra* Ground 6(v)(e); Closing Order (Indictment) (D360), paras 307-310, 637.

alleged rape in Prey Chhor and Kampong Siem Districts.[1046] Specifically, the Co-Lawyers argue that there is insufficient evidence that: AO An regulated, supported or oversaw the implementation of such CPK policies; oversaw their implementation; presided over wedding ceremonies, or chaired meetings on marriage.[1047] The Co-Lawyers assert that these findings are based on unspecific, uncorroborated and misrepresented evidence as well as the unsupported findings regarding AO An's positions in Sector 41 and the Central Zone.[1048]

538. In the Response, the International Co-Prosecutor argues that the Co-Lawyers fail to demonstrate that no reasonable trier of fact could have made these findings.[1049] He further alleges that the Co-Lawyers' arguments are based on the unpersuasive contention that AO An was not the Sector 41 Secretary, as well as conclusory statements regarding the persuasiveness of evidence which fail to reach the requisite standard to demonstrate error.[1050]

2. Discussion

539. The International Judges are unpersuaded by the Co-Lawyers' assertion that AO An had "no role" in the forced marriages or alleged rape in Prey Chhor and Kampong Siem Districts.[1051] Despite the Co-Lawyers' contention that there is "insufficient evidence demonstrating [that] AO An held the [...] positions" of Sector 41 Secretary and Deputy Zone Secretary,[1052] the International Judges recall they found no error.[1053] Accordingly, the International Judges consider that the International Co-Investigating Judge did not err by relying on AO An's held positions, in conjunction with specific evidence (*inter alia* that AO An chaired meetings on marriage and that he presided over wedding ceremonies), when finding that AO An supported the CPK policy on the regulation of marriage and that he oversaw the CPK policy implementation in Kampong Siem and Prey Chhor Districts.[1054]

540. Moreover, in relation to the finding that AO An chaired meetings on marriage, the International Judges are unpersuaded that the International Co-Investigating Judge erred by

---

[1046] AO An's Appeal (D360/5/1), para. 151; Case 004/2, Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625282, pp. 23:22 to 23:24.
[1047] AO An's Appeal (D360/5/1), paras 152-154.
[1048] AO An's Appeal (D360/5/1), paras 152-154.
[1049] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 77.
[1050] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 77.
[1051] AO An's Appeal (D360/5/1), paras 151-154.
[1052] AO An's Appeal (D360/5/1), para. 152.
[1053] *See supra* Ground 6(iv) and 6(v).
[1054] Closing Order (Indictment) (D360), paras. 224-232, 314-319.

relying on uncorroborated, unspecific or misrepresented evidence.[1055] The International Judges observe that the International Co-Investigating Judge relied on SAT Pheap who is a direct witness of AO An's presence at meetings in late 1977 at Wat Ta Meak and provides specific detail of the substance of the meeting including AO An's proposed method (Pol Pot's plan) to increase the population through marriage planning.[1056] He further names AO An as the most senior official in attendance at this meeting.[1057] The International Judges find no improper practice on account of the investigators and observe that SAT Pheap's account is detailed and credible.[1058]

541. The International Judges find that the International Co-Investigating Judge did not err when finding that AO An presided over "at least five" wedding ceremonies[1059] and reject the Co-Lawyers' reading of the evidence—that each allegation of AO An's involvement in a wedding ceremony requires direct corroboration for that event itself. The International Judges consider that the evidence from multiple witnesses implicating AO An as presiding over several wedding ceremonies is mutually corroborative. The International Co-Investigating Judge's reliance on YOU Vann and PRAK Yut's evidence,[1060] when finding that AO An presided over wedding ceremonies in Kampong Siem District and Prey Totueng District Office, was not unreasonable.[1061] The International Judges further observe that TOY Meach and TOUCH

[1055] AO An's Appeal (D360/5/1), para. 153 and footnotes 387-391 *referring to* Closing Order (Indictment) (D360), paras 314-316. The Co-Lawyers' assertion that the International Co-Investigating Judge misrepresented SARAY Hean's evidence is dismissed. The International Judges observe that the International Co-Investigating Judge's full finding is that "[b]oth K[E] Pauk and A[O] An chaired meetings touching upon the topic of marriages and shared Pol Pot's visions of increasing the population". *See* Closing Order (Indictment) (D360), para. 314. This finding is clearly supported by SARAY Hean's evidence, which states that KE Pauk discussed marriage policy at a Sector 42 conference. SARAY Hean's account does not directly implicate AO An but is relevant because it corroborates that the CPK's marriage policy was promulgated across the Central Zone. In this case, corroboration came from KE Pauk who was AO An's direct superior. The International Co-Investigating Judge relied on SAT Pheap for AO An's involvement in the meetings.

[1056] Closing Order (Indictment) (D360), paras 314-315 *referring to* Written Record of Interview of SAT Pheap, 17 September 2015, D219/504, at ERN (EN) 01167888, 01167912 (A27-A28, A138-139) ("[AO An] spoke about marriage planning. They planned to raise new forces, to increase the population to 15 or 20 million in the next 15 or 20 years [...] this was the Asian plan, referring to POL Pot's plan [...] [b]y marrying off workers from ministerial offices and cooperatives. He specifically mentioned this point [...] [a]fter their marriage, [...] [they] had to produce children"), 01167916 (A159) ("I want to speak more about the 'forces in Asia'. Their plans were to increase the number of people aged between 15 and 20 to 20 million and to fight for and retake Prey Nokor and Khmer Surin by 2001").

[1057] Written Record of Interview of SAT Pheap, 17 September 2015, D219/504, at ERN (EN) 01167887 (A19).

[1058] *See supra* Ground 5(iii).

[1059] AO An's Appeal (D360/5/1), para. 153 and footnote 392 *referring to* Closing Order (Indictment) (D360), paras 228, 685.

[1060] *See supra* Ground 5(ii)(a) where the International Judges discussed the material inconsistencies in PRAK Yut's evidence concerning forced marriage and their finding that the International Co-Investigating Judge's reliance on PRAK Yut's evidence (as corroborated by YOU Vann) was not unreasonable.

[1061] Both YOU Vann and PRAK Yut provide first-hand testimony that AO An presided over wedding ceremonies. *See* Case 002 Transcript of 19 January 2016 (PRAK Yut), D219/702.1.95, ERN (EN) 01441062, pp. 53:5 to 53:9

Chamroeun provide detailed first-hand evidence of AO An's presiding over wedding ceremonies, including at TOUCH Chamroeun's own wedding.[1062]

542. Finally, the International Co-Investigating Judge's finding that AO An announced a policy that required married couples to consummate their marriage[1063] is supported by SAT Pheap whose evidence is that AO An stated: "after their marriage, people should love each other as married" and that they have to "produce children".[1064] Contrary to the Co-Lawyers' assertion,[1065] SAT Pheap's evidence is further corroborated by YOU Vann, who details that she heard from PRAK Yut that "[AO] An [...] announced the rule that those who had married had to sleep together."[1066] Finally, evidence that couples in Kampong Siem and Prey Chhor Districts (under AO An's authority as Sector 41 Secretary) were instructed to consummate their marriages,[1067] including by PRAK Yut,[1068] only supports the finding that AO An promulged

("And I personally acknowledge that *Ta* An participated in the wedding ceremony and I, myself, [was] also involved in the wedding ceremony where 10 couples were organized to get married"); Case 002 Transcript of 14 January 2016 (YOU Vann), D219/702.1.87, ERN (EN) 01438518, pp. 77:20 to 77:23 ("For many couples, between five to [ten] couples, *Ta* An was present. However, for a few number [...] of couples then he would let Prak Yut be presiding over the ceremony"); Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059279 (A31, A33). YOU Vann states that AO An had authority to arrange marriages on his own. *See* Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059278 (A26) ("*Ta* An had district level authority to arrange marriages on his own").

[1062] Written Record of Interview of TOY Meach, 2 September 2015, D219/582, at ERN (EN) 01179838-01179839 (A122-A129) ("It was held in the dining hall of the Logistics Office [...] *Ta* An, the Sector Committee. He organised the wedding ceremony [...] He presided over the ceremony"); Written Record of Interview of TOUCH Chamroeun, 30 July 2015, D219/435, at ERN (EN) 01142989 (A38-A40) ("*Ta* An told me to get married to my wife the next day [...] Q: Did *Ta* An attend the wedding? A39: Yes. Q: Did he preside over the wedding? A40: Yes").

[1063] AO An's Appeal (D360/1/5), paras 153-154, footnotes 387, 390-391, 393 *referring to* Closing Order (Indictment) (D360), para. 316.

[1064] Closing Order (Indictment) (D360), para. 316, footnote 839 *referring to* Written Record of Interview of SAT Pheap, 17 September 2015, D219/504, at ERN (EN) 01167912 (A139). The International Judges recall they found no error in the International Co-Investigating Judge's reliance on SAT Pheap's detailed account of AO An's presence at a meeting where he spoke of the CPK's marriage policy.

[1065] AO An's Appeal (D360/1/5), para. 153, footnote 391 *referring to* Closing Order (Indictment) (D360), para. 316.

[1066] Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059292 (A80) ("PRAK Yut told me that *Ta* An, Sector Commander, announced the rule that those who had married had to sleep together"). The International Judges recall their findings on hearsay evidence in Ground 5(v) and in reviewing the substance of the interview find no error on account of the International Co-Investigating Judge.

[1067] Closing Order (Indictment) (D360), para. 686, footnote 2360.

[1068] Written Record of Interview of NHIM Kol, 11 February 2015, D219/171, at ERN (EN) 01076952 (A44) ("If any couple did not get along with each other, they would be accused of being against *Angkar* or betraying *Angkar*. They did not say directly we had to have sex, but we all understood that they meant by that. When PRAK Yut was the chairperson of the wedding, she also said the same thing [...] [w]e all knew in advance that after marriage, we had to sleep with our partners"); Written Record of Interview of MUOK Sengly, 4 September 2015, D219/502, at ERN (EN) 01152377 (A37) ("*Yeay* Yuth and Comrades Loeun and Siem presided over the weddings. They encouraged each couple to love each other and create babies for *Angkar*. They said that during both weddings I attended").

such a policy. Contrary to the Co-Lawyers' assertions,[1069] whether or not AO An gave specific instructions to certain couples is not determinative of his responsibility.[1070]

543. The International Judges find that the Co-Lawyers fail to demonstrate that no reasonable trier of fact could have made the impugned factual findings. Accordingly, Ground 6(vii) is dismissed.

Ground 6(viii): AO An's Role in the Charged Crimes at the Crime Sites

1. Submissions

544. The Co-Lawyers allege that, given AO An's lack of authority, position and responsibility in Sector 41 and the Central Zone, his lack of conduct and presence at the alleged crime sites and his lack of knowledge or intent to commit the charged crimes, the International Co-Investigating Judge erred in finding him criminally responsible for the alleged crimes through the modes of liability charged.[1071] In the Response, the International Co-Prosecutor submits that the Co-Lawyers fail to demonstrate that no reasonable trier of fact could have reached the relevant findings because their argument is based on allegations of error that AO An has failed to prove.[1072]

2. Discussion

545. The International Judges observe that AO An's argument is premised on purported errors in the International Co-Investigating Judge's findings regarding AO An's position, authority and conduct in the Central Zone and Sector 41, without alleging new specific factual errors. The International Judges have already held, *inter alia*, that the International Co-Investigating Judge did not err in finding that AO An was the Deputy Secretary of the Central

---

[1069] AO An's Appeal (D360/1/5), para. 154, footnotes 394-395.
[1070] The Co-Lawyers allege that none of the witnesses cited by the International Co-Investigating Judge state that AO An gave specific instructions to consummate marriage. However, the International Judges have found no error in the International Co-Investigating Judge's finding that AO An promulgated a policy that required married couples to consummate their marriage and consider that what is relevant here is that this policy was implemented through specific instructions (including by AO An's direct subordinate PRAK Yut) in the areas under AO An's authority.
[1071] AO An's Appeal (D360/5/1), para. 155; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625286, pp. 27:12 to 27:19.
[1072] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 84.

Zone and the Secretary of Sector 41 and that he exercised his authority in the Central Zone and Sector 41.[1073] Accordingly, Ground 6(viii) is dismissed.

G. Ground 7: Erroneous Finding that Charged Crimes Were of Sufficient Gravity

1. Submissions

546. The Co-Lawyers argue the International Co-Investigating Judge erred in finding that the gravity of the charged crimes is sufficient for the Court to establish personal jurisdiction over AO An.[1074] First, the Co-Lawyers submit that the majority of the evidence concerns AO An's responsibility and role in crimes in Sector 41, which is "a small geographic area" in comparison to areas controlled by other cadres, such as KE Pauk and *Ta* Mok.[1075] Second, the Co-Lawyers contend that the method of calculating victim numbers attributable to AO An (in Sectors 41, 42 and 43) is based on "guesswork"; the resulting number of victims fail to satisfy the requisite standard of proof.[1076]

547. Third, concerning the charged modes of liability, the Co-Lawyers argue that the International Co-Investigating Judge failed to apply the "legal requirements to hold AO An liable for genocide in Sectors 42 and 43 through JCE."[1077] The Co-Lawyers submit that it must be shown that "the crime can be imputed to at least one JCE member, and that this member, when using a physical perpetrator, acted to further the common purpose."[1078] The Co-Lawyers aver that there is "no attempt" to link the crimes to JCE members.[1079] The Co-Lawyers also allege that the International Co-Investigating Judge purportedly failed to provide evidence that AO An is liable for genocide in Sectors 42 and 43 through planning, ordering, instigating or superior responsibility.[1080] Consequently, the International Co-Investigating Judge erred by including the deaths of Cham people in Sectors 42 and 43 in the total number of genocide

[1073] *See supra* Ground 6(iv) and 6(v).
[1074] AO An's Appeal (D360/5/1), para. 157 *referring to* Closing Order (Indictment) (D360), paras 706-708.
[1075] AO An's Appeal (D360/5/1), para. 158; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625291, pp. 32:15 to 32:19.
[1076] AO An's Appeal (D360/5/1), para. 159.
[1077] AO An's Appeal (D360/5/1), para. 162.
[1078] AO An's Appeal (D360/5/1), para. 162.
[1079] AO An's Appeal (D360/5/1), para. 162.
[1080] AO An's Appeal (D360/5/1), para. 161.

victims alleged and in finding sufficient gravity to determine personal jurisdiction over AO An.[1081]

548. In the Response, the International Co-Prosecutor submits that AO An fails to demonstrate that the charged crimes are not sufficiently grave to subject him to the ECCC's personal jurisdiction.[1082] The International Co-Prosecutor highlights that the size of the geographical area controlled by an individual is not determinative of his or her level of responsibility—indeed, Duch was among those most responsible even though S-21 was vastly smaller than Sector 41; what is relevant is that the charged crimes in which AO An allegedly participated amount to "the most serious criminal accusations known to humankind".[1083] The International Co-Prosecutor further notes that the International Co-Investigating Judge's method of calculating victim numbers was conservative, favouring lower numbers in case of doubt and, regarding Cham victims of genocide in Sectors 42 and 43, contends that the only reasonable inference is that the direct perpetrators committed genocide pursuant to orders from KE Pauk and other CPK cadres, all members of the JCE.[1084]

549. In the Reply, the Co-Lawyers submit that the International Co-Prosecutor fails to substantiate his arguments or engage the Co-Lawyers' assertions and, instead, "cherry picks" their arguments.[1085] The Co-Lawyers assert that the International Co-Prosecutor fails to dispute the fact that the evidence provided by the International Co-Investigating Judge is almost exclusively from Sector 41 and that insufficient evidence exists to support the calculations of victim numbers in the Central Zone or Sector 41.[1086] The Co-Lawyers allege that the International Co-Prosecutor incorrectly claims, contrary to ECCC jurisprudence, that "factors

---

[1081] AO An's Appeal (D360/5/1), paras 160-163; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625291-01625292, pp. 32:25 to 33:5.
[1082] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 89; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625340, pp. 81:5 to 81:12.
[1083] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 90 *referring to* AO An's Appeal (D360/5/1), para. 227; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625340-01625341, pp. 81:21 to 82:1.
[1084] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 90 *referring to* Closing Order (Indictment) (D360) paras 180, 184, 195, 607-615, 623-628; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625133-01625134, pp. 69:15 to 70:5, 01625136, pp. 72:8 to 72:22, 01625137, pp. 73:18 to 73:25; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625516-01625517, pp. 24:21 to 25:21.
[1085] AO An's Reply (D360/11), para. 44.
[1086] AO An's Reply (D360/11), paras 44-45.

such as geographical scope and victim numbers are less important than the gravity of the crimes charged and that genocide in Sectors 42 and 43 can be inferred and attributed to AO An".[1087]

2. Discussion

550. The International Judges hold that it was not unreasonable for the International Co-Investigating Judge to determine that the charged crimes were sufficiently grave to conclude that AO An falls within the personal jurisdiction of the ECCC.[1088]

551. First, concerning the alleged "small geographic area",[1089] including in comparison to areas controlled by KE Pauk and *Ta* Mok, the International Judges are not persuaded that a small geographic area of criminality in itself or in comparison to other alleged offenders somehow must "support"[1090] the determination of most responsible. The International Judges affirm that even where crimes transpire within a "geographically limited" area, serious offences may be considered in the context of the gravity.[1091] The International Judges recall that the considerations which may be properly assessed in determining the gravity of alleged crimes have been well-delineated and implicate factors such as, *inter alia*, the nature and scale of the alleged or charged crimes, their impact on the victims, the number of victims, the geographic and temporal scope and manner in which they were allegedly committed, as well as the number of separate incidents.[1092] The geographic scope of the crime is one of the multiple factors, but not a determinative one.

552. In the present case, the International Judges remark that the International Co-Investigating Judge evaluated the nature of the serious offences and scrutinised relevant factors

---

[1087] AO An's Reply (D360/11), paras 44-45.
[1088] The International Judges recall that finding personal jurisdiction involves, as enshrined under Article 1 and Article 2*new* of the ECCC Law, an identification of "senior leaders of Democratic Kampuchea and those who were most responsible"— *See, e.g.*, Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321 (describing this as entailing an assessment of both the gravity of the crimes alleged or charged and the level of responsibility of the suspect. This assessment must be done both from a quantitative and qualitative perspective within a case-by-case assessment which takes into account the context and the personal circumstances of the suspect.).
[1089] AO An's Appeal (D360/5/1), para. 158.
[1090] AO An's Appeal (D360/5/1), para. 158.
[1091] *See* Closing Order (Indictment) (D360), paras 706-708 (where the International Co-Investigating Judge considered the nature and impact of AO An's crimes against the Cham population); *See also, e.g.*, *Kunarac et al.* Trial Judgement (ICTY), para. 858 (where that Trial Chamber considered the small geographic area of *Foča* and found no error in considering this criminal basis by holding that while none of the Accused were commanders and "their crimes were geographically relatively limited", the serious offences could be considered "in the context of the consideration of the gravity of the offences").
[1092] Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 327.

in assessing gravity: he determined *inter alia* that: "[i]n addition to A[O] An's elevated formal position, the gravity of his actions and the severity of their impact, in particular on the Cham community [...] justify the conclusion that he was one of the most responsible".[1093] This included considering the geographic scope of AO An's responsibility and his "defining role in orchestrating and implementing the annihilation of the Cham in the Central Zone across Sector 41 in particular".[1094] Accordingly, the International Judges find that the International Co-Investigating Judge did not err in finding sufficient gravity within personal jurisdiction: even with a purportedly "small geographic area".

553. Second, notwithstanding the unnecessary and improper "conservative" calculation of victim numbers,[1095] the International Judges are not persuaded by the Co-Lawyers' contention that the International Co-Investigating Judge engaged in an approach "based on guesswork"[1096] or that he failed to provide sufficient evidence of alleged victim numbers for "the charged crimes in Sector 41 and the Central Zone."[1097]

554. The International Judges find it clear that the number of victims alleged, 17,115 Cham,[1098] are rooted in and derived from the evidence—not any purported "guesswork".[1099] The International Judges consider particularly the Closing Order (Indictment), Annex IV – Cham Victims: this detailed chart provided by the International Co-Investigating Judge delineates the evidentiary source from which he based the victim numbers, including, for example, the Sector (41, 42 or 43), district, village and commune alleged, the identity of the witness, the precise question posed and the exact response concerning the explicit number of Cham victims described.[1100]

555. The International Judges further recall that there is no mathematical threshold for

---

[1093] Closing Order (Indictment) (D360), para. 706.
[1094] Closing Order (Indictment) (D360), para. 708 (Further, the International Judges find that the International Co-Investigating Judge did not err in his gravity determination by considering and finding that the "eradication of the Cham in A[O] An's sphere of influence after his installation in the Central Zone was relentless in its pace, all-encompassing in its reach, coldly methodological and merciless in its operation").
[1095] *See supra* para. 86.
[1096] AO An's Appeal (D360/5/1), para. 159.
[1097] AO An's Appeal (D360/5/1), para. 159.
[1098] Closing Order (Indictment) (D360), para. 814.
[1099] See, *inter alia*, Case 004/2, Annex IV to Closing Order (Indictment), 16 August 2018, notified in English on 16 August 2018 and in Khmer on 31 October 2018, D360.4 ("Annex IV to Closing Order (Indictment) (D360.4)"); *see also* Closing Order (Indictment) (D360), para. 138 (stating, for example, "[i]n respect of all crime sites or scenarios, I have conservatively adopted the minimum number of victims that can be estimated *on the evidence* [...].") (emphasis added).
[1100] Annex IV to Closing Order (Indictment) (D360.4).

casualties which evidence must surpass in assessing the gravity of the crimes for determining the personal jurisdiction.[1101] Consequently, the Co-Lawyers' allegation that "there is insufficient evidence to support the [International Co-Investigating Judge's] calculations of victim numbers"[1102] must be dismissed.

