DOI:10.1017/ilm.2020.37

INTRODUCTORY NOTE TO CASE 004/2 INVOLVING AO AN: CONSIDERATIONS ON APPEALS AGAINST CLOSING ORDERS (EXTRAORDINARY CHAMBERS CTS. CAMBODIA)

BY DAVID J. SCHEFFER*

[December 19, 2019]

Introduction

On December 19, 2019, the Pre-Trial Chamber (PTC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) rendered its "Considerations on Appeals Against Closing Orders" in *Case 004/2 Involving Ao An*.[1] The 266-page ruling exemplified, and brought to a head, the longstanding conflict within the ECCC between the national and international co-prosecutors and between the national and international judges on the parameters of personal jurisdiction and the interpretation of relevant provisions of the ECCC's constitutional documents.[2] The fate of the ECCC now hangs in the balance.[3]

Background

The ECCC, a special Cambodian criminal court established under Cambodian and treaty law by the Royal Government of Cambodia and the United Nations with international assistance (including foreign judicial officials and staff) provided by and under the direction of the United Nations, has been operating since 2005 and is mandated in its personal jurisdiction "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."[4] Those years encompassed the rule of the Pol Pot regime in Cambodia, when an estimated 1.7 million or more Cambodian citizens died and most of the population endured atrocities that have been documented by historians and in the ECCC's investigations and jurisprudence. The ECCC has two co-investigating judges (one Cambodian and one foreign) and two co-prosecutors (one Cambodian and the other foreign), which leads to considerable complexity in how cases evolve in the tribunal.

To date, three defendants have been convicted by the ECCC for their actions during the Pol Pot regime: Kaing Guek Eav (Duch) (Case 001), Nuon Chea, who died in August 2019 (Cases 002/1 and 002/2), and Khieu Samphan (Cases 002/1 and 002/2).[5] One defendant, Ieng Sary, died while standing trial in Case 002/1. Another defendant in Case 002/1, Ieng Thirith, was rendered incompetent and the Trial Chamber stayed proceedings against her. She died in August 2015. The suspect in Case 004/1, Im Chaem, avoided prosecution when the Closing Order dismissed her case with the finding that she fell outside the personal jurisdiction of the ECCC. The cases of Meas Muth (Case 003) and Yim Tith (Case 004) are pending before the PTC.

The investigation of Ao An commenced in 2009 after the International Co-Prosecutor of the ECCC identified Ao An and four other individuals as targets for investigation by the National and International Co-Investigating Judges of the ECCC. The National Co-Prosecutor and National Co-Investigating Judge have consistently argued that Ao An does not fall within the personal jurisdiction of the ECCC. The ECCC legal framework provides that in the event of a dispute between the Co-Prosecutors or between the Co-Investigating Judges, the prosecution or investigation shall proceed unless the PTC, comprising five judges (three Cambodian and two international), rules by supermajority vote, namely at least four judges in the affirmative, to deny the prosecution or investigation.[6]

Following almost ten years of investigative work, the Co-Investigating Judges simultaneously rendered conflicting Closing Orders on August 16, 2018, with the National Co-Investigating Judge, You Bunleng, dismissing the case[7] and the International Co-Investigating Judge, Michael Bohlander of Germany, issuing an indictment to proceed to trial.[8] Judge Bohlander found that Ao An wielded the requisite degree of authority as the Khmer Rouge deputy secretary of Democratic Kampuchea's Central Zone and secretary of that zone's Section 41 to fall within the

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"most responsible" category of suspects. The charges against Ao An included crimes against humanity, particularly the deaths of tens of thousands of Cambodians, and genocide against the Muslim Cham minority in the country during the Pol Pot regime. Judge You Bunleng objected to the finding of personal jurisdiction regarding Ao An.

The Pre-Trial Chamber's Unanimous Decision

The PTC Judges (Prak Kimsan, Ney Thol, and Huot Vuthy of Cambodia, and Olivier Beauvallet of France and Kang Jin Baik of South Korea) unanimously concluded that the Co-Investigating Judges committed not only "a blatant legal error," but also violated "the most fundamental principles of the ECCC legal system," which "may well amount to a denial of justice" because the PTC "is unable to exclude that the Co-Investigating Judges may have willfully intended to defeat the purpose of the default position in this case and deliberately sought to frustrate the authority of the Pre-Trial Chamber."[9] That default position requires the Co-Investigating Judges to submit to the PTC a dispute between them *before* issuing any Closing Order, so that the dispute can be addressed by that Chamber. If a supermajority of the PTC agrees on a resolution of the dispute, that decision then guides the Co-Investigating Judges in their further work on the case. If a supermajority vote is not obtained, then the default position holds, namely that the investigation continues and ultimately a single Closing Order of indictment or dismissal must be issued by the Co-Investigating Judges.

