BEFORE THE PRE-TRIAL CHAMBER

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

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INTRODUCTION

1. AO An, through his Co-Lawyers ('*Defence*'), respectfully submits this reply to the *International Co-Prosecutor's Response to AO An's Appeal of the Case 004/2 Indictment* ('*ICP Response*'),[1] pursuant to Rule 74 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia ('*ECCC*'),[2] ECCC Practice Direction 8.4,[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 Response* fails to rebut the arguments raised in *AO An's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment)* ('*AO An Appeal*')[5] concerning the International Co-Investigating Judge's ('*ICIJ*') numerous legal and factual errors in the *Closing Order (Indictment)*.[6] Instead, the International Co-Prosecutor ('*ICP*') misunderstands or misrepresents the Defence's arguments and stretches the applicable law and facts in an attempt to justify or distract from the ICIJ's errors.

3. More specifically, in response to Appeal Ground 1, the ICP fails to refute the argument that the issuance of separate and opposing closing orders in a single case constitutes a legal error and is fundamentally unfair to AO An. In response to Appeal Ground 3, the ICP undertakes a flawed analysis of the ECCC's negotiating history, cherry picking pieces of the negotiating history and failing to engage with the arguments in any meaningful way. In response to Appeal Ground 5, the ICP ignores the PTC's jurisprudence and fails to show that the ICIJ fully and credibly assessed the evidence. In response to Appeal Ground 6, the ICP erroneously claims that the ICIJ's factual findings regarding personal jurisdiction are correct and supported by sufficient evidence. In response to Appeal Ground 7, the ICP does not address the ICIJ's legal and factual errors concerning the gravity of the charged crimes. In response to Appeal Grounds 8-17, the ICP fails to refute the errors regarding the ICIJ's interpretation and application of the law. Finally, in response to Appeal Ground 18, the ICP

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[1] Case No. 004/2/07-09-2009-ECCC-OCIJ/PTC 60, *International Co-Prosecutor's Response to AO An's Appeal of the Case 004/2 Indictment* ('*ICP Response*'), **D360/9**, 22 Feb. 2019.
[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*, Revision 8, ECCC/01/2007/Rev.8, as revised on 10 May 2012, Practice Direction 8.4.
[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(PTC56), *AO An's Appeal Against the International Co-Investigating Judge's Closing Order (Indictment)* ('*AO An Appeal*'), **D360/5/1**, 20 Dec. 2018.
[6] Case No. 004/2/07-09-2009-ECCC-OCIJ, *Closing Order (Indictment)*, **D360**, 16 Aug. 2018.

ignores the Defence's argument that AO An's fair trial rights were irreparably violated throughout the proceedings and that the *cumulative impact* of these violations undermined the fairness and integrity of Case 004/2 proceedings, rendering a fair trial impossible.

4. Accordingly, the Defence respectfully requests the PTC to admit and grant the *AO An Appeal* in its entirety (and uphold the NCIJ's *Order Dismissing the Case against AO An* ('*Dismissal Order*')).[7]

ARGUMENTS IN REPLY

5. Due to time and page restrictions, the Defence will reply to only those arguments in the *ICP Response* that most affect the outcome of the *AO An Appeal*. However, failure to address other arguments should not be interpreted as tacit acquiescence, and the Defence's arguments in reply are without prejudice to those in its appeal.

I. REPLY TO THE ICP RESPONSE TO APPEAL GROUND 1: THE APPLICABLE LAW DOES NOT ALLOW FOR THE ISSUANCE OF SEPARATE AND OPPOSING CLOSING ORDERS AND REQUIRES THAT THE DISMISSAL PREVAIL

6. The ICP fails to refute the Defence's argument that the issuance of separate and opposing closing orders in a single case constitutes a legal error and is fundamentally unfair.[8] On the contrary, for reasons stated in the *AO An Appeal*[9] and below, the applicable law does not permit the issuance of separate and opposing closing orders, and it requires that the *Dismissal Order* prevail.

A. Textual Argument

7. The ICP argues that the unambiguous instruction in the English version of Rule 67, that the Co-Investigating Judges shall issue *a* single Closing Order *either* indicting a Charged Person *or* dismissing the case, should be disregarded because 'the *Khmer* version of the Rule does not use the plural "Co-Investigating Judges" and can refer to either a single Co-Investigating Judge or both Co-Investigating Judges'.[10] The ICP further argues, with reference to Rule 1(2), that the IRs allow for the Closing Order to be signed by a single CIJ.[11]

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[7] Case No. 004/2/07-09-2009-ECCC-OCIJ, *Order Dismissing the Case against AO An* ('*Dismissal Order*'), **D359**, 16 Aug. 2018.
[8] *ICP Response*, paras 5-15.
[9] *AO An Appeal*, paras 20-32.
[10] *ICP Response*, para. 8.
[11] *ICP Response*, para. 8.

8. The ICP is attempting to deflect from the crux of AO An's argument, namely that Rule 67 provides for a single Closing Order. A Closing Order by a single CIJ is possible under the IRs when a disagreement between the two CIJs has been settled by the PTC under Rule 72. Contrary to the ICP's claim, what is not permitted is for 'each CIJ to issue his own closing order'.[12] The ICP fails to provide any credible justification for this interpretation of Rule 67 in this regard. In fact, his argument that the words 'either' and 'or' in Rule 67 'simply articulate the requirement that a closing order dispose of all the facts and charges before a Co-Investigating Judge or Judges'[13] is self-defeating. It is untenable to argue that equally valid separate and opposing closing orders adequately dispose of the facts and charges and 'definitively conclude a case'.[14] A valid indictment and a valid dismissal in a single case is the very antithesis of a definitive disposition.

9. The ICP then goes on to again misinterpret the Supreme Court Chamber's ('*SCC's*') *obiter dictum* in Case 001 as an explicit confirmation of the validity of two separate and opposing Closing Order under Rule 67.[15] The operative phrase in the quoted passage is 'proposing to issue'.[16] As argued in *AO An's Response to the ICP's Appeal*, the SCC was not contemplating the validity and outcome of two conflicting closing orders under Rule 67, but rather examining the application of the ECCC disagreement procedures under Rule 72.[17]

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[12] *ICP Response*, para. 9.
[13] *ICP Response*, para. 9.
[14] *ICP Response*, para. 9.
[15] *ICP Response*, para. 10.
[16] Case No. 001/18-07-2007-ECCC/SC, *Appeal Judgement* ('*Case 001 Appeal Judgement*'), **F28**, 3 Feb. 2012, para. 65, attached as App. 1 (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 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."').
[17] Case No. 004/2/07-09-2009-ECCC-OCIJ/PTC60, *AO An's Response to International Co-Prosecutor's Appeal of the Order Dismissing the Case against AO An (D359)* ('*AO An's Response to the ICP's Appeal*'), **D359/3/4**, 20 Feb. 2019, para. 66.

B. Fair Trial Rights Argument

10. Next, the ICP argues that two separate and opposing closing orders do not violate AO An's fair trial rights.[18] This argument is unpersuasive, and on close analysis, supports rather than undermines the Defence's arguments on appeal.

11. First, the ICP suggests that the unprecedented nature of conflicting closing orders is not unfair due to the ECCC's 'unique structure' involving two investigating judges, which was 'negotiated and approved after great deliberation by parties determined to uphold "international standards of justice, fairness, and due process of law".'[19] From the outset, the ICP is plainly wrong. The appointment of two investigating judges to a single case is not 'unique' to the ECCC; what is unique is the issuance of two separate conflicting closing orders. For example, in France in complex cases, particularly those involving international crimes, two investigating judges may be assigned to the case.[20] One judge may disagree with the other and refuse to sign the closing order, raising a ground of appeal for parties to proceedings, but s/he cannot issue a conflicting order.[21] The very existence of a special disagreement procedure in Article 7 of the UN-RGC Agreement and Rule 72 attests to the fact that the parties never contemplated the possibility of conflicting closing orders in the same case.

12. Moreover, simply because the drafters attempted to conform to international standards does not automatically immunise the Court from any and all claims of unfairness resulting from its structure, interpretation or application of its governing rules, or any other matter.[22] What

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[18] *ICP Response*, paras 11-13.
[19] *ICP Response*, para. 11.
[20] In France, two investigating judges may be assigned to a case, but one remains in charge and must sign the closing order whether it is a dismissal or indictment. Regardless of how the French procedural rules define the relationship between the two investigating judges, the notable result is the issuance of only one closing order. Code of Criminal Procedure, arts 83-1, 83-2 (France), attached as App. 2.
[21] Code of Criminal Procedure, art. 83-1, para. 1 (France) ('Lorsque la gravité ou la complexité de l'affaire le justifie, l'information peut faire l'objet d'une cosaisine selon les modalités prévues par le présent article'); *see* Code of Criminal Procedure, arts 179, 186-3 ('Lorsque l'information a fait l'objet d'une cosaisine, elles peuvent également, en l'absence de cosignature par les juges d'instruction cosaisis conformément à l'article 83-2, interjeter appel de ces ordonnances.'), 628, 628-1 (France); *Cass. crim.*, 10 Dec. 2014, n°14-83443, attached as App. 3; *Cass. crim.*, 2 Jun. 2015, n°15-81585, attached as App. 4; *see* LexisNexis, 'Fasc. 15: Chambre de l'instruction. – Pouvoirs du président', *LexisNexis JurisClasseur Procédure Pénale* (2018), para. 44, attached as App. 5 ('[I]l est également possible, et ce depuis l'entrée en vigueur de la loi n° 2007-291 du 5 mars 2007, lorsque l'information a fait l'objet d'une cosaisine et que l'ordonnance de renvoi n'est pas signée par tous les juges, ce qui peut laisser supposer un désaccord entre eux.').
[22] *Prosecutor v. Duško Tadić*, Case No. IT-94-1, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 Oct. 1995, para. 45, attached as App. 6 (holding '[t]he requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law [...] [f]or a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full

bears close examination and redress is the prejudice actually caused by conflicting closing orders to AO An's fair trial rights, not the negotiators' intentions.

