

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

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**AO AN'S APPEAL AGAINST THE INTERNATIONAL
CO-INVESTIGATING JUDGE'S CLOSING ORDER (INDICTMENT)**

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INTRODUCTION AND SUMMARY OF ARGUMENTS

1. AO An, through his Co-Lawyers (*Defence*), respectfully submits this *Appeal* against the *International Co-Investigating Judge's Closing Order (Indictment)* (*ICIJ Closing Order (Indictment)*)¹ pursuant to IRs 21, 67(5), and 74(3)(a). The PTC must overturn this order and dismiss AO An's case based on the grounds of appeal set forth below. The Defence emphasises at the outset that its right to appeal was severely restricted by the imposed word and time limits, and it reserves the right to challenge all allegations at trial. AO An maintains his innocence with respect to all charges.
2. *Ground 1*: After nearly 10 years of investigation, AO An is in the unique position of simultaneously being indicted and sent to trial by the ICIJ and having his case dismissed by the NCIJ.² This unregulated limbo must be resolved in AO An's favour. The issuance of two separate and opposing Closing Orders is unprecedented, incompatible with the ECCC law, and violates AO An's fundamental fair trial rights and the principle of legal certainty. The ECCC legal framework only allows for a single Closing Order, either sending the case to trial or dismissing it.
3. *Grounds 2 to 7*: The ICIJ commits numerous legal and factual errors when determining that AO An satisfies the criteria for 'those most responsible' and is within the Court's personal jurisdiction. Ignoring the PTC, the ICIJ erroneously declares that he has unfettered discretion to determine jurisdiction and defines 'those most responsible' in an overly broad manner. He stretches the requisite evidential standard so that it is unrecognizable, and he fails to fully engage with the substance of the evidence. In addition, the ICIJ ignores the lack of credible evidence on the Case File – even after nearly 10 years of investigation – and relies on inconsistent, contaminated, uncorroborated, hearsay, and biased statements from key witnesses and civil party applicants. When the evidence is properly assessed, it is clear that AO An held no significant positions in the Central Zone or Sector 41 and had no roles in any of the charged crimes. When compared to other known Khmer Rouge officials, AO An is not amongst those most responsible.
4. *Grounds 8 to 17*: The ICIJ commits numerous errors related to the substantive law. Namely, he errs in: (a) misapplying CIL in violation of the principle of legality; (b)

¹ Case No. 004/2/07-09-2009-ECCC-OCIJ, *ICIJ Closing Order (Indictment)*, **D360**, 16 Aug. 2018.

² Case No. 004/2/07-09-2009-ECCC/OCIJ, *Order Dismissing the Case Against AO An ('NCIJ Closing Order')*, **D359**, 16 Aug. 2018, paras 552-55.

relying on JCE as an applicable mode of liability; (c) failing to adequately define and apply the parameters of the JCE; (d) relying on planning as an applicable mode of liability; (e) applying the incorrect legal requirements for superior responsibility; (f) finding the ECCC has jurisdiction over domestic crimes; (g) applying the incorrect legal requirements for other inhumane acts; (h) finding the ECCC has jurisdiction over forced marriage; (i) failing to apply and define the correct elements of genocide; and (j) failing to include genocide in the JCE group's common purpose.

5. *Ground 18*: Finally, from the outset of the judicial investigation up to, and including, the issuance of a Closing Order, the ICIJ had a positive duty to take the necessary measures to safeguard the fairness and integrity of current and future proceedings in Case 004/2 and AO An's rights. He failed to do so. The supermajority voting rule undermined AO An's presumption of innocence throughout the investigation. Further, a catalogue of errors, omissions and malpractices violated basic fair trial standards, including AO An's right to counsel, right to be informed of the charges against him, right to prepare an effective defence, right to equality of arms, and right to appeal. The Court's budgetary crisis and future financial uncertainty places AO An's rights and the Court's integrity in additional jeopardy. Whilst each violation undermines AO An's ability to receive a fair trial, the cumulative impact of these violations undermines the fairness and integrity of proceedings in a manner that is egregious and irreparable, rendering a fair trial impossible.
6. Accordingly, the Defence respectfully submits that the PTC must overturn the *ICIJ Closing Order (Indictment)* and dismiss the case against AO An.

PROCEDURAL HISTORY

7. The Defence incorporates paragraphs 15-24 of *AO An's Response to the Co-Prosecutors' Rule 66 Final Submissions ('AO An's Response to ICP Final Submission')*.³
8. On 16 August 2018, the CIJs issued two separate Closing Orders in English and Khmer. The ICIJ indicted and sent AO An's case to trial,⁴ and the NCIJ dismissed it for lack of

³ Case No. 004/2/07-09-2009-ECCC/OCIJ, *AO An's Response to the Co-Prosecutors' Rule 66 Final Submissions*, **D351/6**, 24 Oct. 2017, paras 15-24.

⁴ Case 004/2-**D360**, Counts 1-3, pp. 409-415. The ICIJ also dismissed some charges against AO An at pp. 407-408.

personal jurisdiction.⁵ The translations of the Closing Orders were filed respectively on 31 October 2018 and 5 November 2018.