The Pre-Trial Chamber ruled that the Co-Investigating Judges cannot leapfrog over the dispute mechanism by finishing their work on the case and issuing split Closing Orders, essentially leaving it to the PTC to resolve the conflicting Closing Orders despite the lack of a procedure to do so in the ECCC legal framework. The Co-Investigating Judges are mandated under that framework to work together until they reach consensus on a single Closing Order, while resolving interim disputes through the PTC procedure. If the Co-Investigating Judges arrive at a "procedural stalemate" and cannot agree upon a single Closing Order, then the PTC ruled that "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 a final determination of the matters falling within their jurisdiction is attained."[10] In other words, instead of each Co-Investigating Judge closing the case separately, they should have brought their disagreement to the PTC to resolve the matter. Under the ECCC legal framework, the objective is a single Closing Order and not split Closing Orders.

At this juncture, where the PTC Judges agreed upon the "malpractice"[11] of the Co-Investigating Judges issuing split Closing Orders, the National Judges and International Judges of the PTC parted their ways and rendered Separate Opinions.

The National Judges' Separate Opinion

The three National Judges expressed their view that the Closing Order of the National Co-Investigating Judge that dismissed the case must stand while the indictment must be annulled. The National Judges observed that a *lacunae* exists in the law about what to do when there are split Closing Orders. They concluded that the Closing Order (Dismissal) "was done in accordance with the [UN/Cambodia] Agreement and the ECCC law,"[12] but left unexplained how their majority vote on the matter prevails under the supermajority vote requirement and default provision of the ECCC legal framework. They further explained that only senior leaders of the Khmer Rouge who were members of the Khmer Rouge Standing Committee, as well as Duch (convicted in Case 001), and who also were "most responsible," may stand trial before the ECCC.[13] If someone else was "most responsible" but neither a senior leader nor Duch, that individual apparently would not be covered by the ECCC's personal jurisdiction under their reasoning. Since Duch had already been convicted, it was difficult for the National Judges to explain how he could have been excluded from the personal jurisdiction of the ECCC. Nonetheless, the National Judges embraced the National Co-Investigating Judge's view that Ao An fell outside of the defined categories for personal jurisdiction and concluded that the case must be dismissed.

The International Judges' Separate Opinion

The two International Judges found that only the indictment Closing Order was valid and declared the dismissal Closing Order void. They relied upon "the principle of continuation of judicial investigation"[14] and its embodiment

https://doi.org/10.1017/ilm.2020.37 Published online by Cambridge University Press

in the default provisions of the ECCC legal framework as the logical premise upon which to advance a case towards trial in the absence of a supermajority vote to dismiss it. In their view, the negotiating history of the legal framework supports this position.[15] The essential compromise between the Cambodian Government negotiators and UN negotiators was to accept a majority of judges appointed by the Cambodian Government in exchange for the requirement that all judicial decisions be reached by a supermajority vote or, failing that, the oft-repeated default provision in the legal framework required that the prosecution or investigation "shall proceed." If the majority Cambodian judges ruled in unison, they would have to persuade at least one international judge to join them. If the international judges all voted together, they would require at least two Cambodian judges to join them in order to achieve a supermajority vote. The International Judges stated that, "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 be issued as proposed."[16] They found a reasonable inference in the ECCC legal framework "that the key object of the disagreement settlement mechanism is to prevent a deadlock from derailing the proceedings from moving to trial."[17]

The International Judges also found that, on numerous grounds of review of the law and after considering the International Co-Investigating Judge's exercise of discretion and his evaluation of the evidence, Ao An properly fell within the personal jurisdiction of the ECCC and thus qualified to be indicted, contrary to the view of the National Judges. They believed, however, that the International Co-Investigating Judge "erred in failing to properly consider the issuance of an arrest warrant" against Ao An,[18] who remained free.