556. Third, the International Judges find that the International Co-Investigating Judge did not fail to satisfy the "legal requirements" to "impute the genocidal acts" to AO An in assessing the gravity of the crimes for the purpose of personal jurisdiction.

557. The International Judges initially remark that the Closing Order (Indictment) charges AO An for genocide against the Cham of Kampong Cham Province through JCE and, in the alternative, through planning, ordering or instigating; and in the further alternative, through superior responsibility.[1103] The International Judges further find that the International Co-Investigating Judge did not err in finding there is sufficient evidence to show that AO An is liable for the genocide against the Cham throughout the Central Zone via JCE.

558. The International Judges hold that the International Co-Investigating Judge sufficiently demonstrated a constellation of evidence bearing on AO An's connection to the alleged criminality in Sectors 41, 42 and 43, including, *inter alia*: that AO An formed a part of the common purpose of the JCE to kill Cham people;[1104] and that the evidence demonstrates that

---

[1101] *See, e.g.*, Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), Opinion of Judges BAIK and BEAUVALLET, para. 321; *see also, e.g.*, ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR98bis.1, Judgement, Appeals Chamber, 11 July 2013 ("*Karadžić* 98bis Appeal Judgment (ICTY)"), para. 23 (that Appeals Chamber observed that the *Karadžić* Trial Chamber explicitly (and properly) considered that "the determination of whether there is evidence capable of supporting a conviction for genocide does *not* involve a numerical assessment of the number of people killed and does not have a numeric threshold").

[1102] AO An's Reply (D360/11), para. 45.

[1103] The Co-Lawyers' contentions concerning superior responsibility will not be considered further because the International Co-Investigating Judge did not allege superior responsibility as to Sectors 42 and 43. (*See* Closing Order (Indictment) (D360), para. 849 ("[t]here is insufficient evidence that A[O] An had effective control over the perpetrators of genocide in Sector 42 and Sector 43. A[O] An is therefore not liable as a superior for genocide in those sectors"); moreover, the International Judges note that the International Co-Investigating Judge alleged only JCE I, not JCE II or JCE III liability (*see* Closing Order (Indictment) (D360), p. 409).

[1104] *See, e.g.*, Closing Order (Indictment) (D360), paras 94-98 (AO An shared intent for genocide within the common purpose, including the specific intent to destroy the Cham of Kampong Cham Province as a group); Closing Order (Indictment) (D360), para. 195 (beginning approximately late 1976 or early 1977 and lasting until at least 6 January 1979, KE Pauk, AO An and other CPK cadres shared the common purpose of implementing the targeting of specific groups, including the Cham in the Central Zone of DK); *see also, e.g.*, Written Record of Interview of PRAK Yut, 28 May 2013, D117/70, at ERN (EN) 01056217 (A23) ("Q: Do you recall the names of the cadres who were assigned to take over the sectors and districts in the Central Zone? A23: [...] I only recall the cadres in Sector 41. Grandfather An was the Secretary"); Written Record of Interview of PRAK Yut, 19 June 2013, D117/71, at ERN (EN) 01056224 (A19) ("KE Pauk appointed Grandfather An to take over Sector 41"); *see also* Written Record of Interview of PICH Cheum, 28 February 2013, D117/18, at ERN (EN) 00903203 (A1); Written Record of Interview of YOU Vann, 8 January 2015, D219/138, at ERN (EN) 01059288 (A64).

the genocidal acts in Sectors 42 and 43 were directly aligned with this common purpose,[1105] forming an overall pattern of ethnic targeting within the Central Zone at the relevant time. Sector 42 and 43 Secretaries were also identified as JCE members and implemented the genocidal policy to "smash" the Cham, as AO An did in Sector 41.[1106] For example, concerning the purge in Sector 42, one witness who survived, SMANN Kas, described the systematic arrests and killings and how the orders to kill came from the Sector 42 district level.[1107] Accordingly, the mosaic of evidence sufficiently demonstrates—through circumstantial and/or corroborative evidence within the totality—that the genocide in Sectors 42 and 43 is sufficiently connected to JCE members controlling those regions as a part of an overarching common purpose reinforced by AO An's significant contribution.[1108] The International Judges find that the genocide against the Cham in the Central Zone through JCE is properly characterised in the Closing Order (Indictment) and sufficiently demonstrated through the evidence advanced by the International Co-Investigating Judge.[1109] The International Judges are not persuaded that any error transpired in considering the victims of Sectors 42 and 43.

559. The International Judges conclude that the International Co-Investigating Judge did not

---

[1105] *See, e.g.*, Closing Order (Indictment) (D360), para. 305 (describing AO An's authority to comprehensively and methodically arrest and execute persons, including the Cham, and how the "purge was conducted in a similar manner in Sector 42 and 43"); *see also, inter alia*, Closing Order (Indictment) (D360), paras 623-629 (The International Co-Investigating Judge, holding that the pattern of evidence across areas, including Sector 41 (Kampong Siem, Kang Meas, Prey Chhor Districts) and Sector 42 (Stueng Trang and Baray, Chamkar Leu Districts) and Sector 43 (Stantuk District), "establishes that the arrests, killings and disappearances of the Cham people followed several consistent patterns throughout the Central Zone, demonstrating that there was a coordinated plan to kill the Cham on a massive scale and that they were targeted not for any wrongdoing but because of their ethnic and religious affiliation. There were at least two organized, largescale operations to kill Cham [...] after the arrival of the Southwest Zone cadres: first, in 1977, the widespread killing of Cham extracted from villages and work units throughout the Central Zone and predominantly in Kampong Cham Province; and, second, in 1978, the killing of large numbers of Cham transferred from the East Zone to the Central Zone"); *see also, inter alia*, Closing Order (Indictment) (D360), para. 261 (finding that AO An participated in zone-level meetings to plan the purge of Cham throughout the Central Zone—Sectors 41, 42 and 43); Closing Order (Indictment) (D360), para. 607 (The top CPK leadership, by early 1977, concluded that "the Cham were beyond re-education, and therefore must be totally exterminated, as such").

[1106] *See, e.g.*, Closing Order (Indictment) (D360), paras 252-255 (describing AO An's appointment to Deputy Secretary and the progression of leadership in Sectors 42 and 43, including, for example, that "other members of the Central Zone Permanent Committee included Oeun who was in charge of Sector 42 and Chan who was in charge of Sector 43"); *see also, e.g.*, Closing Order (Indictment) (D360), para. 305; *see, e.g.*, Closing Order (Indictment) (D360), para. 614 (finding that CPK statements demonstrated a policy to eliminate the Cham and that after the arrival of AO An and Southwest Zone cadres, incidents of arrest and killings of Cham were targeted in at least 10 districts of the Central Zone (including five districts in Sector 41, three districts in Sector 42 and two districts in Sector 43)).

[1107] *See, e.g.*, Closing Order (Indictment) (D360), para. 670 *citing* Written Record of Interview of SMANN Kas, 24 May 2016, D219/767, at ERN (EN) 01309816 (A51-A52).

[1108] AO An's Appeal (D360/5/1), para. 162.

[1109] Given that the threshold question of personal jurisdiction advanced by the Co-Lawyers at this juncture is satisfied with JCE, which is the primary mode of liability charged, the International Judges will not further assess the alternative planning, ordering or instigating as to AO An's connection to genocide in Sectors 42 and 43.

err in finding that the charged crimes were sufficiently grave in the context of the personal jurisdiction of the ECCC and dismiss Ground 7.

H. Ground 8: Application of Customary International Law in Violation of the Principle of Legality

1. Submissions

560. The Co-Lawyers submit that the International Co-Investigating Judge incorrectly applied customary international law because he overrelied on *ad hoc* tribunals—"flawed sources of [customary international law]"—and he failed to "demonstrate widespread and consistent practice of states" that alleged conduct was prohibited during 1975-1979.[1110] Purportedly, the International Co-Investigating Judge passively adopted "[customary international law] assertions espoused in the judicial decisions of the *ad hoc* tribunals" and cited "ECCC jurisprudence, which has, in turn, overly relied on *ad hoc* tribunals."[1111] The Co-Lawyers aver that *ad hoc* tribunals are unreliable because: (i) those tribunals did not spring from multilateral State negotiations and did not represent an international consensus on customary international law; (ii) *ad hoc* tribunals were founded to address specific conflicts (after 1975-1979); (iii) *ad hoc* tribunals maintained the ability to depart from customary international law; (iv) *ad hoc* tribunals took an *opinio juris* approach (diminishing the need for state practice); and (v) the *ad hoc* judiciary creatively filled in gaps in the law because the legislative structures were lacking.[1112]

561. Further, the Co-Lawyers contend that the International Co-Investigating Judge "insufficiently considers" ICC law and that the Rome Statute was developed by the international community and adopted by "many states, including Cambodia".[1113] The Co-Lawyers aver that the errors of the International Co-Investigating Judge on customary

[1110] AO An's Appeal (D360/5/1), paras 166-168; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625294-01625296, pp. 35:24 to 37:11.
[1111] AO An's Appeal (D360/5/1), para. 167; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625296, pp. 37:12 to 37:17.
[1112] AO An's Appeal (D360/5/1), para. 168; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625296-01625297, pp. 37:19 to 38:16.
[1113] AO An's Appeal (D360/5/1), para. 169; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625297-01625299, pp. 38:18 to 40:6.

international law "must be viewed cumulatively as an overall failure to respect the principle of legality".[1114]

562. In the Response, the International Co-Prosecutor contends that Ground 8 should be summarily dismissed as the Co-Lawyers make generalised complaints about how the International Co-Investigating Judge analysed customary international law without identifying any discernible legal errors or prejudice or impact on any particular holding.[1115] The International Co-Prosecutor argues that the Rome Statute does not necessarily reflect customary international law[1116] and that *ad hoc* jurisprudence relied on laws following World War II.[1117]

563. In their Reply, the Co-Lawyers address Grounds 8, 9, 11, 12(i) and 15(i)[1118] together and so too will this section summarise below here.[1119]

564. The Co-Lawyers allege that the International Co-Prosecutor failed to refute their contention that the International Co-Investigating Judge erred by disregarding his duty to prove the existence of customary international law in 1975-1979;[1120] instead, the Co-Lawyers maintain that the International Co-Investigating Judge undertook a flawed approach to interpreting and applying customary international law.[1121] The Co-Lawyers further contest the International Co-Prosecutor's position which purportedly reverses the burden onto the Co-Lawyers to demonstrate the existence of customary international law to the contrary, when the appropriate burden is limited to showing a legal error.[1122] The Co-Lawyers aver that—even if ICC law has not reached undisputed customary international law status—"its mere existence and divergence from *ad hoc* tribunal jurisprudence [...] calls into question" the validity of the

[1114] AO An's Appeal (D360/5/1), paras 167-170; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625294-01625296, pp. 35:24 to 37:4.
[1115] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 92.
[1116] Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625344-01625345, pp. 85:18 to 86:15.
[1117] Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625345-01625346, pp. 86:2 to 87:5.
[1118] AO An's Reply (D360/11), paras 46-52.
[1119] This concerns admissible Grounds 8, 9, 11, 12(i), 15(i).
[1120] AO An's Reply (D360/11), para. 46.
[1121] AO An's Reply (D360/11), para. 48; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625299, pp. 40:8 to 40:11.
[1122] AO An's Reply (D360/11), paras 47, 49 *referring to* International Co-Prosecutor's Response (D360/9), paras 93, 96, 100-101, 105; AO An's Reply (D360/11), paras 50, 52 *referring to* International Co-Prosecutor's Response (D360/9), paras 93, 96, 101, 105. Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625299-01625300, pp. 40:12 to 41:7.

International Co-Investigating Judge's customary international law assertions which rely primarily on *ad hoc* jurisprudence.[1123]

565. Moreover, the Co-Lawyers purport that the International Co-Prosecutor erroneously criticises the Co-Lawyers' reliance on ICC law as evidence of customary international law and "ignores" *lex mitior*.[1124] The Co-Lawyers submit that the International Co-Investigating Judge should have considered recent developments in law—particularly ICC law—to assess whether such developments represent customary international law and favour the Accused.[1125] The Co-Lawyers provide examples of ICC law which they argue constitute customary international law and/or are more favourable to the Accused in Grounds 9, 11, 12(i).[1126]

2. Discussion

566. The International Judges dismiss the arguments concerning the International Co-Investigating Judge's "flawed application" of law, purported overreliance on *ad hoc* tribunals or insufficient consideration of ICC law within customary international law because the Co-Lawyers fail to provide detailed and supported argumentation in this Ground.[1127] Beyond this, the International Judges find no merit in the argument concerning *lex mitior*—that the International Co-Investigating Judge should have considered (or applied) recent developments in ICC laws as representative of changing customary international law, favourable to the Accused.[1128]

567. Concerning the preliminary matter of the insufficiency of arguments, the Pre-Trial Chamber previously held that arguments without the potential to reverse or revise the impugned decision may be dismissed immediately.[1129] It is incumbent upon a party to provide precise references to transcript pages or paragraphs in the decision being challenged; the International Judges recall that the Pre-Trial Chamber "will not give detailed consideration to submissions

---

[1123] AO An's Reply (D360/11), para. 52; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625298, pp. 39:16 to 39:20.
[1124] AO An's Reply (D360/11), paras 50-51.
[1125] AO An's Reply (D360/11), para. 51; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625298-01625299, pp. 39:20 to 40:5.
[1126] AO An's Reply (D360/11), para. 51, footnote 108.
[1127] AO An's Appeal (D360/5/1), paras 166-169 (The International Judges note that the finding of a meritless argument in Ground 8 does not impact the determinations on separate Grounds, where more specific arguments with supported citations may be properly considered).
[1128] AO An's Appeal (D360/5/1), paras 166-169; AO An's Reply (D360/11), paras 51-52.
[1129] Case 002 Decision on Civil Party Applications (D250/3/2/1/5), para. 22 *referring to Blaškić* Appeal Judgment (ICTY), para. 13; *Rutaganda* Appeal Judgment (ICTR), para. 18.

which are obscure, contradictory, or vague, or if they suffer from other formal and obvious insufficiencies."[1130]

568. Here, the Co-Lawyers refer to paragraphs 63 to 120 of the Closing Order (Indictment) in purportedly demonstrating the International Co-Investigating Judge's flawed application of customary international law and his "overreliance on the jurisprudence of the [*ad hoc*] tribunals".[1131] Absent detailed identification of issues in the impugned decision, the International Judges hold that referencing 57 paragraphs is insufficiently precise and, accordingly, dismiss these arguments.[1132]

569. Turning to ICC developments which purportedly represent customary international law that is more favourable to the Accused[1133] and which the International Co-Investigating Judge should have considered under *lex mitior*,[1134] this legal issue (implicating various Grounds) is addressed here concerning all pertinent arguments for clarity and expediency.[1135]

[1130] Case 002 Decision on Civil Party Applications (D250/3/2/1/5), para. 22 *referring to Blaškić* Appeal Judgment (ICTY), para. 13; *Rutaganda* Appeal Judgment (ICTR), para. 19; ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 43. *See also* Case 002 Decision on Civil Party Applications (D250/3/2/1/5), para. 43 (finding a ground of appeal to be deficient for lacking the potential to cause the impugned decision to be reversed or revised where "it merely amount[ed] to an assertion without articulating a specific error or without referring to a specific finding of the [...] Impugned Order" and as such dismissing it without considering it on the merits).

[1131] AO An's Appeal (D360/5/1), footnotes 414, 419, 420.

[1132] The International Judges note that the Co-Lawyers attempt to support the contention that the International Co-Investigating Judge over-relied on *ad hoc* jurisprudence with a citation to paragraph 63 of the Closing Order (Indictment) (*see* AO An's Appeal (D360/5/1), para. 167, footnotes 417, 420). However, this source paragraph from the Closing Order (Indictment), upon examination, supports rather than undermines the International Co-Investigating Judge's appropriate approach in considering customary international law. *See* the surrounding paragraph, for example, stating that "the sources of applicable international law during the relevant period are international conventions, customary international law and general principles of law recognized by the community of nations" and "[the ECCC] chambers are obliged to determine that such holdings were applicable during the temporal jurisdiction of the ECCC and were foreseeable and accessible to the charged persons at the time relevant to the charges". Closing Order (Indictment) (D360), para. 63.

[1133] AO An's Reply (D360/11), paras 50-51; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625298-01625299, pp. 39:20 to 40:5.

[1134] AO An's Reply (D360/11), paras 50-51; AO An's Appeal (D360/5/1), para. 166 ("The [International Co-Investigating Judge's flawed application of [customary international law] stems from his incorrect method for determining customary international law"); AO An's Appeal (D360/5/1), para. 167 ("failing to consider other sources of [customary international law]"); Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625298-01625299, pp. 39:20 to 40:5 (Mr. Göran SLUITER: "And we should also bear in mind, your Honours, the principle of leniency, the principle, as they say in Latin, of lex mitior. If the law has developed since 1979 and is more favourable to the defendants, then the more lenient law must be applied to the defendants. Therefore, for these reasons, the law of the international criminal court should have been given due consideration by the International Co-Investigating Judge. And the Defence provides many examples of sections of the law of the [I]nternational [C]riminal [C]ourt[] which the Judge does not consider and that constitute customary international law or are sources of law that are more favourable to the accused").

[1135] *See, e.g., inter alia*, AO An's Appeal (D360/5/1), para. 167 (Ground 8: "by failing to consider other sources of [customary international law]"), para. 169 (Ground 8: "the [International Co-Investigating Judge] insufficiently considers ICC law"), para. 174 (Ground 9: in reference to co-perpetration, the Co-Lawyers argue that "the

570. The International Judges consider that the Rome Statute and ICC jurisprudence are not binding at the ECCC.[1136] The Chamber and the Co-Investigating Judges are bound by the rules and principles enshrined in the legal framework of the ECCC.[1137] The Rome Statute and ICC jurisprudence do not reflect customary international law as a whole and ICC laws cannot be applied to the ECCC absent judicial interpretation.[1138] While customary international law holds important significance, the International Judges at this time are not convinced that ICC laws or developments "represent" customary international law in a manner which the International Co-Investigating Judge is compelled to consider and adopt.[1139] As ICC laws are not binding, the International Judges must find that the International Co-Investigating Judge did not err in failing to apply more lenient developments derived from ICC laws—even those more favourable to the Accused.[1140] Accordingly, the International Judges dismiss this line of

---

[International Co-Investigating Judge] must apply the law which favours the accused."), para. 179 (Ground 11: The Rome Statute also contains no reference to planning or preparing as a mode of liability for war crimes, [crimes against humanity], or genocide").

[1136] Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998), *entered into force* 1 July 2002 ("Rome Statute"). The only Rome Statute provision that is binding on the ECCC is Article 7 pertaining to crimes against humanity as it is directly provided for in the ECCC Agreement, Art. 9. *See also* Antonio CASSESE, International Criminal Law (Oxford University Press, 3rd Edition, 2013) ("CASSESE, International Criminal Law (2013)"), p. 10 (stating summarily, that the Rome Statute embraces rules exclusively applicable to the ICC and that the Rome Statute does not apply to other international criminal courts (such as the ECCC). The Rome Statute does not constitute any sort of international criminal code).

[1137] The ECCC is an internationalised court, governed by its own Statute, laws and principles, including the ECCC Agreement, the ECCC Law, the Internal Rules and Cambodian National Laws applicable from 17 April 1975 to 6 January 1979. Case 002, Decision on Appeal of Co-Lawyers for Civil Parties against Order on Civil Parties' Request for Investigative Actions Concerning all Properties Owned by the Charged Persons, 4 August 2010, D193/5/5 ("Case 002 Decision on Appeal of Co-Lawyers for Civil Parties (D193/5/5)"), para. 25. *See also* ECCC Agreement; Internal Rules; ECCC Law, Article 33*new*. *See* further Case 001 Decision on Closing Order Appeal (D99/3/42), paras 46-47; Case 002, Decision on Khieu Samphan's Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C/26/5/26, para. 79.

[1138] *See, e.g.*, ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, Appeals Chamber, 23 January 2014 ("*Šainović et al.* Appeal Judgment (ICTY)"), para. 1648 ("Moreover, while the ICC Statute may be in many areas regarded as indicative of customary rules, in some areas it creates new law or modifies existing law"); Case 002 Decision on Appeal of Co-Lawyers for Civil Parties (D193/5/5), para. 25. *See also* CASSESE, International Criminal Law (2013), pp. 10-11.

[1139] *Contra* AO An's Reply (D360/11), para. 51; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625298-01625299, pp. 39:20 to 40:5. *See also* CASSESE, International Criminal Law (2013), pp. 10-11, (stating summarily that some Rome Statute provisions may codify customary international law; others may lay down a rule that chooses between conflicting interpretations; and, others instead go beyond what is prescribed by customary international law).

