

BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**FILING DETAILS****Case No:** 004/2/07-09-2009-ECCC/OCIJ (PTC60)**Party Filing:** AO An**Filed to:** Pre-Trial Chamber**Original language:** English**Date of document:** 20 February 2019**CLASSIFICATION****Classification of the document
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**AO AN'S RESPONSE TO THE INTERNATIONAL CO-PROSECUTOR'S APPEAL
OF THE ORDER DISMISSING THE CASE AGAINST AO AN (D359)**

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INTRODUCTION

1. AO An, through his Co-Lawyers (*'Defence'*), respectfully submits this response to the *International Co-Prosecutor's Appeal of the Order Dismissing the Case Against AO An (D359) ('ICP Appeal')*,¹ pursuant to Rule 74 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (*'ECCC'*),² article 8.3 of the ECCC Practice Direction,³ and the Pre-Trial Chamber's (*'PTC'*) *Decision on Requests for Extension of Time and Page Limits for Responses and Replies Relating to the Appeals Against the Closing Orders in Case 004/2*.⁴
2. The *ICP Appeal* fails to identify and properly substantiate tangible legal or factual errors that would invalidate the *Order Dismissing the Case Against AO An ('Dismissal Order')*,⁵ as required for an appeal. Rather, it merely disagrees with the National Co-Investigating Judge's (*'NCIJ's'*) *conclusion* on personal jurisdiction.⁶ Where the International Co-Prosecutor's (*'ICP'*) does superficially identify errors, he fails to demonstrate how the alleged legal errors would invalidate the order or how the alleged factual errors would occasion a miscarriage of justice.⁷ The *ICP Appeal* fails to satisfy the requisite standard for appeals at the ECCC.
3. More specifically, the Defence submits that the ICP erroneously conflates the concepts of personal jurisdiction and individual criminal responsibility.⁸ Whilst some analysis of AO An's responsibility for charged crimes may form *part of* a personal jurisdiction assessment, the ICP fails to appreciate that a full assessment is much broader and must also include a range of other factors.⁹

¹ Case No. 004/2/07-09-2009-ECCC-OCIJ, *International Co-Prosecutor's Appeal of the Order Dismissing the Case Against AO An (D359) ('ICP Appeal')*, **D359/3/1**, 20 Dec. 2018.

² *Extraordinary Chambers in the Courts of Cambodia Internal Rules ('Internal Rules')*, Revision 9, as revised on 16 Jan. 2015, Rule 74.

³ *Practice Directions on the Filing of Documents Before the ECCC ('Practice Direction')*, Revision 8, ECCC/01/2007/Rev.8, as revised on 10 May 2012, article 8.3.

⁴ Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC60), *Decision on Requests for Extension of Time and Page Limits for Responses and Replies Relating to the Appeals Against the Closing Orders in Case 004/2*, **D360/5/3**, 22 Jan. 2019, p. 3.

⁵ Case No. 004/2/07-09-2009-ECCC-OCIJ, *Order Dismissing the Case Against AO An ('Dismissal Order')*, **D359**, 16 Aug. 2018.

⁶ E.g. *ICP Appeal*, paras 87-91, 95-99.

⁷ E.g. *ICP Appeal*, paras 43-46.

⁸ *ICP Appeal*, paras 34-37, 42.

⁹ *Dismissal Order*, paras 424-425; Case No. 004/2/07-09-2009-ECCC-OCIJ (PTC56), *AO An's Appeal Against the Closing Order (Indictment) ('AO An Appeal')*, **D360/5/1**, 19 Dec. 2018, paras 45-47.

4. Moreover, the *ICP Appeal*'s arguments lack consistency. For instance, the ICP accuses the NCIJ of failing to fully consider AO An's individual criminal responsibility, whilst also criticising him for considering issues that go to the heart of AO An's alleged criminal responsibility, that is, coercion, duress, and superior orders.¹⁰
5. Finally, the ICP overstates his case, cherry-picks Case File evidence, or simply fails to provide any substantiation for extraordinary claims, for example, AO An's alleged enthusiastic participation in the charged crimes, benefits from tyranny, 'autonomy' in Sector 41, role in 'creating' Khmer Rouge policy, and lack of remorse.¹¹ Accordingly, the Defence respectfully requests the PTC to dismiss the *ICP Appeal* and uphold the NCIJ's *Dismissal Order*.

ARGUMENTS IN RESPONSE

6. Due to time and page limits, the Defence focuses on errors which have the greatest bearing on the outcome of the *ICP Appeal*. Failure to address other errors should not be interpreted as tacit acquiescence. Arguments in response are made without prejudice to the arguments raised in *AO An's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment)* ('*AO An Appeal*').¹²
- I. RESPONSE TO THE ICP'S APPEAL GROUND A: THE NCIJ DISMISSAL ORDER IS SUFFICIENTLY REASONED, AND THE NCIJ IS NOT REQUIRED TO PROVIDE A FULL ASSESSMENT AND LEGAL QUALIFICATION OF THE ALLEGED CRIMES AND MODES OF LIABILITY WHEN DETERMINING PERSONAL JURISDICTION**
7. The ICP incorrectly states that the NCIJ's failure to present a full assessment of and legal qualification for the allegations against AO An renders the *Dismissal Order* 'unreasoned and legally deficient'.¹³
 8. IR 67(2) sets out the procedural requirements for an indictment, including material facts, their legal characterisation, and the charged person's responsibility. There is no equivalent provision setting out minimum requirements for a dismissal order. IR 67(3) sets out the three permissible grounds for a dismissal order: (a) a lack of jurisdiction, (b) failure to identify the perpetrator, or (c) insufficiency of evidence. These grounds are,

¹⁰ *ICP Appeal*, paras 14-17, 32-37.

¹¹ *ICP Appeal*, paras 35-36, 40-41.

¹² *AO An Appeal*.

¹³ *ICP Appeal*, para. 14.

obviously, not cumulative – satisfying one, like lack of jurisdiction, is sufficient for a valid dismissal order.

9. IR 67(4) requires the NCIJ to provide reasons for his decision to dismiss the case against AO An. The NCIJ clearly states that his main ground for dismissing the case is the Court's lack of personal jurisdiction over AO An,¹⁴ and he provides sufficient reasons for this determination.¹⁵
10. Whilst 'the existence of crimes or the likelihood of [a suspect's] criminal responsibility'¹⁶ may be a factor in assessing personal jurisdiction, the NCIJ has no legal obligation to base his jurisdictional determination on this factor over and above any other valid and relevant considerations. The example relied on by the ICP demonstrates the fallacy of his argument: The ICP claims that AO An is responsible for the alleged genocide against the Cham people by virtue of his alleged membership in a broadly defined joint criminal enterprise ('JCE') that includes hundreds of Khmer Rouge cadre.¹⁷ In fact, this position would not be determinative of whether AO An was amongst those most responsible for the alleged genocide. Not all of these cadre in the JCE would automatically be amongst those most responsible.¹⁸ Moreover, following the ICP's logic, and basing personal jurisdiction solely on criminal liability, would result in the situation where, in effect, the 'trial' would by and large be carried out at the investigative stage.
11. Crucially, the NCIJ's procedural duty was limited to setting out the 'findings that led [to his decision]'¹⁹ on personal jurisdiction, rather than the much broader obligation to determine AO An's likely criminal liability on the charges. The NCIJ provided sufficient reasons for his jurisdictional determination, which included an assessment of AO An's criminal responsibility, as well as a range of other relevant considerations.²⁰ In fact, the NCIJ discussed AO An's alleged criminal responsibility in more than 40 paragraphs;²¹ the

¹⁴ *Dismissal Order*, paras 554-555.

¹⁵ *Dismissal Order*, paras 492-551.

¹⁶ *ICP Appeal*, para. 10.

¹⁷ *ICP Appeal*, paras 15, 95.

¹⁸ *AO An Appeal*, para. 49.

¹⁹ Case No. 004/01/07-09-2009-ECCC/OCIJ (PTC50), *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)* ('Case 004/1 Considerations on Appeal'), **D308/3/1/20**, 28 Jun. 2018, para. 26, attached as App. 1.

²⁰ *Dismissal Order*, paras 492-551.