13. Second, the ICP argues – with no supporting evidence – that the prosecution bears no burden of proof for an indictment, and that 'the issuance of an indictment by one CIJ does not remove the presumption of innocence'.[23] As to the former, the ICP is wrong. At the ECCC, the prosecution bears the *burden of proof* from the Introductory Submission through to the final appeal, and at every stage in between – only the *standard of proof* changes.[24] Thus, for the CIJs to indict AO An, *the prosecution must demonstrate* – through the Final Submission under Rule 66(6) (the burden of proof) – that the evidence on the case file is 'sufficiently serious and corroborative to provide a certain level of probative force' (the standard of proof). To state otherwise is to render AO An's presumption of innocence meaningless. As to the latter statement, the ICP is again deflecting – the violation lies not in the number of signatures on the indictment, but in the existence of a valid dismissal. To send AO An to trial despite the *Dismissal Order* would be a gross violation of his presumption of innocence and the principle of *in dubio pro reo*, alongside a number of other fair trial violations (raised by the Defence in its appeal) that the ICP ignores in his response, presumably because he agrees with them.[25]

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conformity with internationally recognised human rights instruments'); *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, *Decision on the Defence Motion on Jurisdiction*, 18 Jun. 1997, para. 43, attached as App. 7 (holding '[t]his Trial Chamber also subscribes to a view which was expressed by the Appeals Chamber in the Tadić case that when determining whether a tribunal has been "established by law", consideration should be made to the setting up of an organ in keeping with the proper international standards providing all the guarantees of fairness and justice').

[23] *ICP Response*, para. 12.

[24] Code of Criminal Procedure, art. 137 (France) (stating '[a]ll charged persons (persons under judicial examination) are presumed innocent'); *The Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* ('*Bemba, Decision on Charges*'), 15 Jun. 2009, paras 27, 31, attached as App. 8 (holding '[t]he drafters of the Statute established three different, progressively higher evidentiary thresholds for each stage of the proceedings under articles 58(1), 61(7) and 66(3) of the Statute. The nature of these evidentiary thresholds depends on the different stages of the proceedings and is also consistent with the foreseeable impact of the relevant decisions on the fundamental human rights of the person charged [...] [I]n making this determination the Chamber wishes to underline that it is guided by the principle *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutadis mutandis*, to all stages of proceedings, including the pre-trial stage.'); UN Human Rights Committee, *Communication No. 1620/2007*, CCPR/C/101/D/1620/2007/Rev.2 (16 Sep. 2011), para. 9.6, attached as App. 9 (where the national court was found to be in violation of the presumption of innocence by disproportionately reversing the burden of proof onto the accused during a preliminary hearing); *Telfner v. Austria*, ECtHR, 20 Mar. 2001, para. 18, attached as App. 10 (discussing a pre-trial procedure in criminal cases, the Court held '[i]n requiring the applicant to provide an explanation although they had not been able to establish a convincing prima facie case against him, the courts shifted the burden of proof from the prosecution to the defence').

[25] *AO An Appeal*, paras 28-35 (listing right to be tried by a fair and competent tribunal, right to be informed promptly and in detail of the nature and cause of the charges against him, right to be tried without undue delay, principle of legal certainty, and *in dubio pro reo*).

14. Third, the ICP reiterates his erroneous claim that failure by the PTC to reach a supermajority on these appeals will result in the case being sent for trial.[26] The Defence has addressed the ICP's misinterpretation of the UN-RGC Agreement, SCC jurisprudence and the IRs on this point and hereby incorporates its arguments by reference.[27]

C. The Resolution

15. The ICP claims that AO An is seeking 'an arbitrary and unprincipled resolution of the conflict between the closing orders'.[28] On the contrary, the Defence is asking the PTC to resolve this unfair situation by applying the applicable rules. For the reasons set forth in its appeal, the Defence is requesting the PTC to hold that the ECCC legal framework and the International Covenant on Civil and Political Rights ('*ICCPR*') do not allow for conflicting closing orders to be issued in the same case. According to Article 38 of the Constitution of Cambodia, Rule 21(1), and settled international jurisprudence,[29] any case of doubt at any stage in proceedings must be resolved in AO An's favour. As such, the *Dismissal Order* must prevail.

16. For his part, the ICP is asking for the ICIJ's indictment to be given primacy over the NCIJ's dismissal in violation of the equality between judges, on the basis of a rule (Rule 77(13)(b)) that does not explicitly or implicitly regulate the issuance of two separate and opposing orders and citing jurisprudence that does not apply to the case in hand. Crucially, the ICP is asking the PTC to contort existing rules to justify a flagrant violation of AO An's fundamental rights.

II. REPLY TO THE ICP RESPONSE TO APPEAL GROUND 3: THE ICP CHERRY PICKS PIECES OF THE NEGOTIATING HISTORY IN AN ATTEMPT TO BROADEN THE ECCC'S PERSONAL JURISDICTION

17. The ICP argues that the Defence (a) misunderstood the negotiation history; and (b) incorrectly interpreted the criteria for assessing 'most responsible'.[30] However, the ICP fails to substantiate these arguments, and instead, cherry picks pieces of the negotiating history to attempt to broaden the ECCC's personal jurisdiction, and he fails to engage with the Defence's arguments in any meaningful way.

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[26] *ICP Response*, para. 13.
[27] *AO An's Response to ICP's Appeal*, paras 63-67.
[28] *ICP Response*, paras 14-15.
[29] *Bemba, Decision on Charges*, para. 31.
[30] *ICP Response*, para. 20.

18. First, the Defence did not ignore the 'most responsible' category, as claimed by the ICP.[31] Rather, it set out clear arguments and thoroughly examined the negotiating history, which demonstrated that: (a) the term 'leader' was restricted to the CPK's top leadership; and (b) the 'most responsible' category subsequently widened the Court's jurisdiction to prosecute Duch but was never intended as a catch-all category.[32] In contrast, in his response, the ICP only cites to one political speech by Deputy Prime Minister SOK An to the Cambodian National Assembly,[33] and he ignores statements by the parties made during the course of the negotiation process.[34] The ICP thus provides no basis to request 'summary dismissal' of the Defence's arguments.[35]

19. Second, the ICP fails to support his claim that the ICIJ applied the principles of *in dubio pro reo* and strict construction when determining the limits of the 'most responsible' category.[36] The Defence stands by its arguments in the appeal, and the ICP offers little to no explanation of how the ICIJ allegedly 'applied the narrowest reasonable construction' of the most responsible category.[37]

20. Third, the ICP misunderstands the Defence's argument about how the ICIJ conflated the concept of personal jurisdiction with joint criminal enterprise ('*JCE*'), and he claims that the ICIJ was obligated to look at this mode of liability in assessing whether AO An fell within the scope of personal jurisdiction.[38] The Defence agrees that criminal responsibility may be one factor in determining personal jurisdiction, but it cannot be the *only* factor and replace all the others. Personal jurisdiction cannot be solely based on alleged membership of a JCE no matter what the alleged personal contribution may be.[39]

21. Finally, the ICP fails to substantiate his claim that the Defence did not demonstrate the legal error in the ICIJ's comparative analysis – that is, how he inexplicably restricted his analysis to only Duch and IM Chaem when there are other known Khmer Rouge officials, like *Ta* Mok, KE Pauk and SAO Sarun.[40] The term 'most responsible' itself implies the need for

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[31] *ICP Response*, para. 21.
[32] *AO An Appeal*, paras 46-47, 53-54; 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 82-92.
[33] *ICP Response*, para. 23, fn. 33.
[34] *Response to Final Submission*, para. 87.
[35] *ICP Response*, para. 24.
[36] *ICP Response*, paras 25-26.
[37] *ICP Response*, para. 26.
[38] *ICP Response*, paras 27-29.
[39] *AO An Appeal*, paras 49-52.
[40] *ICP Response*, para. 30.

comparative analysis between alleged perpetrators – whether they are investigated, prosecuted, convicted by the ECCC, otherwise the use of 'most' would be meaningless. 'Most' is, by nature, a relative term. AO An notes further that there is no requirement that the comparative analysis be limited to known Khmer Rouge cadre who are alive, as wrongly implied by the ICP.[41]

22. Therefore, the ICP fails to support his claim that the Defence did not demonstrate how the ICIJ interpreted 'most responsible' in an overly broad and incorrect manner.