Subsequent Developments

On February 4, 2020, the International Co-Prosecutor requested that the PTC direct the Court Management Section to transfer the Indictment to the Trial Chamber "to effectuate the 'fundamental and determinative default position' which the PTC unanimously held 'is intrinsic to the ECCC legal framework', that this case proceed to trial" (citations omitted).[19] On March 12, 2020, the International Judges of the PTC issued a memorandum pressing the same point;[20] however, on March 16, 2020, the President of the PTC, Judge Prak Kimsan of Cambodia, released a memorandum signed only by him stating that the section of the PTC Decision in Case 004/2 that was unanimously agreed (on the illegality of split Closing Orders) was the only part that "shall have applicable effect." The opinions of each judge in separate opinions "do not have applicable effect." He then purported to shut down any further action by the PTC on the case, although the legal basis for his memorandum and presumed requirement to comply with its statements are not explained.[21] On April 3, 2020, the President of the Trial Chamber, Judge Nil Nonn of Cambodia, issued a "Statement Of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An."[22] Although not a formal decision, the Trial Chamber noted the communications among ECCC officials since the PTC Decision and pointed out that, "The National Judges of the Trial Chamber believe that this case was closed before the Pre-Trial Chamber. Therefore, the Trial Chamber does not have any authority to make *any* decision regarding the case . . . [The National Judges] have stated there will not be a trial of AO An now or in the future." In contrast, "The International Judges of the Trial Chamber believe an argument could be made that under the unique circumstances of the case the Chamber has *inherent authority* to address some of the preliminary issues raised by the parties in communications sent to the Chamber." Such conflicting views led to the agreed statement that has the result of closing the Trial Chamber's doors to the case.

However, on April 22, 2020, the UN Secretary-General "reinstated Mr. Michael BOHLANDER as the International Co-Investigating Judge . . . Judge Bohlander and his Cambodian counterpart, Judge You Bunleng, accordingly comprise the Office of Co-Investigating Judges from this date."[23] What this means for the Ao An case, if anything, is unclear.

On May 4, 2020, the Co-Prosecutors issued separate press releases.[24] The International Co-Prosecutor cautioned that "attempts by any entity outside the Court to alter the outcome or seek the termination of any case before the Court, by means other than the official judicial process, could be considered as prohibited external interference." This may allude to possible political influence. The National Co-Prosecutor stated that she "agrees with the National Judges of the Trial Chamber that Case 004/2 against the Charted Person AO An has already been concluded before the Pre-Trial Chamber and there is no need for the National Co-Prosecutor to take any action."

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Conclusion

The mixed results of the PTC's ruling in the AO An case further muddied the waters of ECCC jurisprudence after the split Closing Orders of the Co-Investigating Judges created much uncertainty that begged for a unified decision by the PTC Judges to resolve the impasse over the future of the case. Speculation about the possible influence of political considerations on the deliberations of the Cambodian judges will continue to threaten the integrity of the ECCC's record. The PTC ruling and separate opinions will be tested in the performance of the ECCC Judges in the remaining Meas Muth and Yim Tith cases.

ENDNOTES

1 Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), Considerations on Appeals Against Closing Orders, D359/24 & D360/33 (Dec. 19, 2019), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/D359_24_EN.PDF.

2 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, UN–Cambodia, June 6, 2003, 2329 U.N.T.S. 117, https://treaties.un.org/doc/Publication/UNTS/Volume%202329/Part/volume-2329-I-41723.pdf [hereinafter UN/Cambodia 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 and promulgated on Oct. 27, 2004, https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf [hereinafter ECCC Law]; ECCC Internal Rules (rev. 9) (Jan. 2015), https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf [hereinafter Internal Rules]. Together, these documents will hereafter be referred to as the "ECCC legal framework."

3 OPEN SOC'Y JUST. INITIATIVE, DEAD END AT CAMBODIA'S KHMER ROUGE TRIBUNAL: NEXT STEPS FOR THE UN (Apr. 29, 2020), https://www.justiceinitiative.org/uploads/9e0af740-d7b6-4c70-ba0c-96df88328b2c/briefing-eccc-end0304-20200429.pdf.

4 ECCC Law art. 1; UN/Cambodia Agreement art. 1.

5 The Trial Chamber conviction and sentence in Case 002/2 of Khieu Samphan is on appeal to the Supreme Court Chamber.

6 ECCC Law art. 20 new, art. 23 new; Internal Rule 72(4)(d); UN/Cambodia Agreement Art. 7(4).

7 Case No. 004/2/07-09-2009-ECCC/OCIJ, Order Dismissing the Case Against Ao An, D359 (Aug. 16, 2018), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/D359_EN.PDF.