[1140] Case 001 Appeal Judgment (F28), paras 346-348 (The Supreme Court Chamber—in assessing the conflict between Article 39 of the ECCC Law (allowing imprisonment of more than 30 years) and a more favourable Article 46 of the 2009 Cambodian Criminal Code (precluding imprisonment of more than 30 years)—held that this situation did not qualify as an issue implicating *lex mitior* because the more favourable Cambodian Criminal code "[did] not bind the ECCC"). *See also* ICTY, *Prosecutor v. Nikolić*, IT-94-2-A, Judgment on Sentencing Appeal, Appeals Chamber, 4 February 2005, paras 80-81 (stating within that "The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide."); ICTY, *Prosecutor v. Deronjić, IT-02-61-A,* Judgment on Sentencing Appeal, Appeals Chamber, 20 July 2005, para. 97 (concurring that an "inherent element of [the] principle [of *lex mitior* is] that the relevant law must be binding upon the court."); ICTY, *Prosecutor v. Stanisić*

reasoning entirely.[1141]

I. Ground 9: Inapplicability of JCE Mode of Liability at the ECCC

1. Submissions

571. The Co-Lawyers contend that the International Co-Investigating Judge erred in relying on JCE because it did not exist as a mode of liability under customary international law or Cambodian law during 1975-1979.[1142] They assert that JCE is based on a common law doctrine and was judicially created to address the unique circumstances of the ICTY.[1143] The Co-Lawyers contend that the authorities relied on to justify the creation of JCE fail to satisfy the International Court of Justice's ("ICJ") requirements for customary international law.[1144]

572. Further, the Co-Lawyers assert that the International Co-Investigating Judge ignored "compelling evidence of widespread and consistent" state practice that JCE is not customary international law, notably the failure of the international community to recognise JCE in the Rome Statute.[1145] Moreover, the doctrine of co-perpetration in the Rome Statute more closely aligns with the object and purpose of the ECCC given its higher threshold for responsibility—involving the element of essential contribution ("control over the crime theory").[1146] The Co-Lawyers submit that whether JCE or the ICC's co-perpetration is more representative of customary international law is unsettled and, thus, the International Co-Investigating Judge

---

and Simatović, IT-03-69-A, Judgment, Appeals Chamber, 9 December 2015, para. 128 (holding that *lex mitior* is a principle which "applies to situations where there is a change in the concerned applicable law [...]").

[1141] *See* AO An's Appeal (D360/5/1), para. 169 (the allegation that the International Co-Investigating Judge "insufficiently considers ICC law" (Ground 8)). *See also* AO An's Appeal (D360/5/1), para. 173 (the Co-Lawyers alleging that the International Co-Investigating Judge ignored "the ICC's doctrine of co-perpetration" as an alternative mode of liability—including the higher threshold of essential contribution (Ground 9)); AO An's Appeal (D360/5/1), para. 179 (where the Co-Lawyers allege that Planning did not exist as a mode of liability, as is evidenced (as one example) by the Rome Statute containing "no reference to planning or preparing as a mode of liability" (Ground 11)).

[1142] AO An's Appeal (D360/5/1), para. 171; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625303, pp. 44:12 to 44:21.

[1143] AO An's Appeal (D360/5/1), para. 172; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625303, pp. 44:22 to 44:24.

[1144] AO An's Appeal (D360/5/1), para. 172 *referring to North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, Judgment, I.C.J. Reports 1969 (February 20), p. 3, para. 77. Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625303-01625304, pp. 44:24 to 45:4.

[1145] AO An's Appeal (D360/5/1), para. 173; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625304, pp. 45:6 to 45:19.

[1146] AO An's Appeal (D360/5/1), para. 173; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625304, pp. 45:20 to 45:24.

erred in applying JCE and failing to implement the ICC law which favours the Accused.[1147]

573. The International Co-Prosecutor responds that the Co-Lawyers fail to show that the International Co-Investigating Judge erred in following the Pre-Trial, Trial and Supreme Court Chambers of the ECCC, all of which held that JCE I applies at this Court.[1148] The Co-Lawyers fail to establish that the doctrine of co-perpetration in the Rome Statute formed a part of customary international law from 1975 to 1979.[1149]

574. In their Reply, the Co-Lawyers address Ground 9 in conjunction with Grounds 8, 11, 12(i) and 15(i)[1150]— a full summary of their Reply appears in Ground 8 to avoid redundancy.[1151]

2. Discussion

575. The International Judges find that the International Co-Investigating Judge did not err in applying JCE because: (i) JCE existed in customary international law by 1975 as evidenced by state practice and *opinio juris* analysed by multiple Chambers of the ECCC in accordance with the ICJ's customary international law requirements; and (ii) the International Co-Investigating Judge was not required to adopt co-perpetration as an alternative mode of liability because the Rome Statute is not binding on the ECCC and its provisions regarding co-perpetration do not reflect customary international law.

576. First, the International Judges affirm that JCE I as alleged in the Closing Order (Indictment) existed under customary international law by 1975.[1152] As the underlying legal

---

[1147] AO An's Appeal (D360/5/1), para. 174; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625305, pp. 46:1 to 46:8.
[1148] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 93.
[1149] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 93.
[1150] AO An's Reply (D360/11), paras 46-52.
[1151] *See* paras 563-565 (Ground 8, Submissions).
[1152] Case 002 JCE Decision (D97/15/9), paras 54-84 (The Pre-Trial Chamber upheld the existence of JCE I and II as a mode of liability, analysing relevant post-World War II jurisprudence and legal instruments such as Article 6 of the Nuremberg Charter and Control Council Law No. 10. The Pre-Trial Chamber held that with respect to the extended form of JCE (JCE III) the authorities relied upon in *Tadić* did not "constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law."); Case 002/1 Appeal Judgment (F36), paras 775-810 (While not adopting the same particular framework, the Supreme Court Chamber similarly affirmed the existence of JCE I and II (rejecting JCE III) in customary international law at the time relevant to the charges in affirming that the essence of the post-World War case law is that "individual criminal liability may also arise in circumstances where an individual makes a contribution to the implementation of the common criminal purpose, even if that contribution does not amount to the *actus reus* of the crime and is removed from the commission of the crime itself" and by considering that "although the jurisprudence [...] may not always have used consistent terminology, it is sufficient to establish that accused were held criminally liable for crimes committed in the course of the implementation of a common purpose to which they had made some kind of contribution beyond being a bystander"); Case 002, Case 002/01 Judgement, 7 August 2014, E313 ("Case 002/1 Trial Judgment (E313)"),

concepts of JCE trace back to the Nuremberg-era documents and Judgments, [1153] the International Judges dismiss the assertions that JCE was "judicially created" at the ICTY to address "the unique circumstances facing the Tribunal."[1154] Instead, the International Judges uphold the detailed and extensive analysis of customary international law by multiple Chambers of the ECCC and reaffirm the finding that JCE is applicable at the ECCC in the instant case.[1155]

577. The International Judges recall that in determining the state of customary international law in relation to the existence of a mode of liability "a court shall assess the existence of "common, consistent and concordant" state practice, [and] *opinio juris*".[1156] The International Judges find that this requirement is met and contrary to the allegation of the Co-Lawyers, the International Judges are not convinced that the analysis was "too limited and insignificant" to satisfy requirements for customary international law.[1157]

578. The International Judges consider that in previous judgments and decisions, the ECCC

---

para. 691; Case 001 Trial Judgment (E188), paras 505-512; Case 002, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6 ("Case 002 Decision on Applicability of JCE (E100/6)"), para. 22. *See also Tadić* Appeal Judgment (ICTY), paras 185-228; ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, Appeals Chamber, 17 March 2009 ("*Krajišnik* Appeal Judgment (ICTY)"), para. 659; ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, Appeals Chamber, 3 April 2007 ("*Brđanin* Appeal Judgment (ICTY)"), paras 393-410; ICTR, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4, Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Appeals Chamber, 22 October 2004 ("*Rwamakuba* Decision on JCE (ICTR)"), paras 9-31. The International Judges also note that only JCE I is alleged as a mode of liability in the Closing Order (Indictment) and clarify that the International Judges' holdings in the instant case refer to the form of JCE I.

[1153] *See, e.g.*, Case 001 Trial Judgment (E188), para. 504; Case 002 JCE Decision (D97/15/9), para. 40; *Charter of the International Military Tribunal -Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement)*, 8 August 1945 ("Nuremberg Charter"), Art. 6; Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 December 1945, 3 Official Gazette Control Council for Germany 50–5 (1946) ("Control Council Law No. 10"), Art. II(2).

[1154] *Contra* AO An's Appeal (D360/5/1), para. 172. *See* Case 002 JCE Decision (D97/15/9), para. 55 *referring to Tadić* Appeal Judgment (ICTY), para. 191 (The Pre-Trial Chamber considers that JCE is warranted by the nature of international crimes in general. These crimes are often carried out during times of conflict and by "groups of individuals acting in pursuance of a common criminal design").

[1155] Case 002 JCE Decision (D97/15/9), paras 54-73; Case 002/1 Appeal Judgment (F36), paras 775-810; Case 002/1 Trial Judgment (E313), para. 691; Case 001 Trial Judgment (E188), paras 505-512; Case 002 Decision on Applicability of JCE (E100/6), para. 22. *See also Tadić* Appeal Judgment (ICTY), paras 185-228; *Krajišnik* Appeal Judgment (ICTY), para. 659; *Brđanin* Appeal Judgment (ICTY), paras 393-410; *Rwamakuba* Decision on JCE (ICTR), paras 9-31.

[1156] Case 002 JCE Decision (D97/15/9), para. 53 (footnotes omitted) *referring to* ICJ Statute, Art. 38(1); *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Joint Separate Opinion of Judges FORSTER, BENGZON, JIMÉNEZ DE ARÉCHAGA, NAGENDRA SINGH and RUDA, I.C.J. Reports 1974 (July 25), p. 3, para. 16.

[1157] *Contra* AO An's Appeal (D360/5/1), para. 172.

Chambers carried out a "careful, reasoned review"[1158] of *ad hoc* tribunal holdings on JCE (and abstained from adopting JCE III from ICTY), rather than adopting them in their totality.[1159] The ECCC Chambers independently reviewed post-World War II instruments and jurisprudence, and appropriately attached particular weight to the Nuremberg Charter, Control Council Law No. 10 and relevant post-World War II war crimes cases.[1160] The International Judges therefore consider that the jurisprudence relied on by Chambers of the ECCC satisfies the "ICJ's requirements for [customary international law]"[1161] and the International Co-Investigating Judge did not err in relying on JCE.

579. Second, the International Judges are not persuaded that the International Co-Investigating Judge erred by ignoring purportedly "widespread and consistent State practice that JCE is not [customary international law]"[1162] or by failing to adopt the ICC's doctrine of co-perpetration—involving the element of essential contribution—as an alternative mode of liability.[1163] The International Judges consider that the Rome Statute is not a binding instrument here.[1164] Moreover, contrary to the position of the Co-Lawyers,[1165] the statutory interpretation of a crime or mode of liability by ICC Chambers does not necessarily reflect customary international law.[1166] The International Judges consider that the ICC's interpretation of Article 25(3)(a) as requiring that the perpetrator must have a *de minimus* level of control over the crime by virtue of his or her essential contribution to [the crime] ("control over the crime theory")[1167]

[1158] Case 001 Appeal Judgment (F28), para. 97 ("[T]he Supreme Court Chamber stresses that careful, reasoned review of [the] holdings [of *ad hoc* Tribunals] is necessary for ensuring the legitimacy of the ECCC and its decisions").
[1159] Case 002 JCE Decision (D97/15/9), para. 83 (The Pre-Trial Chamber held that with respect to the extended form of JCE (JCE III) the authorities relied upon in *Tadić* did not "constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law"). *See also* Case 002/1 Appeal Judgment (F36), paras 791-807; Case 002/1 Trial Judgment (E313), para. 691; Case 002 Decision on Applicability of JCE (E100/6), para. 29.
[1160] *See, e.g.*, Case 002 JCE Decision (D97/15/9), paras 54-73; Case 002/1 Appeal Judgment (F36), paras 775-810.
[1161] *Contra* AO An's Appeal (D360/5/1), para. 172.
[1162] AO An's Appeal (D360/5/1), para. 173; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625304, pp. 45:6 to 45:19.
[1163] AO An's Appeal (D360/5/1), para. 173; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625304, pp. 45:6 to 45:24.
[1164] *See supra* para. 570. *See also* CASSESE, International Criminal Law (2013), pp. 10-11 ("The ICC Statute embraces a set of rules only applicable to the ICC itself: the Statute does not apply to other international criminal courts [...] each of which is regulated by, and must apply above all, its own Statute").
[1165] AO An's Appeal (D360/5/1), paras 173-174.
[1166] *See, e.g., Šainović et al.* Appeal Judgment (ICTY), para. 1648 ("Moreover, while the ICC Statute may be in many areas regarded as indicative of customary rules, in some areas it creates new law or modifies existing law"). *See also* CASSESE, International Criminal Law (2013), pp. 10-11.
[1167] *See, e.g.*, ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2359, Judgment, Trial Chamber VI, 8 July 2019, para. 774; ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1

is one such instance where the ICC has interpreted its own statute rather than existing customary international law.[1168] Thus, as the principle of *lex mitior* only concerns laws binding upon the Court,[1169] the International Co-Investigating Judge did not err in applying JCE here. Accordingly, Ground 9 is dismissed.

J. Ground 11: Inapplicability of Planning Mode of Liability at the ECCC

1. Submissions

580. The Co-Lawyers submit that the International Co-Investigating Judge purportedly erred by including Planning in the Closing Order (Indictment) because this mode of liability did not exist under customary international law in 1975-1979.[1170] The International Co-Investigating Judge allegedly erred by relying on Trial Chamber holdings which primarily relied on *ad hoc* tribunal jurisprudence; the International Co-Investigating Judge failed to sufficiently determine widespread and consistent state practice that Planning was a mode of liability in 1975-1979.[1171] The Co-Lawyers aver that Planning was limited to crimes against peace in the Charters of the Nuremberg and Tokyo Tribunals[1172] and observe that neither the Genocide Convention nor the Rome Statute refer to Planning as a mode of liability for war crimes, crimes against humanity or genocide.[1173]

December 2014, para. 469; *Katanga* Trial Judgment (ICC), para. 1394; ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012 ("*Lubanga* Trial Judgment (ICC)"), paras 989, 994; *Lubanga* Confirmation of Charges Decision (ICC), paras 335-348.

[1168] Rome Statute, Art. 21(1)(a) & (b) ("The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflicts"); *Katanga* Trial Judgment (ICC), para. 39 ("The Chamber would emphasise that article 21 of the Statute establishes a hierarchy of the sources of applicable law and that, in all its decisions, it must "in the first place" apply the relevant provisions of the Statute [...] the Chamber shall apply the subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute only where it identifies a lacuna in the provisions of the Statute, the Elements of crimes and the Rules"); *Lubanga* Trial Judgment (ICC), para. 994 ("[I]n the view of the Majority of the Chamber, *the wording of Article 25(3)(a)* [...] requires") (emphasis added).

[1169] *See, inter alia, supra* paras 569-570. *See also* ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgement, Appeals Chamber, 9 December 2015, para. 128.

[1170] AO An's Appeal (D360/5/1), para. 179.

[1171] AO An's Appeal (D360/5/1), para. 178.

[1172] AO An's Appeal (D360/5/1), para. 179 *referring to* Robert CRYER et al., An Introduction to International Criminal Law and Procedure (Cambridge University Press, 3rd Edition, 2014), pp. 379-380.

[1173] AO An's Appeal (D360/5/1), para. 179 *referring to Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, *entered into force* 12 January 1951 ("Genocide Convention"); Rome Statute, Art. 25.

581. In the Response, the International Co-Prosecutor argues that the Co-Lawyers fail to demonstrate that the International Co-Investigating Judge erred in relying on Trial Chamber jurisprudence on Planning or that the Trial Chamber's analysis was flawed.[1174]

582. In the Reply, the Co-Lawyers address Ground 11 together with Grounds 8, 9, 12(i) and 15(i)[1175]—the full summary of Reply arguments appears in Ground 8.[1176]

2. Discussion

583. The International Judges find that no error transpired in applying Planning in the Closing Order (Indictment). The International Judges affirm that state practice and *opinio juris* evidence that Planning is properly applicable as a mode of liability to all criminal acts (not only crimes against peace)[1177] as is demonstrated by, *inter alia,* (i) the Nuremberg Tribunal and (ii) the Cambodian Penal Code of 1956. Moreover, the International Judges are not convinced at this time that (iii) international instruments—which have no bearing on the crystallisation of Planning as a mode of liability (*e.g.*, the Genocide Convention or the Rome Statute)—may impact and abolish the existence of Planning within customary international law.

584. First, consistent with state practice and *opinio juris* within customary international law, the International Judges find that Planning emerged as a mode of responsibility in the aftermath of World War II and was first enshrined in the Nuremberg Charter in 1945 —applicable to all crimes.[1178] The first paragraph of Article 6 of the Nuremberg Charter expressly mentions, in the context of individual criminal responsibility, a prohibition concerning crimes against peace, listing among proscribed conduct: "[…] planning, preparation, initiation […]".[1179] The final paragraph in Article 6, contrary to the Co-Lawyers' assertion of Planning's exclusive applicability to crimes against peace, reinforces this principle of Planning for all the crimes within the Tribunal's jurisdiction, articulating that: "[l]eaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in

[1174] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 95.
[1175] AO An's Reply (D360/11), paras 46-52.
[1176] *See* paras 563-565 (Ground 8, Submissions). These overarching submissions reiterate certain Ground 11 issues.
[1177] *Contra* AO An's Appeal (D360/5/1), para. 179.
[1178] Nuremberg Charter, Art. 6.
[1179] Nuremberg Charter, Art. 6.

execution of such plan".[1180] Similarly, the Control Council Law No. 10 from 1945 enshrines criminal responsibility for individuals connected with plans or enterprises involving the commission of crimes.[1181]

585. The International Judges underline that Planning was retained as one of the modes of responsibility to convict accused persons for crimes against humanity at the Nuremberg Tribunal, which confirms that this mode of liability was properly in force by 1975-1979, as articulated in Article 6 of the Nuremberg Charter.[1182] The International Judges find that even if the word "planning" is not always explicitly used in the aforementioned instruments, the conduct referred to—such as participating in the formulation or design of a common plan or conspiracy—falls within the scope of the definition of Planning that was crystallised by the *ad hoc* Tribunals and the ECCC's jurisprudence.[1183]

586. Consequently, the International Judges concur with the findings of the Trial Chamber and the Supreme Court Chamber that the provisions of Article 29*new* of ECCC Law—including Planning as a mode of responsibility—properly qualify as customary international

---

[1180] *See also Charter of the International Military Tribunal for the Far East*, 19 January 1946 ("Tokyo Charter"), Art. 5; *Contra* AO An's Appeal (D360/5/1), para. 179.

[1181] Control Council Law No. 10, Art. II (2) d.

[1182] Case 001 Appeal Judgment (F28), para. 138 *referring to* Nuremberg Judgment, pp. 279-341. *See, e.g.*, Nuremberg Judgment, pp. 292, 297-298, 300 (On October 1 of 1946, the Nuremberg Tribunal convicted an Accused for his "participat[ion] in the arrangements for the evacuation of inmates of concentration camps, and the liquidation of many of them [...] the RSHA played a leading part in the 'final solution' of the Jewish question by the extermination of Jews. A special section under the Amt IV of the RSHA was established to supervise this program". In the same manner, the Tribunal found the Accused FRANK guilty for "introduc[ing] the deportation of slave laborers to Germany in the very early stages of his administration. On January 1940 he indicated his intention of deporting 1 million laborers to Germany [...] they were forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated". Another Accused, FRICK, was also convicted because he "drafted, signed, and administrated many laws designed to eliminate Jews from German life and economy. [...] These laws paved the way for the 'final solution'").

[1183] ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgment (ICTY)"), para. 25; ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, para. 674; ICTR, *Prosecutor v. Semanza*, ICTR-97-20-T, Judgement, Trial Chamber III, 15 May 2003, para. 380; ICTR, *Prosecutor v. Bagilishema,* ICTR-95-1A-T, Judgement, Trial Chamber I, 7 June 2001, para. 30 ("An individual who participates directly in planning to commit a crime under the Statute incurs responsibility for that crime even when it is actually committed by another person. The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another."); Case 001 Judgment (E188), paras 518-519 ("[planning] requires that one or more persons design the criminal conduct that constitutes one or more crimes that are later perpetrated. It must be demonstrated that the planning was a substantially contributing factor to the criminal conduct. [...] The accused must have acted with the intent that the crime be committed, or have been aware of the substantial likelihood that the crime would be committed in the execution or implementation of that plan."); Case 002/1 Judgment (E313), para. 698 ("To be held responsible for planning, an accused, alone or with others, must design criminal conduct constituting or involving a crime later perpetrated").

law recognised since the Nuremberg cases of 1945 and has been reaffirmed ever since.[1184]

587. Second, the International Judges recall that the Cambodian Penal Code of 1956, one source of law directly binding on the ECCC,[1185] explicitly criminalises the planning and preparation of a criminal conduct.[1186] The 1956 Penal Code evidences the existence of Planning as a proper mode of responsibility in 1975-1979, as well as its foreseeability and accessibility to the Accused.[1187]

588. Third, concerning the absence of Planning in certain international instruments, the International Judges find that the Genocide Convention does not impact the existence of Planning and is otherwise irrelevant because that Convention is aimed at articulating the underpinnings of genocide only, without a focus on modes of liability in the context of customary international law.[1188] Moreover, the Rome Statute (including the absence of Planning in certain sections) is not a binding instrument at the ECCC;[1189] its provisions do not always reflect customary international law[1190] and cannot impact the existence of Planning within customary international law, originally from the Nuremberg Tribunal. Accordingly, Ground 11 is dismissed.