9. On 5 October 2018, the Defence filed its *Notice of Appeal* and requested additional time and pages for this *Appeal*.⁶ On 26 October 2018, the ICP filed its response.⁷ On 8 November 2018, the PTC issued its decision setting the parties' deadline for 45 days from the date of notification of the Closing Orders' translations and the page limit for each appeal at 100 pages.⁸

APPLICABLE LAW

10. The Defence incorporates the applicable law into the Appeal Grounds Section below.

ADMISSIBILITY

11. This *Appeal* is admissible under IRs 67(5), 74(3)(a), and 21, as it raises errors of law and fact concerning the ICIJ's determinations of personal and subject matter jurisdiction and his violations of AO An's fair trial rights. Pursuant to IR 67(5), the *ICIJ Closing Order (Indictment)* is subject to appeal as provided for in IR 74. The Defence filed this *Appeal* within the parameters set by the PTC. The Defence sets out the reasons for the admissibility of each Ground below.
12. *IR 74(3)(a) and Personal Jurisdiction*: IR 74(3) specifically permits the Defence to appeal jurisdictional decisions and orders. In Case 004/1, the PTC held that personal jurisdiction determinations are reviewable, and it took a broad approach in admitting the ICP's jurisdictional challenges to the ICIJ's Closing Order.⁹ It explained that, as an appellate chamber, it must review all findings that led to the CIJs' personal jurisdiction

⁵ Case 004/2-**D359**, paras 552-555.

⁶ Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC56), *Notice of Appeal*, **D360/5**, 5 Oct. 2018; Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC56), *Request for Extension of Time and Page Limit for AO An's Appeal against the Closing Order (Indictment)*, **D360/4**, 5 Oct. 2018, para. 4.

⁷ Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC56), *Co-Prosecutors' Response to AO An's Request for an Extension of Time and Page Limit for His Appeal Against the Closing Order (Indictment)*, **D360/6**, 26 Oct. 2018, para. 1.

⁸ Case No. 004/2/07-09-2009-ECCC/OCIJ, *Decision on Request for Extension of Time and Page Limit for AO An's Appeal Against the Closing Order (Indictment)*, **D360/7**, 8 Nov. 2018, para. 6.

⁹ Case No. 004/1/07-09-2009-ECCC/OCIJ (PTC50), *Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)*, **D308/3/1/20**, 28 Jun. 2018, paras 20, 26. The PTC noted that the appeal was filed by the ICP under IR 74(2). It did not clarify whether the Defence would have the same broad ability to appeal personal jurisdiction matters. The Defence submits the scope of jurisdictional appeals must be the same for the Defence and OCP because like IR 74(2), IR 74(3)(a) specifically permits the Defence to appeal orders and decisions confirming the Court's jurisdiction.

determination, including those regarding the existence of crimes, the specific contours of the crimes, and the likelihood of the Charged Person's criminal responsibility.¹⁰

13. Appeal Grounds 1-7, 10, 12, 14, and 16-17 are admissible under IR 74(3)(a) as valid challenges to the ICIJ's confirmation of the Court's personal jurisdiction over AO An. Ground 1 addresses the ICIJ's erroneous issuance of a Closing Order confirming the Court's jurisdiction while the NCIJ validly dismissed the case for lack of personal jurisdiction. Appeal Grounds 2-7 concern the ICIJ's errors of law and fact when determining that AO An was amongst those most responsible for the charged crimes. Finally, Appeal Grounds 10, 12, 14, and 16-17 are challenges to the specific contours of genocide, other inhumane acts, and JCE in the Closing Order. If the ICIJ had correctly defined these crimes and applied the law, AO An could not be amongst those most responsible.
14. *IR 74(3)(a) and Subject Matter Jurisdiction*: Appeal Grounds 8-9, 11, 13, and 15 are admissible under IR 74(3)(a) as valid challenges to the Court's subject matter jurisdiction. These grounds relate to the existence of certain crimes and modes of liability and whether their application in Case 004/2 violates the principle of legality. The PTC has previously held challenges to subject matter jurisdiction are admissible in appeals against closing orders under IR 74(3)(a).¹¹ These challenges may be raised against the legal existence of crimes or modes of liability in their entirety, or the existence of their chapeau elements.¹²
15. *IR 74(3) in Light of IR 21*: Appeal Grounds 1 and 18 are admissible pursuant to a broad interpretation of IR 74(3) in light of IR 21. These grounds raise serious violations of AO An's fair trial rights. The PTC has previously recognised that where the facts and circumstances require, it may consider appeal grounds not explicitly listed under IR 74(3), 'through a liberal interpretation of a charged persons' right to appeal in light of

¹⁰ Case 004/1-D308/3/1/20, paras 24-26.

¹¹ Case No. 002/19-09-2007/ECCC/OCIJ (PTC75), *Public Decision on IENG Sary's Appeal Against the Closing Order*, **D427/1/30**, 11 Apr. 2011, paras 45-46, attached as App. 1; Case No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), *Public Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order*, **D427/2/15**, 15 Feb. 2011, paras 60-61, attached as App. 2; see also Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), *Public Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise*, **D97/15/9**, 20 May 2010, paras 22-25, attached as App. 3.