8 Case No. 004/2/07-09-2009-ECCC/OCIJ, Closing Order (Indictment), D360 (Aug. 16, 2018), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/D360_Further%20Redacted_EN.pdf.

9 Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), Considerations on Appeals Against Closing Orders, ¶ 123.

10 *Id.* ¶ 122.

11 *Id.* ¶ 123.

12 *Id.* ¶132.

13 *Id.* ¶¶ 204–227.

14 *Id.* ¶ 320.

15 *Id.* ¶ 407.

16 *Id.* ¶ 322.

17 *Id.* ¶ 324.

18 *Id.* ¶ 693.

19 Case 004/2/07-09-2009-ECCC/OCIJ (PTC60), International Co-Prosecutor's Request for All Required Administrative Actions to be Taken to Forward Case File 004/2 (AO An) to the Trial Chamber, D359/25 (Feb. 4, 2020), http://www.cambodiatribunal.org/wp-content/uploads/2020/02/D359_25_EN.pdf.

20 Interoffice Memorandum from Judge Olivier Beauvallet & Judge Kang Jin Baik, Pre-Trial Chamber of the ECCC, to Office of the Co-Prosecutors, Co-Lawyers for AO An, All Civil Party Lawyers in Case 004/2, D363.1.1 (Mar. 12, 2020), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/D363.1.1_EN.pdf.

21 Memorandum from Judge PRAK Kimsan, President of the Pre-Trial Chamber, ECCC, to Office of the Co-Prosecutors, Co-Lawyers for AO An, and Co-Lawyers for Civil Party in the Case 004/2 (Mar. 16, 2020), https://www.eccc.gov.kh/sites/default/files/articles/Document%203%20%28En%29.pdf.

22 Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An (Apr. 3, 2020), https://eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao.

23 Statement, ECCC, International Co-Investigating Judge Reinstated (Apr. 24, 2020), https://eccc.gov.kh/en/articles/statement-international-co-investigating-judge-reinstated.

24 Press Release, ECCC, Press Release from the International Co-Prosecutor & Press Release from the National Co-Prosecutor Regarding the Charged Person AO An in Case 004/02 (May 4, 2020), https://eccc.gov.kh/sites/default/files/media/PRESS%20RELEASE%20FROM%20OCP%204%20MAY%202020%20En.pdf.

https://doi.org/10.1017/ilm.2020.37 Published online by Cambridge University Press

DOI:10.1017/ilm.2020.37

CASE 004/2 INVOLVING AO AN: CONSIDERATIONS ON APPEALS AGAINST CLOSING ORDERS (EXTRAORDINARY CHAMBERS CTS. CAMBODIA)*

[December 19, 2019]

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**

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 19 / 12 / 2019
ម៉ោង (Time/Heure): 12:30
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier: SANN RADA

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IV. PRELIMINARY ISSUES

. . .

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 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]

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.

. . .

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 under minding the very foundations of their judicial office. The Chamber addresses in separate sections the impact of 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.

https://doi.org/10.1017/ilm.2020.37 Published online by Cambridge University Press

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 the two investigating judges, one Cambodian and another foreign, [. . .], and shall following 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 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.
>
> (d) 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 the 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 30 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 the different positions to the Director of the Office of Administration.

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(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 one, 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 a 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 Judge 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 23*new*, 23*new*, 33*new* and 37*new* of the ECCC Law also make it clear that ECCC organs must

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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 004/02 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 ("Decisions 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.
>
> 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

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> view to arriving at a common approach to the prosetution" 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 Chambers]'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 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 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

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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 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 under 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 follow: [. . .]
>
> (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. [. . .].

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

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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 the 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 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 Cambodia 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 time, 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 an effective way out of any possible procedural impacts.

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 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]

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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 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 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 at 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 Judges 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 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

https://doi.org/10.1017/ilm.2020.37 Published online by Cambridge University Press

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 (*jurisdiction*) 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 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]

. . .

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

. . .

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, 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.

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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 participating 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 [sic] 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 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 ORA, 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 COK 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" 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]

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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 (decreased) 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 Central Committees, the ministries functioned as operational arms of the CPK. For example, IENFG 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 Kamupchea 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 (decreased)
- 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
- SAO Phim, Member (deceased)
- Ta Mok, Member (decreased)
- VON Vet, Member (deceased)
- SON Sen, Member (deceased)

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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.