²¹ *E.g. Dismissal Order*, paras 292, 295, 308-309, 328-330, 338, 348, 391, 396, 398, 401-402, 410-411, 413, 415-418 (discussing AO An's alleged role, or lack thereof, at the charged crime sites and in the charged crimes in the following sections: Wat Phnom Pros execution site; Wat Au Trakuon security centre; Met Sop security centre; Anlong Chrey Dam; Wat Ta Meak security centre; Wat Angkuonh Dei security centre; Tuol Beng execution site; forced marriage in Sector 41; and the alleged genocide of the Cham people in Kampong Cham

alleged responsibility of other Khmer Rouge cadre, including in comparison to AO An, in more than 10 paragraphs;²² the hierarchy of the Khmer Rouge, including AO An's alleged positions, in more than 120 paragraphs;²³ and the gravity of the charged crimes in more than 50 paragraphs.²⁴

12. Considering the presumption of innocence and other factors, such as judicial economy,²⁵ it is to be expected that courts provide more detailed justification when sending a person to trial. The same level of evidential assessment is not required when dismissing a case.²⁶ The *Dismissal Order* in Case 004/2 provides sufficient reasons for dismissal.
13. Thus, the NCIJ has complied with all applicable procedural requirements for a valid dismissal order, and the ICP has failed to demonstrate any legal or factual errors, or abuse of discretion, invalidating the *Dismissal Order*. The PTC should reject the ICP's deliberate attempts to conflate the requirements for an indictment and a dismissal order.

Province); paras 496-498, 500-501 (generally discussing AO An's alleged role as Sector 41 secretary); paras 544-551 (discussing AO An's alleged participation in crimes in comparison to Duch); paras 552-553 (discussing AO An's lack of *de facto* authority and non-autonomous decision-making power); paras 502-506, 510 (further highlighting the lack of reliable, credible evidence of AO An's participation in the charged crimes).

²² *E.g. Dismissal Order*, paras 516-520, 552 (acknowledging KE Pauk made all decisions in the Central Zone, worked closely with the upper echelon, and was authorised to arrest and order executions); paras 545-548, 553 (discussing Duch's role as Chief of S-21 Security Centre).

²³ *E.g. Dismissal Order*, paras 80-81, 522-523 (discussing the importance of the Central Committee and Standing Committee in the Democratic Kampuchea ('DK') administrative structure); paras 105-106 (discussing the authority of the zone secretaries); paras 107-108, 116 (discussing the authority of the upper echelon over cadre at all levels); paras 118-135 (discussing the administrative structure of the Party Centre); paras 180-276 (discussing the administrative structure at the base level and mentioning AO An's alleged role); paras 462-466 (discussing decision-making in the DK regime); para. 507 (discussing AO An's position relative to the Central Committee members); paras 511-519 (discussing KE Pauk's authority over AO An).

²⁴ *E.g. Dismissal Order*, paras 290, 297, 300, 303-305, 310-311, 315-316, 318-320, 322, 327, 330-331, 333-334, 336, 339, 344-347, 349, 359-360, 362-364, 368-369, 372-374, 376, 381-386, 388, 390, 394, 399, 404, 407 (discussing both the manner in which the alleged crimes were committed as well as the alleged number of victims at the charged and non-charged crime sites, including Wat Phnom Pros execution site, Wat Au Trakuon security centre, Wat Batheay security centre, Met Sop security centre, Kok Pring execution site, Anlong Chrey Dam, Wat Ta Meak security centre, Wat Kandal security centre, Chamkar Svay Chanty security centre, Wat Baray Chan Dek security centre, Wat Srange security centre, Wat Angkuonh Dei security centre, and Tuol Beng execution site); paras 419-420 (estimating the number of victims).

²⁵ See generally Case No. 002/19-09-2007/ECCC/TC, *Decision on JCE III*, **E100/6**, and para. 26, attached as App. 2 (holding for reasons of judicial economy, the Trial Chamber will not issue lengthy decisions in circumstances where it is not departing from previous jurisprudence and where it concurs in the result).

²⁶ See Internal Rules, Rule 67(3) (c); Code of Criminal Procedure of the Kingdom of Cambodia (2007), art. 247 (Cambodia); Code of Criminal Procedure, arts 177(1), 184(1) (France), attached as App. 3; 'Chapitre 614 "Ordonnance de règlement"', section 3, in Guéry & Chambon (ed.), *Droit et pratique de l'instruction préparatoire* (Dalloz action 2018-2019), attached as App. 4; *Cass. crim*, 14 Nov. 2018, n°17-84.665, attached as App. 5.

II. RESPONSE TO THE ICP'S APPEAL GROUND B: THE NCIJ DID NOT ERR IN CONSIDERING FACTORS SUCH AS COERCION, DURESS, AND SUPERIOR ORDERS WHEN DETERMINING PERSONAL JURISDICTION

14. The ICP incorrectly accuses the NCIJ of giving excessive weight to coercion, duress, and superior orders in his assessment of personal jurisdiction.²⁷ Moreover, the ICP fails to point to any legal or factual errors, or abuse of discretion, invalidating the NCIJ's *Dismissal Order*.
15. Remarkably, having argued in his first appeal ground (Ground A) that the NCIJ failed to make a full assessment of AO An's alleged criminal conduct and responsibility, the ICP then argues in his second appeal ground (Ground B) that the NCIJ's consideration of the impact of coercion, duress, and superior orders on AO An's criminal responsibility is erroneous. This contradiction demonstrates that the ICP has failed to identify errors in fact, law or discretion, and simply disagrees with the way the NCIJ has exercised his judicial discretion on the issue of personal jurisdiction.
16. Although the ICP has not clearly specified the NCIJ's alleged legal errors, the Defence submits that the NCIJ did not err in assessing the impact of coercion, duress, and superior orders on AO An's position in the hierarchy of responsibility. Whilst there are rules and limitations attached when raising coercion, duress, and superior orders *as a substantive defence* at trial, this does not prevent the NCIJ from considering such factors independently in his assessment of personal jurisdiction.²⁸ Clearly, when an investigative judge considers these factors, amongst others, in his assessment of personal jurisdiction, he is *not bound* by the same limitations as the defence at trial. Evidence that AO An was subject to coercion and duress and was following superior orders may clearly be relevant to demonstrating that he lacked the free will, discretion, ability to set policy, and seniority

²⁷ *ICP Appeal*, paras 32-46.

²⁸ See e.g. *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, *Judgement Volume I*, 10 Jun. 2010, paras 1410, 1414, attached as App. 6 (considering superior orders in the context of assessing whether an accused had the requisite *mens rea* for genocide where the accused's 'blind dedication' to his superiors led him to 'doggedly pursue the efficient execution of his assigned tasks'); *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, *Judgement*, 30 Jan. 2015, para. 516, attached as App. 7.

necessary to be amongst those most responsible.²⁹ The ICP has failed to identify an error because there was no error.³⁰

17. Moreover, the ICP fails to identify any factual errors occasioning a miscarriage of justice in the NCIJ's assessment. On the contrary, the ICP grossly overstates his case and provides no evidential basis for his claim that '[AO] An was one of those who helped to create the system, exercised considerable autonomy in enforcing its tyranny, and benefited from his criminal acts'.³¹ His argument that failing to flee or challenge the regime equates to willing and active participation is an insult to thousands of Cambodians who were forced into abusive conduct out of fear for their lives.³² The ICP's claims³³ about AO An's 'willingness' to participate in the crimes and 'relish' for power are unsubstantiated, based on hearsay or otherwise non-credible and unreliable evidence.³⁴ The ICP's assertion³⁵ that AO An continued to support the Khmer Rouge after their overthrow and expressed no regrets for the suffering under the Democratic Kampuchea is neither relevant nor true.³⁶

²⁹ For example, where an accused is instructed by a superior to kill certain persons under the threat of death (to him or his family), this demonstrates that the accused has no power to decide who is killed, no authority to determine the means of implementing policy, and no ability to alter or refuse orders. These facts are highly relevant to an assessment of whether the court has personal jurisdiction over this individual.

³⁰ In paragraph 36, footnote 104, of the *ICP Appeal*, the ICP reveals the key error in his logic by stating that 'there is no principled reason not to apply' the standards for individual criminal responsibility to the assessment of personal jurisdiction, as it would be 'an incongruous and unprincipled result if those who bore the most individual criminal responsibility for the crimes of the DK regime were held somehow not to be among those most responsible for the crimes of the DK regime'.

³¹ *ICP Appeal*, paras 35-36.

³² *ICP Appeal*, para. 37.