[1184] Case 001 Judgment (E188), paras 518-519; Case 001 Appeal Judgment (F28), para. 138 ("Convictions for enslavement as a crime against humanity by the Tribunal were largely based on the defendants' roles in planning, ordering, executing, controlling or otherwise participating in the systematic transfer, employment, and abuse of involuntary labourers under the Nazi's slave labour policy") *referring to* Nuremberg Judgment, pp. 279-341; Case 002/1 Judgment (E313), para. 697 ("By 1975, planning was a form of individual criminal responsibility recognized in customary international law. Considering the senior positions held by the Accused, and that planning was recognised as a mode of liability in both customary international and Cambodian law by 1975, the Chamber finds that this mode of liability was foreseeable and accessible to the Accused") (footnotes omitted).
[1185] ECCC Law, Arts 1, 3*new*.
[1186] *Penal Code of the Kingdom of Cambodia* (*Code Pénal et Lois Pénales*), 1956 ("1956 Penal Code"), Arts 223, 239, 290; Case 001 Judgment (E188), para. 474 ("Planning was, however, criminalized by specific provisions, making the criminalisation of such conduct foreseeable, whether as a form of responsibility or as a crime"); ECCC Law, Arts 1, 3*new*.
[1187] *See also* Case 001 Judgment (E188), para. 474; Case 002/1 Judgment (E313), para. 697 (recognising Planning in customary international law and Cambodian law by 1975 and stating in relevant part that "[...] planning was recognised as a mode of liability in both customary international and Cambodian law by 1975").
[1188] Genocide Convention.
[1189] *See* para. 570 (Ground 8). The only Rome Statute provision that is binding on the ECCC is Article 7 pertaining to crimes against humanity as it is directly provided for in the ECCC Agreement, Art. 9; *See also* CASSESE, International Criminal Law (2013), p. 10 (stating summarily, that the Rome Statute embraces rules exclusively applicable to the ICC and that the Rome Statute does not apply to other international criminal courts (such as the ECCC). The Rome Statute does not constitute any sort of international criminal code).
[1190] *See* Rome Statute, Art. 21 (laying out the hierarchy of the application of laws, citing in Article 21(1)(a) the pre-eminence of the Rome Statute and the ICC framework and in Article 21(1)(b) listing as a secondary source only, the rules of international law).

K. Ground 12(i): Inapplicability of Superior Responsibility in AO An's Case

1. Submissions

589. The Co-Lawyers argue that the International Co-Investigating Judge erred in using superior responsibility to indict the Accused "as a civilian leader outside of the context of an international armed conflict" and that doing so in the Closing Order (Indictment) breaches the principle of legality.[1191] While acknowledging that "the ECCC previously found that superior responsibility may apply to civilian commanders",[1192] the Co-Lawyers argue that those Decisions "failed to provide" sufficient evidence demonstrating the existence of this mode of liability within customary international law in 1975-1979, including its applicability to "civilian commanders outside of an international armed conflict".[1193]

590. In the Response, the International Co-Prosecutor submits that the Pre-Trial Chamber has previously held, after conducting a thorough analysis of post-World War II cases, that superior responsibility applies to both military and non-military superiors.[1194] The International Co-Prosecutor alleges that since the Co-Lawyers have not shown that the use of superior responsibility in those cases depended on the existence of an international armed conflict or that those findings would have been decided differently in the absence of such a conflict, the Co-Lawyers have not demonstrated a breach of the principle of legality.[1195]

591. In the Reply, the Co-Lawyers address Ground 12(i) in conjunction with Grounds 8, 9, 11 and 15(i).[1196] A summary of this Reply appears in Ground 8 to avoid repetition.[1197]

[1191] AO An's Appeal (D360/5/1), para. 180. As Ground 12(ii) is inadmissible, the International Judges will not summarise nor address the merits of the Co-Lawyers' arguments on whether the International Co-Investigating Judge incorrectly applied the legal elements of superior responsibility. *See* AO An's Appeal (D360/5/1), para. 181.
[1192] AO An's Appeal (D360/5/1), para. 180 *referring to* Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), paras 190-232; Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 413-460; Case 001 Trial Judgment (E188), paras 476-477.
[1193] AO An's Appeal (D360/5/1), para. 180.
[1194] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 96 *referring to* Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 459-460.
[1195] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 96.
[1196] AO An's Reply (D360/11), paras 46-52.
[1197] *See* paras 563-565. Generally, the Co-Lawyers contest purported legal errors in the International Co-Investigating Judge's approach to applying customary international law, such as failing to demonstrate customary international law and breaching the principle of legality.

2. Discussion

592. The International Judges find that the International Co-Investigating Judge did not err in applying superior responsibility or violate the principle of legality. Contrary to the Co-Lawyers' submissions, the International Judges affirm that (i) the ECCC Chambers sufficiently established that superior responsibility existed within customary international law in 1975-1979—demonstrating state practice and *opinio juris*.[1198] Further, the International Judges find that (ii) applying superior responsibility is not contingent on whether charges against civilians under superior responsibility are linked to an international armed conflict but, rather, centers on the responsibility of the individual.[1199]

593. First, the International Judges uphold the Chamber's prior findings and concur with the ECCC Chambers concerning the existence of superior responsibility within customary international law and dismiss the argument of purportedly insufficient evidence.[1200] Examining the ECCC cases and the law, the International Judges uphold that superior responsibility existed as a mode of liability within customary international law in 1975-1979.[1201] The International Judges find no reason to deviate from the settled jurisprudence in the instant case.

[1198] *Contra* AO An's Appeal (D360/5/1), para. 180 ("the [International Co-Investigating Judge] errs in this case in relying on superior responsibility as an applicable mode of liability under [customary international law] during 1975-1979."); Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), paras. 190-232; Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 413-460; Case 001 Trial Judgment (E188), paras 476-477; Case 002/1 Trial Judgment (E313), paras 718-719.

[1199] ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-T, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16 July 2003 ("*Hadžihasanović et al.* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (ICTY)"), para. 20; *contra* AO An's Appeal (D360/5/1), para. 180.

[1200] *Contra* AO An's Appeal (D360/5/1), para. 180.

[1201] *Contra* AO An's Appeal (D360/5/1), para. 180. *See* Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), paras 190-232 (*see*, for example, a detailed discussion of: (i) the evolution of superior responsibility beginning with the 1919 report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties—evidencing "expression to the doctrine of superior responsibility" (para. 193); (ii) detailed discussion of multiple cases in the aftermath of World War II where Japanese and German superiors were tried before the IMTFE and the Allied military commissions or tribunals and that the theory of superior responsibility was articulated and applied as a mode of individual liability (paras 195-230); the Decision also held that superior responsibility applied to war crimes and crimes against humanity, in accordance with the Nuremberg Military Tribunal findings (paras 231-232) (footnotes omitted)); *see* Case 002/1 Trial Judgment (E313), paras 714, 718 (in relevant part: "Superior responsibility, applicable to both military and civilian superiors, was recognized in customary international law by 1975. [...] [T]he Chamber considers that this mode of liability was accessible and foreseeable to the Accused." (para. 714); "After reviewing Nuremberg-era jurisprudence, the Pre-Trial Chamber found that the doctrine of superior responsibility [...] existed in customary international law between 1975 and 1979." (para. 718) (footnotes omitted)); *see* Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 418, 460 (holding that "[...] jurisprudence from the Nuremberg-era tribunals also indicate that superior responsibility was not confined to military commanders under customary international law during the 1975-1979 period." (para. 418)) and ("[...] the Pre-Trial Chamber finds that the doctrine of superior responsibility [...] existed as a matter of customary international law from 1975-1979. In light

594. Second, the International Judges are not persuaded that "charges against civilians under superior responsibility must be linked to an international armed conflict".[1202] The International Judges find that whether alleged acts transpired within an international armed conflict merely affects the characteristics of crimes; superior responsibility hinges not on the connection between an accused and the armed conflict or even on the existence of the conflict but, rather, centers on the responsibility of the individual, including, *inter alia*, a person's role within a hierarchy, knowledge, obligations and/or failure to act.[1203]

---

of the post-World War II international case law cited above and the serious nature of the crimes, it was both foreseeable and accessible to Ieng Sary that he could be prosecuted as a superior, whether military or non-military, for such crimes perpetrated by his subordinates from 1975-1979." (para. 460) (footnotes omitted)). *See also* Case 001 Trial Judgment (E188), para. 477 (holding that "Jurisprudence from the Nuremberg-era tribunals and more recent international criminal tribunals also indicate that superior responsibility was not confined to military commanders under customary international law during the 1975-1979 period."). *See further* ECCC Law, Art. 29*new* (which defines superior responsibility at the ECCC, stating that "[t]he fact that any of the acts [...] were committed by a subordinate does not relive the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators."); *USA v. Karl Brandt et al.* (Medical Case), Judgment of 19 August 1947, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. II, p. 206; *USA v. Friedrich Flick and five others* (Case No. 48), Judgment of 22 December 1947, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. IX, pp. 2, 4 ("*Flick and five others* (Case No. 48) Judgment (NMT)"); International Military Tribunal for the Far East, Judgment of 4 November 1948, Vol. 22, p. 49, 816; *USA v. Oswald Pohl et al.* (Case No. 4), Supplemental Judgment of 11 August 1948, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. V, p. 1176; *Delalić et al.* Trial Judgment (ICTY), paras 356-357; *Delalić et al.* Appeal Judgment (ICTY), para. 195.

[1202] *Contra* AO An's Appeal (D360/5/1), para. 180. *See* ICTY, *Prosecutor v. Hadžihasanović et. al.*, IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, Trial Chamber, 12 November 2002 ("*Hadžihasanović et al.* Decision on Joint Challenge to Jurisdiction (ICTY)"), para. 75 (reflecting on the International Law Commission ("ILC") and its work on Draft Code of Offences against Peace and Security of Mankind in 1950, that Chamber held, in discussing the existence of superior responsibility, that "[t]he 'acts under the draft code' included genocide, which can be committed in the absence of an armed conflict [...]").

[1203] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 418, 460; further, the International Judges recall that texts from the ILC have been held to reflect legal considerations largely shared by the international community and may expertly identify rules of international law (Case 002 JCE Decision (D97/14/15), para. 61 *quoting* ICTY, *Prosecutor v. Vasiljević*, IT-98-32-T, Judgement, Trial Chamber II, 29 November 2002, para. 200). In this regard, the International Judges note that ILC's Draft Articles enshrining principles of international law (beginning around 1950s) and the ILC's continuing affirmation of superior responsibility through years reinforce the existence and applicability of this mode of liability within an established body of customary international law (including in relation to genocide)—*see Hadžihasanović et al.* Decision on Joint Challenge to Jurisdiction (ICTY), para. 89 (holding that in 1986, the ILC updated the Draft Articles, including a specific provision on superior responsibility and that, within the offences listed, included genocide—that Trial Chamber, citing ILC Draft Articles in relevant part, affirmed that: "[t]he fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offense and if they did not take all the practically feasible measures in their power to prevent or suppress the offense." (footnotes omitted)); para. 92 (discussing the responsibility of the superior and noting that crimes included in the 1991 Draft Code expand far beyond armed conflict, encompassing international terrorism, narcotics trafficking and damage to the environment as well as genocide); para. 93(v) (where that Trial Chamber affirmed the existence of command responsibility prior to 1991 in stating that "(v) the doctrine has been recognised as applying to offenses committed either within or in the absence of an armed conflict [...]"—this Trial Chamber also recognised that, as of the 2002 issuance of its decision, this notion

595. Accordingly, Ground 12(i) is dismissed.

L. Ground 13: Whether the ECCC has Jurisdiction to Prosecute National Crimes Committed between 1975-1979

1. Submissions

596. The Co-Lawyers submit the International Co-Investigating Judge erred in indicting AO An for premeditated homicide under the 1956 Penal Code since the ten-year statutory limitations period for national crimes committed during 1975-1979 expired, at the latest, on 6 January 1989.[1204] There is no evidence to suggest the limitations period was interrupted or suspended by an act of investigation or prosecution or by exceptional circumstances.[1205] Further, Cambodia did not adopt prospective legislation to enable the prosecution of offences that would otherwise be time barred, and Article 3*new* of the ECCC Law, which was adopted after the limitations period expired, could not extend it retroactively.[1206] The Co-Lawyers moreover observe that in Case 001, after failing to reach the required supermajority vote, the Trial Chamber held that the Accused there could not be prosecuted for national crimes,[1207] and conclude that in case of uncertainty, the law must be applied in favour of the accused.[1208]

597. The International Co-Prosecutor does not respond to Ground 13 of AO An's Appeal aside from stating that he believes AO An's criminal conduct is better described when legally characterised as the international crimes of genocide and crimes against humanity rather than

---

had not been explicitly codified in an international agreement nor ruled on by an international judicial body at the time; *see* further *Hadžihasanović et al.* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (ICTY), para. 20 ("[...] the fact that it was in the course of an internal armed conflict that a war crime was about to be committed or was committed is not relevant to the responsibility of the commander; that only goes to the characteristics of the particular crime and not to the responsibility of the commander. The basis of the commander's responsibility lies in his obligations as commander of troops making up an organised military force under his command, and not in the particular theatre in which the act was committed by a member of that military force."). *See also Flick and five others* (Case No. 48) Judgment (NMT), pp. 2, 4; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 230; Case 002/1 Trial Judgment (E313), para. 718.

[1204] AO An's Appeal (D360/5/1), paras 182-183, 185 *referring to, inter alia,* Case 004, Application to Seise the Pre-Trial Chamber with a View to Annulment of the Judicial Investigation due to Lack of Subject Matter Jurisdiction, 30 July 2015, D258, paras 18-34; 1956 Penal Code, Arts 109, 111-112, 114.

[1205] AO An's Appeal (D360/5/1), para. 184 *referring to* Case 001, Decision on the Defence Preliminary Objection concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187 ("Case 001 Decision on Statute of Limitations of Domestic Crimes (E187)"), paras 12, 27, 31-35.

[1206] AO An's Appeal (D360/5/1), para. 184 *referring to* Case 001 Decision on Statute of Limitations of Domestic Crimes (E187), paras 43-49, 50-54.

[1207] AO An's Appeal (D360/5/1), para. 182 *referring to* Case 001 Decision on Statute of Limitations of Domestic Crimes (E187), paras 27-35, 39-56.

[1208] AO An's Appeal (D360/5/1), para. 185 and footnote 472.

as national crimes, and that such characterisation could expedite proceedings if the case goes to trial.[1209]

598. The Co-Lawyers do not address Ground 13 in their Reply.[1210]

2. Discussion

599. The International Judges recall that Article 109 of the 1956 Penal Code establishes a ten-year limitations period for felonies, five years for misdemeanours and one year for petty offences. These run from the date of commission of the crime and are interrupted by judicially-ordered acts of investigation or prosecution. In the absence of any such act, the limitations period in relation to the domestic crimes charged in this case expired, at the latest, ten years after the conclusion of the indictment period, namely on 6 January 1989.[1211]

600. However, as the International Co-Investigating Judge noted,[1212] the Pre-Trial Chamber in Case 002 unanimously found that the ECCC's jurisdiction to prosecute national crimes committed during 1975-1979 is not barred by the statute of limitations.[1213] As the Chamber explained, "[t]he underlying principle of statutes of limitations is to provide for a time frame within which criminal proceedings must be instituted. As such, it presupposes that judicial institutions operate effectively, so proceedings can be instituted."[1214] The Chamber accordingly adopted the Trial Chamber's "unanimous finding [in Case 001] that statutes of limitation do not run where the judicial institutions are not functioning."[1215] Since it has been established "that between 1975 and 1979, there was no legal or judicial system in Cambodia, and accordingly that no criminal investigations or prosecutions were possible during that period [...] the limitation period therefore did not commence between these dates."[1216]

601. With respect to the period subsequent to the fall of the Khmer Rouge, the Pre-Trial

---

[1209] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 97 *referring to* International Co-Prosecutor's Final Submission (D351/5), paras 636-638.
[1210] *Cf.* AO An's Reply (D360/11), para. 5.
[1211] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 278; Case 001 Decision on Statute of Limitations of Domestic Crimes (E187), paras 10, 12; 1956 Penal Code, Arts 109-114. *See also* Closing Order (Indictment) (D360), para. 195.
[1212] Closing Order (Indictment) (D360), para. 59.
[1213] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 278-287.
[1214] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 285.
[1215] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 285 *referring to* Case 001 Decision on Statute of Limitations of Domestic Crimes (E187), paras 14, 16-17, 27, 29.
[1216] Case 001 Decision on Statute of Limitations of Domestic Crimes (E187), para. 14; Case 001 Trial Judgment (E188), para. 94.

Chamber further adopted the findings of the three Cambodian Trial Chamber Judges that "from 1979 until 1982, the judicial system of the People's Republic of Kampuchea did not function at all" as it had been destroyed by the DK regime, and that from 1982 "until the Kingdom of Cambodia was created by the promulgation of its Constitution on 24 September 1993, a number of historical and contextual considerations", including, *inter alia*, civil war, the ongoing peace process and the continuing international recognition of the Khmer Rouge as Cambodia's government, "significantly impeded domestic prosecutorial and investigative capacity".[1217] As a result, the ten-year statutory limitations period for domestic crimes provided for in the 1956 Penal Code started to run, at the earliest, on 24 September 1993.[1218] Hence, it would have expired in 2003, barring any interruption.

602. However, Article 3 of the ECCC Law promulgated in 2001 purported to extend the statute of limitations for domestic crimes within the Court's jurisdiction by 20 years, while Article 3*new*, adopted as an amendment to the ECCC Law in 2004, increased the extension to 30 additional years. The International Judges recall, in this regard, that although the reinstatement of the right to prosecute after the statute of limitations has already elapsed might violate Article 15(1) of the ICCPR[1219] and the principle of legality, the extension of the statute of limitations before its expiry is a matter of state policy and does not violate the principle of legality.[1220] Accordingly, since the ten-year statute of limitations for domestic crimes had not expired before Article 3 of the ECCC Law extended it in 2001, "the extension by the National Assembly in 2001 and 2004, respectively for 20 and then 30 years, did not violate the principle of legality".[1221]

603. The International Judges therefore find that the national crimes for which AO An has been charged are not statute barred; Ground 13 is accordingly dismissed.

[1217] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 286 *quoting* Case 001Decision on Statute of Limitations of Domestic Crimes (E187), Opinion of Judges NIL, YA and THOU, paras 19-20; *see also* paras 18-25.
[1218] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 286-287.
[1219] ICCPR, Art. 15(1) ("no one shall be held guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed").
[1220] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 282.
[1221] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 287.

M. Ground 15(i): Forced Marriage not under the Jurisdiction of the ECCC

1. Submissions

604. The Co-Lawyers allege that the International Co-Investigating Judge erred in finding that forced marriage was a crime under the 1956 Penal Code or customary international law in 1975-1979[1222] and finding that forced marriage qualifies under other inhumane acts,[1223] by erroneously relying on "human rights law to establish the criminality of forced marriage under [customary international law]".[1224] The International Co-Prosecutor submits that "AO An's arguments regarding 'underlying criminality' should be summarily dismissed, as he merely repeats arguments from his Final Submissions Response without demonstrating" that the International Co-Investigating Judge erred.[1225] Further submissions and replies relate to inadmissible Ground 15(ii) and will not be addressed here.[1226]

2. Discussion

605. As a preliminary issue, the International Judges note that the Co-Lawyers attempt to incorporate "by reference"[1227] their previously litigated arguments from their *AO An's Forced Marriage Annulment Application*—which were already addressed and dismissed by the International Judges.[1228] While these arguments are submitted at a new juncture citing certain issues concerning the Closing Order (Indictment), the International Judges find no reason to deviate from their prior determinations on forced marriage.