. . .

5. Practices by the Co-Investigating Judges

. . .

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 the 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

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

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in the Pre-Trial Chamber. . . , based on the factual findings indicated in paragraphs 157 to 589, shall be punishable according to Articles 3 (new) and 39 of the ECCC Law and Articles 501 and 506 of the 1956 Penal Code."[349]

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

286. The views of the International Co-Investigating Judge have left no precise definition 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 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.

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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 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 the law should be interpreted based on the original understanding of the authors of 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.

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 the 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

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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 the 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 into 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

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. . .

IX. OPINION OF JUDGES BAIK AND BEAUVALLET

. . .

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

. . .

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 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 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]

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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 meeting 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 the ECCC Agreement and the ECCC Law is to *bring to trial* senior leaders of the DK and those who are 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 to be tried by a fair and competent tribunal, the right to be informed promptly and in detail of the nature and causes 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 observed 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

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 wide but not entirely non-justiciable appreciation for the [Co-Prosecutors] and [Co-Investigating Judges]."[424] The International Co-Investigating Judge therefore did

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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

. . .

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]

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 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 subject.[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,

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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 are indispensable in settling 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]

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]

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 evacuation 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 and 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 Judgest 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-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 in 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

https://doi.org/10.1017/ilm.2020.37 Published online by Cambridge University Press

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-Investigating Judge's considerations.

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

. . .

F. GROUND 6: AO AN'S POSITION IN THE CPK AND ROLE IN THE CRIMES – INTRODUCTION

. . .

GROUND 6(II): AO AN'S ROLE IN IMPLEMENTING CPK POLICIES COMPARED TO OTHER KHMER ROUGE OFFICIALS

. . .

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 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 participate 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

. . .

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 observed 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,"

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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 findings 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* 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(VI): AO AN'S ROLE IN THE GENOCIDE OF THE CHAM

. . .

2. Discussion

531. The International Judges find that the Co-Lawyers fail to demonstrate that no reasonable investigating judge could have found at 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, 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 incredible information on the reporting system at the village, district and sector levels.[1035] Finally, YOU Vann provides credible evidence that she personally 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

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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-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

. . .

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 Kampon 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 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 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

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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 promulgated 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.

. . .

G. Ground 7: Erroneous Finding that Charged Crimes Were of Sufficient Gravity

. . .

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 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, 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]

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555. The International Judges further recall that there is no mathematical threshold for 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 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 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 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

. . .

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 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

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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]

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 jurisdiction 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 reasoning entirely.[1141]

I. GROUND 9: INAPPLICABILITY OF JCE MODE OF LIABILITY AT THE ECCC

. . .

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 *opinion juris* analysed by multiple Chambers of the ECCC in accordance with the ICJ's customary international law requirements; (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 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 Chambers carried out a "careful, reasoned view"[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 open brackets 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 motive liability.[1163] The International judges consider that the Rome Statute is not a binding

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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] 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

. . .

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 *opinion 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 prescribed 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 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 enforced 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 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

https://doi.org/10.1017/ilm.2020.37 Published online by Cambridge University Press

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.

K. GROUND 12(I): INAPPLICABILITY OF SUPERIOR RESPONSIBILITY IN AO AN'S CASE

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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 opinion of *opinion 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.

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]

595. Accordingly, Ground 12(i) is dismissed.

I. GROUND 13: WHETHER THE ECCC HAS JURISDICTION TO PROSECUTE NATIONAL CRIMES COMMITTED BETWEEN 1975–1979

. . .

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 or 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 Chamber further adopted the findings of the three Cambodian Trial Chamber Judges that "from 1979 until 1982, the judicial

https://doi.org/10.1017/ilm.2020.37 Published online by Cambridge University Press

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 10-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 has 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.

M. GROUND 15(I): FORCED MARRIAGE NOT UNDER THE JURISDICTION OF THE ECCC

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2. Discussion

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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 as a crime within customary international law prior to and during l975–1979;[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 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]

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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 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

. . .

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) 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]

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 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

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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]

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] 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 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

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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 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.

. . .

CONCLUSION

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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 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.

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.