³³ *ICP Appeal*, para. 35 (claiming AO An 'willingly maintained the machinery of terror'); para. 35 (claiming AO An 'was the person that people in Sector 41 lived in fear of'); para. 40 (claiming AO An carried out his duties 'with evident relish for the power he held').

³⁴ *E.g. ICP Appeal*, para. 40, fn 108 (citing **D219/504** (SAT Pheap WRI), A24-25; **D219/226** (PENH Va WRI), A6. The ICP references SAT Pheap's statements and attempts to corroborate them with PENH Va's statements, which are hearsay evidence from a partially identified individual who is now deceased. This evidence is not sufficiently serious and corroborative and thus does not satisfy the standard of proof.); para. 40, fn 109 (citing **D219/837** (SO Saren WRI), A75-A77. The ICP relies on uncorroborated, partial hearsay evidence from SO Saren, who fails to identify the source and cannot provide details surrounding the alleged orders or killings. This evidence is not sufficiently serious and corroborative, and thus does not satisfy the standard of proof.); para. 40, fn 110 (citing **D3/15** (DUONG Sim WRI), A9; **D219/24** (PREAP Sokhoeum WRI), A60; **D117/67** (KAO Khom WRI), A12; **D97** (SENG Run WRI), EN 00746830-31, pp. 3-4; **D6.1.192** (SENG Srun WRI), EN 00242087, p. 4; **D6.1.400** (SAMRIT Muy WRI), EN 00235508, p. 3; **D219/504** (SAT Pheap WRI), A152. Although some of the cited statements may discuss the continued killings, none of these individuals state that AO An ordered the continuation of killings or was in any way connected to these alleged killings.).

³⁵ *ICP Appeal*, para. 41.

³⁶ In paragraph 41, footnotes 116-117, of the *ICP Appeal*, the ICP references AO An's interview from the Documentation Center of Cambodia (DC-Cam) and ignores AO An's statement during his first appearance in which he acknowledged the suffering of the Cambodian people. Case No. 004/2/07-09-2009-ECCC-OCIJ, *Written Record of Initial Appearance*, **D242**, 27 Mar. 2015, EN 01096764-65, pp. 5-6.

18. Finally, in stating that the NCIJ's consideration of coercion, duress, and superior orders was arbitrarily different in Case 001 and Case 004/2,³⁷ the ICP fails to appreciate that a personal jurisdiction assessment involves a broad examination of a whole range of factors.³⁸ Just because, on the basis of all the facts and evidence, Duch's relationship to his superiors did not negate his individual responsibility does not mean that this conclusion can be transposed onto every other case at the Court. Each case must be examined on its own merits. Furthermore, AO An and Duch's positions and roles in the Khmer Rouge were different: for example, AO An allegedly primarily held a sector-level position controlling only a small portion of the Democratic Kampuchea, whereas Duch was the head of S-21 which received prisoners from around the country.³⁹ AO An had little or no communication with members of the Standing Committee or Central Committee in Phnom Penh, whereas Duch regularly communicated with these individuals.⁴⁰ AO An had no independent authority or decision-making power to determine how policy could be implemented, whereas Duch did.⁴¹
19. Therefore, the ICP once again fails to demonstrate any legal or factual error, or abuse of discretion, in the NCIJ's assessment that would sustain the ICP's ground of appeal.

III. RESPONSE TO THE ICP APPEAL GROUND C: THE NCIJ DID NOT HOLD THAT DUCH WAS 'THE ONLY MOST RESPONSIBLE PERSON'

20. The ICP incorrectly argues that the NCIJ held that Duch is 'the only most responsible person'.⁴² Moreover, the ICP fails to demonstrate that this is the NCIJ's interpretation of the ECCC's legal framework and that it was determinative of his personal jurisdiction assessment in AO An's case. In fact, the NCIJ has not committed any legal error.
21. In his appeal, the ICP isolates three statements by the NCIJ regarding Duch,⁴³ taking them out of context to distort the NCIJ's holding.⁴⁴ However, when read in the proper context

³⁷ *ICP Appeal*, paras 43-46.

³⁸ *E.g. Dismissal Order*, paras 424-425; Case No. 001/18-07-2007/ECCC/TC, *Judgement* ('Case 001 Trial Judgement'), **E188**, 26 Jul. 2010, para. 22, attached as App. 8; Case No. 004/1/07-09-2009-ECCC-OCIJ, *Closing Order (Reasons)*, **D308/3**, 10 Jul. 2017, paras 38-40, attached as App. 9; *Case 004/1 Considerations on Appeal*, paras 321, 332.

³⁹ Case No. 004/2/07-09-2009-ECCC/OCIJ, *AO An's Response to the Co-Prosecutor's Rule 66 Final Submission* ('Response to Final Submission'), **D351/6**, 24 Oct. 2017, paras 91, 103-113; *Case 001 Trial Judgement*, para. 23.

⁴⁰ *AO An Appeal*, paras 84-85; *Dismissal Order*, paras 546-547; *Case 001 Trial Judgement*, para. 23.

⁴¹ *AO An Appeal*, para. 83; *Dismissal Order*, paras. 547-549; *Case 001 Trial Judgement*, para. 23.

⁴² *ICP Appeal*, paras 47-48.

⁴³ *Dismissal Order*, paras 473, 478, 542.

⁴⁴ *ICP Appeal*, paras 47-48.

and considered with the NCIJ's analysis throughout the *Dismissal Order*, it is clear that the NCIJ did not hold that Duch was the 'only most responsible person'.

22. In the *Dismissal Order*, the NCIJ applied the criteria for most responsible to AO An, and with sufficient reasoning, then demonstrated that AO An is not amongst the most responsible, thus satisfying his duties as a Co-Investigating Judge.⁴⁵ If the NCIJ had believed that Duch was the only most responsible person, then there would be no need for this analysis.
23. Furthermore, the NCIJ spends a substantial portion of the *Dismissal Order* evaluating the responsibility of Duch or KE Pauk and comparing AO An to them.⁴⁶ Again, if the NCIJ had believed that Duch was the only most responsible person, this analysis would be unnecessary.
24. Therefore, the ICP has wrongly asserted that the NCIJ held that Duch was the only most responsible person. The NCIJ did not commit a legal error in the *Dismissal Order*, and the ICP's appeal ground must be dismissed.

IV. RESPONSE TO THE ICP APPEAL GROUND D: THE ICP FAILS TO IDENTIFY OR SUBSTANTIATE ANY FACTUAL ERRORS RELATED TO THE NCIJ'S ASSESSMENT OF THE CREDIBILITY OF EVIDENCE

25. The ICP fails to identify or substantiate any factual errors in the NCIJ's assessment of the Case File evidence, specifically PRAK Yut's evidence, occasioning a miscarriage of justice.⁴⁷ Moreover, the ICP's submissions contradict his own admissions about PRAK Yut's lack of credibility in his *Final Submission*.⁴⁸ The NCIJ correctly determined that PRAK Yut's numerous inconsistent statements are non-credible, unreliable, uncorroborated, and biased.⁴⁹ In the *Response to the Final Submission*⁵⁰ and the *AO An Appeal*,⁵¹ the Defence explains the significant problems with relying on PRAK Yut's testimony and why this evidence fails to meet the standard of proof.
26. Additionally, the ICP fails to demonstrate any factual errors in the NCIJ's statement that factors, such as 'the strict context of the Khmer Rouge regime', the 'mind your own

⁴⁵ *Dismissal Order*, paras 492-551.

⁴⁶ E.g. *Dismissal Order*, paras 518-519, 543-547, 549, 552-553.

⁴⁷ *ICP Appeal*, paras 58-61.

⁴⁸ Case No. 004/2/07-09-2009-ECCC/OCIJ, *International Co-Prosecutor's Rule 66 Final Submission* ('*Final Submission*'), **D351/5**, 21 Aug. 2017, paras 63-71.

⁴⁹ *Dismissal Order*, paras 502-504.

⁵⁰ *Response to Final Submission*, paras 137-156.

⁵¹ *AO An Appeal*, paras 63-64.

business' policy, and the effect of passage of time on witness' memory, may cast doubt on evidence concerning AO An's role and participation in the alleged crimes.⁵² Without any further substantiation, the ICP incorrectly argues that this statement demonstrates that the NCIJ considers 'all evidence of AO An's participation in crimes categorically unreliable'.⁵³ It is unclear what allows the ICP to make this leap of reasoning. The NCIJ's statement quoted by the ICP does not preclude the assessment of credibility and reliability of each piece of evidence. The ICP fails to demonstrate how this alleged factual error was applied to the credibility assessment of specific witnesses or how this application has occasioned a miscarriage of justice.