¹² Case 002-D427/1/30, para. 46; Case 002-D427/2/15, paras 60, 61.

[IR] 21.’¹³ In particular, the PTC has admitted appeals raising pressing matters unforeseen by the IRs¹⁴ and those raising serious issues of fairness.¹⁵

16. While IR 21 does not provide appeal grounds, the PTC has acknowledged ‘[t]he overriding consideration in all proceedings before the ECCC is the fairness¹⁶ of the proceedings’.¹⁷ Furthermore, the PTC has held that where appeals filed against an indictment ‘raise matters which cannot be rectified by the Trial Chamber’, and where not allowing the possibility to appeal ‘would irreparably harm the fair trial rights of the accused’, IR 21 ‘may, on a case by case basis, warrant application to broaden the scope of [IR] 74.’¹⁸ Accordingly, the issues raised in Appeal Grounds 1 and 18 are admissible, as they are all of a serious nature and must be addressed prior to trial.

STANDARD OF REVIEW

17. The PTC may review the CIJs’ decisions where they are: (a) based on an incorrect interpretation of governing law (error of law); (b) based on a patently incorrect conclusion of fact (error of fact); or (c) so unfair or unreasonable as to constitute an abuse of discretion.¹⁹ The PTC has held that the error or abuse must be ‘fundamentally

¹³ Case 002-**D427/2/15**, para. 71.

¹⁴ Case No. 004/07-09-2009-ECCC/OCIJ (PTC19), *Confidential Considerations on IM Chaem’s Appeal against the International Co-Investigating Judge’s Decision to Charge Her In Absentia*, **D239/1/8**, 1 Mar. 2016, para. 23; Case 002-**D427/2/15**, para 71.

¹⁵ Case No. 002/19-09-2007-ECCC/OCIJ (PTC 42), *Public Decision on IENG Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1)*, **D264/2/6**, 10 Aug. 2010, para. 14, attached as App. 4.

¹⁶ What constitutes fairness at all stages of proceedings before the ECCC should be guided by international law and standards. Law on the Establishment of the ECCC for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (*‘ECCC Law’*), art. 33 *new*; Case 002-**D264/2/6**, para. 13; Case 002-**D97/15/9**, paras 31-34.

¹⁷ Case 002-**D264/2/6**, para. 14.

¹⁸ Case 002-**D427/1/30**, paras 48-49; *see* Case No. 002/19-09-2007-ECCC-PTC/OCIJ (PTC 104), *Public Decision on KHIEU Samphan’s Appeal against the Closing Order*, **D427/4/15**, 21 Jan. 2011, para. 18, attached as App. 5; Case 002-**D427/2/15**, paras 71-73.

¹⁹ Case 004/1-**D308/3/1/20**, paras 20-21; Case 002-**D427/2/15**, para. 86; Case 002-**D427/1/30**, para. 111; *see also* Case No. 004/07-09-2009-ECCC/OCIJ (PTC35), *Confidential Decision on Appeal Against Decision on AO An’s Twelfth Request for Investigative Action*, **D320/1/1/4**, 16 Mar. 2017, para. 10; Case No. 002/19-09-2007-ECCC-OCIJ (PTC67), *Public Decision on Reconsideration of Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons’ Knowledge of the Crimes*, **D365/2/17**, 27 Sep. 2010, para. 36, attached as App. 6.

determinative' to the exercise of the discretion leading to the challenged decision.²⁰ This standard²¹ is consistent with international jurisprudence.²²

18. The PTC has consistently held that alleged errors of law are reviewed *de novo* to determine whether legal holdings are correct, and alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the factual finding at issue.²³
19. The Defence also submits that the ICC Appeals Chamber recently cautioned judges not to unduly constrain their appellate review with respect to errors of law or fact, especially when such a deferential approach would go against the interests of justice and the law does not require such deference.²⁴ The Defence notes that neither Cambodian nor ECCC law provides for significant deference to the CIJs' decisions on fact or law, and it urges the PTC to adopt the recent approach of the *Bemba* Appeals Chamber.

²⁰ Case 004/1-D308/3/1/20, para. 21; Case 004/2-D320/1/1/4, para. 10.

²¹ Neither Cambodian law, ECCC Law, nor the IRs specify the standard of review, and thus under Article 12 of the UN-RGC Agreement, the PTC may seek guidance in procedural rules and jurisprudence established at the international level.

²² *The Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11 OA 5, *Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"*, 19 Aug. 2015, paras 23-24, attached as App. 7; *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, *Judgment*, 26 Sep. 2013, para. 28, attached as App. 8; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR72.1, IT-95-5/18-AR72.2, IT-95-5/18-AR72.3, *Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE III - Special Intent Crimes, Superior Responsibility)*, 25 Jun. 2009, para. 10, attached as App. 9; *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, *Judgement*, 22 Apr. 2008, para. 130, attached as App. 10 (citing *Prosecutor v. Galić*, Case No. IT-98-29-A, *Judgement*, 30 Nov. 2006, para. 21; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, *Judgement*, 17 Dec. 2004, para. 119); *Prosecutor v. Gotovina, Čermak, and Markač*, Case No. IT-06-90-AR72.1, *Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction*, 6 Jun. 2007, para. 7, attached as App. 11.