III. REPLY TO THE ICP RESPONSE TO APPEAL GROUND 5: THE ICP IGNORES AND MISUNDERSTANDS THE PTC'S JURISPRUDENCE AND FAILS TO SHOW THAT THE ICIJ FULLY AND CORRECTLY ASSESSED CREDIBILITY

23. The ICP claims that the Defence did not demonstrate how the ICIJ erred in law or in fact when assessing the evidence. Specifically, the ICP states that the Defence's attempt to 'discredit key witnesses [was] largely based on flawed analysis and allegations of impropriety already found to be baseless'.[42] The ICP's claims are unpersuasive and incorrect. First, he downplays the ICIJ's explicit rejection and refusal to follow the PTC's holding in Case 004/1 concerning evidence assessment and the ICIJ's insistence on applying a form-over-substance approach, which was held by the PTC to be a legal error. Second, he overlooks the fact that the ICIJ did not explain his heavy reliance on witness and civil party applicant testimony related to personal jurisdiction, despite material inconsistencies and other credibility concerns. Finally, the ICP misrepresents the PTC's *Decision on AO An's Application to Annul Written Records of Interview of Three Investigators* ('*Decision on Bias*')[43] and distorts the holding to claim that the Defence is attempting to relitigate issues. When in fact, the issue of bias in that decision is different from the issue of evidence assessment and of witness and civil party applicant credibility currently before the PTC.

A. The ICIJ explicitly rejected and refused to follow the PTC's approach to evidence assessment

24. The ICP contends that the ICIJ did not follow a form-over-substance approach when assessing the evidence and claims that he merely 'took issue with some of the PTC's

[41] *ICP Response*, para. 30.
[42] *ICP Response*, para. 32.
[43] Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC37), *Decision on AO An's Application to Annul Written Records of Interview of Three Investigators* ('*Decision on Bias*'), **D338/1/5**, 11 May 2017.

reasoning in Case 004/1'.[44] In fact, the ICP downplays the ICIJ's position and overlooks key parts of the *Closing Order (Indictment)*. The ICIJ explicitly rejected the PTC's Case 004/1 reasoning and refused to adopt its approach, even after this Chamber held that the ICIJ's approach was a legal error.[45] As in Case 004/1, the ICIJ again applied the same erroneous hierarchy with his WRIs at the top, refused to engage in the substance of WRIs, and quickly dismissed alternative forms of exculpatory evidence.[46]

25. The ICP fails to show that 'the ICIJ examined the evidence's intrinsic value, staying mindful of credibility issues and rejecting aspects that did not seem reasonable'.[47] The ICP has only identified a handful of examples compared to those in the *Closing Order (Indictment)* demonstrating the ICIJ's application of a form-over-substance approach and his failure to engage with the substance of his WRIs.[48] Moreover, many of the examples provided by the ICP only reinforce the Defence's position, as they demonstrate how the ICIJ has merely systematically rejected exculpatory evidence and not engaged with substantive credibility

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[44] *ICP Response*, para. 33.
[45] *AO An Appeal*, paras 60-61; *Closing Order (Indictment)*, para. 35; 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, paras 49-59, 80 attached as App. 11.
[46] *Closing Order (Indictment)*, paras 123, 127, 130 (The ICIJ explains his hierarchy of evidence based on the form and origin of the evidence.). In the *AO An Appeal*, the Defence identifies non-exhaustive examples where the ICIJ applies a form-over-substance approach when assessing evidence. *AO An Appeal*, paras 58, 60, fns 103, 109; *e.g. Closing Order (Indictment)*, para. 246, fn. 600 (In finding that AO An appointed PRAK Yut as Kampong Siem district secretary, the ICIJ fails to engage in the substance of PRAK Yut's evidence, accepting without question evidence from a single and uncorroborated WRI – his evidence – and disregarding extensive inconsistencies with other evidence, as well as the OCIJ investigators' dubious investigative methods. For example, in two WRIs, PRAK Yut states that she was appointed by AO An; but in the first one she provides this information only after being fed this information by the OCIJ investigator. **D117/70** (PRAK Yut WRI), A25-A28; **D117/71** (PRAK Yut WRI), A25. When interviewed by DC-Cam, PRAK Yut claims that KANG Chap told her about the plan and that she received a mission letter from him. **D219/234.1.2** (PRAK Yut DC-Cam Interview), EN 01064280-83, pp. 57-60. Finally, PRAK Yut testified in Case 002 that KANG Chap's messenger told her to go to Kampong Cham. **D219/702.1.95** (PRAK Yut Case 002 Transcript), EN 01441065, p. 56. As a result, the ICIJ ignores exculpatory and contradictory evidence from PRAK Yut's DC-Cam interview and testimony during Case 002 trial, and favours the evidence from her WRI, despite the fact that this evidence is tainted by the OCIJ investigator's leading questions.); para. 296, fn. 778 (In finding that AO An ordered *Ta* Am's arrest, the ICIJ again fails to engage in the substance of his WRIs. He relies on the accounts of SAT Pheap, CHOM Vong, PENH Va, IM Pon, POV Sarom and PUT Kol. Not only are four of these witnesses are not credible, but they also do not have personal knowledge of the events that led to *Ta* Am's arrest. SAT Pheap's evidence results from hearsay from an un-named messenger of AO An. **D219/504** (SAT Pheap WRI), A135. CHOM Vong has no knowledge of who ordered this arrest and simply speculates that it was AO An, only after the OCIJ investigator feeds him this information. **D219/442** (CHOM Vong WRI), A40-A45. PENH Va speculates that AO An ordered *Ta* Am's replacement. **D219/226** (PENH Va WRI of Civil Party Applicant), A11. Then, the ICIJ attempts to corroborate this insufficient evidence by citing several WRIs of IM Pon, CHOM Vong, POV Sarom and PUT Kol; however, the ICIJ misrepresents their evidence as they all discuss *Ta* Am's arrest without making any reference to AO An ordering it. **D117/50** (IM Pon WRI), A42; **D219/284** (POV Sarom WRI), A33; **D117/56** (CHOM Vong WRI), A18; **D117/26** (PUT Kol WRI), A4).
[47] *ICP Response*, para. 33, fn. 56.
[48] *AO An Appeal*, paras 58-59; *e.g. Closing Order (Indictment)*, para. 246, fn. 600; para. 296, fn. 778.

issues, like material inconsistencies or bias motivation of witnesses providing inculpatory evidence on personal jurisdiction.[49]

26. Finally, the ICP's assertion that the ICIJ secondarily considered evidence from parties or civil party applicants is irrelevant to the Defence's argument,[50] and even if true, would not demonstrate that the ICIJ engaged in the substance of his WRIs.

27. Thus, the ICP's claim that the ICIJ did not apply a rigid hierarchy when assessing evidence is wrong. On the contrary, the ICIJ fully rejected the PTC's approach to evidence assessment and followed his hierarchy, placing WRIs at the top and refusing to engage in their substance as a result.

B. The ICIJ did not properly assess the credibility of key witnesses and civil party applicants, and despite material inconsistencies and other credibility concerns, he principally relied upon their testimony without any explanation

28. The ICP asserts that the ICIJ properly assessed the credibility of key witnesses and civil party applicants and that the PTC should be 'loathe to disturb such assessments *unless* there was an abuse of discretion.'[51] The ICP is incorrect. First, he misstates the standard of review for discretionary decisions. The PTC held in Case 004/1 that it may overturn discretionary decisions relating to personal jurisdiction where there is a discernible error of law, of fact *or* an abuse of discretion that was fundamentally determinative of the exercise of discretion.[52]

29. Second, in his response, the ICP focuses solely on the consistency of witness and civil party applicant accounts in determining credibility.[53] In doing so, he misunderstands the concept of credibility. Credibility is not exclusively based on the consistency or inconsistency of statements – although this is an important factor – but rather, also includes assessment of motives to lie, corroboration, and the way in which questions are presented to individuals.[54] In reality, as set out in the *AO An Appeal*, the ICIJ did little to no assessment of credibility, ignoring material inconsistencies and overlooking motives to lie, lack of corroboration, and the dubious methods of OCIJ investigators.[55]

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[49] *ICP Response*, para. 33, fn. 56.
[50] *ICP Response*, para. 33.
[51] *ICP Response*, para. 34 (emphasis added).
[52] *Case 004/1 Considerations on Appeal*, para. 21; *see also* paras 43, 142, 160, 320-340.
[53] *ICP Response*, para. 34.
[54] *AO An Appeal*, paras 62-77.
[55] *AO An Appeal*, paras 62-77.