27. Therefore, the ICP fails to identify or substantiate any factual errors in the NCIJ's assessment of the Case File evidence, and this appeal ground must be dismissed.

V. RESPONSE TO THE ICP APPEAL GROUND E: THE ICP FAILS TO IDENTIFY ANY FACTUAL ERRORS BY THE NCIJ THAT IMPACTED HIS DETERMINATIONS ABOUT PERSONAL JURISDICTION

28. The ICP's claim that 'unreasonable factual findings on specific points [...] played a key role in the Dismissal Order's assessment of personal jurisdiction'⁵⁴ is incorrect and unsubstantiated. The ICP's main reproach is that the NCIJ only cites some of the Case File evidence to support his factual conclusions and fails to 'thoroughly review the evidence on the Case File'.⁵⁵ In doing so, the ICP implies that the NCIJ has a duty to cite every piece of evidence that he considered in reaching each specific factual conclusion – something that has been expressly rejected by the Co-Investigating Judges and PTC.⁵⁶ In **Section I** above, the Defence explains in detail that the ICP is wrongly applying the standards for indictments to dismissal orders and that the reason for the difference is based on the presumption of innocence.

29. The ICP appears to be accusing the NCIJ of using the same strategy for evidence assessment as the ICP did in the *Final Submission* and as the ICIJ did in his *Closing*

⁵² *Dismissal Order*, paras 62-64.

⁵³ *ICP Appeal*, para. 62.

⁵⁴ *ICP Appeal*, para. 65.

⁵⁵ *ICP Appeal*, para. 66.

⁵⁶ Case No. 004/07-09-2009-ECCC-OCIJ, *Order on Ao An's Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, **D284**, 18 Dec. 2015, para. 23 ('I am not obliged to expressly address every party's submissions on a legal issue when making a decision'); *Case 004/1 Considerations on Appeal*, para. 306 ('the Undersigned Judges recall the presumption that the Investigating Judges have evaluated all the evidence and need not mention every piece of evidence on the Case File, as long as there is no indication that they completely disregarded any particular piece of evidence').

Order (Indictment). Both the ICP and the ICIJ have built the case against AO An by cherry picking statements from witnesses and civil party applicants, relying on contaminated, biased evidence, and ignoring exculpatory more credible evidence.⁵⁷

30. As demonstrated below, the ICP's claim that the NCIJ's factual findings are 'unreasonable' or 'manifestly unreasonable' is not sustained by evidence in the Case File. The ICP also fails to demonstrate how the alleged errors invalidate the *Dismissal Order*.

A. AO An's alleged orders regarding arrests and killings

31. The ICP claims that the NCIJ made a 'manifestly unreasonable' finding that there is little evidence of AO An ordering arrests and killings, and he argues that this is contradicted by 'overwhelming' evidence to the contrary.⁵⁸ The ICP is wrong. Not only was the NCIJ's finding not 'manifestly unreasonable', but Case File evidence demonstrates that he was correct in reaching this conclusion. The Defence incorporates by reference paragraphs 120-125, 146-150 of *AO An Appeal* and paragraphs 284, 308-312 of the *Response to Final Submission*, in which it explains in detail how both the ICP and ICIJ fail to satisfy the standard of proof and provide sufficient evidence of AO An issuing orders related to arrests and killings.⁵⁹
32. As he did in the *Final Submission*, the ICP again primarily relies on three non-credible, uncorroborated witnesses, PRAK Yut, YOU Vann, and NHEM Chen⁶⁰ to claim that AO An issued orders regarding arrests and killings.⁶¹ With respect to the ICP's claim about AO An's alleged orders to arrest, six of the ICP's seven assertions are supported by only PRAK Yut's, YOU Vann's, or NHEM Chen's non-credible statements.⁶² With respect to the ICP's claim about AO An's alleged orders to kill, four of the ICP's seven assertions are supported by only PRAK Yut's or NHEM Chen's non-credible evidence.⁶³ Moreover,

⁵⁷ E.g. *AO An Appeal*, paras 58-79; *Response to Final Submission*, paras 127-212.

⁵⁸ *ICP Appeal*, paras 67-72.

⁵⁹ *AO An Appeal*, paras 109-135; *Response to Final Submission*, paras 274-291.

⁶⁰ *AO An Appeal*, paras 63-66, 69-70; *Response to Final Submission*, paras 137-161, 170-176.

⁶¹ *ICP Appeal*, paras 69-70.

⁶² *ICP Appeal*, para. 69, fns 173, 175-180 (The ICP cites statements by PRAK Yut, YOU Vann, and NHEM Chen. Specifically, in footnote 173, the ICP relies exclusively on PRAK Yut and NHEM Chen. In footnote 175, the ICP relies primarily on PRAK Yut and attempts to corroborate her evidence with YOU Vann's. In footnotes 176 to 178, the ICP relies exclusively on PRAK Yut. In footnotes 179 to 180, the ICP relies exclusively on NHEM Chen.).

⁶³ *ICP Appeal*, para. 70, fns 181-183, 186 (The ICP cites statements by PRAK Yut, YOU Vann, and NHEM Chen. Specifically, in footnote 181, the ICP relies exclusively on PRAK Yut. In footnote 182, the ICP relies primarily on PRAK Yut and attempts to corroborate her evidence with YOU Vann's. In footnotes 183 and 186, the ICP relies exclusively on NHEM Chen.).

concerning the remaining evidence referenced, the ICP often overstates or misstates the witnesses' testimony.⁶⁴ Therefore, the Case File evidence is not sufficiently serious and corroborative to find that AO An issued orders on arrests and killings in Sector 41.

B. Timing of AO An's arrival in the Central Zone and his alleged involvement in the purge

33. The ICP claims that the NCIJ made an 'unreasonable' finding that AO An was sent to the Central Zone in mid-1977 at a time when the 'purges in the Central Zone [...] were about to end', and he asserts that there is 'strong' evidence that AO An 'arrived in the Central Zone in early 1977 and served as Sector 41 Secretary for almost two years'.⁶⁵ The ICP is wrong. Not only was the NCIJ's finding not 'unreasonable', but the Case File evidence demonstrates that he was correct in reaching this conclusion. The Defence incorporates by reference the arguments made in paragraphs 88 to 92 of the *AO An Appeal*.
34. Specifically, the ICP fails to demonstrate that the NCIJ erroneously relied on KE Pauk's biography to find that AO An arrived in the Central Zone in mid-1977 when the purge was about to end.⁶⁶ Rather, the NCIJ properly considered this exculpatory evidence⁶⁷ indicating that the Southwest Zone group, including AO An, were sent to Central Zone to fill *unoccupied positions* only after the alleged purge was completed.⁶⁸ There is no ambiguity in the wording in KE Pauk's biography: '[...] only me [KE Pauk] remained and the Central Zone had no cadres left. The upper brother decide[d] to transfer cadres from Southwestern Zone to fill the unoccupied positions'.⁶⁹ Furthermore, contrary to the ICP's claim, if '[KE] Pauk was primarily concerned with justifying his own actions in the DK regime',⁷⁰ then he would not have directly implicated himself in his own biography.⁷¹

⁶⁴ *E.g. ICP Appeal*, para. 69, fn 174 (The ICP cites statements by TOY Meach and SO Saren. However, SO Saren did not state that AO An ordered arrests. SO Saren first states that he did not know who issued the orders to replace the old commune and district cadre. Then, only after being asked a leading question, SO Saren speculates when stating '[h]ow could [AO An] not know, given that he was sector chairperson'.); para. 70, fns 184-185, 187 (The ICP cites statements by KE Pich Vannak, TOY Meach, and SO Saren. However, KE Pich Vannak does not state that AO An ordered killings. The ICP relies on TOY Meach in relation to alleged orders to kill, but he omits TOY Meach's response where the witness states that his source of knowledge is based on hearsay. **D219/582** (TOY Meach WRI), A89). The Defence notes that the evidence cited in paragraph 71 is purely circumstantial and does not relate to AO An issuing any orders.

⁶⁵ *ICP Appeal*, paras 73-78.