²³ Case 002-D427/1/30, para. 113 (citing *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-A, *Judgement*, 19 Jul. 2010, paras 11-12); Case 002-D427/2/15, para. 86 (citing *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-A, *Judgement*, 19 Jul. 2010, paras 11-12); see also *The Prosecutor v. Bemba*, Case No. ICC-01/05-01/08 A, *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"* ('*Bemba Appeal Judgment*'), 8 Jun. 2018, paras 38, 45-46, attached as App. 12; *The Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06 OA 2, *Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9"*, 22 Mar. 2016, para. 33, attached as App. 13; *The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06 A5, *Public Redacted Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction*, 1 Dec. 2014, para. 18, attached as App. 14.

²⁴ *Bemba Appeal Judgment*, paras 38, 40, 45-46 (In particular, with respect to errors of fact and the standard of reasonableness, the ICC Appeals Chamber held that the idea that deference must be shown to the factual findings of a lower court must be approached with extreme caution. It clarified that 'when a reasonable and objective person can articulate serious doubts about the accuracy of a given finding, and is able to support this view with specific arguments, this is a strong indication [...] that an error of fact may have been made'. In other words, when an appellate chamber is able to identify findings that can reasonably be called into doubt, it must overturn them.)

APPEAL GROUNDS

I. GROUND 1: THE ISSUANCE OF AN INDICTMENT IN CONJUNCTION WITH A VALID DISMISSAL ORDER WAS BASED ON AN ERROR OF LAW

20. On 16 August 2018, the CIJs issued two contradictory Closing Orders in Case 004/2.²⁵ The CIJs' position is that 'separate and opposing closing orders based on a disagreement between them [i]s permissible under the law applicable before the ECCC'.²⁶ The Defence avers that this is an erroneous interpretation of the governing law. The ECCC's legal framework explicitly and unambiguously provides for *a single* Closing Order – concluding each investigation with either a dismissal²⁷ or an indictment.²⁸ Contradictory Closing Orders are unprecedented in Cambodia and other international and domestic courts and inconsistent with applicable law.²⁹ They also violate AO An's presumption of innocence and other fair trial rights and leave AO An in an unregulated limbo that could not have been the ECCC Law drafters' intention. Article 38 of the Cambodian Constitution dictates that any case of doubt should be resolved in favour of the accused.³⁰ Accordingly, the Defence requests the PTC to (a) declare the issuance of the two Closing Orders to be unlawful; and (b) strike down the *ICIJ Closing Order (Indictment)* and dismiss the case against AO An.

A. The legal framework unequivocally provides for a single closing order

21. It is well established that the Court's legal framework must be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the [document] in their context and in the light of its object and purpose'.³¹

²⁵ Case 004/2-**D359**; Case 004/2-**D360**.

²⁶ In effect, the ICIJ creates permission for himself, implements the practice, and then claims it is permissible under the law. Case 004/2-**D360**, para. 14 (citing earlier opinion expressed in Case No. 004/2/07-09-2009-ECCC-OCIJ, *Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements*, **D355/1**, 18 Sep. 2017, paras 13-16).

²⁷ The Defence notes the use of the singular 'a Closing Order' throughout *ECCC Internal Rules*, Rule 67.

²⁸ A valid indictment may also dismiss some of the facts and charges. *ECCC Internal Rules*, Rule 67(4).

²⁹ International courts that allow for judicial decision-making with concurring, separate, or dissenting opinions explicitly provide for this in their constituent documents. In all other circumstances, the courts issue one decision. National courts follow similar principles. See Sluiter, 'Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY', in Swart, Zahar & Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, (Oxford: Oxford University Press, 2011), pp. 191-218, attached as App. 15.

³⁰ Constitution of the Kingdom of Cambodia ('*Cambodian Constitution*'), art. 38. This general principle of criminal law also codified in the Rome Statute of the International Criminal Court ('*Rome Statute*'), 1 Jul. 2002, art. 22.

³¹ Vienna Convention on the Law of Treaties ('*Vienna Convention*'), 1155 UNTS 331, 23 May 1969, art. 31(1); see UN-RGC Agreement, art. 2(2); Case No. 001/18-07-2007-ECCC/SC, *Appeal Judgement* ('*Duch Appeal Judgement*'), **F28**, 3 Feb. 2012, para. 59, attached as App. 16.