30. Third, the ICP argues that the ICIJ was not required to explain material inconsistencies in witness and civil party applicant accounts because there were none.[56] The ICP thus accepts that material inconsistencies must be explained. The ICP correctly cites the jurisprudence (that triers of fact are required to explain why they principally rely on testimony despite material inconsistencies)[57] but incorrectly claims that no material inconsistencies existed. The Defence pointed to numerous material inconsistencies in the *AO An Appeal*,[58] in particular, with respect to PRAK Yut, and the ICP's attempts to refute these inconsistencies are unconvincing.[59] Thus, in the *Closing Order (Indictment)*, the ICIJ should have fully explained why he principally relied on certain witnesses, like PRAK Yut, despite the material inconsistencies and other credibility concerns, but he failed to do so.[60]

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[56] *E.g. ICP Response*, para. 36, fn. 67.
[57] *ICP Response*, para. 34.
[58] *AO An Appeal*, paras 62-75, 86, 89, 95, 108, 111, 121, 125, 127, 142-143.
[59] *ICP Response*, paras 35-38, fn. 67 (The ICP misrepresents and cherry picks evidence to support his claims that PRAK Yut consistently identified AO An as the one who appointed her as district secretary. A thorough and careful analysis of the evidence, including of PRAK Yut's omissions, reveals that PRAK Yut is not consistent on this issue. **D360/5/1.5** (Annex D: PRAK Yut's Inconsistent Statements Related to Personal Jurisdiction), EN 01597562-63, pp. 2-3; **D6.1.721** (PRAK Yut WRI), A2-A3 (PRAK Yut states that KANG Chap was the one who ordered her transfer to the Central Zone.); **D179/1.2.4** (PRAK Yut Case 002 Transcript), EN 00774121, 00774123, pp. 88, 91 (PRAK Yut testifies that KANG Chap was the one who called, re-educated and transferred her to Kampong Cham, specifically Kampong Siem District. Then, she states that her role in Kampong Siem District was district secretary, and that she followed KANG Chap's order to go there. She does not make any reference to AO An.); **D117/70** (PRAK Yut WRI), A6-A10, A18-A21, A26 (PRAK Yut consequently discusses KANG Chap's, KE Pauk's and AO An's role in relation to her appointment as district secretary; but the OCIJ investigator fails to ask follow-up questions to clarify who actually appointed her.); **D117/71** (PRAK Yut WRI), A19 (PRAK Yut states that KE Pauk appointed her and others to their positions.); **D219/234.1.2** (PRAK Yut DC-Cam Interview), EN 01064270, 01064280-82, pp. 47, 57-59 (PRAK Yut states that *Ta* Chap told her and others to move to Kampong Cham; that they travelled to Kampong Cham where they waited for their duties at a Zone level committee meeting; that she was told about this meeting by *Ta* Chap; and that *Ta* Chap had already sent a letter of mission and they had to follow the instructions.); **D219/702.1.95** (PRAK Yut Case 002 Transcript), EN 91441065-67, pp. 56-58 (PRAK Yut testifies KANG Chap sent a messenger to tell her that she was being transferred to Kampong Cham and then specifies that she only met with KANG Chap in relation to her assignment to Kampong Cham.)); para. 39, fn. 77 (The ICP misrepresents evidence to attempt to show that YOU Vann provided consistent accounts. Concerning AO An's alleged orders about marriages, the ICP first relies on **D219/138** (YOU Vann WRI), A80, where YOU Vann provides hearsay evidence about AO An ordering married couples to sleep together. Then, the ICP deduces from this hearsay that this answer was consistent with that in **D219/701.1.87** (YOU Vann Transcript). However, in **D219/701.1.87** (YOU Vann Transcript), EN 01431623-24, pp. 37-38, YOU Vann discusses the prohibition of inter-ethnic marriages and simply states that the order came from the 'upper echelon' without mentioning AO An.).
[60] *E.g. ICP Response*, para. 36, fn. 68. **Whether the Southwest Zone group arrived in the Central Zone in early 1977**: The ICP claims that the ICIJ properly considered PRAK Yut's inconsistent evidence on the timing of her arrival to the Central Zone. The ICP suggests that the ICIJ considered exculpatory evidence from other individuals because he uses '*c.f.*' in the footnote. This reference does not constitute an explanation for disregarding this exculpatory evidence. **Whether AO An travelled to the Central Zone with PRAK Yut**: The ICP applies the same incorrect reasoning as above to PRAK Yut's inconsistent statements about AO An travelling to the Central Zone with her. **Whether AO An conducted the 'purge' of former Central Zone cadre**: The ICP argues that the ICIJ did not rely on PRAK Yut's inconsistent statements regarding the purge of the former cadre in Kampong Siem District. This is incorrect. In paragraph 297 of the *Closing Order (Indictment)*, the ICIJ concludes that AO An ordered the purge of cadre at the district level, and then concludes

C. The Defence is not re-litigating issues, but rather, the ICP misunderstands the PTC's *Decision on Bias*

31. The ICP asserts that the Defence's numerous contentions that PRAK Yut was fed inculpatory information were 'unanimously rejected by the PTC',[61] and made similar claims in relation to YOU Vann's and NHEM Chen's evidence.[62] In making these assertions, the ICP misrepresents the essence of the PTC's *Decision on Bias*, which focused on whether the OCIJ investigators were biased.

32. In the *Decision on Bias*, the PTC held that bias of the OCIJ investigators was not proven,[63] but it also stated that instances of 'feeding' inculpatory information or alleged inconsistencies were 'related to the assessment of credibility and reliability of the evidence, which will be performed at a later stage [closing order stage]'.[64] The PTC specifically held that '[t]he circumstances in which evidence is obtained, including the reliability of the interviews in light of the nature of the questions asked to the witnesses and civil parties, will be fully assessed at the closing order stage, including eventually by the [PTC]'.[65] We are now at that stage. Consequently, the Defence is not re-litigating the issue of bias, which was already decided, but rather, it is rightly and timely raising credibility and reliability issues.[66]

33. Therefore, in the *AO An Appeal*, the Defence demonstrated that the ICIJ erred in law and fact when assessing the evidence. The ICP downplays the ICIJ's explicit rejection and refusal to follow the PTC's holding in Case 004/1 concerning evidence assessment. He wrongly asserts that the ICIJ properly assessed the credibility of witnesses and civil party applicants, and he misrepresents the PTC's *Decision on Bias*.

IV. REPLY TO THE ICP RESPONSE TO APPEAL GROUND 6: CONTRARY TO THE ICP'S CLAIMS, THE ICIJ'S FACTUAL FINDINGS REGARDING PERSONAL JURISDICTION ARE INCORRECT AND UNSUPPORTED BY THE EVIDENCE

34. With respect to Appeal Ground 6, the ICP fails to credibly refute the Defence's argument that the ICIJ erred in fact in determining that the ECCC has personal jurisdiction over AO An. The ICP also does not refute the factual errors identified by the Defence in the *Closing Order*

AO An ordered, after consulting with KE Pauk, the arrests of the old commune chiefs and replaced them with Southwest Zone cadre. In reaching such finding, the ICIJ relies heavily on PRAK Yut in footnotes 783 and 784.
[61] *ICP Response*, para. 37, fn. 70.
[62] *ICP Response*, para. 39, fn. 76; para. 42, fn. 89.
[63] *Decision on Bias*, para. 21.
[64] *Decision on Bias*, paras 23-24.
[65] *Decision on Bias*, para. 24.
[66] *AO An Appeal*, paras 62-75.

(Indictment), concerning AO An's alleged positions, roles, or participation in the charged crimes in Sector 41 or the Central Zone. First, the ICP misconstrues the Defence's argument regarding hearsay evidence. Second, the ICP misunderstands the concept of corroborative evidence throughout his analysis of the specific factual errors identified by the Defence. Finally, the ICP misrepresents evidence in an attempt to justify the ICIJ's factual errors.