⁶⁶ *ICP Appeal*, para. 74, fn. 198; para. 75; para. 78, fn. 217.

⁶⁷ The CIJs have a duty to investigate and consider both inculpatory and exculpatory evidence. IR 55(5).

⁶⁸ *Dismissal Order*, para. 494, fn. 1416 (citing **D1.3.16.1** (KE Pauk's biography), EN 00089713-14, pp. 6-7; **D117/31** (YOU Vann WRI), p. 4; **D1.3.16.1** (KE Pauk's biography), EN 000899708, 000899713-14, pp. 1, 6-7).

⁶⁹ **D1.3.16.1** (KE Pauk's biography), EN 000899713-14, pp. 6-7.

⁷⁰ *ICP Appeal*, para. 75.

⁷¹ **D1.3.16.1** (KE Pauk's biography), EN 000899713-14, pp. 6-7.

35. It is also within the NCIJ's discretion to consider this evidence and assess its credibility and reliability. Although this document is not produced under judicial supervision,⁷² KE Pauk's biography is relevant to the issue of timing, as KE Pauk was present in the Central Zone before and after the Southwest Zone group's transfer. Thus, the NCIJ properly considered this evidence in making his finding.
36. Additionally, the ICP wrongly claims that the NCIJ failed to provide corroborating evidence in support of KE Pauk's biography; in fact, he cited to several WRIs corroborating this account.⁷³ The Defence incorporates by reference paragraphs 88 to 92 of the *AO An Appeal* and submits that the NCIJ's finding is supported by additional sufficient evidence on the Case File, which demonstrates that the alleged purge was completed before the arrival of AO An and the Southwest Zone cadre; that KE Pauk and Oeun were the only persons remaining in the Central Zone when the Southwest Zone group arrived; and that the group only came to fill vacant positions.⁷⁴ In contrast, the ICP assertions are primarily based on non-credible WRIs,⁷⁵ as explained in paragraphs 62 to 75 of the *AO An Appeal*.⁷⁶
37. Thus, the NCIJ properly considered KE Pauk's biography as exculpatory evidence with other credible and corroborating evidence on the Case File (the majority of which supports his position). The ICP fails to identify any factual error by the NCIJ.

C. Timing of the commission of the charged crimes

38. The ICP claims that the NCIJ's reliance on the fact that 'AO An's participation in alleged crimes occurred when the "purges in the Central Zone [...] were about to end"' was 'manifestly unreasonable'.⁷⁷ He asserts instead that 'most or all of the charged crimes were committed with AO An's participation during the time he served as Sector 41 Secretary'.⁷⁸ The ICP is wrong. The NCIJ's finding is not 'manifestly unreasonable', and the Case File evidence supports this conclusion. As argued in Ground 6 of the *AO An*

⁷² As explained in the *AO An Appeal*, judicial supervision did not guarantee credible and reliable evidence in AO An's case, in light of the OCIJ investigators' dubious practices, including feeding inculpatory information to the witnesses and civil party applicants through closed questions and off-record conversations. *AO An Appeal*, para. 76.

⁷³ *ICP Appeal*, para. 76 (citing *Dismissal Order*, paras 202-203, fns 576-577); para. 77.

⁷⁴ *AO An Appeal*, para. 88, fns 186-188; para. 90, fns 194-196.

⁷⁵ *ICP Appeal*, para. 77 (a)-(f) (citing PECH Chim, YOU Vann, PRAK Yut, NHEM Chen, NHIM Kol and PENH Va).

⁷⁶ *AO An Appeal*, paras 62-75.

⁷⁷ *ICP Appeal*, para. 79 (citing *Dismissal Order*, paras 508, 553).

⁷⁸ *ICP Appeal*, paras 79-86.

Appeal, there is no sufficient evidence on the Case File to conclude that at any time during 1977-1979, AO An held any significant positions or had any roles in the most serious crimes allegedly occurring in Sector 41 or the Central Zone when compared to other known Khmer Rouge officials.⁷⁹ The Defence incorporates these arguments by reference.

39. The ICP argues that the NCIJ relies on a broad definition of the term ‘purge’, and even if the NCIJ’s timetable is adopted, AO An was present and participated in some crimes against civilians, which means that the NCIJ erred in considering the shorter time period as a factor in his personal jurisdiction assessment.⁸⁰ The ICP further claims that ‘[p]arsing dates to determine liability is an unnecessary and meaningless exercise when the evidence refers directly and explicitly to [AO] An’s actions.’⁸¹
40. These arguments and claims are erroneous because timing is relevant to assessing whether AO An had significant roles in the most serious crimes when compared to other known Khmer Rouge officials, who may have participated in crimes throughout the Khmer Rouge period. Moreover, the ICP again fails to present any sufficient evidence to support these claims. He continues to primarily rely on PRAK Yut, who is not credible⁸² due to her inconsistent, uncorroborated statements and motives to lie.⁸³
41. The ICP also ignores relevant sections of the *Dismissal Order* where the NCIJ holds that ‘[t]here is minimal evidence showing that AO An participated in the commission of certain acts; however, those allegations appear to be unreliable’ as the interviewed witnesses were likely to incriminate AO An due to their own direct involvement.⁸⁴ In particular, the NCIJ provides the example of PRAK Yut, whom he considers unreliable because of her active participation in the activities in Kampong Siem district.⁸⁵ Accordingly, the NCIJ did not err, but rather, properly assessed the evidence.
42. Furthermore, the ICP misrepresents and overstates Case File evidence when claiming that ‘the vast bulk of [it] shows that the crimes in the Central Zone were committed after AO An arrived’ and that witnesses ‘describe the way in which [AO An] personally ordered,

⁷⁹ *AO An Appeal*, Section (II), Ground 6, paras 80-156.

⁸⁰ *ICP Appeal*, paras 80-81.

⁸¹ *ICP Appeal*, para. 82.

⁸² *ICP Appeal*, para. 81, fns 222-225 (citing primarily non-credible witness PRAK Yut).

⁸³ *AO An Appeal*, paras 63-64; *Response to Final Submission* paras 137-156.

⁸⁴ *Dismissal Order*, paras 502-504.

⁸⁵ *E.g. Dismissal Order*, para. 503. The NCIJ also uses the example of KE Pich Vannak, who may have provided exculpatory statements in favour of KE Pauk, his father. *Dismissal Order*, para. 505.

encouraged, coordinated, followed up on, and participated in the crimes'.⁸⁶ Again, the ICP primarily relies on PRAK Yut and other non-credible witnesses whose statements do not corroborate PRAK Yut's and who fail to meet the requisite standard of proof.⁸⁷ In the *AO An Appeal*, the Defence explains that the Case File evidence is not sufficiently serious or corroborative to find AO An had a significant position or authority in Sector 41 or that he ordered, encouraged, coordinated, followed up on, or participated in the charged crimes.⁸⁸

43. Lastly, the ICP argues that even if 'purge' is understood in a limited sense to mean only former Khmer Rouge cadre, then the NCIJ's finding is 'at least partially inaccurate'.⁸⁹ However, this argument is also flawed because the ICP again references only a single witness account and attempts to corroborate it with accounts from non-credible witnesses,⁹⁰ such as PRAK Yut, YOU Vann, PENH Va and NHIM Kol.⁹¹ This fails to

⁸⁶ *ICP Appeal*, para. 82.