22. The ordinary meaning of the words, syntax, and grammar in IR 67 is unambiguous – the drafters explicitly envisaged a single Closing Order per investigation. This is most apparent in the first sub-paragraph, providing for ‘a Closing Order, *either* indicting a Charged Person and sending him or her to trial, *or* dismissing the case’ (emphasis added). This is further confirmed by reference to ‘a’ or ‘the’ Closing Order in its singular form throughout the rest of this provision and others in the IRs.³²
23. The object and purpose of IR 67 is to regulate for a clear and legally certain outcome of a judicial investigation at the ECCC. To this end, it provides for a single Closing Order – adopting the legal concept and formulation from domestic civil law jurisdictions such as Cambodia³³ and France.³⁴ It could not have been the drafters’ intention to permit a situation whereby AO An’s case is both dismissed by the NCIJ and sent for trial by the ICIJ when these two judges enjoy equal status and authority.³⁵
24. Furthermore, there are no other provisions in the ECCC legal framework that alter this interpretation of IR 67. On the contrary, Article 23 *new* of the ECCC Law expressly states that ‘all investigations shall be *the joint responsibility* of two Investigating Judges’ – implying the need for a joint decision on its outcome (emphasis added). Moreover, IR 14(4),³⁶ read in conjunction with references to a single Closing Order in IR 67, confirms that a Closing Order must be the joint work product of both CIJs.
25. When interpreted in good faith, IR 67 can only mean that the outcome of a judicial investigation must result in a single Closing Order: either indicting the Charged Person or dismissing all charges. This interpretation is consistent with every other legal system known to the Defence. Issuing two Closing Orders from one investigation is therefore inconsistent with the ECCC, Cambodian, and international legal frameworks.

³² *E.g. ECCC Internal Rules*, Glossary of Terms (defining Closing Order as ‘the final order made by the [CIJs] or the [PTC] at the end of the judicial investigation, whether Indictment or Dismissal Order’), Rules 68, 69 (referring to Closing Order in singular terms).

³³ Code of Criminal Procedure of the Kingdom of Cambodia (2007) (*‘Cambodian Criminal Procedure Code (2007)’*), art. 247.

³⁴ Code of Criminal Procedure (France), arts 175-184, attached as App. 17.

³⁵ ECCC Law, art. 27 *new*.

³⁶ *ECCC Internal Rules*, Rule 14(4) (‘Except for action that must be taken jointly under the ECCC Law and these IRs, the [CIJs] may delegate power to one of them, by a joint written decision, to accomplish such action individually.’).

B. The issuance of two contradictory Closing Orders is unprecedented and incompatible with AO An's fundamental rights and the principle of legal certainty

26. No other defendant in Cambodia – or before any other jurisdiction in the world – has ever been presented with two contradictory Closing Orders (or procedural equivalents thereof). The situation faced by AO An is unprecedented and fundamentally unfair.
27. The unprecedented nature of AO An's position violates his right to equality before the law in Article 31 of the Constitution of Cambodia and equality before the courts in Article 14 of the ICCPR. Crucially, it breaches his equal enjoyment of minimum fair trial guarantees,³⁷ namely:
28. *The right to be presumed innocent until proven guilty*,³⁸ which places the burden of proof on the prosecution from the outset of a case until its conclusion.³⁹ The prosecution must discharge its burden at every stage for the case to progress.⁴⁰ For Case 004/2 to move from judicial investigation to trial, the prosecution must convince both CIJs that the evidentiary material on the Case File is 'sufficiently serious and corroborative to provide a certain level of probative force.'⁴¹ The *NCIJ Closing Order (Dismissal)* unambiguously indicates that the ICP failed to discharge his burden of proof vis-à-vis the NCIJ.⁴² Since the NCIJ and ICIJ enjoy equal status and authority at the ECCC,⁴³ allowing the case to move forward against the NCIJ's position violates AO An's presumption of innocence.
29. *The right to be tried by a fair and competent tribunal*,⁴⁴ which requires procedure to be 'sufficiently accessible, precise and foreseeable'.⁴⁵ Contradictory Closing Orders render

³⁷ ECCC Law, art. 35 *new*; International Covenant on Civil and Political Rights ('ICCPR'), 999 UNTS 171, 16 Dec. 1966, art. 14.

³⁸ ICCPR, art. 14(2); ECCC Law, art. 35. *ECCC Internal Rules*, Rule 21(d).

³⁹ A few minor and specific exceptions to this basic rule may arise in certain jurisdictions. For example, when certain defences are raised by the accused such as duress, insanity, mental capacity, and other 'mitigating factors', the defence bears a reversed, but lesser burden of proof. *E.g.* Case No. 002/19-09-2007/ECCC/TC, *Case 002/1 Judgement* ('*Case 002/1 Trial Judgement*'), **E313**, 7 Aug. 2014, para. 1070, attached as App. 18. Such reversals of the burden of proof are limited to exceptional cases and do not extend to the criminal elements or aggravating factors of an alleged offence. *E.g. Prosecutor v. Čelebići*, Case No. IT-96-21-A, *Appeal Judgement*, 20 Feb. 2001, para. 763, attached as App. 19.

⁴⁰ UN Human Rights Council, *General Comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial* ('*Human Rights Council General Comment no. 32*'), CCPR/C/GC/32, 23 Aug. 2007, paras 6, 30, attached as App. 20.

⁴¹ Case No. 002/19-09-2007-ECCC-OCIJ, *Closing Order*, **D427**, 15 Sep. 2010, paras 1320-1323, attached as App. 21. This standard applies to the substantive finding on charges as well as jurisdiction. *E.g.* Case No. 004/1/07-09-2009-ECCC-OCIJ, *Closing Order (Reasons)*, **D308/3**, 10 Jul. 2017, para. 2.