A. The ICP misconstrues AO An's argument regarding hearsay evidence

35. The ICP claims that AO An 'systematically impugns factual findings on the grounds that they are based on hearsay evidence'.[67] In doing so, the ICP misconstrues the Defence's argument regarding hearsay evidence. The Defence did not argue that all hearsay evidence is inadmissible, but rather, it emphasised that the ICIJ must exercise caution when relying on hearsay, which he failed to do.[68] In the *AO An Appeal*, the Defence provided specific examples of where the ICIJ failed to exercise such caution and how if he had exercised caution, he could not have determined AO An was within the Court's personal jurisdiction.[69]

36. Moreover, pretending, as the ICP does, that hearsay evidence has equal probative value to direct evidence based on personal knowledge is contrary to the jurisprudence cited by both the Defence and the ICP.[70]

37. Finally, it is false for the ICP to claim that hearsay from PRAK Yut demonstrates her consistency 'for decades'.[71] The ICP speculates 'based on context and wording' that this hearsay evidence 'almost certainly' was made 30 years ago.[72] His speculation is an attempt to dispute the Defence's serious concerns about PRAK Yut potentially contacting and interfering with witness testimony during the ICIJ's investigation.[73] The Defence maintains and reiterates its concerns with this evidence, as set out in the *AO An Appeal*.[74]

B. The ICP misunderstands the concept of corroborative evidence

38. In responding to the factual errors raised by the Defence concerning AO An's alleged role and functions in Sector 41, the ICP primarily alleges that the Defence took a 'piecemeal'

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[67] *ICP Response*, para. 52.
[68] *AO An Appeal*, para. 78.
[69] *AO An Appeal*, para. 78.
[70] *ICP Response*, para. 52, fn 125; *AO An Appeal*, para. 78, fn. 174.
[71] *ICP Response*, para. 53.
[72] *ICP Response*, para. 53.
[73] *ICP Response*, para. 53.
[74] *AO An Appeal*, paras 78-79.

approach to the evidence assessment instead of a 'cumulative' approach.[75] In doing so, the ICP demonstrates a fundamental misunderstanding of the concept of corroborative evidence.[76] This misunderstanding results in the ICP failing to examine whether corroborative evidence supports each of the ICIJ's factual findings leading to the determination on personal jurisdiction.[77]

39. Despite the SCC holding that there is not a 'general rule' requiring corroboration, the importance of corroborative evidence is clear. First, the standard of proof places corroboration at the centre of evidential analysis ('sufficiently serious and corroborative evidence'). Second, the ECCC's standard is consistent with practice and jurisprudence at the international tribunals and in civil law national jurisdictions.[78] Courts recognise that corroboration is more likely to be required where witnesses or civil party applicants lack credibility, either on a particular material fact or on the whole. Accordingly, corroborative evidence should be required to support the evidence of PRAK Yut and others identified in the *AO An Appeal*.[79]

40. In his response, the ICP criticises the Defence's approach to evidence assessment as 'piecemeal' because it examined whether *individual* factual findings were supported by sufficiently serious and corroborative evidence – that is, whether they satisfied the standard of proof.[80] The ICP prefers what he calls a 'cumulative' approach whereby he incorrectly strings together various factual findings to make 'corroborative evidence'.[81] This approach is inconsistent with international jurisprudence.[82] Each factual finding underlying the ICIJ's

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[75] *ICP Response*, paras 55-57.
[76] *The Prosecutor v. Ruto, Kosgey and Sang*, Case No. ICC-01/09-01/11, *Decision on Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 Jan. 2012, paras 293-294, attached as App. 12 (refusing to confirm charges against defendant based on single uncorroborated account of anonymous witness about defendant's role in organisation); *The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Decision on the Confirmation of Charges* ('*Lubanga, Decision on Confirmation of Charges*'), 29 Jan. 2007, paras 121-122, attached as App. 13 (following jurisprudence from ICTR, Pre-Trial Chamber I held that it generally attaches higher probative value to those parts of testimony which are corroborated).
[77] *E.g. ICP Response*, paras 48, 52-53, 55, 60-63, 67-68, 73-77, 81.
[78] *AO An Appeal*, para. 77.
[79] *AO An Appeal*, paras 63-75; *The Prosecutor v. Ruto and Sang*, Case No. ICC-01/09-01/11, *Decision on Defence Applications for Judgments of Acquittal, Reasons of Judge Fremr*, 5 Apr. 2016, paras 56-57, attached as App. 14 (finding where there was only a single uncorroborated witness supporting the specific allegation, evidence did not 'afford the necessary solid basis upon which a reasonable [chamber] could rely for proper conviction'); *Lubanga, Decision on Confirmation of Charges*, paras 121-122.
[80] *ICP Response*, paras 55-57.
[81] *E.g. ICP Response*, para. 48, fn. 114; paras 55-57, 60, 63, 67-68, 71-72, 75, 80-81.
[82] *AO An Appeal*, para. 77, fn. 169; *see The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, *Judgement*, 7 Jul. 2006, para. 174, attached as App. 15 (holding '[o]nly after the analysis of all the relevant evidence, can the Trial Chamber determine whether the evidence upon which the Prosecution relies should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies. At

determination on personal jurisdiction must satisfy the standard of proof, which may require *corroborative evidence* before accepting the individual fact as proven.[83]

C. The ICP misrepresents evidence in an attempt to justify the ICIJ's factual errors

41. Finally, throughout his response to Appeal Ground 6, the ICP sometimes misrepresents evidence concerning AO An's alleged role and responsibilities in Sector 41 and the Central Zone to attempt to justify the ICIJ's factual errors, and ultimately, his determination of personal jurisdiction.

42. For example, the ICP asserts that the evidence 'clearly supports the ICIJ's finding that AO An received orders and instructions from KE Pauk' based primarily on an excerpt of a media interview by AO An from which the ICP omits a key part.[84] On another occasion, the ICP claims that '[PRAK] Yut's extensive evidence' regarding subordinates reporting to AO An 'is solidly corroborated by' other witnesses.[85] In reality, these other witnesses only speak about meetings, not reporting, and most of them do not know the subject matter of the meetings.[86] Finally, the ICP argues that 'it was clearly reasonable' for the ICIJ to find that

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this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction.'); *Prosecutor v. Stakić*, Case No. IT-97-24-A, *Judgement*, 22 Mar. 2006, para. 219, attached as App. 16 (holding '[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.'); *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, *Judgement*, 9 May 2007, para. 226, attached as App. 17 (holding '[t]he standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable doubt'); *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-1-A, *Judgement*, 5 May 2009, para. 220, attached as App. 18 (holding '[t]his standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond a reasonable doubt').

[83] *AO An Appeal*, para. 55, fns 97-98.

[84] *ICP Response*, para. 60, fn 149 (The ICP references **D103.1.39** (AO An Interview with VOA Khmer), but he omits a critical part. In the interview, AO An states that although KE Pauk ordered him to kill supporters of the Lon Nol regime, he did not follow these orders, instead hiding these individuals in the fields.).

[85] *ICP Response*, para. 68.

[86] *ICP Response*, para. 68, fns 173-174 (The witnesses cited by the ICP only provide evidence regarding AO An's attendance at meetings. Many do not know what these meetings were about or what was said. PUT Kol reports seeing AO An speaking with PRAK Yut but states she had no idea what was spoken about. SAT Pheap also reports that AO An attended meetings on a daily basis, but he only knows this information because he saw AO An being driven away. It is unclear how SAT Pheap knows AO An was being driven to meetings as opposed to anywhere else. IM Pon provides evidence that AO An visited work sites, that he was in charge of the dam construction, and that he had meetings with the chairperson. However, this information results from

AO An was deputy secretary of the Central Zone.[87] However, in his analysis, the ICP ignores the substantial exculpatory evidence identified by the Defence indicating that AO An did not hold this *de jure* or *de facto* position.[88]

43. Accordingly, the ICP fails to refute the Defence's assertions that the ICIJ erred in fact in finding AO An to be amongst those 'most responsible'.

V. REPLY TO THE ICP RESPONSE TO APPEAL GROUND 7: THE ICP DEFLECTS AND CHERRY PICKS AO AN'S ARGUMENTS ABOUT THE ICIJ'S FACTUAL AND LEGAL ERRORS CONCERNING THE GRAVITY OF THE CHARGED CRIMES

44. The ICP does not substantiate his claim that the Defence 'fails to show that the crimes he is charged with are not sufficiently grave to subject him to the personal jurisdiction of the ECCC'.[89] Rather than fully engaging with the Defence's argument, the ICP deflects and cherry picks pieces of the argument.[90] He incorrectly claims that factors such as geographical scope and victim numbers are less important than the gravity of the crimes charged and that genocide in Sectors 42 and 43 can be inferred and attributed to AO An. These claims are contrary to previous ECCC jurisprudence.[91] The Defence's analysis in the *AO An Appeal* is based on this jurisprudence.

45. Thus, the ICP has not disputed the fact that the evidence provided by the ICIJ is almost exclusively from Sector 41, a small geographic area, that there is insufficient evidence to support the ICIJ's calculations of victim numbers in the Central Zone or Sector 41, or that the ICIJ cannot impute the alleged genocidal acts or alleged victim numbers from Sectors 42 and 43 to AO An through the charged modes of liability.[92]

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information being fed to IM Pon by the OCIJ investigator. Similarly, YOU Vann states she delivered letters from PRAK Yut, but she does not state the contents of these letters.).
[87] *ICP Response*, para. 83.
[88] *AO An Appeal*, paras 93-145.
[89] *ICP Response*, para. 89.
[90] *ICP Response*, para. 90.
[91] *AO An Appeal*, para. 50, fn. 86; *Case 004/1 Considerations on Appeal*, paras 327-328; *Dismissal Order*, para. 428; *Case 001 Appeal Judgement*, para. 62.
[92] *AO An Appeal*, paras 157-162.