⁸⁷ *ICP Appeal*, para. 82 (citing YOU Vann, PENH Va, SAT Pheap, TOY Meach, SO Saren, NHEM Chen and PUT Kol). The Defence explains why YOU Vann, PENH Va, NHEM Chen and PUT Kol are not credible in paragraphs 157-165, 170-181 of the *Response to Final Submission* and paragraphs 65-70, 74-75 of the *AO An Appeal*. Regarding SAT Pheap, TOY Meach and SO Saren, the Defence sets forth several instances where they provide insufficiently serious or corroborative evidence in relation to AO An allegedly issuing orders, to alleged reports to AO An, or to AO An giving instructions during meetings. *E.g.* *AO An Appeal*, para. 107, fn. 234 (referring to **D219/460** (SAT Pheap WRI), A8 (SAT Pheap merely states that Sop was arrested by 'sector cadres' with no specific reference to AO An.)); para. 117, fn. 261 (citing **D219/582** (TOY Meach WRI), A102, A109-110 (TOY Meach is the only witness who mentions AO An in connection with Met Sop's arrest, and he has a severely limited personal knowledge. TOY Meach does not know who replaced Met Sop, does not say how he knew that AO An arrested Met Sop, and gives primarily hearsay evidence.)); para. 118, fn. 265 (referring to **D219/504** (SAT Pheap WRI), A135 (The Defence points out that SAT Pheap provides only hearsay evidence as he heard from Aun's messenger that AO An gave an order.)); para. 122, fn. 276 (citing **D219/800** (SO Saren WRI), A160-164; **D219/837** (SO Saren WRI), A113 (SO Saren first recalls seeing Ngauv come to AO An's office and seeing them talk together, but 'did not know about their work'. In another WRI, SO Saren admits he does not know who Ngauv reported to and only saw him coming to the sector to meet 'Ta An, Bang Aun and whoever'. He does not know about the content of the meetings.)); **D219/504** (SAT Pheap WRI), A87 (SAT Pheap states that Ngauv reported to AO An, however, he admits that he only 'know[s]' this 'because Ta An was Sector Secretary'. He also recalls seeing Ngauv drive to AO An's house once every five days or once a week but did not directly witness a meeting, and he does not know what they talked about.)); para. 124, fn. 285 (referring to **D219/582** (TOY Meach WRI), A140-A143 (TOY Meach states that Aun gave arrest orders and decided the fate of arrested village deputies, but he does not mention AO An's authorisation.)); para. 133, fn. 315 (referring to **D219/800** (SO Saren WRI), A160-164 (SO Saren states that he saw Ngauv coming in and out of the sector office to meet AO An, but he admits he was never present when they met and did not know what they were talking about.)); para. 139, fn. 345 (citing **D219/582** (TOY Meach WRI), A100-101 (TOY Meach provides hearsay evidence when he states he heard that, on AO An's orders, people were sent to Wat Au Trakuon.)).

⁸⁸ *AO An Appeal*, paras 113-130. There is no sufficiently serious or corroborative on the Case File to show that AO An had a role in the alleged genocide of the Cham people, in the forced marriages or alleged rape in Prey Chhor and Kampong Siem districts, or in the charged crimes at the crime sites. *AO An Appeal*, paras 146-155.

⁸⁹ *ICP Appeal*, paras 85-86.

⁹⁰ *AO An Appeal*, paras 63-66, 74-75; *Response to Final Submission*, paras 137-161, 177-181.

⁹¹ *ICP Appeal*, para. 85, fns 228-232 (citing PENH Va, PRAK Yut, YOU Vann, SO Saren and NHIM Khol. The Defence has demonstrated that PENH Va, PRAK Yut, You Vann and NHIM Kol are not credible in paragraphs 137-161, 177-181 of the *Response to Final Submission* and paragraphs 63-66, 74-75 of the *AO An Appeal*; SO

meet the requisite standard of proof. The Case File evidence does not establish that the alleged purge of the former cadre in the Central Zone occurred after AO An's arrival.⁹²

44. Thus, the ICP fails to demonstrate that the NCIJ's finding is manifestly unreasonable, and this appeal ground must be dismissed.

D. KE Pauk and AO An's alleged collective decision-making at the zone level

45. The ICP claims that the NCIJ erred in portraying '[KE] Pauk as an active and powerful leader with extensive decision-making authority' and 'AO An as a cadre with limited decision-making authority'.⁹³ Instead, the ICP asserts that KE Pauk and AO An cooperatively and collectively made decisions with other members of the Central Zone committee.⁹⁴ The ICP's assertions are unsubstantiated, and even if they were true (which they are not), he fails to explain how this alleged error occasions a miscarriage of justice.

46. The Defence incorporates by reference its arguments in the *AO An Appeal*⁹⁵ and the *Response to Final Submission*,⁹⁶ where it explained that there is no sufficiently serious and corroborative evidence to find that AO An had any significant positions, roles, or decision-making power at the zone level or that AO An received and implemented orders from or sent reports to KE Pauk or the Central Zone Committee.⁹⁷

47. Furthermore, there is no sufficient evidence on the Case File to establish that AO An and KE Pauk made collective decisions on the Central Zone committee. The ICP states that the NCIJ incorrectly edited a statement from witness BAN Siek when finding that KE Pauk had primary responsibility for the alleged purge.⁹⁸ He claims that the only reasonable reading of BAN Siek's full statement is that KE Pauk and AO An reached decisions cooperatively and collectively on the Central Zone committee.⁹⁹ There is no Case File evidence showing that AO An shared decision-making power with KE Pauk or

Saren provides information only in relation to PRAK Yut's own and direct involvement in the alleged purge. **D219/800** (SO Saren WRI), A13-14).

⁹² *AO An Appeal*, paras 88-92.

⁹³ *ICP Appeal*, paras 87-94.

⁹⁴ *ICP Appeal*, para. 91.

⁹⁵ *AO An Appeal*, paras 80-87, 93-105.

⁹⁶ *Response to Final Submission*, paras 246-269.

⁹⁷ *AO An Appeal*, paras 80-105; *Response to Final Submission*, paras 246-269.

⁹⁸ *ICP Appeal*, paras 88-90.

⁹⁹ *ICP Appeal*, paras 88-90.

any other member of the Central Zone committee.¹⁰⁰ Accordingly, the ICP fails to demonstrate that the NCIJ's finding is manifestly unreasonable.

48. In sum, the ICP fails to identify any factual errors by the NCIJ that impacted his determination on personal jurisdiction. Rather, he simply makes unsubstantiated claims in relation to AO An's alleged orders regarding killings and arrests; the timing of AO An's arrival in the Central Zone and his alleged involvement in the purge; the timing of the commission of the crimes; and KE Pauk and AO An's alleged collective decision-making. The ICP's appeal ground must therefore be dismissed.

VI. RESPONSE TO THE ICP APPEAL GROUND F: THE NCIJ CONSIDERS THE IMPACT OF THE GENOCIDE ALLEGATIONS WHEN ASSESSING THE COURT'S PERSONAL JURISDICTION, AND THE ICP AGAIN FAILS TO IDENTIFY ANY LEGAL ERROR IN THE DISMISSAL ORDER

49. The ICP fails to substantiate his claim that the NCIJ committed a legal error by failing to adequately consider the impact of AO An's alleged participation in the genocide in his personal jurisdiction assessment, and he fails to demonstrate that this alleged error invalidated the *Dismissal Order*.¹⁰¹

50. First, the ICP wrongly claims that AO An's alleged role in the genocide 'was determined and direct'; that there is 'the clearest possible evidence of genocidal intent that can be imagined'; and that the NCIJ's findings support these conclusions.¹⁰² In fact, the ICP overstates the Case File evidence and the NCIJ's findings. Second, the ICP mistakenly asserts that the NCIJ did not consider any genocide allegations in his personal jurisdiction determination, despite the ICP's own references to such considerations by the NCIJ.¹⁰³ Finally, based on flawed assessments of ECCC and international law, the ICP appears to suggest that the ECCC is somehow obligated under the Genocide Convention to indict

¹⁰⁰ Many witnesses and civil party applicants on the Case File could not confirm whether AO An was even on the Zone Committee or was KE Pauk's deputy. Additionally, even if AO An was the zone deputy secretary, there is evidence that he did not have power to make decisions and that KE Pauk made decisions alone. **D117/18** (PICH Cheum WRI), A3; **D219/800** (SO Saren WRI), A85-A86; **D219/504** (SAT Pheap WRI), A108, A110; **D219/687** (MAO Saroeun WRI), A20; **D219/485** (TEP Pauch WRI), A3, A5; **D219/498** (PENH Va WRI of Civil Party Applicant), A20; **D219/772** (SAT Sim WRI), A22-A, A103-A106; **D219/774** (OUM Seng WRI), A37, A66; **D219/837** (SO Saren WRI), A3, A5; **D117/66** (ORN Kim Eng WRI), A10, A13; **D219/138** (YOU Vann WRI), A67; **D219/435** (TOUCH Chamroeun WRI), A97; **D219/789** (CHHEAN Chhoeurn WRI), A51; **D117/71** (PRAK Yut WRI), A35-A36; **D117/56** (CHOM Vong WRI), A46; **D117/19** (TEP Pauch WRI), A12, A14; **D117/5** (UY Rim WRI), A12.

¹⁰¹ *ICP Appeal*, para. 95.