606. The International Judges are not persuaded by the Co-Lawyers' submissions and find that their arguments contradict well-established law because: (i) other inhumane acts existed

---

[1222] AO An's Appeal (D360/5/1), para. 192.
[1223] AO An's Appeal (D360/5/1), para. 192.
[1224] AO An's Appeal (D360/5/1), para. 192. *See also* Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625311-01625312, pp. 52:22-53:4.
[1225] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 99 (footnote omitted).
[1226] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 98-103; AO An's Appeal (D360/5/1), para. 193.
[1227] AO An's Appeal (D360/5/1), para. 192, footnote 487.
[1228] Case 004, TA An's Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigative Action concerning Forced Marriage, 19 December 2014, A259; Case 004 (PTC21), Considerations on AO An's Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigative Action concerning Forced Marriage, Opinion on Merit of the Application by Judges BAIK and BEAUVALLET, 17 May 2016, D257/1/8 ("Case 004 Considerations on Forced Marriage, Opinion on Merit by Judges BAIK and BEAUVALLET (D257/1/8)").

as a crime within customary international law prior to and during 1975-1979;[1229] (ii) there is no need to establish forced marriage as a separate criminal act (or to rely on human rights law to do so);[1230] and (iii) forced marriage may fall within the accepted definition of other inhumane acts and this case-by-case analysis would occur in-depth at trial.[1231] The International Judges find that it is sufficient to establish that the overarching category of other inhumane acts was a crime under customary international law and that, as such, its elements were foreseeable and accessible to the Accused.[1232]

607. First, the International Judges reaffirm here the well-settled law that the crime of other inhumane acts had attained customary international law status by the requisite and relevant time period of 1975-1979.[1233] This is supported by evidence of *opinio juris* and state practice, such as the inclusion of this norm in treaty law since 1945 and its application in post-World War II cases.[1234] Subsequent tribunals have confirmed the customary nature of other inhumane acts and in their assessment, relied on sources predating 1975.[1235]

608. Multiple Chambers within the ECCC have held that it was foreseeable and accessible that other inhumane acts were punishable as a crime against humanity by 1975.[1236] Applying the notion of *ejusdem generis* (of the same kind),[1237] the Pre-Trial Chamber found that the

---

[1229] *See, e.g.*, Case 002/2 Trial Judgment (E465), para. 723.
[1230] *See, e.g.*, Case 002/1 Trial Judgment (E313), para. 436.
[1231] *See* Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 397; Case 002 (PTC145 & 146), Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15 & D427/3/15 ("Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15)"), para. 166.
[1232] The principle of legality, as enshrined in Article 15 of the ICCPR, requires that the criminal acts or forms of liability charged before the ECCC must have existed in law at the time within the ECCC's temporal jurisdiction. In addition, the criminal acts or forms of liability must be sufficiently clear and accessible to the accused. ICCPR, Art. 15. *See also* Case 002/1 Appeal Judgment (F36), para. 578; Case 004 Considerations on Forced Marriage, Opinion on Merit by Judges BAIK and BEAUVALLET (D257/1/8), para.1.
[1233] Case 002/2 Trial Judgment (E465), para. 723; Case 002/1 Trial Judgment (E313), para. 435; Case 001 Trial Judgment (E188), para. 367; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), paras 130, 157; Case 004 Considerations on Forced Marriage, Opinion on Merit by Judges BAIK and BEAUVALLET (D257/1/8), para. 9. *See also Brima et al.* Appeal Judgment (SCSL), para. 183; ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, Appeals Chamber, 22 March 2016 ("*Stakić* Appeal Judgment (ICTY)"), para. 315.
[1234] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 381-383; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 130; *See, e.g.*, IMT Charter, Art. 6(c); Control Council Law No. 10, Art. II(i)(c); Tokyo Charter, Art. 5(c); ILC, Report of the ILC to the General Assembly, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, in Yearbook of the International Law Commission, 1950, Vol. II, Principle VI(c); Nuremberg Judgment, pp. 174, 253, 254-255.
[1235] Case 002/1 Appeal Judgment (F36), para. 576.
[1236] Case 002/1 Appeal Judgment (F36), para. 578; Case 002/2 Trial Judgment (E465), para. 723; Case 002/1 Trial Judgment (E313), para. 435.
[1237] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 389-390; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), paras 161-164.

elements of the crime of other inhumane acts were sufficiently clear and specific by 1975.[1238] It was established and generally understood "that an individual may be held criminally responsible for committing crimes which are 'similar in nature and gravity' to the other listed crimes against humanity."[1239]

609. Considering the above, the International Judges find that the underlying acts or sub-categories within other inhumane acts (such as forced marriage) do not have to be criminalised because the principle of legality "attaches to the entire category of 'other inhumane acts' and not to each sub-category of this offence."[1240] To require that the underlying conduct of forced marriage must be criminalised, would render the concept of other inhumane acts as a residual category of crimes against humanity ineffective and futile.[1241]

610. Second, as there is no requirement to establish forced marriage as a distinct crime, the International Co-Investigating Judge's purported error in relying on human rights law is irrelevant and without merit.[1242] The International Judges find that the International Co-Investigating Judge properly articulated that "the conduct underlying 'other inhumane acts' need not have been criminalised under international law."[1243]

611. Third, examining the alleged conduct underpinning forced marriage includes an assessment of whether the facts are of a similar nature and gravity to other enumerated crimes under other inhumane acts.[1244] This question must be considered on a case-by-case basis with due regard for the individual circumstances of the case.[1245] Factors to consider in analysing the similar nature and gravity to other enumerated crimes may include, *inter alia*, "the nature of

---

[1238] Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 165; Case 004 Considerations on Forced Marriage, Opinion on Merit by Judges BAIK and BEAUVALLET (D257/1/8), para. 12. *See also* Case 002/1 Appeal Judgment (F36), para. 578.
[1239] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 396. *See also* Case 002/1 Appeal Judgment (F36), para. 578.
[1240] Case 002/1 Trial Judgment (E313), para. 436; Case 002 Decision on Closing Order Appeals (NUON Chea & IENG Thirith) (D427/2/15 & D427/3/15), para. 156; *See further* Case 004 Considerations on Forced Marriage, Opinion on Merit by Judges BAIK and BEAUVALLET (D257/1/8), paras 9, 17, where the International Judges previously held that the word "criminal" was not included in the phrase other inhumane acts in Article 6(c) of the Nuremberg Charter, nor does post-World War II jurisprudence refer to the underlying acts as crimes.
[1241] Case 002/1 Appeal Judgment (F36), para. 584; Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 378. *See also* Case 002/1 Trial Judgment (E313), para. 436; *Brima et al.* Appeal Judgment (SCSL), para. 183
[1242] *Contra* AO An's Appeal (D360/5/1), para. 192.
[1243] Closing Order (Indictment) (D360), para. 81.
[1244] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 396. *See also* Case 002/1 Appeal Judgment (F36), para. 578.
[1245] Case 002/2 Trial Judgment (E465), para. 725; Case 001 Trial Judgment (E188), para. 369; Case 002/1 Trial Judgment (E313), para. 438. *See also Kordić and Čerkez* Appeal Judgment (ICTY), para. 117; *Kayishema and Ruzindana* Trial Judgment (ICTR), para. 151.

the act or omission, the context in which it occurred, the personal circumstances of the victim, including age, sex and health, as well as physical, mental and moral effects of the act upon the victim."[1246] The International Judges consider that this analysis requires an in-depth assessment of the totality of the evidence which is best left to trial.

612. Therefore, the International Judges find that the International Co-Investigating Judge did not err and that other inhumane acts existed as a crime under customary international law in 1975-1979 and the relevant elements of the crime were foreseeable and accessible to the Accused. Ground 15(i) is accordingly dismissed.

N. Ground 16 (ii) and (iii): Incorrect Definition and Application of the Elements of Genocide

1. Submissions

613. The Co-Lawyers challenge the International Co-Investigating Judge's purportedly erroneous finding that AO An is responsible for genocide and that he falls within the Court's personal jurisdiction.[1247] First, the Co-Lawyers contend that the International Co-Investigating Judge failed to demonstrate the Cham people were positively identified and targeted as such, by reference to the group's particular identity.[1248] By instead attempting to demonstrate the Cham were targeted negatively, as part of a broad victim group labelled as "enemies", the International Co-Investigating Judge failed to apply the correct *mens rea* for genocide.[1249] The Co-Lawyers aver that this resulted in the erroneous determination that AO An and the JCE group had the necessary intent to commit genocide against the Cham.[1250]

614. Second, the Co-Lawyers assert that the International Co-Investigating Judge "fail[ed] to apply the *mens rea* for genocide to AO An and to demonstrate that he personally possessed

---

[1246] Case 004 Considerations on Forced Marriage, Opinion on Merit by Judges BAIK and BEAUVALLET (D257/1/8), para. 16; Case 002/2 Trial Judgment (E465), para. 725. *See also* ICTY, *Prosecutor v. Vasiljević*, Judgement, IT-98-32-A, Appeals Chamber, 25 February 2004, para. 165; *Brima et al.* Appeal Judgment (SCSL), para. 184.
[1247] AO An's Appeal (D360/5/1), para. 194; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625300, 01625303, pp. 41:13 to 41:24, 44:1 to 44:6.
[1248] AO An's Appeal (D360/5/1), para. 198; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625301, pp. 42:8 to 42:21.
[1249] AO An's Appeal (D360/5/1), para. 198; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625301, pp. 42:8 to 42:21.
[1250] AO An's Appeal (D360/5/1), paras 197-198; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625301, pp. 42:8 to 42:21.

specific genocidal intent".[1251] They allege that, "to prove an individual's state of mind by inference, it must be the only reasonable inference available on the evidence."[1252] Since AO An was not a senior leader of the CPK or an architect of the alleged genocide[1253] and, since "he may have only received orders from above," it is reasonable to infer that "his 'blind dedication' to the CPK party may have led him to 'doggedly pursue' the execution of his tasks without genocidal intent."[1254] Further, evidence of AO An's awareness through reports and his participation at meetings demonstrates, at best, that he may have had knowledge of crimes committed against the Cham people, which does not satisfy the strict requirements of genocidal intent.[1255]

615. In the Response, the International Co-Prosecutor argues that the Co-Lawyers fail to show that the International Co-Investigating Judge erred in law or fact in applying the elements of genocide.[1256] First, the International Co-Prosecutor contends that the Co-Lawyers falsely claim that the International Co-Investigating Judge failed to find that AO An and the other JCE members positively identified and targeted the Cham as such, when he expressly and repeatedly made such findings.[1257] The International Co-Prosecutor argues that the findings cited by the Co-Lawyers simply demonstrate that the International Co-Investigating Judge found that the JCE members labelled many people and groups as enemies, including the Cham, and targeted them with a variety of crimes.[1258]

616. Second, the International Co-Prosecutor asserts that the Co-Lawyers fail to show that no reasonable trier of fact could have found, based on the direct and corroborating evidence in the Closing Order (Indictment), that the only reasonable inference was that AO An possessed the specific intent to destroy the Cham of the Central Zone of Kampong Cham Province.[1259]

[1251] AO An's Appeal (D360/5/1), para. 199; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625301, pp. 42:22 to 42:44.
[1252] AO An's Appeal (D360/5/1), para. 199; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625301-01625302, 01625368, pp. 42:24 to 43:3, 109:10 to 109:24.
[1253] AO An's Appeal (D360/5/1), para. 200; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625302, pp. 43:5 to 43:25.
[1254] AO An's Appeal (D360/5/1), para. 201; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625302, pp. 43:5 to 43:25.
[1255] AO An's Appeal (D360/5/1), para. 202.
[1256] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 104.
[1257] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 106 *referring to* Closing Order (Indictment) (D360), paras 590-677, 812-819, *in particular* paras 614-615, 623, 633-637, 708, 817-819. Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625332-01625334, pp. 73:21 to 75:12.
[1258] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 106.
[1259] International Co-Prosecutor's Response to AO An's Appeal (D360/9), paras 107-108 *referring to* Closing Order (Indictment) (D360), paras 623, 633-637, 708, 818-819, 824(iii), 826, 829-830. The International Co-

The International Co-Prosecutor continues that while knowledge combined with continuing participation can be conclusive as to a person's intent, AO An did not simply know of the purge or simply continue to participate in the common purpose; rather, AO An affirmatively ordered the purge and ensured its implementation.[1260] Moreover, specific intent does not require that AO An be a senior leader or progenitor of the genocidal policy but, rather, that he intended his subordinates to purge the Central Zone of Cham when he ordered them to do so.[1261] The International Co-Prosecutor submits that acting on superior orders is not a defence and the cases cited by the Co-Lawyers are inapposite because neither involves an accused who was the primary implementer of a genocidal policy in his area of control or who directly ordered his subordinates to kill the targeted groups.[1262]

617. In the Reply, the Co-Lawyers maintain that the Cham people were not positively identified and targeted as such and that AO An did not have specific intent to commit genocide.[1263] Moreover, contrary to the International Co-Prosecutor's misrepresentations, the Co-Lawyers argue in their Appeal that the International Co-Investigating Judge erred by disregarding evidence that AO An was neither a senior leader nor an architect of the genocidal campaign.[1264] These factors, amongst others, are relevant to the assessment of genocidal intent and suggest alternative reasonable inferences that AO An did not possess such intent.[1265]

2. Discussion

618. The International Judges find that the International Co-Investigating Judge did not err in applying the elements of genocide because: (i) the Closing Order (Indictment) identified and defined the protected group (the Cham) as such; and (ii) the Closing Order (Indictment)

Prosecutor also argues it is clear from the International Co-Investigating Judge's findings that Count 1 of the Indictment should be limited to the Cham of Kampong Cham Province in the Central Zone, so it would be appropriate for the Pre-Trial Chamber to recharacterise the Indictment accordingly. *See* International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 107, footnote 267.

[1260] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 108; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625330-01625331, 01625334-01625335, pp. 71:24 to 72:3, 75:25 to 76:23.

[1261] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 108.

[1262] International Co-Prosecutor's Response to AO An's Appeal (D360/9), para. 108; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625334, pp. 75:13 to 75:24.

[1263] AO An's Reply (D360/11), para. 61.

[1264] AO An's Reply (D360/11), para. 59.

[1265] AO An's Reply (D360/11), para. 59.

presented sufficiently serious and corroborative evidence that AO An possessed the specific intent required for genocide. The following will address in turn Grounds 16(ii) and 16(iii).

619. First, turning to the issue of defining the Cham protected group as such, the International Judges affirm the essential nature of this requirement which is enshrined within Article 2 of the Genocide Convention and Article 4 of the ECCC Law which delineate protected groups as "national, ethnical, racial or religious group[s], as such".[1266] The perpetrator's destructive intent must be based specifically on the victim's membership in the group, not on the individuality of the victim.[1267] It follows that the protected group must have a particular identity and be defined as such by its common characteristics rather than a lack thereof. A protected group cannot be defined by negative criteria.[1268]

620. In the instant case, the International Judges find that the International Co-Investigating Judge did not err and identified the Cham as such, including as a distinct entity targeted for their specific religious and ethnic characteristics. The International Judges dismiss the arguments in this regard and consider that the Co-Lawyers have selectively identified instances that refer to a broader victim group whereas the Closing Order (Indictment) clearly identified the Cham as the protected group, defining them as such.[1269]

[1266] The ECCC has jurisdiction over the crime of genocide as defined in the Genocide Convention, Art. 2 ("In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"). *See also* ECCC Law, Art. 4 ("The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group [...]"); Case 002/2 Trial Judgment (E465), paras 790, 797.

[1267] *See, e.g.*, ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgement, Trial Chamber, 24 March 2016 ("*Karadžić* Trial Judgment (ICTY)"), para. 551; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Judgement, Trial Chamber, 12 December 2012, para. 747; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Judgement, Trial Chamber II, 10 June 2010 ("*Popović et al.* Trial Judgment (ICTY)"), para. 821; ICTY, *Prosecutor v. Krajišnik*, IT-00-39-T, Judgement, Trial Chamber, 27 September 2006, para. 856; ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para. 669; ICTR, *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Judgement, Appeals Chamber, 9 July 2004, para. 53; *Akayesu* Trial Judgment (ICTR), para. 521. *See also* Closing Order (Indictment) (D360), para. 98, footnotes 234, 235.

[1268] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (26 February), p. 43 ("*Application of the Genocide Convention* (ICJ)"), paras 191-194; Case 002/2 Trial Judgment (E465), para. 793; *Stakić* Appeal Judgment (ICTY), paras 20-28.

[1269] *See, e.g.*, Closing Order (Indictment) (D360), paras 195 ("The targeting of specific groups, including [...] the Cham"), 218 ("The CPK identified and targeted particular categories of people perceived as potential threats to the DK regime or to have views otherwise incompatible with CPK doctrine, including [...] the Cham [...]."), 220 ("As early as 1976, K[E] Pauk reported to Pol Pot regarding the situation of enemies in the Central (old North) Zone, naming Cham people [...] as enemies"), 302 ("A[O] An directly ordered Kampong Siem District Secretary Prak Yut and other district secretaries to identify and arrest Cham [...] In some instances, A[O] An provided lists of names to Prak Yut, ordering her to arrest these specific individuals, which included Cham [...]"), 303 ("Furthermore A[O] An ordered the Sector Military to arrest Cham people [...]"), 305 ("Witnesses consistently describe Southwest Zone cadres under A[O] An's authority comprehensively and methodically arresting and executing [...] the Cham"), 311 ("A[O] An ordered his subordinate district and commune chiefs, [to] identify [...]

621. It is evident from the Closing Order (Indictment) that the CPK objective to create a "politically and ideologically pure party and society"[1270] or to establish a "classless, atheist and ethnically homogenous society"[1271] was to be achieved through the targeting of positively identified groups, including the Cham. The International Judges hold that this objective was not achieved through negative identification, such as 'non-Khmer'.

622. The Closing Order (Indictment) identified the Cham people as a "distinct ethnic and religious group within Cambodia";[1272] it referred to the group's particular and "common characteristics"[1273] which are distinguishable from the Khmer majority as demonstrated by, *inter alia*, their religion, language, and culture.[1274] Subsequently, the Closing Order (Indictment) identified the CPK policy (and its implementation) of targeting the Cham on the basis of these criteria through, for example, arrests, transfers and killings.[1275] In addition, the

---

'people of different ethnicities' such as the Cham, so that they could be 'purge[d]'"), 313 ("The targeting and killing of the Cham continued right up until the fall of the regime"), 818 ("The Cham were specifically targeted because of their religious and ethnic identity. This conclusion is unavoidable when considering the restrictions that were imposed on the Cham that sought to deny them the very characteristics that defined their group. It is also relevant that members of the group were singled out from their villages and work units and then the men, women, and children were killed indiscriminately soon after capture without any steps being taken to identify who was or was not responsible for any wrongdoing or who opposed the DK regime. This finding is bolstered by the evidence of CPK cadres expressly acknowledging that there was a discriminatory policy against the Cham which ultimately entailed the aim of their physical elimination.") (footnotes omitted). The International Judges note that, similar to the International Co-Investigating Judge's findings, the Trial Chamber in Case 002/2 found that: "the CPK, in the effort to establish an atheistic and homogenous society without class divisions, targeted the Cham as an ethnic and religious distinct group". *See* Case 002/2 Trial Judgment (E465), paras 3228 ("The Chamber finds that the CPK, in the effort to establish an atheistic and homogenous society without class divisions, targeted the Cham as an ethnic and religious distinct group throughout the DK period"), 3345 ("As regards the specific intent of genocide, namely killing with the intent to destroy, in whole or in part, the Cham group **as such**, the Chamber recalls that the CPK targeted the Cham as an ethnic and religious distinct group throughout the DK period, first by restricting their cultural and religious practices, then by brutally supressing "rebellions" and dispersing Cham communities and, at a later stage, by ordering to purge all the Cham who had not yet been deemed as being fully assimilated to the Khmer society"), 3993 ("Having established that a CPK policy to destroy the Cham population existed from 1977, the Chamber finds that the CPK policy targeting the Cham had as its primary objective their physical destruction as an ethnic and religious group, **as such**. The Chamber is satisfied that the treatment of the Cham demonstrates the CPK's objective of establishing an atheistic and homogenous society without class divisions and, in so doing, the Party's intent to abolish all national, religious, class and cultural differences") (emphasis added) (footnotes omitted).

[1270] Closing Order (Indictment) (D360), para. 208.

[1271] Closing Order (Indictment) (D360), para. 597.

[1272] Closing Order (Indictment) (D360), para. 590.

[1273] *Application of the Genocide Convention* (ICJ), paras 191-194; Case 002/2 Trial Judgment (E465), para. 793; *Stakić* Appeal Judgment (ICTY), paras 20-28.

[1274] Closing Order (Indictment) (D360), para. 592 ("[T]he Cham maintained a distinct and separate cultural and ethnic identity despite living in Cambodia for more than 500 years. [...] [T]he Cham practice a unique variation of Islam and speak the Cham language, which is distinct from Khmer. Witnesses consistently describe Cham communities as distinguishable from the ethnic Khmer by virtue of their clothing, language and traditions") (footnotes omitted).

[1275] *See, e.g.*, Closing Order (Indictment) (D360), paras 597 ("The CPK implemented a policy to systematically target specific groups within the Cambodian population"), 599 ("[T]he Cham were prohibited from practicing Islam or speaking the Cham language. Mosques were closed, Islamic religious leaders were arrested, and Cham were forced to relinquish their holy books. Cham who violated the prohibitions could be given a warning, but

Closing Order (Indictment) detailed AO An's alleged role in the targeting of the Cham.[1276] The International Judges find that the above cannot be defined as or otherwise constitute the purported negative approach to identifying the protected group—the Cham.