⁴² Case 004/2-**D359**, paras 552-555. Even though the NCIJ does not discuss the prosecution's burden of proof, it can be inferred that this burden has not been met because of the dismissal of charges.

⁴³ ECCC Law, art. 27 *new*.

⁴⁴ ICCPR, art. 14(1); *ECCC Internal Rules*, Rule 21(1)(a).

AO An's current and future legal positions neither accessible, precise, nor foreseeable. The uncertainty will not be cured on appeal if both Closing Orders are allowed to stand (for lack of supermajority). The absence of clarity as to the outcome of the investigation is a flagrant violation of AO An's fair trial rights.

30. *The right to be informed promptly and in detail of the nature and cause of the charges against him*,⁴⁶ which requires the Closing Order to determine the charges on which AO An is to be tried (if any). Although AO An was informed of the preliminary charges against him,⁴⁷ following the issuance of contradictory Closing Orders, it is no longer clear and certain what the nature and cause of the charges against him are (if any) going forward. This absence of clarity is a flagrant violation of AO An's fair trial rights.
31. *The right to be tried without undue delay*,⁴⁸ which requires proceedings to conclude within a reasonable time.⁴⁹ Two Closing Orders will logically double the time required for their appellate review.⁵⁰ Furthermore, if neither Closing Order is dismissed (due to a lack of supermajority at the PTC), Case 004/2 will be left in unregulated limbo. In both cases, the proceedings will be delayed further. In light of the nearly 10-year long investigation, any further delay based on an incorrect interpretation of the Court's legal framework seriously violates AO An's fair trial rights.
32. Furthermore, the issuance of two separate and opposing Closing Orders in Case 004/2 constitutes an affront to the fundamental principle of legal certainty – a fundamental pillar and central requirement of the rule of law.⁵¹ It demands laws and judicial decisions be definite and clear, court orders be binding, and legitimate expectations be protected.⁵² The contradictory Closing Orders are the very antithesis of legal certainty and a mockery of justice. An appellate review that results in the confirmation of both Closing Orders will only serve to perpetuate the affront to legal certainty, rather than assuage it.

⁴⁵ *Carbonara and Ventura v. Italy*, ECtHR, 30 May 2000, para. 64, attached as App. 22; *Toniolo v. San Marino and Italy*, ECtHR, 26 Jun. 2012, para. 51, attached as App. 23.

⁴⁶ ICCPR, art. 14(3)(a); *ECCC Internal Rules*, Rule 21(1)(c); ECCC Law, art. 35(a).

⁴⁷ Case No. 004/07-09-2009-ECCC-OCIJ, *Written Record of Initial Appearance*, **D242**, 27 Mar. 2015, EN 01096763, p. 4; Case No. 004/07-09-2009-ECCC-OCIJ, *Written Record of Further Appearance*, **D303**, 14 Mar. 2016, EN 01213484-01213491, pp. 3-10.

⁴⁸ ICCPR, art. 14(3)(c); ECCC Law, art. 35(c).

⁴⁹ Case 004/1-**D308/3/1/20**, paras 28-31.

⁵⁰ Apart from the Defence, the Co-Prosecutors indicated that they will submit separate and opposing appeals.

⁵¹ *Lupeni Greek Catholic Parish and Others v. Romania*, ECtHR, 29 Nov. 2016, para. 116, attached as App. 24; *Brumărescu v. Romania*, ECtHR, 28 Oct. 1999, paras 61-62, attached as App. 25.

⁵² *Harkins v. The United Kingdom*, ECtHR, 15 Jun. 2017, para. 54, attached as App. 26; *Amministrazione delle finanze dello Stato v. SRL Meridionale Industria Salumi and Others*, ECJ, 12 Nov. 1981, para. 10, attached as App. 27; *Korchuganova v. Russia*, ECtHR, 8 Jun. 2006, para. 47, attached as App. 28.

C. This unprecedented procedural impasse must be resolved in AO An's favour

33. The advent of two separate and opposing Closing Orders has created an impasse that is not contemplated by Cambodian or international rules of procedure. All cases of doubt must be resolved in AO An's favour.
34. According to the CIJs, the issuance of two separate and opposing Closing Orders has resulted from a disagreement between them.⁵³ The Court's legal framework provides that disagreements between CIJs are to be resolved using the settlement procedure in IR 72. In the absence of a resolution by the PTC, 'the default decision shall be that the order or investigative act done by one CIJ shall stand'.⁵⁴ The PTC has held that referring agreements to the PTC is not mandatory,⁵⁵ and it is clear that the CIJs have opted out of doing so in this case. Document numbers indicate that the *NCIJ Closing Order (Dismissal)* (e.g D359) was placed in the Case File before the *ICIJ Closing Order (Indictment)* (e.g D360), meaning that, under IR 72, the former must stand as the 'default decision [...] done by one CIJ'. Moreover, the investigation has ended, and the presumption of continuation applicable during an open investigation no longer applies. Thus, the only workable solution under IR 72 is to allow the *NCIJ Closing Order (Dismissal)* to stand.
35. In the alternative, the contradictory Closing Orders create an impasse that cannot be resolved by any ECCC, Cambodian, or international rules of procedure. In such circumstances, it is well established in ECCC, Cambodian and international law that any doubts should be resolved in AO An's favour.⁵⁶

D. Conclusion on Ground 1

36. The issuance of two separate and opposing Closing Orders is unprecedented, incompatible with the ECCC law, and violates AO An's presumption of innocence, fundamental fair trial rights, and the principle of legal certainty. The ECCC legal framework only allows for a single Closing Order, either sending the case to trial or dismissing it. Having failed to reach a mutual decision on the outcome of the

⁵³ Case 004/2-D360, paras 14, 16; Case 004/2-D359, paras 5, 50.