¹⁰² *ICP Appeal*, para. 95.

¹⁰³ *ICP Appeal*, para. 99.

AO An.¹⁰⁴ As explained below, this erroneous position would lead to hundreds or even thousands of Khmer Rouge cadre being prosecuted by the ECCC for genocide and other crimes with no regard to the personal jurisdiction limitations. The ICP thus fails to demonstrate any legal error by the NCIJ that would invalidate the *Dismissal Order*.

A. Neither the Case File evidence nor the NCIJ's findings support the ICP's claims

51. Neither the Case File evidence nor the NCIJ's findings support the ICP's claims that AO An's alleged role in the genocide of the Cham people 'was determined and direct' or that there is 'the clearest possible evidence of genocidal intent that can be imagined'.¹⁰⁵ In his appeal, the ICP overstates both the Case File evidence and the NCIJ's findings.
52. As in the *Final Submission*, the ICP again fails to present sufficient evidence of AO An ordering his alleged subordinates to identify and kill the Cham people in the areas under their control;¹⁰⁶ insisting on reports from his alleged subordinates to monitor the progress of the alleged genocide;¹⁰⁷ or ordering his alleged subordinates to determine whether any Cham people remained.¹⁰⁸ In fact, he merely refers to the evidence cited in the *Final Submission*, which the Defence disputes in both the *Response to Final Submission*¹⁰⁹ and the *AO An Appeal*.¹¹⁰

¹⁰⁴ *ICP Appeal*, para. 98.

¹⁰⁵ *ICP Appeal*, para. 95.

¹⁰⁶ *ICP Appeal*, para. 95 (The ICP cites to paragraphs 54-59 of the *Final Submission*, in which he relied almost exclusively on PRAK Yut's uncorroborated and non-credible statements about AO An's alleged orders. As the Defence explained in paragraphs 137 to 156 of the *Response to Final Submission*, the ICP misrepresented several witnesses' accounts while attempting to corroborate PRAK Yut's evidence, ignored the serious inconsistencies in her statements about this issue, and overlooked her motives to lie. The Defence has raised concerns regarding PRAK Yut's evidence on numerous occasions and reiterates that statements of a single uncorroborated, non-credible witness cannot satisfy the requisite standard of proof.).

¹⁰⁷ *ICP Appeal*, para. 95 (The ICP cites to paragraph 60 of the *Final Submission*, in which he relied almost exclusively on evidence from PRAK Yuk to claim that AO An monitored and managed the progress of the alleged killing of the Cham people. The only corroborative evidence offered by the ICP in the *Final Submission* is hearsay from YOU Vann resulting from the OCIJ investigator feeding her inculpatory information. **D219/138** (YOU Vann WRI), A55, A106. As previously noted by the Defence in paragraph 313 of the *Response to Final Submission*, this evidence does not satisfy the standard of proof.).

¹⁰⁸ *ICP Appeal*, para. 95 (The ICP cites to paragraphs 61-62 of the *Final Submission*, in which he relied on YOU Vann's uncorroborated evidence about AO An's alleged orders to create a second set of lists of all Cham, Chinese, and Vietnamese people and LON Nol officers. As explained by the Defence in paragraph 300 of the *Response to Final Submission*, the ICP misstates PEOU Sarom's evidence when attempting to corroborate YOU Vann. PEOU Sarom does not mention orders from AO An to make a second set of lists, and she specifically states that she was never required to pay attention to any specific group when making lists. **D219/284** (PEOU Sarom WRI), A63-A67).

¹⁰⁹ *Response to Final Submission*, paras 305-317.

¹¹⁰ *AO An Appeal*, paras 146-150.

53. Furthermore, the ICP claims that factual findings in the *Dismissal Order* support his conclusion about AO An's genocidal intent.¹¹¹ However, the ICP overstates these findings, as the NCIJ never found that AO An had the requisite genocidal intent. Rather, the NCIJ's findings relate generally to CPK policy, AO An allegedly passing down orders from his superiors, and alleged deaths of Cham people in the Central Zone.¹¹² As explained in the *AO An Appeal* and incorporated by reference, such findings are not sufficient to satisfy the *mens rea* requirement for genocide or to demonstrate that the *only reasonable inference* was that AO An intended to destroy in whole or part the Cham people.¹¹³
54. Therefore, the ICP overstates the evidence on the Case File and the NCIJ's findings concerning genocide, and these claims must be dismissed.

B. The ICP erroneously asserts that the NCIJ failed to consider the alleged genocide in his personal jurisdiction assessment

55. The ICP is incorrect to claim that the NCIJ did not consider the alleged genocide against the Cham people, and AO An's potential role in it, as part of his personal jurisdiction assessment.¹¹⁴ The ICP himself provides instances of the NCIJ's discussion of the alleged genocide in areas under AO An's alleged control.¹¹⁵ The ICP has failed to state what the alleged legal error invalidating the *Dismissal Order* might be.
56. As noted above, the NCIJ considered a range of factors related to personal jurisdiction in determining that the ECCC does not have jurisdiction over AO An. It was within his discretion to weigh these various factors. Thus, the ICP erroneously claims that the NCIJ erred in failing to consider the genocide allegations.

C. The ICP wrongly suggests the ECCC is obligated under the Genocide Convention to indict AO An

57. Although the ICP has again not clearly identified a legal error in the *Dismissal Order*, it appears that he may be wrongly suggesting that the ECCC has an obligation under the Genocide Convention to 'punish genocide' – that is, indict AO An for genocide – and that

¹¹¹ *ICP Appeal*, para. 95. The ICP also erroneously relies on the *Case 002/02 Pronouncement of Judgement* in support of his claim; however, this does not relate to or mention AO An.

¹¹² *Dismissal Order*, paras 494-510, 543-553. The Defence disputes all findings relating to AO An allegedly committing genocide. It notes that the NCIJ does not find that there is sufficiently serious and corroborative evidence of AO An possessing genocidal intent.

¹¹³ *AO An Appeal*, paras 199-202.

¹¹⁴ E.g. *Dismissal Order*, paras 497, 498, 500.

¹¹⁵ *ICP Appeal*, para. 95.

this obligation expands or supersedes the jurisdictional limitations under the UN-RGC Agreement and ECCC law.¹¹⁶ When followed to its logical conclusion, the ICP's position effectively suggests that hundreds, if not thousands of Cambodians who bear responsibility for genocide and other international crimes committed during the Khmer Rouge-era, can and should be prosecuted by the ECCC, with no regard to the personal jurisdiction limitations agreed between the UN and RGC.¹¹⁷

58. There are several issues with the ICP's argument. First, the ICP overstates Cambodia's obligations under the Genocide Convention. No provision exists in the Convention that differentiates leaders from foot soldiers for the purposes of the obligation to prosecute.
59. Second, in making his argument, the ICP erroneously relies on the *Bosnia and Herzegovina v. Serbia and Montenegro* case, which is distinguishable from the situation on appeal.¹¹⁸ In the *Bosnia and Herzegovina* case, the International Court of Justice ('ICJ') held that Serbia had violated its obligation to punish genocide by failing to fully cooperate with the International Criminal Tribunal for the former Yugoslavia ('ICTY') in the arrest and transfer of a defendant indicted for genocide crimes.¹¹⁹ In other words, the Serbian State had been uncooperative with a court that had *already accepted* personal jurisdiction, as defined by the ICTY. By contrast, in the present case, the NCIJ found that AO An is not within the Court's limited jurisdiction, as defined by the ECCC. The ICJ never held that (international) courts may not limit personal jurisdiction when addressing genocide cases.

¹¹⁶ *ICP Appeal*, paras 96-99.

¹¹⁷ Other treaties to which Cambodia is a party, including the four Geneva Conventions, could impose similar obligations to those which the ICP suggests stem from the Genocide Convention. If it were the case that the UN and Cambodia intended the ECCC to fulfil obligations to prosecute all international crimes committed during the Khmer Rouge-era, the ECCC would be required to try all those suspected of crimes of genocide and grave breaches of the Geneva Conventions. *E.g.* Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, 75 UNTS 85; Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (Cambodia ratified the Geneva Conventions in 1958).

¹¹⁸ *ICP Appeal*, paras 97-98 (citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ('*Bosnia and Herzegovina v. Serbia and Montenegro*'), ICJ Reports 2007, paras 439-450).