623. Second, turning to Ground 16(iii) and the purported failure of the International Co-Investigating Judge to demonstrate specific genocidal intent, the International Judges recall that the *mens rea* for genocide requires "not only proof of the intent to commit the underlying act, but also proof of the specific intent to destroy the group, in whole or in part".[1277] This specific intent is also known as genocidal intent, *dolus specialis* or special intent.[1278]

---

more frequently were beaten, killed, or accused of being '*enemies*' and taken away, presumably to be killed"), 601 ("Throughout the Central Zone, Cham were prohibited from practicing their religion. They were forced to eat pork, and the women were required to remove their scarves. Cham were also prohibited from speaking their language or wearing their traditional clothing"), 607-608 ("The CPK policies of suppression of Cham religious practices and dispersal of Cham communities demonstrate a concerted attempt by the CPK to break down Cham communities and erase Cham identity in Kampong Cham Province. By early 1977, [...] the top [CPK] leadership [...] concluded that the Cham were beyond re-education and therefore must be totally exterminated, as such. [...] The consistency of statements attributed to CPK cadres, ranging from high to low levels, and the evidence of mass arrests and killings are convincing evidence of this escalation in policy. Witnesses consistently describe hearing CPK cadres announce discriminatory policies toward the Cham"), 615 ("[T]here was an escalation in the enforcement of CPK policy targeting the Cham following the arrival of the Southwest Zone administration in the Central Zone. The policy, as applied in Kampong Cham Province, progressed from the suppression of the Cham religious and cultural identity to the physical destruction of the Cham population"), 623 ("The evidence below establishes that the arrests, killings and disappearances of the Cham people followed several consistent patterns throughout the Central Zone, demonstrating that there was a coordinated plan to kill the Cham on a massive scale and that they were targeted not for any wrongdoing but because of their ethnic and religious affiliation"), 817-818 ("The acts of genocide were carried out with the intent to destroy the Cham of Kampong Cham Province. This finding of special intent is based on the extensive evidence of an evolution in CPK policy from one of religious suppression to one of elimination and the resulting pattern and scale of the killing of the Cham population. [...] The Cham were specifically targeted because of their religious and ethnic identity. This conclusion is unavoidable when considering the restrictions that were imposed on the Cham that sought to deny them the very characteristics that defined their group. It is also relevant that members of the group were singled out from their villages and work units and then the men, women, and children were killed indiscriminately soon after capture without any steps being taken to identify who was or was not responsible for any wrongdoing or who opposed the DK regime. This finding is bolstered by the evidence of CPK cadres expressly acknowledging that there was a discriminatory policy against the Cham which ultimately entailed the aim of their physical elimination") (footnotes omitted).

[1276] *See, e.g.*, Closing Order (Indictment) (D360), paras 633-637 ("A[O] An ordered Kampong Siem District Secretary Prak Yut to compile a list of the Cham in Kampong Siem District. [...] A[O] An ordered Prak Yut and the other Sector 41 district committees to arrest and kill all the Cham. [...] You Vann was later instructed to make a second list of Cham names during a meeting chaired by A[O] An"), 829-830 ("A[O] An made a significant contribution to the CPK policy targeting specific groups including [...] the Cham [...] A[O] An shared the special intent to destroy the Cham of Kampong Cham province [...]") (footnotes omitted).

[1277] Genocide Convention, Art. 2; ECCC Law, Art. 4; Case 002/2 Trial Judgment (E465), para. 797 *referring to* ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Judgement, Appeals Chamber, 19 April 2004 ("*Krstić* Appeal Judgment (ICTY)"), para. 20; *Application of the Genocide Convention* (ICJ), paras 186-187.

[1278] Case 002/2 Trial Judgment (E465), para. 797 *referring to* ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, Appeals Chamber, 5 July 2001 ("*Jelisić* Appeal Judgment (ICTY)"), para. 45; *Karadžić* Trial Judgment (ICTY), para. 549; *Karadžić* 98bis Appeal Judgment (ICTY), para. 22; *Akayesu* Trial Judgment (ICTR), para. 498; *Application of the Genocide Convention* (ICJ), para. 187.

624. The International Judges consider that "[b]y its nature, intent is not usually susceptible to direct proof"[1279] and instead must be inferred from relevant facts and circumstances such as, *inter alia*, "the general context, the perpetration of other culpable acts systematically directed at the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group or the repetition of destructive and discriminatory acts."[1280]

625. The International Judges are unpersuaded, at this stage of the proceedings, that "to prove an individual's state of mind by inference, it must be the only reasonable inference available on the evidence".[1281] The International Judges affirm that "pursuant to Internal Rule 67, the test for issuing closing orders is the existence of "sufficient evidence [...] of the charges".[1282] At this pre-trial stage, it is sufficient for the International Co-Investigating Judge to present "serious and corroborative evidence".[1283]

626. The International Judges hold that the International Co-Investigating Judge is not required to disprove all other reasonable inferences as this would amount to imposing a higher standard of proving the Accused's mental state beyond a reasonable doubt, as if at trial.[1284]

[1279] *Popović et al.* Trial Judgment (ICTY), paras 823, 1398 ("[D]irect evidence of genocidal intent is rare. Instead it must be inferred from the acts, conduct and knowledge of the accused, as well as other relevant circumstances") *referring to Gacumbitsi* Appeal Judgment (ICTR), para. 40. *See also Popović et al.* Appeal Judgment (ICTY), para. 468; ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-T, Judgement, Trial Chamber III, 11 February 2010, para. 29; *Rutaganda* Appeal Judgment (ICTR), para. 525.

[1280] Case 002/2 Trial Judgment (E465), para. 803 (footnotes omitted). *See also, e.g., Popović et al.* Appeal Judgment (ICTY), para. 468; *Jelisić* Appeal Judgment (ICTY), para. 47; ICTR, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, Judgment, Trial Chamber, 17 June 2004, paras 252-253; *Akayesu* Trial Judgment (ICTR), para. 523; *Kayishema and Ruzindana* Trial Judgment (ICTR), para. 93.

[1281] *Contra* AO An's Appeal (D360/5/1), para. 199 *referring to Krstić* Appeal Judgment (ICTY), para. 41; *Brđanin* Appeal Judgment (ICTY), para. 970.

[1282] *See, e.g., supra* paras 84-87; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 61-62 ("Pursuant to Internal Rule 67, the test for issuing closing orders is the existence of "sufficient evidence [...] of the charges").

[1283] *See supra* para. 84; Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), paras 60-63, and Opinion of Judges BAIK and BEAUVALLET, paras 305, 313.

[1284] ICC, *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05/-01/09-OA, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Appeals Chamber, 3 February 2010, para. 33 ("In the view of the Appeals Chamber, requiring that the existence of genocidal intent must be the *only* reasonable conclusion amounts to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt. If the only reasonable conclusion based on the evidence is the existence of genocidal intent, then it cannot be said that such a finding establishes merely 'reasonable grounds to believe'. Rather, it establishes genocidal intent 'beyond reasonable doubt'"). The International Judges consider that the following is the applicable standard at the trial stage of the proceedings: Case 002/2 Trial Judgment (E465), para. 803 ("In order to infer specific intent, the Chamber needs to consider 'whether all of the evidence, taken together, demonstrated a genocidal mental state'. Where an inference of specific intent is drawn, it must be the only reasonable inference available on the evidence") (footnotes omitted). *See also Stakić* Appeal Judgment (ICTY), para. 219 ("A Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime (as defined with respect to the relevant mode of liability) beyond a reasonable doubt. This standard applies whether the evidence evaluated is

Therefore, if the inference on the genocidal intent drawn from evidence by the International Co-Investigating Judge is sufficiently reasonable, the standard of proof at this stage would be met. The mere fact that he did not consider the other allegedly "reasonable" inference does not constitute a failure to demonstrate the genocidal intent in the Closing Order (Indictment).

627. Bearing in mind this evidentiary standard applicable in pre-trial proceedings, the International Judges find that the International Co-Investigating Judge presented a sufficiently reasonable inference that AO An possessed the requisite specific intent (including, *inter alia*, beyond mere knowledge of the crimes committed against the Cham).[1285] The evidence clearly demonstrates that AO An, as Sector 41 Secretary, Deputy Zone Secretary and Member of the Central Zone Committee, shared the common purpose of implementing the CPK policy of targeting the Cham in the Central Zone of DK; AO An was aware of all CPK activities in his sector and zone.[1286]

628. Specifically, AO An was the primary person responsible for implementing CPK policies in Sector 41 and, indeed, implemented the genocidal policy to target the Cham in the area under his control.[1287] AO An ordered his subordinates to compile a list of the Cham and to arrest and kill all of them;[1288] AO An monitored the progress of the killing operation through meetings and a reporting system.[1289] He also played a significant role in the operation to transfer the Cham from the East Zone to the Central Zone, where they were to be killed, while planning the purge and providing resources for it.[1290] A minimum of 7,910 Cham were killed in Sector 41 as a result of the operation.[1291] Based on these facts and circumstances, the

---

direct or circumstantial. Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the standard is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented. In such instances, the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven. If no reasonable Trial Chamber could have ignored an inference which favours the accused, the Appeals Chamber will vacate the Trial Chamber's factual inference and reverse any conviction that is dependent on it.") (footnotes omitted).

[1285] *Contra* AO An's Appeal (D360/5/1), para. 202.

[1286] *See, e.g.*, Closing Order (Indictment) (D360), paras 824-826.

[1287] *See, e.g.*, Closing Order (Indictment) (D360), paras 633-655.

[1288] *See, e.g.*, Closing Order (Indictment) (D360), paras 633-655 ("A[O] An ordered Kampong Siem District Secretary Prak Yut to compile a list of the Cham in Kampong Siem District. [...] A[O] An ordered Prak Yut and the other Sector 41 district committees to arrest and kill all the Cham. [...] You Vann was later instructed to make a second list of Cham names during a meeting chaired by A[O] An [...]").

[1289] *See, e.g.*, Closing Order (Indictment) (D360), paras 633-655 ("Once the names of the Cham were recorded, the lists were sent back to the "*sector level*", specifically to AO An [...] Prak Yut personally delivered the lists to A[O] An [...] Prak Yut reported [the arrest and killings of the Cham] back to A[O] An").

[1290] *See, e.g.*, Closing Order (Indictment) (D360), paras 633-655.

[1291] *See, e.g.*, Closing Order (Indictment) (D360), paras 638-655 ("**1027** Cham were killed in Kampong Siem District [...] **6443** Cham from Kang Meas District were killed [...] a minimum of **200** Cham were killed in Prey Chhor District [...] a minimum of **240** Cham were killed in Batheay District") (emphasis added).

International Judges conclude that the inference of AO An's specific intent to destroy the Cham is sufficiently reasonable to meet the standard of proof at the closing order stage.

629. Moreover, the International Judges are unpersuaded by the Co-Lawyers' other "reasonable inference", that AO An's blind dedication to the CPK party led him to doggedly pursue the execution of his tasks without genocidal intent; the evidence that AO An (as Sector 41 Secretary, Deputy Zone Secretary and Member of the Central Zone Committee) implemented the genocidal policy in the region under his control by planning, ordering and monitoring the massive transfer and killing operation of the Cham, effectively defeats the Co-Lawyers' contention.[1292]

630. Accordingly, Grounds 16(ii) and 16(iii) are dismissed.

O. CONCLUSION FOR AO AN'S APPEAL

631. For the foregoing reasons, the International Judges conclude that the International Co-Investigating Judge did not commit errors or abuses fundamentally determinative of the exercise of his discretion in finding that AO An was amongst the most responsible for the crimes committed during the period from 17 April 1975 to 6 January 1979. The International Judges accordingly uphold the International Co-Investigating Judge's Closing Order (Indictment) and find that AO An is subject to the ECCC's personal jurisdiction.

632. The International Judges note that Count 1 of the Indictment in the International Co-Investigating Judge's Closing Order commits AO An for trial for the crime of genocide "Against the Cham of Kampong Cham Province",[1293] which includes within its scope Cham victims in both the Central Zone and the East Zone. However, AO An may not be tried for

---

[1292] *Contra* AO An's Appeal (D360/5/1), para. 201, footnote 512 *referring to Popović et al.* Trial Judgment (ICTY), para. 1414. In *Popović et al.*, the Trial Chamber found that another reasonable inference was that Nikolić's "blind dedication to the Security Service led him to doggedly pursue the efficient execution of his assigned tasks in this operation". However, here, the International Judges find that Nikolić's situation is directly distinguishable from that of AO An. For example, Nikolić "was a 2nd Lieutenant, the lowest rank of officer, had never attended a military academy, and was occupying the position of Chief of Security, a post usually reserved for the rank of Major or higher" (para. 1412); moreover, that Trial Chamber held, *inter alia*, that Nikolić had limited knowledge of other killings and the nature of the victims (paras 1402-1403) but he obtained knowledge of the killing operation soon after the inception of his involvement (para. 1407); further, unlike AO An's direct responsibility in implementing the genocidal policy, Nikolić "was brought in to carry out specific tasks assigned to him, in implementation of a [...] plan, designed by others. His criminal acts [...] were confined to his sphere of responsibility – some specific detention and execution sites in Zvornik. [...] He did not participate in capturing nor was he involved in selecting the prisoners. [...] He was not implicated in the arrangements for the movement of the prisoners from Bratunac to Zvornik" (para. 1410).

[1293] Closing Order (Indictment) (D360), at ERN (EN) 01580615.

genocide against the Cham in the East Zone. On 16 December 2016, the International Co-Investigating Judge decided to reduce the scope of the investigation against AO An and excluded facts concerning the arrests and executions of Cham in the East Zone pursuant to Internal Rule 66*bis*.[1294] In his Closing Order (Indictment), the International Co-Investigating Judge also formally terminated the judicial investigation concerning these excluded facts and did not provide factual findings regarding genocide of the Cham in the East Zone.[1295] The International Judges recall that facts excluded pursuant to Internal Rule 66*bis* "shall not form the basis for charges" against the person named for investigation.[1296] Genocide against the Cham in the East Zone should not be included among the Crimes in the Indictment. Consequently, the International Judges amend[1297] Count 1 of the Indictment to provide that AO An is indicted and committed to trial for the crime of genocide against the Cham of Kampong Cham Province *in the Central Zone*.[1298]

633. The International Judges uphold the remaining Counts as set out in the International Co-Investigating Judge's Indictment. AO An is accordingly indicted and committed to trial in proceedings before the Trial Chamber.

[1294] Decision Reducing Scope of Investigation (D337).
[1295] Closing Order (Indictment) (D360), at ERN (EN) 01580612.
[1296] Internal Rule 66*bis*(5).
[1297] Case 002, Decision on KHIEU Samphan's Appeal against the Closing Order, 13 January 2011, D427/4/14.
[1298] The International Judges observe that the International Co-Prosecutor concurs with this amendment. *See* International Co-Prosecutor's Response to AO An's Appeal (D360/9), footnote 267.

NATIONAL CO-PROSECUTOR'S APPEAL AGAINST THE CLOSING ORDER (INDICTMENT)

1. Submissions

634. The National Co-Prosecutor appeals the Closing Order (Indictment)[1299] and requests the Pre-Trial Chamber to dismiss the case against AO An because the ECCC has no jurisdiction over him.[1300]

635. In the Appeal submissions, the National Co-Prosecutor expresses her "viewpoint" of "Free of Liability" and "Non-applicability of Personal Jurisdiction",[1301] without specifying errors in the Closing Order (Indictment). At the Hearing, the National Co-Prosecutor clarified that the Appeal is alleging an error of law in determining personal jurisdiction over AO An.[1302]

636. Under the title "Free of Liability", the National Co-Prosecutor submits that AO An is not liable for the charged crimes because he had no autonomy or *de facto* authority.[1303] Emphasising CPK's hierarchical nature and the decision-making authority of the Standing Committee,[1304] the National Co-Prosecutor argues that the Zone Standing Committee controlled by KE Pauk as Zone Secretary issued the decisions regarding the implementation of CPK policies aimed at purging enemies.[1305] KE Pauk was the most powerful and influential man in the Central Zone, had a close relationship with the CPK Standing Committee members, had authority to chair zone meetings, ordered arrests and killings and strictly controlled all

---

[1299] Closing Order (Indictment) (D360).
[1300] National Co-Prosecutor's Appeal (D360/8/1), para. 98.
[1301] National Co-Prosecutor's Appeal (D360/8/1), paras 68-97. The National Co-Prosecutor includes her factual findings in her Appeal submission (paras 26-60). The International Judges do not consider this as a separate Appeal Ground.
[1302] Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625511, pp. 19:15 to 19:19, 19:21 to 19:25 ("[...] the National Co-Prosecutor finds that only Duch was the most responsible person for the crimes committed in the DK regime. And the ECCC, therefore, has no personal jurisdiction over Ao An. [...] The National Co-Prosecutor also finds that the International Co-Investigating Judge makes legal error when determining personal jurisdiction as outlined earlier. This *one legal* error concerning personal jurisdiction is *sufficient* for the Pre-Trial Chamber to make reasoned decision on the appeal.") (emphasis added).
[1303] National Co-Prosecutor's Appeal (D360/8/1), para. 83, *see* generally paras 68-83; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625088, pp. 24:2 to 24:3, pp. 24:11 to 24:14.
[1304] National Co-Prosecutor's Appeal (D360/8/1), paras 72, 78-79, 82-83; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625086-01625087, pp. 22:16 to 23:18.
[1305] National Co-Prosecutor's Appeal (D360/8/1), paras 68-70, 72, 75, 79-82.

work in the Zone; in sum, "[a]ll the decisions were made by KE Pauk at the zone level after communicating and receiving instructions [...] from Office 870".[1306]

637. With respect to AO An's roles, while the National Co-Prosecutor acknowledges that AO An was Sector 41 Secretary,[1307] Deputy Zone Secretary[1308] and "later Central Zone Secretary for a while",[1309] she avers that AO An "was not officially appointed"[1310] and claims that no evidence demonstrates that AO An took control as Acting Central Zone Secretary when KE Pauk was absent.[1311] AO An had no authority to make decisions and merely received orders from the upper echelon, especially from KE Pauk.[1312] Cadres of all levels would sometimes be arrested and executed if they failed to fulfil their tasks and AO An asserted that he "had to comply absolutely" with all orders and "feared for his life if he did not".[1313] The purge of the Kampong Cham cadres occurred before AO An's arrival in the Central Zone and, in fact, his arrival coincided with KHIEU Samphan's order to stop killing.[1314] The death rates were a result of the nationwide famine—especially in Sector 41 where AO An served as Secretary—caused by the implementation of policies issued by the upper echelon.[1315]

638. In the Response, the International Co-Prosecutor argues that the National Co-Prosecutor fails to meet her burden, as an Appellant alleging factual errors, of demonstrating that the challenged findings in the Closing Order (Indictment) are unreasonable.[1316] Rather, the International Co-Prosecutor submits that the National Co-Prosecutor simply expresses a different view of the facts, without addressing or referring to any findings. As such, the factual portions of her Appeal should be dismissed.[1317] The factual assertions in the National Co-

---

[1306] National Co-Prosecutor's Appeal (D360/8/1), paras 70-72, 75, 82-83.
[1307] National Co-Prosecutor's Appeal (D360/8/1), paras 73, 75, *see also* para. 58.
[1308] National Co-Prosecutor's Appeal (D360/8/1), para. 72, *see also* paras 48, 58.
[1309] National Co-Prosecutor's Appeal (D360/8/1), para. 75.
[1310] National Co-Prosecutor's Appeal (D360/8/1), para. 82, *but see* paras 48, 58 (stating AO An was appointed as Sector 41 Secretary and his position as Deputy Zone Secretary "was officially announced in a zone congress").
[1311] National Co-Prosecutor's Appeal (D360/8/1), paras 76-77, *but see* para. 58 (stating "AO An also became the Deputy Secretary of the Central Zone, a position that required him to act in KE Pauk's place when KE Pauk was absent").
[1312] National Co-Prosecutor's Appeal (D360/8/1), paras 72, 75, 82-83; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625086, 01625088, pp. 22:8 to 22:14, 24:2 to 24:5.
[1313] National Co-Prosecutor's Appeal (D360/8/1), para. 83, *see also* para. 81; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625088, pp. 24:5 to 24:10.
[1314] National Co-Prosecutor's Appeal (D360/8/1), para. 73.
[1315] National Co-Prosecutor's Appeal (D360/8/1), para. 73.
[1316] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 6 *referring to* Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 113; *Haradinaj* Appeal Judgment (ICTY), para. 12; *Krajišnik* Appeal Judgment (ICTY), para. 14.
[1317] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 6 *referring to* National Co-Prosecutor's Appeal (D360/8/1), paras 68-83.