VI. REPLY TO THE ICP RESPONSE TO APPEAL GROUNDS 8, 9, 11, 12, 14, 15 AND 16(I): THE ICP FAILS TO REFUTE THE LEGAL ERRORS IDENTIFIED BY THE DEFENCE CONCERNING THE ICIJ'S APPROACH TO DETERMINING AND APPLYING CUSTOMARY INTERNATIONAL LAW

46. With respect to Appeal Grounds 8, 9, 11, 12, 14, 15 and 16(i), the ICP claims that the Defence did not demonstrate a legal error concerning the ICIJ's approach to determining and applying customary international law ('*CIL*').[93] However, in making this claim, the ICP (a) disregards the ICIJ's duty to adequately prove the existence of CIL relied upon in the *Closing Order (Indictment)* and (b) misapprehends the importance of examining alternative CIL sources, other than *ad hoc* tribunal jurisprudence. Consequently, the ICP does not refute these appeal grounds resulting from the ICIJ's flawed approach to CIL.

A. The ICP disregards the ICIJ's duty to adequately prove the existence of CIL

47. The ICP disregards the ICIJ's duty to adequately prove the existence of CIL relied upon in the *Closing Order (Indictment)*. In doing so, he erroneously claims that the Defence failed to identify errors in the ICIJ's use of CIL.[94] He further asserts that in order to demonstrate the ICIJ's error in relying on CIL, the Defence *must prove* the existence of CIL to the contrary.[95]

48. Contrary to the ICP's claims, the Defence identified clear legal errors in the ICIJ's approach to CIL, which breached the principle of legality.[96] Throughout the *Closing Order (Indictment)*, the ICIJ primarily relied upon CIL as a legal basis for criminal liability,[97] and thus, he had to prove such CIL existed during 1975-1979,[98] which he failed to do. Instead, he undertook a flawed approach to interpreting and applying CIL, thus undermining the principle of legality.[99] As highlighted throughout the *AO An Appeal* in relation to a number of the ICIJ's legal findings, the ICIJ incorrectly interpreted and applied CIL by: (a) failing to uphold the correct standard of proof required for CIL, in particular failing to provide sufficient evidence of State Practice;[100] (b) overly relying on *ad hoc* tribunal jurisprudence;[101]

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[93] *ICP Response*, paras 92-93, 95-96, 99-101, 105.
[94] *ICP Response*, paras 92-93, 95-96, 99-101, 105.
[95] *ICP Response*, paras 93, 96, 100-101, 105.
[96] *AO An Appeal*, paras 166-174, 178-181, 187-193, 196.
[97] *Closing Order (Indictment)*, paras 63-120
[98] *AO An Appeal*, para. 167 (noting the international law requirements for CIL findings).
[99] *AO An Appeal*, paras 166-170.
[100] *AO An Appeal*, paras 167-168, 172-173, 178-181, 187-188, 190-193, 196, fn. 419 (demonstrating the ICJ's failure to provide sufficient evidence of State Practice and *opinio juris* to establish CIL and highlighting examples of his incorrect and insufficiently reasoned CIL determinations which result from this lack of CIL evidence).

and (c) failing to consider relevant CIL evidence, such as ICC law.[102] These are discernible legal errors, which the ICP fails to address in his response.

49. Moreover, on several occasions in the *ICP Response*, the ICP asserts that unless the Defence demonstrated the existence of CIL to the contrary, there could not be a discernible legal error and the ICIJ's CIL findings, even if insufficiently reasoned or incorrect, must stand.[103] This argument demonstrates a disregard for the principle of legality and attempts to reverse the burden onto the Defence. The Defence's burden is limited to showing a legal error; the Defence does not have the burden to prove contrary CIL.[104] It is sufficient for the Defence to demonstrate that the ICIJ provided insufficient evidence for his reliance on CIL or to show that the ICIJ failed to consider reasonable alternative CIL interpretations.

B. The ICP misapprehends the importance of examining alternative CIL sources, other than *ad hoc* tribunal jurisprudence

50. The ICP erroneously criticises the Defence's reliance on ICC law as CIL evidence. In doing so, the ICP ignores the principle of *lex mitior* (principle of leniency) and misconstrues the purpose of the Defence's reliance on alternative sources of CIL.

51. First, the ICP takes issue with the Defence's use of ICC law, codified post-1979, as evidence of CIL applicable at this Court.[105] However, in accordance with the principle of *lex mitior*, it is necessary to examine developments in CIL and Cambodian law, which have occurred since 1979. Should there be a development in the applicable law subsequent to the occurrence of

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[101] *AO An Appeal*, paras 166-174, 178, 181, 196 (discussing issues with relying on *ad hoc* tribunal jurisprudence as CIL evidence and providing examples of the ICIJ's over-reliance on such jurisprudence).
[102] *AO An Appeal*, paras 169, 173, 179, 181, 190-191, 196 (providing examples of CIL evidence which the ICIJ failed to consider).
[103] *ICP Response*, paras 93, 96, 100-101, 105.
[104] It is the obligation of the ICIJ to adequately prove the existence of CIL in 1975-1979. The principle of *iura novit curia* (the court knows the law) applies in international law. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement*, 1986 ICJ 14, para. 29, attached as App. 19; *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), Judgement*, 1974 ICJ 175, para. 18, attached as App. 20 (holding '[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court'); *Prosecutor v. Milutinović et al.*, Case No. IT-05-97-PT, *Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration*, 22 Mar. 2006, para. 16, attached as App. 21 (holding '[a]s a final preliminary matter, the Trial Chamber holds that the submission in the Ojdanic Reply to the effect that "[t]he prosecution bears the burden of showing that its 'indirect co-perpetration' form of liability existed in customary international law in 1999" is unfounded. Ojdanic's jurisdictional challenges are matters of law to be determined by the Trial Chamber, not matters of fact that one of the parties bears the burden of proving, although the Chamber may of course be assisted by submissions made by the parties in its evaluation of the challenges.').
[105] *ICP Response*, paras 93, 96, 101, 105. The Defence also notes a contradiction in the ICP's argument that ICC law should not be considered applicable because it was codified post-1979, given the significant weight afforded to *ad hoc* tribunal jurisprudence in the ICIJ's *Closing Order (Indictment)*.

the offence and which is favourable to the accused, this *more lenient* law must apply.[106] Thus, the ICIJ should have considered recent developments in law to assess whether such developments represent CIL norms and favour the accused. Of particular importance, ICC law represents the codification of CIL norms, which existed prior to the Rome Statute, and Cambodia is currently a party to the Rome Statute.[107] The Defence provided examples of ICC law which constitute CIL and/or are more favourable to the accused that the ICIJ did not apply in AO An's case.[108] Thus, the Defence demonstrated the ICIJ's legal error.

52. Second, the ICP argues that the Defence failed to demonstrate that ICC law reflects CIL.[109] Once again, this argument incorrectly places the burden on the Defence to prove CIL, as refuted above. Additionally, the ICP misunderstands the full reasoning behind the Defence's reliance on ICC law in the *AO An Appeal*. The ICIJ did not adequately consider alternative sources of CIL evidence, such as ICC law.[110] While the Rome Statute represents the codification of CIL norms, even if ICC law has not reached undisputed CIL status, its mere existence and divergence from *ad hoc* tribunal jurisprudence (and other claims of CIL) calls into question the validity of the ICIJ's CIL assertions, considering these assertions rely primarily on *ad hoc* tribunal jurisprudence. The Defence relied on ICC law throughout the *AO An Appeal* to highlight alternative interpretations of CIL which are equal,[111] if not more favourable,[112] than those made by the ICIJ. In doing so, the Defence identified the ICIJ's legal error.

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[106] The principle of *lex mitior* is applicable at the ECCC and represents CIL. Case No. 002/19-09-2007-ECCC/SC, *Appeal Judgement*, **F36**, 23 Nov. 2016, paras 579, 585, attached as App. 22; Case No. 003/07-09-2009-ECCC-OCIJ, *Notification on the Interpretation of 'Attack against the Civilian Population' in the Context of Crimes against Humanity with regard to a State's or Regime's Own Armed Forces*, **D306/17.1**, 7 Feb. 2017, para. 16, attached as App. 23; Royaume Du Cambodge Code Pénal et Lois Penales (1956) (Cambodia), art. 6, attached as App. 24; International Covenant on Civil and Political Rights, 999 UNTS 171, adopted on 19 Dec. 1966, art. 15(1); *see also Prosecutor v. Deronjić*, Case No. IT-02-61-A, *Judgement on Sentencing Appeal*, 20 Jul. 2005, paras 96- 97, attached as App. 25.

[107] Parties and Signatories to the Rome Statute, attached as App. 26; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, *Judgement*, 15 Jul. 1999, para. 223, attached as App. 27 (holding '[the Rome Statute] was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio iuris* of those States.'); *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, *Judgement*, 17 Sep. 2003, para. 221, attached as App. 28 (holding the Rome Statute reflects State Practice).

[108] *AO An Appeal*, paras 173, 179, 181, 190-191, 196.

[109] *ICP Response*, paras 93, 96, 101, 105.

[110] *AO An Appeal*, paras 169, 173, 179, 181, 190-191, 196.

[111] Considering both the *ad hoc* tribunals and the ICC were established after 1979. *AO An Appeal*, para. 168.

[112] In contrast to the *ad hoc* tribunals, the international community was involved in the codification of crimes in the Rome Statute, which was formally adopted by many states, including Cambodia. *AO An Appeal*, paras 168-169.