¹¹⁹ *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 449, attached as App. 10. (Serbia failed to arrest and transfer Ratko Mladić to the ICTY, where he had been indicted for genocide and complicity in genocide. The ICJ held that the ICTY constituted an international penal tribunal, within the meaning of Article VI, and Serbia had accepted its jurisdiction. Therefore, Serbia failed in its duty to cooperate fully with the ICTY, thus violating its obligations under Article VI of the Genocide Convention.).

60. Third, while offering no evidence to support his position, the ICP appears to erroneously suggest that it is reasonable to assume the negotiators of the UN-RGC Agreement intended the ECCC to fulfil Cambodia's obligations to punish genocide by prosecuting a broader category of suspects than those within the Court's jurisdiction.¹²⁰ However, contrary to this position, the text of the ECCC's founding instruments and the negotiation history demonstrate that the ECCC was intended to fulfil a specific mandate and try a limited number of persons.¹²¹ It is accepted in international law and practice that international courts can be established with (very) limited jurisdictions.¹²²
61. Finally, the ICP concludes his argument by acknowledging that the ECCC has limited personal jurisdiction, essentially accepting that the Court was not intended to try all genocide suspects from the Democratic Kampuchea-era and rendering his previous arguments meaningless.¹²³ Once again, the Defence notes that the NCIJ carried out an assessment of personal jurisdiction and found that AO An was not a senior leader or person most responsible for genocide.¹²⁴
62. In sum, the ICP simply disagrees with the jurisdiction of the Court and the NCIJ's findings on personal jurisdiction.

¹²⁰ *ICP Appeal*, para. 98.

¹²¹ *Case 004/1 Considerations on Appeal*, paras 76-78 (holding explicit text of the ECCC's founding instruments and a close scrutiny of their negotiating history demonstrate that the negotiation parties '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').

¹²² *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* ('*Belgium v. Senegal*'), ICJ Reports 2012, pp. 422-463, paras 35-36, 41, 89-90, 94-95, 118-121, attached as App. 11 (The ICJ found that Senegal was obligated to submit the case of Hissène Habré to competent authorities for prosecution because of obligations under the Convention against Torture. The ICJ also acknowledged that an *ad hoc* court had been mandated by the African Union to conduct proceedings against Habré specifically. Ultimately, the establishment of the Extraordinary African Chambers in Senegal, which prosecuted just one man, followed the ICJ's decision. At no point in the proceedings of *Belgium v. Senegal* did Belgium or the ICJ suggest that there was an obligation to prosecute other, let alone all, suspects involved in the torture in Chad during the Habré-regime. It is accepted practice amongst the international community that specialised courts may be established to prosecute only the political leadership, or just one leader, for international crimes, and such an approach does not undermine obligations stemming from international treaties. Other examples of international courts and *ad hoc* tribunals established to deal with specific situations and groups of people include: the Nuremberg Tribunal, which dealt with 'major war criminals of the European Axis countries', focusing on Nazi leadership; the Special Court for Sierra Leone, which dealt with 'persons who bear the greatest responsibility for serious violations of international humanitarian law'; and the ICC which has to ignore or forego cases which are not of sufficient gravity. In line with this international practice, the ECCC was established with a specific mandate and jurisdiction focusing on senior leaders and persons most responsible for crimes committed during the Khmer Rouge era.

¹²³ *ICP Appeal*, para. 98 (stating '[b]oth parties must therefore have intended that the ECCC personal jurisdiction covering those "most responsible" for the crimes of the DK regime would include a leader who played a key role in a genocide by personally giving orders to kill thousands with the intent to destroy a religious and ethnic group').

¹²⁴ *Dismissal Order*, paras 552-555.

VII. RESPONSE TO THE ICP'S SUBMISSIONS REGARDING CONFLICTING CLOSING ORDERS AND IR 77(13)

63. For reasons set forth in paragraphs 26-36 of *AO An Appeal*, incorporated here by reference, the Defence strongly disputes the ICP's claim that if neither the NCIJ nor the ICJ's Closing Orders are affirmed on appeal for lack of a supermajority, ECCC law and procedure 'mandate that the case proceed to trial on the basis of the Indictment'.¹²⁵
64. IR 77(13)(b) does not support the ICP's position, as it is clearly intended to regulate the situation where a single indictment issued by both CIJs is appealed before the PTC. IR 77(13)(b), read on its own or in conjunction with IR 1(2), does not provide for or clarify the situation where two separate and opposing Closing Orders are 'confirmed' through lack of supermajority on appeal. Nor is Article 7(4) of the UN-RGC Agreement applicable, as this provision relates to the PTC's specific jurisdiction for resolving formal disagreements between CIJs and Co-Prosecutors, which is not the present situation.
65. The ICP's suggested interpretation of IR 77(13)(b) also violates ECCC law and procedure. First, it leads to a situation where one Co-Investigating Judge has more power and control over the case than the other, contrary to ECCC law.¹²⁶ Second, it violates the principle of *in dubio pro reo*, which requires procedural uncertainties to be resolved in AO An's favour.¹²⁷ Finally, it violates AO An's presumption of innocence, which cannot allow a case to proceed where the NCIJ has found there is insufficient evidence at this stage of the proceedings, and a valid dismissal order has been issued.
66. Furthermore, the ICP misuses jurisprudence from the Supreme Court Chamber ('SCC') in Case 001 to support his interpretation of IR 77(13)(b). He misleads the Court by extracting only a portion of the quote and taking it out of context.¹²⁸ When read in full, it is clear that the SCC was not interpreting IR 77(13)(b), but rather, examining the ECCC disagreement procedures within the context of an ongoing investigation.¹²⁹ This

¹²⁵ *ICP Appeal*, para. 101.

¹²⁶ *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, with the inclusion of amendments as promulgated on 27 October 2004*, NS/RKM/1004/006, 27 Oct. 2004, arts 16, 23 *new*.

¹²⁷ In the *AO An Appeal*, the Defence explains how the current situation is not regulated by ECCC law, procedure, or any other domestic or international law and should therefore be resolved in AO An's favour. *AO An Appeal*, paras 20-26.

¹²⁸ *ICP Appeal*, para. 106.

¹²⁹ Case No. 001/18-07-2007-ECCC/SC, *Appeal Judgement*, **F28**, 3 Feb. 2012, para. 65, attached as App. 12 (holding '[t]he Pre-Trial Chamber's role in settling disagreements between the two Co-Prosecutors or between the two Co-Investigating Judges does not alter the conclusion that the term "most responsible" is not a

jurisprudence is not applicable to the current situation where there are two closing orders and where the investigation has ended.

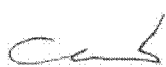
67. Therefore, the ICP wrongly concludes that AO An's case should proceed to trial if the PTC fails to reach a supermajority on the various appeals. His position is contrary to ECCC law, violates the principle of *in dubio pro reo* and the presumption of innocence, and is unsupported by ECCC or other relevant jurisprudence.

CONCLUSION AND RELIEF REQUESTED

68. For the reasons stated above, the ICP has failed to demonstrate or substantiate any legal errors invalidating the *Dismissal Order*, factual errors occasioning a miscarriage of justice, or any evidence of abuse of discretion on the NCIJ's part. The ICP may disagree with the NCIJ's conclusion on the issue of personal jurisdiction in AO An's case, but to request the PTC to overturn it, he must demonstrate that this conclusion was based on sufficiently determinative legal or factual errors or an abuse of discretion. The ICP has failed to do so.

69. Accordingly, the Defence respectfully requests the PTC to: (a) dismiss the *ICP Appeal*; and (b) uphold the *Dismissal Order*.

Respectfully submitted,



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Signed 20 February 2019, Phnom Penh, Kingdom of Cambodia

jurisdictional requirement of the ECCC. In a disagreement case filed under Internal Rule 71 or 72 where the reason for disagreement on the execution of an action, decision, or order is whether or not a suspect or charged person is a "senior leader" or "most responsible," the Pre-Trial Chamber's role would be to settle the specific issue upon which the Co-Investigating Judges or Co-Prosecutors disagree. If, for example, the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in proposing to issue an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, "the investigation shall proceed."); para. 70 (holding "[s]imilarly, the ECCC's Co-Investigating Judges are responsible for "either indicting a Charged Person and sending him or her to trial, or dismissing the case," and "are not bound by the Co-Prosecutors' submissions." Pursuant to the UN-RGC Agreement, "It is understood, however, that the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible."").