Prosecutor's Appeal are moreover unsupported by the evidence when the Case 004/2 investigation is considered as a whole.[1318]

639. Under the title "Non-Applicability of Personal Jurisdiction", the National Co-Prosecutor alleges that AO An does not fall within the ECCC's personal jurisdiction.[1319] She argues that the ECCC is not a permanent court, as the ICTY, the ICTR and the SCSL, which have ended their mandates; "a restriction on the scope of the personal jurisdiction" is a "method acceptable" for terminating the ECCC mandate.[1320] In her view, "founders of international tribunals" may have an "influence on the scope of personal jurisdiction and judicial affairs without prejudice to impartiality and independence of tribunals"[1321] and the Royal Government of Cambodia, a founder of the ECCC Agreement, may have an influence on termination of its mandate.[1322]

640. The National Co-Prosecutor submits that the Royal Government of Cambodia "is playing a role as the UN Security Council did with the ICTY, ICTR and SCSL" and may restrict the ECCC's personal jurisdiction.[1323] The UN Security Council—founder of the ICTY—instructed that Tribunal to focus indictments only on senior leaders suspected of being most responsible; the ICTY judges created new rules pursuant to which cases were transferred to national jurisdictions in alignment with the UN Security Council's instructions.[1324]

641. The National Co-Prosecutor urges the Chamber to "act in line with the [Royal Government of Cambodia's] determination and the spirit of the ECCC Law" that require the Court to bring to investigation and trial "only senior leaders and those most responsible" during the DK period.[1325] In her view, "those who were most responsible" refers to S-21 Chairman KAING Guek Eav *alias* Duch, as he played a key role in the commission of crimes, with

[1318] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 7 *referring to* International Co-Prosecutor's Appeal (D359/3/1), paras 32-41, 73-78, 83-86.
[1319] National Co-Prosecutor's Appeal (D360/8/1), para. 97, *see* generally paras 84-97. Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625082, 01625083-01625084, 01625085, 01625091, 01625092, pp. 18:12 to 18:22, 19:20 to 20:1, 21:24 to 21:25, 27:11 to 27:18, 28:6 to 28:16; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1 ERN (EN) 01625511, pp. 19:11 to 19:25.
[1320] National Co-Prosecutor's Appeal (D360/8/1), paras 84, 86.
[1321] National Co-Prosecutor's Appeal (D360/8/1), para. 90.
[1322] National Co-Prosecutor's Appeal (D360/8/1), para. 86.
[1323] National Co-Prosecutor's Appeal (D360/8/1), para. 90.
[1324] National Co-Prosecutor's Appeal (D360/8/1), paras 86-88, 90.
[1325] National Co-Prosecutor's Appeal (D360/8/1), para. 90.

autonomy and *de facto* authority. The number of those falling under the ECCC jurisdiction is very limited and restricted.[1326]

642. The National Co-Prosecutor further submits that, in the Preamble of the ECCC Agreement, the United Nations recognised the legitimate concerns of the Cambodian Government and Cambodian people that a balance must be struck between justice and national reconciliation.[1327] With this recognition, the ECCC Agreement and Law aim at only two categories—senior leaders and those who were most responsible—to be brought to trial.[1328] The National Co-Prosecutor contends that "[e]xpanding the scope of personal jurisdiction over AO An beyond the scope of the existing Cases 001 and 002 will lengthen the time and spend money unnecessarily".[1329] She further argues that justice has been "brought to the victims of the DK regime through the trial of Cases 001 and 002."[1330] Therefore, AO An does not fall within the jurisdiction of the ECCC Law.[1331]

643. In the Response, the International Co-Prosecutor argues that the National Co-Prosecutor's Appeal: (i) disregards the intent of both the Royal Government of Cambodia and the United Nations in concluding the ECCC Agreement; (ii) fails to demonstrate that the Royal Government of Cambodia has the power to unilaterally restrict personal jurisdiction; and (iii) unpersuasively claims that Cases 001 and 002 constitute sufficient justice.[1332]

644. First, the ECCC negotiating history shows that the Royal Government of Cambodia and the United Nations shared the intent that those who were most responsible was an open category whose membership would be decided by the Co-Prosecutors and Judges based on the evidence, independent of any instructions.[1333] The statements of Cambodian Government officials at the time of the ECCC Agreement negotiations and passage of the ECCC Law demonstrate that the Royal Government of Cambodia's intent was to refrain from interfering with the ECCC in any way; this includes abstaining from interfering in the determination of

[1326] National Co-Prosecutor's Appeal (D360/8/1), paras 91-93; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625090, pp. 26:12 to 26:24.
[1327] National Co-Prosecutor's Appeal (D360/8/1), para. 94; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625090-01625091, pp. 26:25 to 27:9.
[1328] National Co-Prosecutor's Appeal (D360/8/1), para. 95.
[1329] National Co-Prosecutor's Appeal (D360/8/1), para. 96.
[1330] National Co-Prosecutor's Appeal (D360/8/1), para. 96.
[1331] National Co-Prosecutor's Appeal (D360/8/1), para. 97.
[1332] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 5.
[1333] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 16, *see also* para. 5; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625096-01625097, pp. 32:7 to 33:18.

who or how many people should be prosecuted, which falls within the sole competence of the Court.[1334] Similarly, the United Nations was of the view that no numerical limit on the persons who could be investigated should be offered. [1335]

645. Second, neither party to the ECCC Agreement can unilaterally change the scope of personal jurisdiction.[1336] Any change in policy addressed by the ECCC Agreement, including personal jurisdiction, must be discussed and approved by both parties.[1337] As the Cambodian Government is bound by the ECCC Agreement, it cannot modify its terms by unilateral policy declarations made after its adoption.[1338] The alleged analogy to the UN Security Council's influence on the ICTY and the ICTR is inapt.[1339] The fundamental rule-of-law principle of judicial independence, which prohibits judges from accepting instructions from governments or other outside sources, is also enshrined in the ECCC Agreement and the ECCC Law.[1340]

646. Third, the ECCC Agreement's Preamble is not intended as part of the test for "restricting the scope of personal jurisdiction to senior leaders and those most responsible".[1341] There is "simply no indication" that the judicial resolution of Case 004/2 would threaten Cambodia's peace and security.[1342] Case 004/2 includes issues and crime sites that were not the subject of Cases 001 or 002; hundreds of civil party applicants applied to take part in Case 004/2, which they would not have done had they believed that justice had been fully served with Cases 001 and 002.[1343]

647. The National Co-Prosecutor did not file a Reply.

[1334] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), paras 9-12 *quoting* Letter from the Prime Minister of Cambodia to the Secretary General, 24 March 1999, UN Doc. A/53/875, S/1999/324, paras 2-3; *Statement made on 18 April 1999 by the Cabinet of Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia*, 19 April 1999, UN Doc. A/53/916, Annex; "Hun Sen regrets stating number of K. Rouge leaders to be tried", *Kyodo News International*, 7 January 2000, D360/10.1.18; Cambodian National Assembly Debate, pp. 31, 35, 46-48.
[1335] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), paras 13-14 *quoting* *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, 16 March 1999, UN Docs A/53/850 and S/1999/231, Annex, para. 110; David SCHEFFER, "The Negotiating History of the ECCC's Personal Jurisdiction", *Cambodia Tribunal Monitor*, 22 May 2011, pp. 3-5.
[1336] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), paras 17-26.
[1337] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 20 *referring to* ECCC Agreement, Art. 2(3).
[1338] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 21 *referring to* Vienna Convention, Arts 54, 56.
[1339] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), paras 18-19.
[1340] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 26.
[1341] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 28.
[1342] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 29.
[1343] International Co-Prosecutor's Response to National Co-Prosecutor's Appeal (D360/10), para. 34.

2. Discussion

648. While noting that the Co-Prosecutors may appeal against all orders issued by the Co-Investigating Judges,[1344] the International Judges summarily dismiss the National Co-Prosecutor's Appeal in its entirety for failure to demonstrate any articulable or substantiated errors in the impugned Closing Order (Indictment).

649. The International Judges recall that the arguments of a party, which do not have the potential to cause the impugned decision to be reversed or revised may be dismissed immediately and need not be considered on the merits.[1345] The National Co-Prosecutor makes submissions on the overarching historical background or context,[1346] puts forth alternative readings of the evidence[1347] and merely asserts her understanding or interpretations of senior leaders or those most responsible under personal jurisdiction.[1348] The International Judges cannot find any possibility in the submissions to cause the impugned decision to be reversed or revised and, accordingly, summarily dismiss the Appeal in its entirety.

650. Notwithstanding this summary dismissal, as the National Co-Prosecutor raises two issues related to the integrity of the ECCC, the International Judges exercise their inherent jurisdiction to address these matters in the interests of justice: (i) the position and power of the Royal Government of Cambodia with regard to the personal jurisdiction of the ECCC;[1349] and (ii) the alleged "balance between justice and reconciliation" for the victims in Case 004/2.[1350]

651. First, the International Judges categorically and unequivocally reject the National Co-Prosecutor's contention that the Royal Government of Cambodia is tantamount to the UN

[1344] Internal Rule 74(2).
[1345] Case 002 Decision on Civil Party Applications (D250/3/2/1/5), para. 22 *referring to Blaškić* Appeal Judgment (ICTY), para. 13; *Rutaganda* Appeal Judgment (ICTR), para. 18.
[1346] *See, inter alia*, National Co-Prosecutor's Appeal (D360/8/1), paras 26-30 (describing CPK history and evolution), paras 31-52 (delineating, for example, the Central Committee as the "highest operational unit throughout the country", the Standing Committee and the Party Congress in relation to the CPK Leadership), or paras 53-60 (providing certain details on AO An's personal background).
[1347] National Co-Prosecutor's Appeal (D360/8/1), paras 70-78.
[1348] *See, inter alia*, National Co-Prosecutor's Appeal (D360/8/1), paras 84-97. Concerning personal jurisdiction, the International Judges remark that while the term of those who were most responsible is not defined in the ECCC Agreement or Law, its proper interpretation—in light of the object and purpose of the Court's founding instruments—may be discerned by examining relevant international law jurisprudence—without consulting negotiation history or original intent (*See* Vienna Convention, Art. 31(1)-(2)).
[1349] National Co-Prosecutor's Appeal (D360/8/1), para. 90.
[1350] National Co-Prosecutor's Appeal (D360/8/1), paras 94, 96.

Security Council and may have "influence on the scope of the personal jurisdiction and judicial affairs."[1351]

652. The International Judges do not find any legal basis that the Royal Government of Cambodia, as one of the two Parties who founded the Court, may wield unilateral power to redefine the meaning of personal jurisdiction and/or assert its "influence" on the independent judicial functioning of the Court. The National Co-Prosecutor's reference to the ECCC's negotiation history[1352] only reflects the viewpoint of the Royal Government of Cambodia and fails to constitute a meaningful ground for the interpretation of the ECCC Agreement and the ECCC Law for the purpose of personal jurisdiction.

653. Second, the International Judges recall that the Preamble of the ECCC Agreement enshrines that "the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security". The International Judges are not convinced by the National Co-Prosecutor's contention that striking a balance between "justice" and "national reconciliation"[1353] leads to the conclusion that justice has been brought to the Case 004/2 victims through the trials of Cases 001 and 002.[1354] Further, the International Judges are unpersuaded that the Court's exercise of personal jurisdiction over AO An in Case 004/2 will lengthen the time and spend money unnecessarily.[1355]

654. It is evident from Article 1 of the ECCC Agreement that the purpose of the Agreement is to regulate the cooperation between the Royal Government of Cambodia and the United Nations *in bringing to trial* senior leaders of DK and those who were most responsible for the crimes. Therefore, the Preamble of the ECCC Agreement should be understood that the "national reconciliation and stability, peace and security" are promoted as a consequence of justice by bringing to trial senior leaders and those who were most responsible, rather than compromising justice by creating an impunity gap and leaving the victims' voices unheard.

655. AO An is charged with, among allegations, genocide, which is one of the most heinous crimes in international criminal law, given the focus and intensity of the criminality. The

[1351] National Co-Prosecutor's Appeal (D360/8/1), para. 90.
[1352] National Co-Prosecutor's Appeal (D360/8/1), paras 89-93.
[1353] National Co-Prosecutor's Appeal (D360/8/1), para. 94.
[1354] National Co-Prosecutor's Appeal (D360/8/1), para. 96.
[1355] National Co-Prosecutor's Appeal (D360/8/1), para. 96.

National Co-Investigating Judge, in his Closing Order (Dismissal) of the Case 004/2, delineated thousands of victims as having perished at various sites,[1356] counting an estimated 30,000 victims in a crime site where as many skulls were found as in S-21.[1357] In Case 004/2 alone, hundreds of civil party applicants applied to take part in the proceedings, of which 434 civil party applicants were certified as admissible by the International Co-Investigating Judge.[1358] While the International Judges acknowledge that it takes time and resources to ensure that justice is served, disregarding the plight of the victims in Case 004/2 cannot be considered a feasible or reasonable means of achieving "national reconciliation". Each individual victim is entitled to access the mechanisms of justice and to prompt redress for the harm they have suffered.[1359]

[1356] *See, inter alia*, Closing Order (Dismissal) (D359), para. 297 (concluding that around ten thousand people died at Phnom Pros based on government documents and given an excavation of bones from an execution site), para. 311 (finding that around thirty thousand people were estimated to have been killed at Wat Au Trakuon Security Centre), para. 322 (finding that around ten thousand victims were killed at Wat Batheay Security Centre), para. 331 (finding that around two thousand persons were estimated to have been killed at Met Sop Security Centre) and para. 336 (finding that one thousand victims died at Kok Pring Security Centre).
[1357] Closing Order (Dismissal) (D359), para. 311 ("After the fall of the DK regime numerous skulls seen at Wat Au Trakuon Security Centre were possibly as many as the ones at S-21 Security Centre. After the liberation according to officials of the State of Cambodia, the number of the victims who were killed at Wat Au Trakuon Security Centre was around 30 000 (thirty thousand) people. Despite such a confirmed figure, it was just an estimate made by certain official."), *see also* para. 547 (finding similarly that up to 20,000 people died over the course of the operation at S-21 Security Centre.).
[1358] *See, e.g.*, Annex A (Civil Party Applicants Declared Admissible) to International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants, 16 August 2018, D362.1.
[1359] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, para. 4. *See also* Internal Rules 21 (1) ("The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of [...] Victims"); Internal Rule 21(1)(c) (articulating that "The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings [...]").

INTERNATIONAL CO-PROSECUTOR'S APPEAL AGAINST THE CLOSING ORDER (DISMISSAL)

1. Submissions

656. The International Co-Prosecutor appeals the Closing Order (Dismissal) and requests the Pre-Trial Chamber to: (i) reverse the Closing Order (Dismissal)'s finding that AO An is not subject to the personal jurisdiction of the ECCC; (ii) find that AO An was one of those most responsible for Khmer Rouge crimes; and (iii) send him for trial on the basis of the Indictment.[1360]

657. The International Co-Prosecutor submits that the National Co-Investigating Judge erred in law and fact in finding that AO An is not subject to the personal jurisdiction of the ECCC,[1361] as detailed in the below Grounds A to F sections. In addition, he makes submissions on the conflicting Closing Orders.

A. Ground A: Legal Error of Failure to Make Findings

658. The International Co-Prosecutor submits that the National Co-Investigating Judge committed an error of law by failing to make findings on the crimes charged and AO An's liability for these crimes.[1362] The International Co-Prosecutor asserts that the Closing Order (Dismissal) is "unreasoned and legally deficient" because it failed to adequately assess who is most responsible for crimes, including genocide.[1363] While the Closing Order (Dismissal) contains "a partial review of the evidence and limited factual findings",[1364] it fails to reach the legal conclusions on the "commission of crimes and AO An's responsibility that would necessarily follow from its own factual findings".[1365]

659. In the Response, the Co-Lawyers submit that Ground A should be rejected because the International Co-Prosecutor failed to demonstrate any legal or factual errors invalidating the

[1360] International Co-Prosecutor's Appeal (D359/3/1), paras 4, 112.
[1361] International Co-Prosecutor's Appeal (D359/3/1), para. 13.
[1362] International Co-Prosecutor's Appeal (D359/3/1), paras 14-31.
[1363] International Co-Prosecutor's Appeal (D359/3/1), paras 14-15; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625129, pp. 65:2 to 65:13.
[1364] International Co-Prosecutor's Appeal (D359/3/1), para. 17.
[1365] International Co-Prosecutor's Appeal (D359/3/1), paras 17-31. *See* Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625123-01625125, pp. 59:25 to 61:4.

Closing Order (Dismissal);[1366] moreover, the National Co-Investigating Judge "has complied with all applicable procedural requirements for a valid dismissal order"[1367] and provided reasons for his decision to dismiss the case against AO An—indicating that the main ground is the "Court's lack of personal jurisdiction over AO An."[1368] The Co-Lawyers aver that the National Co-Investigating Judge provided "sufficient reason for dismissal" and that "the same level of evidential assessment is not required when dismissing a case".[1369]

660. In the Reply, the International Co-Prosecutor argues that contrary to the Co-Lawyers' assertions, the law requires the Closing Order (Dismissal) to contain findings as to the characterisation of the crimes and modes of responsibility in order to provide a reasoned decision on personal jurisdiction.[1370] The Closing Order (Dismissal) fails to make proper legal conclusions on the facts of which the Co-Investigating Judges were seised.[1371]

B. Ground B: Legal or Factual Errors of Giving Excessive Weight to Coercion, Duress, and Superior Orders

661. The International Co-Prosecutor submits that the National Co-Investigating Judge made legal and factual errors by giving excessive weight to coercion, duress and superior orders in failing to find personal jurisdiction over AO An.[1372] The errors include *inter alia*: (i) the Closing Order (Dismissal)'s emphasis on superior orders, duress and coercion;[1373] (ii) the failure to consider that AO An "was prepared to commit crimes without any coercion", meaning that he committed crimes willingly without any threat;[1374] (iii) the illogical and unfounded conclusion that AO An's participation in crimes "did not exceed the scope of his official authority";[1375] and (iv) the National Co-Investigating Judge's arbitrarily different treatment of superior orders, coercion, and duress in Case 001 versus Case 004/2.[1376]

[1366] AO An's Response (D359/3/4), para. 13.
[1367] AO An's Response (D359/3/4), para. 13.
[1368] AO An's Response (D359/3/4), paras 7-13; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625350-01625351, pp. 91:25 to 92:6.
[1369] AO An's Response (D359/3/4), paras 8-12; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625351-01625354, pp. 92:19 to 95:1.
[1370] International Co-Prosecutor's Reply (D359/3/5), paras 6-10.
[1371] International Co-Prosecutor's Reply (D359/3/5), paras 11-12.
[1372] International Co-Prosecutor's Appeal (D359/3/1), paras 32-46.
[1373] International Co-Prosecutor's Appeal (D359/3/1), paras 32-37.
[1374] International Co-Prosecutor's Appeal (D359/3/1), paras 38-41.
[1375] International Co-Prosecutor's Appeal (D359/3/1), para. 42.
[1376] International Co-Prosecutor's Appeal (D359/3/1), paras 43-46.

662. In the Response, the Co-Lawyers contend that the International Co-Prosecutor fails to identify "any legal or factual errors, or abuse of discretion, invalidating" the Closing Order (Dismissal).[1377] This includes a failure to pinpoint error in the National Co-Investigating Judge's assessment of coercion, duress and superior orders because (i) these factors are relevant to determining whether AO An is among the most responsible;[1378] (ii) the argument that AO An willingly participated in the crimes is based on unreliable evidence which is not credible;[1379] and (iii) since a personal jurisdiction assessment includes an examination of varying factors, Case 004/2 should be examined on its own merits, separately from Case 001 findings.[1380]

663. In the Reply, the International Co-Prosecutor maintains that contrary to the Co-Lawyers' argument, under the ECCC jurisprudence, the Closing Order (Dismissal) should not have given excessive weight to superior orders in assessing personal jurisdiction.[1381] Further, AO An was not "a victim of coercion and duress" but actively implemented the DK policies.[1382] The International Co-Prosecutor asserts that the Closing Order (Dismissal) applied the law inconsistently from Case 001 and rejects the Co-Lawyers' explanation as to why Duch was found to be most responsible and AO An was not.[1383]

C. Ground C: Legal Error of Holding that Duch is the Only Most Responsible Person

664. The International Co-Prosecutor submits that the National Co-Investigating Judge made a legal error in holding that Duch is "the only most responsible person"[1384] because (i) this contradicts the Chief Royal Government of Cambodia negotiator's statements on personal jurisdiction and fails to respect the Government's intent in establishing the ECCC;[1385] (ii) this is inconsistent with the United Nations' understanding of those who were most responsible established in negotiations and enshrined in the plain language of the ECCC Law and Internal

[1377] AO An's Response (D359/3/4), para. 14.
[1378] AO An's Response (D359/3/4), paras 14-16; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625354-01625356, pp. 95:7 to 97:7.
[1379] AO An's Response (D359/3/4), para. 17; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625356, pp. 97:8 to 97:23.
[1380] AO An's Response (D359/3/4), para. 18; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625356-01625357, pp. 97:25 to 98:21.
[1381] International Co-Prosecutor's Reply (D359/3/5), paras 14-17.
[1382] International Co-Prosecutor's Reply (D359/3/5), paras 18-22.
[1383] International Co-Prosecutor's Reply (D359/3/5), paras 23-24 (including, *inter alia,* that AO An "controlled a vastly greater number of civilians than prisoners under Duch's control" and "commanded a higher number of subordinates" and was charged with more crimes, notably genocide, while Duch was not).
[1384] International Co-Prosecutor's Appeal (D359/3/1), paras 47-48 and footnote 140.
[1385] International Co-Prosecutor's Appeal (D359/3/1), para. 49 and footnote 143.