VII. REPLY TO THE ICP RESPONSE TO APPEAL GROUND 10: THE ICP FAILS TO DEMONSTRATE THAT THE PARAMETERS OF THE JCE ARE CORRECTLY DEFINED AND APPLIED

53. In response to Appeal Ground 10, the ICP fails to address errors identified in the *AO An Appeal* relating to the ICIJ's findings on the JCE's group membership, geographical scope, and common purpose.

54. First, the ICP fails to explain how the ICIJ's description of the JCE group could be considered sufficiently precise.[113] Moreover, the ICP attempts to clarify the JCE group membership by providing a 'detailed list of *some* of the cadres in this category'.[114] In doing so, he further confounds this issue; this 'detailed list' stretches from Pol Pot to AO An's drivers, and everyone in between.[115] This catch-all JCE group is even broader than the one proposed by the ICIJ. While the ICIJ is not required to identify every JCE member by name, neither he nor the ICP sufficiently identify an actual functioning JCE group with a shared common purpose.[116]

55. Second, the ICP does not rebut the failure of the ICIJ to define the JCE's geographical scope in accordance with the facts of the case.[117] The ICP fails to explain how the charges in the *Written Record of Further Appearance* would remedy the inconsistency in the *Closing Order (Indictment)*, whereby the geographical scope of the JCE is not reflective of the described facts and crimes.[118] Moreover, while the ICP recognises the need to demonstrate cooperation between an accused and JCE members in the implementation of a common criminal purpose, across a determined geographical area,[119] he fails to address the arguments raised in *AO An Appeal* that the ICIJ did not provide sufficient evidence that AO An was involved in, intended to commit, or made a significant contribution to crimes in Sectors 42 and 43 or that crimes committed outside of Sector 41 can be imputed to the JCE group.[120] Consequently, the ICIJ erred in finding that AO An participated in a Central Zone JCE.

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[113] *ICP Response*, para. 94; *contra AO An Appeal*, para. 175.
[114] *ICP Response*, para. 94 (emphasis added) (citing Case No. 004/2/07-09-2009-ECCC/OCIJ, *International Co-Prosecutor's Rule 66 Final Submission* ('*Final Submission*'), **D351/5**, 21 Aug. 2017, para. 675).
[115] *Final Submission*, para. 675.
[116] *AO An Appeal*, para. 175.
[117] *ICP Response*, para. 94; *contra AO An Appeal*, para. 176.
[118] *ICP Response*, para. 94.
[119] *ICP Response*, para. 94.
[120] While the ICIJ attempts to indict AO An for genocidal acts in Sectors 42 and 43, such acts cannot be legally attributed to AO An through any form of liability, including JCE. Thus, AO An was erroneously indicted for genocide committed against the Cham in Central Zone. *AO An Appeal*, paras 160-163, 176.

56. Third, the ICP asserts that there is no error in the ICIJ's reliance on evidence of central CPK policies to determine the common criminal plan of a JCE to which AO An allegedly belonged, given that AO An and the other members of the JCE allegedly implemented those central policies in areas under their control.[121] However, the ICP misunderstands the difference between the common purpose of the Central Committee (where central CPK policies were conceived and disseminated) and the common purpose of lower level cadre (where policies were implemented locally). These different alleged common purposes are not the same.[122] Both the ICIJ and ICP blur the lines between numerous JCE groups, thus failing to identify an actual JCE to which AO An actually belonged, namely, one made up of a plurality of persons with a shared common purpose.

VIII. REPLY TO THE ICP RESPONSE TO APPEAL GROUND 14(I): THE ICP ERRONEOUSLY SUGGESTS THAT NUMEROUS DISTINCT ACTS CAN BE RELIED UPON TO SATISFY THE REQUIREMENTS OF OTHER INHUMANE ACTS

57. The ICP erroneously claims that 'the ICIJ did not "conflate" forced marriage and rape – both of which may individually constitute other inhumane acts – but properly assessed the collective conduct holistically to determine whether the elements of other inhumane acts were established'.[123] The ICIJ's and ICP's approach is plainly wrong.

58. The ICP essentially suggests that separate and distinct non-criminal acts may be cobbled together to satisfy the threshold elements of the crime. Such an approach results in a vague and multifaceted crime within the category of other inhumane acts, which would breach the principle of legality.[124] It would also make it impossible to identify the criminal elements of each specific act, such as intent to commit the underlying act.[125]

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[121] *ICP Response*, para. 94; *contra AO An Appeal*, para. 177.
[122] *AO An Appeal*, para. 177.
[123] *ICP Response*, para. 100.
[124] *AO An Appeal*, para. 189 (demonstrating the ICIJ conflates separate and distinct acts, such as rape and forced marriage, in order to satisfy the gravity requirement of other inhumane acts). The Defence avers that underlying criminality is a requirement of other inhumane acts. However, even if underlying criminality were not a requirement, the ICP's approach is wrong and violates the principle of legality, notably the requirement for specificity. *AO An Appeal*, paras 188-189.
[125] *AO An Appeal*, paras 190-191 (demonstrating the ICIJ fails to establish that AO An had the necessary *mens rea* to commit acts of rape).

IX. REPLY TO THE ICP RESPONSE TO APPEAL GROUND 16(III): THE ICP MISREPRESENTS THE DEFENCE'S ARGUMENTS REGARDING SPECIFIC GENOCIDAL INTENT

59. The ICP misrepresents the Defence's arguments regarding specific genocidal intent.[126] Nowhere in the *AO An Appeal* was it suggested that only senior leaders or architects of a genocide can possess specific genocidal intent nor was the defence of superior orders invoked.[127] Rather, the Defence argued that when assessing whether AO An had the requisite genocidal intent, the ICIJ erred by disregarding evidence that AO An was neither a senior leader nor an architect of the genocidal campaign.[128] Such factors, amongst others, are relevant to an assessment of genocidal intent and suggest alternative reasonable inferences that AO An did not possess such intent.[129]

X. REPLY TO THE ICP RESPONSE TO APPEAL GROUND 17: THE ICP DOES NOT SHOW THAT THE JCE'S COMMON PURPOSE INVOLVED GENOCIDE

60. The paragraphs of the *Closing Order (Indictment)* cited by the ICP do not show that the JCE's common purpose involved genocide.[130] The ICP cites paragraphs related to AO An and KE Pauk's alleged involvement in a plan to target specific groups, but not a genocide.[131] The ICP ignores the legal requirement of specific intent for genocide in the JCE's common purpose.[132] Thus, contrary to the ICP's assertion, it is unclear that genocide formed part of the group's common purpose and, given that JCE III is not applicable at the ECCC, AO An cannot be found liable for this crime.

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[126] *ICP Response*, paras 107-108.
[127] *Contra ICP Response*, para. 108
[128] *AO An Appeal*, paras 199-202. Further, the Defence relied on *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, *Judgement Volume I*, 10 Jun. 2010, para. 1414, attached as App. 29, and *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, *Judgement*, 30 Jan. 2015, para. 516, attached as App. 30, to demonstrate that an individual's 'blind dedication' to the CPK party may have led them to 'doggedly pursue' the execution of their tasks without genocidal intent. This inference could apply equally to anyone following orders passed down from superiors within a hierarchical system, such as the CPK. The Defence was not advocating for a defence of superior orders, rather it was highlighting a reasonable inference which can be drawn from the facts in the ICIJ's *Closing Order (Indictment)* and which was not considered or refuted by the ICIJ. *AO An Appeal*, paras 200-201. The ICP fails to address this point in his response.
[129] *AO An Appeal*, paras 199-202.
[130] *ICP Response*, para. 109.
[131] *ICP Response*, para. 109-111; *contra AO An Appeal*, paras 203-205.
[132] *AO An Appeal*, paras 203-205.

XI. REPLY TO THE ICP RESPONSE TO APPEAL GROUNDS 14(II), 16(II), 16(III), AND 17: THE ICP FAILS TO DEMONSTRATE THAT THE ICIJ REASONABLY FOUND THE LEGAL ELEMENTS OF CRIMES TO BE SUFFICIENTLY PROVEN

61. With respect to Appeal Grounds 14(ii), 16(ii), 16(iii), and 17, the ICP offers no new or relevant arguments, other than repeating the ICIJ's findings.[133] The Defence adequately addressed these findings in the *AO An Appeal* and maintains that: (a) AO An did not have the necessary *mens rea* to commit the other inhumane act of rape;[134] (b) the Cham people were not positively identified and targeted 'as such', as required for genocide;[135] (c) AO An did not have specific intent to commit genocide;[136] and (d) genocide did not form part of the alleged JCE group's common purpose.[137]

XII. REPLY TO THE ICP RESPONSE TO APPEAL GROUND 18: AO AN'S FAIR TRIAL RIGHTS HAVE BEEN VIOLATED THROUGHOUT THE PROCEEDINGS

62. The ICP fails to credibly refute the Defence's argument that AO An's fair trial rights have been violated throughout the investigation, and that the ICIJ has erred in failing to dismiss or stay proceedings against him on this basis. Crucially, the ICP fails to address the Defence's central argument, that the *cumulative impact* of violations has egregiously and irreparably undermined the fairness and integrity of Case 004/2 proceedings, rendering a fair trial at the ECCC impossible.