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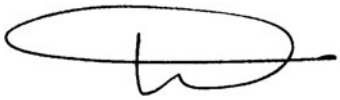
FOR THESE REASONS, THE INTERNATIONAL JUDGES HEREBY:

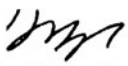
Finding that the Closing Order (Indictment) is not being reversed by supermajority and stands,

- 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

ENDNOTES

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.

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. 040/001/001 (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 translations based on the text published by the *Phnom Penh Post*, Vol. 3, No. 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

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those who were not the most responsible to remain within the jurisdiction of the ordinary Cambodian courts. *See, e.g.,* Cambodian National Assembly Debate, p. 37.

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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- I-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.

164 *See infra* paras 170–302 (National Judges' Opinion) and paras 304–329 (International Judges' Opinion, Ground l).

165 *See supra* paras 31–54.

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. l ("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/l), 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)").

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).

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.

174 ECCC Law, Art. 14(1).

175 ECCC Law, Art. 23 (emphasis added).

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/l/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 (Al22/6.1/3)"), 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* (Dl28/1/9), 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.

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

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

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/l/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.

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

188 [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

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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 accomplitant 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").

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.

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 internationalists", 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'internatfonalisatfon des tribunaux pénaux internationalists"),* p. 48 ("On s'accorde pour dire qu'une juridiction est un organe qui tranche des différends par des décisions obligatoires fondles sur 1' application du droit. En somme, il y a trois éléments qui sont censés essentiels dans la définition d'une juridiction: (l) 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 internationalists,* 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).

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).

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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.

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.

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.

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.

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344 Cambodian Code of Criminal Procedure (2007), Arts 44 and 125.

345 ECCC Law, Art. 1; ECCC Agreement, Art. 1; Internal Rule 53.

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.

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

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

352 Justice Scalia and Interpretation of Theory of Originalism.

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393 Closing Order (Indictment) (D360).

394 Closing Order (Dismissal) (D359).

395 *See* paras 88–124.

396 Decision on Disclosure concerning Disagreements (D355/l), 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).

399 AO An's Appeal (D360/5/1), para. 34.

400 Internal Rule 67(l) ("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

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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").

406 ECCC Agreement, Art. l; 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

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/l/1/7), para. 65.

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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

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.

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460 Case 004/1 Considerations on Closing Order Appeal (D308/3/1/20), para. 20.

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/l/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(l) (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.

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.

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.

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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.

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.

485 Closing Order (Indictment) (D360), paras 699–712.

. . .

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.

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, D2l9/731, 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, D2l9/226, 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), D2l9/702.1.99, 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), D2l9/702.1.87, 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.

. . .

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.

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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."

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, A7l, A73), 01374650-01374651, (A79-A86), 01374654-01374655 (A138-A139); Written Record of Interview of YOU Vann, 8 January 2015, D2l9/138, 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, D2l9/171, 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.

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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, D2l9/120, 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.

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 l7:20 ("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").

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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 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, D2l9/120, 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), D2l9/702.1.95, 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").

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 "); 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), D2l9/702.1.88, 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 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.

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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.

1055 AO An's Appeal (D360/5/1), para. 153 and footnotes 387–391 *referring to* Closing Order (Indictment) (D360), paras 314–

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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, D2l9/504, 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), D2l9/702.1.95, ERN (EN) 01441062, pp. 53:5 to 53:9 ("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, D2l9/138, 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, D2l9/582, 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, D2l9/504, 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, D2l9/171, 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").

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.

. . .

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

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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.

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).

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, D1l7/71, 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).

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

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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, D2l9/767, at ERN (EN) 01309816 (A5l-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

. . .

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.

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 [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.

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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. Stanišić 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)).

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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)"), 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 (El00/6)"), 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 (El00/6), 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.

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

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(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 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.

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1177 *Contra* AO An's Appeal (D360/5/1), para. 179.

1178 Nuremberg Charter, Art. 6.

1179 Nuremberg Charter, Art. 6.

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 & 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-l-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").

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

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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).

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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 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 leng 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

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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 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.

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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.

1217 Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 286 *quoting* Case 001 Decision 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.

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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/l/8), para. l.

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

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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.

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.

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.

. . .

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 [. . .] '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

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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 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.

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

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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 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).

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.

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.

. . .

1449 Closing Order (D360), para. 853.

1450 Closing Order (D360), para. 854.

1451 Closing Order (D360), paras 709, 711.

1452 *See supra* paras 101–124.

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