Rules;[1386] (iii) it contradicts the National Co-Investigating Judge's own holdings in the Closing Order (Dismissal) and Case 004/1 Closing Order;[1387] and (iv) it violates international human rights norms and protections in the Constitution of Cambodia.[1388]

665. In the Response, the Co-Lawyers assert that the International Co-Prosecutor erred by failing to "demonstrate" that the National Co-Investigating Judge interpreted the ECCC legal framework to mean that Duch was "the only most responsible person"[1389] or that this was determinative of his personal jurisdiction assessment.[1390]

666. In the Reply, the International Co-Prosecutor argues that AO An's assertion that the National Co-Investigating Judge did not limit those most responsible to Duch is "directly contradicted by the exact words" in the Closing Order (Dismissal)[1391]— specifically, that the National Co-Investigating Judge held that "the prosecution of these senior leaders shall not extend to low-level cadres besides Duch."[1392] The International Co-Prosecutor avers that the Co-Lawyers "fail to address the error of law" concerning the interpretation of those "most responsible by the International Co-Prosecutor"; their position is based on an incorrect interpretation of the ECCC Agreement, the ECCC Law and the Internal Rules.[1393]

D. Ground D: Factual Errors Related to the Assessment of the Credibility of Evidence

667. The International Co-Prosecutor submits that the Closing Order (Dismissal) concerning PRAK Yut's evidence is unclear because an "unreasoned two-paragraph discussion" suggests a conclusion that PRAK Yut may be unreliable.[1394] The International Co-Prosecutor contends that the National Co-Investigating Judge's reasons are "illogical and fly in the face of extensive corroborating evidence and the Dismissal Order's own findings"; PRAK Yut's evidence is reliable and corroborated.[1395] The International Co-Prosecutor argues that while "the compartmentalization of information by the Khmer Rouge" and the passage of time can affect

[1386] International Co-Prosecutor's Appeal (D359/3/1), paras 50-51 and footnote 144, paras 54-55 and footnotes148-149.
[1387] International Co-Prosecutor's Appeal (D359/3/1), paras 52-53.
[1388] International Co-Prosecutor's Appeal (D359/3/1), paras 56-57.
[1389] AO An's Response (D359/3/4), paras 20-24; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625357-01625358, pp. 98:22 to 99:18.
[1390] AO An's Response (D359/3/4), para. 20.
[1391] International Co-Prosecutor's Reply (D359/3/5), para. 25 and footnotes 76-77.
[1392] International Co-Prosecutor's Reply (D359/3/5), para. 25 *citing* Closing Order (Dismissal) (D359), para. 478.
[1393] International Co-Prosecutor's Reply (D359/3/5), paras 26-27.
[1394] International Co-Prosecutor's Appeal (D359/3/1), para. 58.
[1395] International Co-Prosecutor's Appeal (D359/3/1), paras 58-61.

memory, it is manifestly unreasonable to label all proof of AO An's criminal conduct unreliable based on this.[1396] The International Co-Prosecutor emphasises that the evidence includes numerous independent witnesses' testimony implicating AO An's acts and conduct in highly consistent ways.[1397]

668. In the Response, the Co-Lawyers submit that the International Co-Prosecutor fails to demonstrate any factual errors in the National Co-Investigating Judge's assessment of PRAK Yut's evidence, which do not meet the standard of proof.[1398] The Co-Lawyers aver that contrary to the International Co-Prosecutor's reasoning, the factors listed in the Closing Order (Dismissal) do not preclude the credibility and reliability assessment of evidence in Case 004/2.[1399]

669. In the Reply, the International Co-Prosecutor argues that the National Co-Investigating Judge unreasonably assessed PRAK Yut's statements by ignoring other corroborative evidence which implicates AO An.[1400] The International Co-Prosecutor asserts that though the secrecy of the regime and the time are factors that could affect witness accounts, the National Co-Investigating Judge dismissed such evidence, without examining its substance or corroboration.[1401] The Closing Order (Dismissal) fails to provide a reasoned, case-by-case assessment of evidence.[1402]

E. Ground E: Erroneous Factual Findings with a Determinative Impact on the Personal Jurisdiction Issue

670. The International Co-Prosecutor submits that the National Co-Investigating Judge made erroneous factual findings which exerted a determinative impact on personal jurisdiction.[1403] First, the International Co-Prosecutor argues that the Closing Order (Dismissal)'s findings that AO An mostly attended meetings and played a "coordinating role" are unreasonable and

[1396] International Co-Prosecutor's Appeal (D359/3/1), paras 62-63; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625130, pp. 66:6 to 66:11.
[1397] International Co-Prosecutor's Appeal (D359/3/1), para. 64.
[1398] AO An's Response (D359/3/4), paras 25, 27; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625358, pp. 99:20 to 99:25.
[1399] AO An's Response (D359/3/4), para. 26; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625359-01625360, pp. 100:1 to 101:1.
[1400] International Co-Prosecutor's Reply (D359/3/5), paras 28-29; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625130, pp. 66:18 to 66:23
[1401] International Co-Prosecutor's Reply (D359/3/5), para. 30.
[1402] International Co-Prosecutor's Reply (D359/3/5), para. 30.
[1403] International Co-Prosecutor's Appeal (D359/3/1), paras 65-66.

contradicted by "overwhelming evidence" that AO An ordered a large number of arrests and killings, including of "the Cham throughout Sector 41".[1404] The Closing Order (Dismissal) "does not engage" with the "tremendous volume of evidence".[1405]

671. Second, the International Co-Prosecutor contends that the Closing Order (Dismissal) erroneously found that AO An was "sent to the Central Zone in mid-1977" when the purges were about to end.[1406] The International Co-Prosecutor avers that the timing of AO An's arrival in the Central Zone is an estimation and reliance on KE Pauk's biography is unreasonable;[1407] moreover, evidence demonstrates that AO An arrived in the Central Zone in "1976 or early 1977" as supported by statements from former cadres or those who worked with him upon his arrival.[1408] Third, the International Co-Prosecutor asserts that the vast bulk of evidence, consisted of evidence from the key witnesses, shows the charged crimes were committed with AO An's participation as Sector 41 Secretary.[1409] Fourth, contrary to the Closing Order (Dismissal)'s portrayal, KE Pauk and AO An reached decisions cooperatively and collectively.[1410]

672. In the Response, the Co-Lawyers contend that the International Co-Prosecutor erroneously applies the standards for indictments to dismissal orders and fails to demonstrate any errors invalidating the Closing Order (Dismissal).[1411] The Co-Lawyers dispute the International Co-Prosecutor's arguments based on the misrepresentation, insufficiency and lack of corroborative and credible evidence regarding (i) AO An issuing arrest and killing orders;[1412] (ii) AO An's participation in the crimes as Sector 41 Secretary;[1413] and (iii) KE Pauk's and AO An's alleged collective decision-making.[1414] Moreover, the Co-Lawyers maintain that the National Co-Investigating Judge did not err in relying on KE Pauk's

[1404] International Co-Prosecutor's Appeal (D359/3/1), paras 67-72.
[1405] International Co-Prosecutor's Appeal (D359/3/1), paras 68-72.
[1406] International Co-Prosecutor's Appeal (D359/3/1), para. 73.
[1407] International Co-Prosecutor's Appeal (D359/3/1), paras 73-76, 78.
[1408] International Co-Prosecutor's Appeal (D359/3/1), para. 77; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625341, pp. 82:3 to 82:15.
[1409] International Co-Prosecutor's Appeal (D359/3/1), paras 79-86; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625340-01625342, pp. 81:18 to 83:3.
[1410] International Co-Prosecutor's Appeal (D359/3/1), paras 87-94; Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625125, pp. 61:6 to 61:24.
[1411] AO An's Response (D359/3/4), paras 28-30; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625360, pp. 101:2 to 101:8.
[1412] AO An's Response (D359/3/4), paras 31-32; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625360-01625361, pp. 101:19 to 102:18.
[1413] AO An's Response (D359/3/4), paras 38-44.
[1414] AO An's Response (D359/3/4), paras 45-47; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625363, pp. 104:10 to 104:18.

biography as exculpatory evidence, which credible witnesses corroborate.[1415]

673. In the Reply, the International Co-Prosecutor argues that the Co-Lawyers minimise and consider the evidence "in a piecemeal fashion", ignoring corroborative witness accounts establishing AO An's role in arrests and killings.[1416] The International Co-Prosecutor asserts that contrary to the Co-Lawyers' argument, it is not the timing but the gravity of the crimes that is relevant in determining AO An's responsibility: this is supported by PRAK Yut's credible evidence.[1417] The International Co-Prosecutor contends that the Co-Lawyers ignore the relevant corroborative evidence of AO An's role in the zone-level decision-making, supporting the conclusion that he is among the most responsible.[1418]

F. Ground F: Legal Error of Failing to Consider the Impact of AO An's Leadership in Genocide

674. The International Co-Prosecutor submits that the Closing Order (Dismissal) fails to "take into account the impact" of AO An's role in the genocide,[1419] including not even considering AO An's overall central role in the genocide against the Cham in determining personal jurisdiction.[1420] Specifically, the International Co-Prosecutor argues that AO An's role in the genocide was "determined and direct" and genocide is "universally acknowledged as an extremely grave crime, as it is an attack on the whole of the human family as well as the victims themselves."[1421]

675. In the Response, the Co-Lawyers argue that the International Co-Prosecutor fails to substantiate his claim that the National Co-Investigating Judge erred.[1422] The Co-Lawyers allege that the International Co-Prosecutor errs in claiming that AO An's role in the genocide was "determined and direct", including overstating the evidence.[1423] The Co-Lawyers aver that contrary to the International Co-Prosecutor's assertion, the National Co-Investigating Judge considered AO An's role in the genocide, among a "range of factors", in determining personal

[1415] AO An's Response (D359/3/4), paras 33-37.
[1416] International Co-Prosecutor's Reply (D359/3/5), paras 31-35.
[1417] International Co-Prosecutor's Reply (D359/3/5), paras 36-39.
[1418] International Co-Prosecutor's Reply (D359/3/5), paras 40-42.
[1419] International Co-Prosecutor's Appeal (D359/3/1), paras 95-99.
[1420] International Co-Prosecutor's Appeal (D359/3/1), para. 99.
[1421] International Co-Prosecutor's Appeal (D359/3/1), paras 95-98.
[1422] AO An's Response (D359/3/4), para. 49.
[1423] AO An's Response (D359/3/4), paras 49-54; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625364, pp. 105:2 to 105:19.

jurisdiction.[1424] The Co-Lawyers reject the International Co-Prosecutor's argument that the ECCC has an obligation under the Genocide Convention to indict AO An because the suggestion of this "obligation expands or supersedes the jurisdictional limitations" of the ECCC.[1425]

676. In the Reply, the International Co-Prosecutor submits that the National Co-Investigating Judge erred by failing to assess personal jurisdiction over AO An and to provide reasons for his findings.[1426] The International Co-Prosecutor argues that such error results in the failure to assess the existence and gravity of genocide and AO An's responsibility, which impacts the personal jurisdiction determination.[1427] The International Co-Prosecutor maintains that contrary to the Co-Lawyers' assertion, the Royal Government of Cambodia and the United Nations intended to prosecute those most responsible, including AO An, for genocide.[1428]

G. Submissions regarding Conflicting Closing Orders

677. Regarding the existence of conflicting closing orders, the International Co-Prosecutor is "strongly of the view" that the Closing Order (Dismissal)'s findings on personal jurisdiction "should be reversed" and the case against AO An "should be sent for trial on the basis of the Indictment".[1429] The International Co-Prosecutor argues that, in the event that the Pre-Trial Chamber is unable to reach a supermajority on the Appeals against the two Closing Orders, the Internal Rules—supported by ECCC jurisprudence and the policy of the Court's legal framework—"mandate that the case proceed to trial" on the basis of the Closing Order (Indictment).[1430] Given the language of the ECCC legal framework (including "the investigation or prosecution shall proceed"), even if there is no supermajority within the Pre-Trial Chamber, the International Co-Prosecutor submits that "the Trial Chamber must be seised and the case brought to trial."[1431]

678. In the Response, the Co-Lawyers "strongly dispute" the International Co-Prosecutor's

[1424] AO An's Response (D359/3/4), paras 55-56; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625364-01625365, pp. 105:20 to 106:9.
[1425] AO An's Response (D359/3/4), paras 57-61; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625365, pp. 106:9 to 106:23; 01625366-01625367, pp. 107:13 to 108:7.
[1426] International Co-Prosecutor's Reply (D359/3/5), para. 43.
[1427] International Co-Prosecutor's Reply (D359/3/5), paras 44, 46.
[1428] International Co-Prosecutor's Reply (D359/3/5), para. 45.
[1429] International Co-Prosecutor's Appeal (D359/3/1), para. 100.
[1430] International Co-Prosecutor's Appeal (D359/3/1), paras 100-108; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625323-01625329, pp. 64:16 to 70:5.
[1431] International Co-Prosecutor's Appeal (D359/3/1), para. 108.

argument that, if neither of the two Closing Orders is affirmed for lack of supermajority, the ECCC law and procedure mandate that the case proceed to trial.[1432] The Co-Lawyers contend that Internal Rule 77(13)(b) is "clearly intended to regulate the situation where a single indictment is issued" by both Co-Investigating Judges and does not provide clarity on this situation.[1433] Moreover, the International Co-Prosecutor's position contradicts the ECCC Law and jurisprudence, the principle of *in dubio pro reo* and the presumption of innocence;[1434] the Pre-Trial Chamber should dismiss the International Co-Prosecutor's Appeal and uphold the Closing Order (Dismissal).[1435]

679. In the Reply, the International Co-Prosecutor maintains that contrary to the Co-Lawyers' assertion, unless the Pre-Trial Chamber decides by supermajority on the conflicting Closing Orders, the case must proceed to trial, which is in conformity with the ECCC legal framework, *in dubio pro reo* and AO An's fundamental rights.[1436]

2. Discussion

680. The Co-Prosecutors may appeal against all orders issued by the Co-Investigating Judges.[1437] The International Judges recall that the Co-Investigating Judges violated the ECCC legal framework here by issuing two conflicting Closing Orders.[1438] Within the ECCC provisions, only two avenues were legally available to the Co-Investigating Judges regarding their disagreement: (i) reaching a consensus on a singular Closing Order or (ii) referring the disagreement to the Pre-Trial Chamber.[1439] The Co-Investigating Judges failed to judiciously employ the procedures necessary to resolve their disagreement, agreeing instead to issue contradictory Closing Orders in violation of the ECCC laws.[1440]

681. The International Judges reaffirm that, despite the International Co-Investigating Judge's erroneous agreement with the National Co-Investigating Judge to issue two separate Closing Orders, the Closing Order (Indictment) conformed with the applicable law before the

[1432] AO An's Response (D359/3/4), para. 63.
[1433] AO An's Response (D359/3/4), para. 64.
[1434] AO An's Response (D359/3/4), paras 63-67; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625367, pp. 108:7 to 108:25.
[1435] AO An's Response (D359/3/4), paras 68-69.
[1436] International Co-Prosecutor's Reply (D359/3/5), paras 47-51.
[1437] Internal Rule 74(2).
[1438] Closing Order (Indictment) (D360); Closing Order (Dismissal) (D359).
[1439] *See supra* paras 103-124.
[1440] *See supra* paras 88-124.

ECCC.[1441] On the contrary, the issuance of the Closing Order (Dismissal) has been found to be an attempt to circumvent the essential and mandatory requirement to refer the disagreement in this Case to the Pre-Trial Chamber, rendering it *ultra vires* and void.[1442]

682. The International Judges declare the International Co-Prosecutor's Appeal moot because the Order appealed against, *i.e.* the Closing Order (Dismissal), is *ultra vires* and void.[1443] The consequence of this finding with regard to Internal Rule 77(13)(b), that the Trial Chamber be seised of the Closing Order (Indictment), will be addressed in the Conclusion section of this Consideration.[1444]

[1441] *See supra* Ground 1; ECCC Agreement, Art. 5(4) ("The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, *the investigation shall proceed* unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7") (emphasis added). *See also* ECCC Law, Art. 23*new*, para. 3.
[1442] *See supra* paras 315-328 and *infra* para. 683.
[1443] *See supra* Ground 1. *See, e.g.*, ICC, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, ICC-01/05-01/08 A2 A3, Decision on the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 21 June 2016 entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 June 2018, para. 8 (finding that since the Appeals Chamber reversed the Conviction Decision and acquitted the Accused, the Appeals filed against the Sentencing Decision were rendered moot and dismissed them as such); Case 002 (PTC70), Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Constructive Denial of Ieng Sary's Two Applications to Seise the Pre-Trial Chamber with Requests for Annulment, 15 September 2010, D381/1/2, para. 2 ("The Pre-Trial Chamber finds the Appeal inadmissible because the subject matter of the Appeal is moot in light of the Order."); *See also* Case 002/1 Appeal Judgment (F36), paras 999, 1040, 1070; ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Judgement, Appeals Chamber, 16 October 2007, para. 40.
[1444] *See infra* paras 685-687.

CONCLUSION

Findings on the Appeals

683. For the foregoing reasons, the International Judges summarily dismiss the National Co-Prosecutor's Appeal. They find that the National Co-Investigating Judge's Closing Order (Dismissal) is *ultra vires* and void, without legal effect, and hence declare the International Co-Prosecutor's Appeal moot.

684. Further, the International Judges dismiss Grounds 1 to 9, 11, 12(i), 13, 15(i), 16(ii) and 16(iii) of the Co-Lawyers' Appeal for AO An and find that Count 1 of the Indictment shall be amended to provide that AO An is indicted and committed to trial for the crime of genocide against the Cham of Kampong Cham Province in the Central Zone.

Internal Rule 77(13)(b)

685. Pursuant to Internal Rule 77(13)(b), where the required majority is not attained, the default decision of the Chamber, as regards appeals against indictments, shall be that "the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges."[1445] As the International Judges have found that the National Co-Investigating Judge's Closing Order (Dismissal) is *ultra vires*, void and without legal effect and given that the required majority has not been attained, the default decision must be that the International Co-Investigating Judge's Closing Order (Indictment) be forwarded to the Trial Chamber so that it shall be seised of the Indictment.

686. The International Judges reiterate that the principle of *in dubio pro reo* is primarily a rule of evidentiary proof and not a rule of legal interpretation.[1446] Second, even if *in dubio pro reo* applies in legal interpretation, there is no doubt to resolve here because the National Co-Investigating Judge's Closing Order (Dismissal) is *ultra vires*, void and without legal effect.[1447] Moreover, Internal Rule 77(13)(a), concerning how an appeal against "an order [...] other than an indictment" shall stand, this provision is inapplicable since no valid dismissal order exists. Only the Closing Order (Indictment) stands and the Trial Chamber is seised on the basis of the

[1445] *See also* Internal Rule 79(1) ("The Trial Chamber shall be seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.").
[1446] *See supra* Ground 1; Case 003 Decision on MEAS Muth's Appeal against the International Co-Investigating Judge's Decision concerning Nexus (D87/2/1.7/1/1/7), para. 65.
[1447] *See supra* Ground 1.

valid Indictment pursuant to Internal Rule 77(13)(b), which unambiguously applies to the appeals against indictments. There are no *lacunae* which would permit resolution in favour of AO An.[1448] Consequently, *in dubio pro reo* finds no application here.

687. In light of the clear terms of Internal Rule 77(13)(b), the inability of the Pre-Trial Chamber to reach a decision by a majority of at least four judges does not prevent the Indictment, along with the supporting Case File, from being transmitted to the Trial Chamber so that it may commence trial proceedings against AO An. Consistent with this provision, the Greffier of the Pre-Trial Chamber will forward the present Considerations, the International Co-Investigating Judge's Closing Order (Indictment) and the remaining Case File onward to the Trial Chamber.

Security Measures

688. In his Closing Order (Indictment), the International Co-Investigating Judge considered that provisional detention was not necessary within the meaning of Internal Rule 63(3)(b).[1449] He also considered that another reason was "the procedural uncertainty resulting from the opposing closing orders".[1450] The Co-Investigating Judge did not contemplate any other security measure at his disposal.

689. AO An is charged with the most serious of crimes, namely genocide, crimes against humanity, and murder. Moreover, the International Co-Investigating Judge noted that the acts implicated were directly or indirectly related to the deaths of tens of thousands of people.[1451] He faces a heavy sentence of imprisonment for these charges.

690. In view of the foregoing, the International Judges consider that the reasoning of the International Co-Investigating Judge was undermined by two serious errors.

691. In considering that no security measure was necessary, the International Co-Investigating Judge committed a first error. Indeed, it is advisable to avoid putting any pressure on witnesses, especially those who have benefited from a letter of guarantee issued by the Co-Investigating Judge. It is also necessary to bring AO An to justice. Finally, in view of the disturbance to public order, both national and international, caused by acts so detrimental to

[1448] *Contra* National Judges' Opinion, paras 268, 295-297.
[1449] Closing Order (D360), para. 853.
[1450] Closing Order (D360), para. 854.
[1451] Closing Order (D360), paras 709, 711.

humanity that they cannot be subject to statutory limitation, a measure of provisional detention or another security measure available to the International Co-Investigating Judge was imperative.

692. The Pre-Trial Chamber unanimously held that the Co-Investigating Judges violated the applicable law by issuing two conflicting Closing Orders.[1452] To claim to rely on the procedural uncertainty caused by the intentional joint violation of the applicable law by the Co-Investigating Judges is tantamount to committing further errors in law, especially when the International Co-Investigating Judge fails to consider other security measures which are available to him. Such shortcomings further demonstrate the willingness of the International Co-Investigating Judge to avoid any measure that could have given greater meaning and effectiveness to his Order.

693. Pursuant to Internal Rule 44 and the facts on the record, the International Judges find that the International Co-Investigating Judge erred in failing to properly consider the issuance of an arrest warrant.

[1452] *See supra* paras 101-124.

DISPOSITION

694. Given the lack of the supermajority in the Chamber and the exceptional situation of the Appeals against conflicting Closing Orders, the International Judges consider it imperative to clarify the subsequent procedures following these Considerations to ensure legal certainty, transparency of proceedings and the interests of justice.

FOR THESE REASONS, THE INTERNATIONAL JUDGES HEREBY:

Finding that the Closing Order (Indictment) is not being reversed by supermajority and stands,

- **APPROVE** that AO An be sent for trial as provided in the Closing Order (Indictment), as hereby amended;

- **FIND** that the Trial Chamber be seised on the basis of the Closing Order (Indictment) under Internal Rule 77(13)(b).

Phnom Penh, 19 December 2019

Judge Olivier BEAUVALLET **Judge Kang Jin BAIK**