63. First, the ICP incorrectly suggests that the presumption of innocence is limited to trial (where the prosecution has the burden of proof) and does not apply to the pre-trial stage (as the ICP supposedly has no corresponding burden).[138] This is clearly wrong. It is well established that AO An enjoys the presumption of innocence from the outset of proceedings until a final decision.[139] For this fundamental right to have meaning, the prosecution must be required to

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[133] *ICP Response*, paras 102-103 106-111.
[134] *AO An Appeal*, para. 191.
[135] *AO An Appeal*, paras 197-198.
[136] *AO An Appeal*, paras 199-202.
[137] *AO An Appeal*, paras 203-205.
[138] *ICP Response*, paras 113-114; *see also* para. 12.
[139] UN Human Rights Committee, *General Comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, 23 Aug. 2007, para. 30, attached as App. 31 ('The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.'); *Minelli v. Switzerland*, ECtHR, 25 Mar. 1983, para. 30, attached as App. 32 ('In the Court's opinion, Article 6 § 2 governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge.'); European Parliament and Council, *Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*, Directive (EU)

discharge its burden of proof at every stage of proceedings for the case to advance – the only difference being in the 'standard' of proof at each stage.[140] Thus, *because* the presumption applies, the Co-Prosecutors have the burden to demonstrate a 'reason to believe that crimes within the jurisdiction of the ECCC have been committed' to launch a judicial investigation.[141] For suspects to be charged, the Co-Prosecutors' Introductory or Supplementary submissions must demonstrate 'clear and consistent evidence' of their criminal responsibility.[142] At the end of the investigation, the Co-Prosecutors' Final Submission under Rule 66(6) must convince the CIJs that the evidence on the case file is 'sufficiently serious and corroborative to provide a certain level of probative force'[143] to indict AO An and send him for trial.[144] A reversal of the burden of proof would be a clear breach of due process *because* the suspect or charged person is presumed innocent throughout the process. Unlike other systems alluded to by the ICP,[145] at the ECCC, the decision to indict is made by two CIJs, based on and limited by the prosecution's case set forth in the introductory, supplementary and final submissions.[146] Thus, sending AO An for trial despite the ICP having failed to convince the NCIJ *and* a majority of the PTC, would be a gross

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2016/343, 9 Mar. 2016, para. 12, attached as App. 33 ('It should apply from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, and, therefore, even before that person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he or she is a suspect or accused person. This Directive should apply at all stages of the criminal proceedings until the decision on the final determination of whether the suspect or accused person has committed the criminal offence has become definitive.').

[140] *See Bemba*, *Decision on Charges*, paras 27, 31; *Telfner v. Austria*, ECtHR, 20 Mar. 2001, para. 18; UN Human Rights Committee, *Communication No. 1620/2007*, CCPR/C/101/D/1620/2007/Rev.2 (16 Sep. 2011), para. 9.6; *see* Code of Criminal Procedure, art. 137 (France).

[141] Internal Rules, Rule 53(1).

[142] Internal Rules, Rule 55(4).

[143] *E.g.* Case 002/19-09-2007-ECCC-OCIJ, *Closing Order* ('*Case 002 Closing Order*'), **D427**, 15 Sep. 2010, paras 1320-1326, attached as App. 34.

[144] *See* Internal Rules, Rule 67(3)(c) (stating where 'there is not sufficient evidence against the Charged Person', the CIJs must issue a dismissal order); Code of Criminal Procedure of the Kingdom of Cambodia (2007), art. 247(3) (Cambodia) (stating that an investigating judge will issue an order of non-suit where 'there is insufficient evidence for a conviction of the charged person'); Code of Criminal Procedure, art. 184 (France). Although neither the *Internal Rules* nor the *Code of Criminal Procedure of the Kingdom of Cambodia (2007)* defines the standard of 'sufficient evidence', the CIJs have done so in Cases 001, 002, and 004/1. *Case 004/1 Considerations on Appeal*, paras 61-62; Case 004/1/07-09-2009-ECCC-OCIJ, *Closing Order (Reasons)*, **D308/3**, 10 Jul. 2017, para. 2, attached as App. 35; *Case 002 Closing Order*, paras 1321-1323; Case No. 001/18-07-2007-ECCC-OCIJ, *Closing Order*, **D99**, 8 Aug. 2008, para. 130, attached as App. 36. In Case 002, the CIJs interpreted 'sufficient evidence' to mean probability of guilt rather than mere possibility of guilt. In paragraph 1323 of *Case 002 Closing Order*, it explained that the evidence on the Case File 'must be sufficiently serious and corroborative to provide a certain level of probative force' that there is a probability of the charged person's guilt. *See also* 'Chapitre 613 "Appréciation du juge d'instruction"', section 1, in Guéry & Chambon (ed.), *Droit et pratique de l'instruction préparatoire* (Dalloz action 2015), para. 613.12, attached as App. 37.

[145] *ICP Response*, para. 114.

[146] Internal Rules, Rule 55(2) (stating 'the Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission').

violation of AO An's presumption of innocence. To find otherwise would render the presumption meaningless.

64. Second, the ICP's challenge to procedural rights violations raised by AO the Defence is limited to stating that there is no error or prejudice, with no further argument or substantiation.[147] On the contrary, the violations and ensuing prejudice were set out and justified in the *AO An Appeal*.[148]

65. Third, the ICP labels the Defence's position on the Court's budgetary crisis and its impact on AO An's rights as 'speculative', stating that the PTC, TC and SCC will assume the duty of safeguarding AO An's fair trial rights.[149] In doing so, he dismisses the CIJs' warning that a breakdown in funding would prevent judges seised of AO An's case in the future from completing proceedings or safeguarding his rights,[150] and denies the very real (rather than speculative) financial woes that the Court finds itself in at present.[151]

66. The Defence's key argument – that the *cumulative impact* of rights violations throughout the investigation renders a fair trial impossible – is conspicuous by its absence from the *ICP Response*. For reasons stated in the *AO An Appeal*, it justifies an examination of all violations raised under this ground (whether previously raised or not), in light of their cumulative impact and in the context of the entire investigation.[152]

67. Finally, the ICP suggests that any rights violations should be remanded back to the ICIJ to provide an 'appropriate remedy'.[153] In so doing, he ignores clear jurisprudence that in the event of irreparable harm or serious threat to proceedings, judges have a duty to terminate proceedings by dismissing the case or ordering a permanent stay.[154] The duty to safeguard the

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[147] The ICP incorrectly claims that issues previously raised before the PTC which have not been decided on for failure to reach a supermajority require reasons for reconsideration to constitute discernible errors. An issue that has not been decided on remains 'undecided' by definition. The language of 'reconsideration' is misplaced.
[148] *AO An Appeal*, paras 213-218.
[149] *ICP Response*, para. 118.
[150] Case 004/2/07-09-2009-ECCC-OCIJ, *Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004 and 004/2*, **D349**, 5 May 2017, paras 52-54, 58.
[151] *AO An Appeal*, paras 220-221.
[152] *AO An Appeal*, paras 223-227.
[153] *ICP Response*, para. 119.
[154] Case No. 002/19-09-2007-ECCC-TC/SC(28), *Decision on Immediate Appeals against the Trial Chamber's Second Decision on Severance of Case*, **E284/4/8**, 25 Nov. 2013, para. 75, attached as App. 38; *see also Prosecutor v. Brđanin and Talić*, Case No. IT-99-36, *Decision on Second Motion by Brđanin to Dismiss the Indictment*, 16 May 2001, para. 5, attached as App. 39; *see also Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, *Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of a Written Statement*, 21 Oct. 2003, para. 21, attached as App. 40; *see The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Decision on the consequences of non-disclosure of exculpatory materials covered by Article*

fairness and integrity of proceedings and AO An's fundamental rights now falls on the PTC.[155] Consequently, the Defence requests that the PTC overturn the *Closing Order (Indictment)* and dismiss AO An's case.

CONCLUSION AND RELIEF REQUESTED

68. For the reasons explained above, the *ICP Response* fails to rebut the arguments raised in the *AO An Appeal* concerning the ICIJ's numerous legal and factual errors in the *Closing Order (Indictment)*. Throughout his response, the ICP misunderstands or misrepresents the Defence's arguments and stretches the applicable law and facts in an attempt to justify or distract from these errors. Accordingly, the Defence respectfully requests the PTC to admit and grant the *AO An Appeal* (and uphold the *Dismissal Order*).

Respectfully submitted,

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Signed 1 April 2019, Phnom Penh, Kingdom of Cambodia

54(3)(e) agreements and the application to stay the prosecution of accused, together with certain other issues raised at the Status Conference on 10 June 2008, 15 Jun. 2008, paras 92-95, attached as App. 41.

[155] *Closing Order (Indictment)*, para. 44.