⁵⁴ *ECCC Internal Rules*, Rule 72(4)(d).

⁵⁵ Case 002-D427/1/30, para. 274.

⁵⁶ Cambodian Constitution, art. 38; *ECCC Internal Rules*, Rule 21(1); Rome Statute, art. 22(2); Case No. 002/19-09-2007-ECCC-TC/SC(04), *Decision on Immediate Appeal by KHIEU Samphan on Application for Release*, E50/3/1/4, 6 Jun. 2011, para. 31, attached as App. 29; Case 002-D427/2/15, paras 134-144; *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, *Judgement*, 2 Sep. 1998, para. 319, attached as App. 30.

investigation, the default position in light of Art. 38 of the Cambodian Constitution should have been to dismiss the case, as doubt resulting from opposing Closing Orders must be resolved in AO An's favour. The resulting doubt must be resolved in AO An's favour. For the reasons above, the Defence requests the PTC to declare that the issuance of two contradictory Closing Orders is unlawful, overturn the *ICIJ Closing Order (Indictment)*, and dismiss AO An's case.

II. GROUNDS 2 TO 7 CONCERNING THE ICIJ'S ERRONEOUS FINDING THAT AO AN IS AMONGST THOSE MOST RESPONSIBLE AND THUS WITHIN THE COURT'S PERSONAL JURISDICTION

37. The ICIJ erroneously finds that AO An is within the Court's personal jurisdiction because he is 'one of the persons most responsible'.⁵⁷ This finding is based on the following legal and factual errors: (a) the ICIJ errs in exercising unfettered discretion when determining whether AO An is within the Court's jurisdiction; (b) the ICIJ incorrectly interprets 'those most responsible' in an overly broad manner; (c) the ICIJ applies the wrong standard of proof; (d) the ICIJ erroneously creates and relies on an evidential hierarchy, rather than examining the substance of the evidence, as required by the PTC; and (e) the ICIJ incorrectly finds that AO An had a more significant CPK position and role in the most serious crimes in the Central Zone and Sector 41 than other Khmer Rouge officials.
38. In contrast, the NCIJ correctly finds that AO An is not within the Court's jurisdiction. In doing so, he properly exercises his discretion to determine personal jurisdiction, correctly defines 'those most responsible', applies the correct standard of proof, examines the substance of the evidence, and conducts a genuine comparison of AO An's alleged position and role in the most serious crimes.⁵⁸

A. Ground 2: The ICIJ erroneously finds that he has unfettered discretion to determine personal jurisdiction

39. The ICIJ erroneously holds that he has unfettered discretion to decide whether AO An is within the Court's personal jurisdiction.⁵⁹ Despite his previous criticisms⁶⁰ of the SCC

⁵⁷ Case 004/2-D360, paras 697, 712. Although the Defence maintains that AO An is not a 'senior leader', this issue is not at the centre of this *Appeal* because the ICIJ has not made a finding on it.

⁵⁸ Case 004/2-D359, 16 Aug. 2018, paras 430-431, 543.

⁵⁹ Case 004/2-D360, para. 54 (reiterating SCC has found that terms 'senior leaders' and 'most responsible' are 'in principle unfettered by any strict rules of interpretation and in essence non-justiciable before the Trial Chamber or SCC, short of a showing of abuse of discretion through bad faith or unsound professional judgment'); para. 699 (stating OCP and CIJs in Case 001 'would have been at liberty to reject this political accord as in any way fettering their discretion under the applicable law').

⁶⁰ Case 004/1-D308/3, paras 6-11.

Case 001 findings,⁶¹ the ICIJ follows the SCC's same flawed approach on personal jurisdiction and ignores the recent PTC holding in Case 004/1, which correctly limited his discretion.⁶² Additionally, the ICIJ's position runs counter to the intentions and subsequent practice of the parties to the UN-RGC Agreement.

i. The ICIJ ignores the PTC's holding in Case 004/1 and, instead, follows the SCC's flawed reasoning in Case 001

40. The ICIJ errs in ignoring the PTC's jurisprudence in Case 004/1⁶³ and following the SCC's flawed reasoning in Case 001.⁶⁴ In Case 004/1, the PTC held that the CIJs' discretion regarding personal jurisdiction is not unfettered.⁶⁵ Although the decision about personal jurisdiction is discretionary, it is still a judicial decision and its determination 'does not permit arbitrary action'.⁶⁶ The PTC further held that the terms 'senior leader' and 'most responsible' 'represent the limits of the ECCC's personal jurisdiction' and that while there is inherently 'some margin of appreciation' by the CIJs, their 'discretion is not unlimited and does not exclude control by the appellate court'.⁶⁷
41. Ignoring the PTC, the ICIJ instead follows the SCC's flawed and obsolete position,⁶⁸ which is also non-binding, as acknowledged by the CIJs in Case 004/1.⁶⁹ The Defence incorporates by reference its arguments in *AO An's Response to ICP Final Submission*⁷⁰ and reiterates that the SCC's position grants the Co-Prosecutors and CIJs an inappropriately wide jurisdictional ambit that effectively requires almost all surviving Khmer Rouges cadre to be prosecuted. The position is incongruous and incompatible with the UN-RGC Agreement and the intentions and subsequent practice of the parties, and it precludes judicial scrutiny for arguably the most crucial question before the Court. The ICIJ fails to present any valid explanation for following the SCC's flawed and obsolete reasoning and ignoring the PTC.

⁶¹ Case 001-F28, paras 61, 79.

⁶² Case 004/1-D308/3/1/20, para. 20; Case 004/2-D360, para. 54.

⁶³ Case 004/1-D308/3/1/20, para. 20.

⁶⁴ Case 001-F28, paras 61, 79.

⁶⁵ Case 004/1-D308/3/1/20, para. 20.

⁶⁶ Case 004/1-D308/3/1/20, para. 20.

⁶⁷ Case 004/1-D308/3/1/20, para. 20.

⁶⁸ Concerning the SCC's flawed and obsolete position, the Defence further notes that the personal jurisdiction matter in Case 001 was not properly litigated. Case 004/2-D351/6, para. 77.

⁶⁹ Case 004/1-D308/3, para. 10 (holding 'the only direct appellate panel for the decisions of the OCIJ is the PTC and that in a civil law system such as that of Cambodia there is no doctrine of *stare decisis*'); Case 004/2-D351/6, paras 77-80.

⁷⁰ Case 004/2-D351/6, paras 77-79.

ii. The intentions and subsequent practice of the parties to the UN-RGC Agreement limit the CIJs' discretion

42. The ICIJ errs in ignoring the intentions and subsequent practice of the parties to the UN-RGC Agreement when determining that he has unfettered discretion in determining personal jurisdiction. The negotiation history and the views of the RGC and the UN are essential to interpret the UN-RGC Agreement because: (a) it is impossible to determine the UN-RGC Agreement's object and purpose, especially on personal jurisdiction, without resorting to a detailed analysis of the contracting parties' positions and views; and (b) in line with the Vienna Convention,⁷¹ the positions and views of the contracting parties are subsequent practice that cannot be overlooked in a methodologically sound interpretation effort, particularly when uncertainty exists as to terms' ordinary meaning, as in this case. The Defence incorporates by reference its arguments in *AO An's Response to ICP Final Submission*,⁷² and reiterates that the parties' intentions and subsequent practices, in the very least, show that the Co-Prosecutors and CIJs do not have unlimited discretion to determine personal jurisdiction.

B. Ground 3: The ICIJ interprets 'those most responsible' in an overly broad manner

43. The ICIJ misunderstands⁷³ the limits of the Court's personal jurisdiction, particularly the meaning of those most responsible. His overbroad interpretation of this term is an error of law invalidating the *ICIJ Closing Order (Indictment)*. Under the correct narrow understanding, as applied by the NCIJ,⁷⁴ AO An is not one of those most responsible.

44. Specifically, the ICIJ errs in: (a) ignoring the narrow understanding of the term based on the ECCC negotiating history, subsequent statements by the parties to the UN-RGC Agreement, and the position of the NCP and a majority of Case 004 Judges; (b) failing to apply the principles of *in dubio pro reo* and strict construction; (c) viewing those most responsible through the lens of JCE I; and (d) only comparing AO An to IM Chaem and

⁷¹ See Vienna Convention, art. 31(3)(b).

⁷² Case 004/2-D351/6, paras 62-76.

⁷³ In determining whether AO An is amongst those most responsible, the ICIJ does not clearly set out the criteria, but instead, refers the parties to the reasoning in the *Closing Order (Reasons)* in Case 004/1. Case 004/2-D360, paras 55-56. At times, he references the criteria in passing with limited discussion. *E.g.* Case 004/2-D360, paras 55, 699.

⁷⁴ Case 004/2-D359, paras 430, 482-484, 542.

Duch,⁷⁵ rather than conducting a genuine comparison with other known Khmer Rouge officials, like KE Pauk, *Ta Mok*, and SAO Sarun, as done by the NCIJ.⁷⁶

45. The Defence incorporates by reference its arguments from *AO An's Response to ICP Final Submission* regarding the definition of those most responsible.⁷⁷ As explained by the Defence, the terms must be understood in the ECCC's context and creation and considering the intentions of the parties to the UN-RGC Agreement to restrict the number of potential candidates for prosecution. Thus, the ECCC's personal jurisdiction is limited to: (a) leaders who set policy or those indispensable to its implementation and dissemination; and (b) those who played a more significant role in the perpetration of the most serious crimes when compared to other known Khmer Rouge officials. As explained in Section II (E), AO An does not satisfy these criteria.

i. The ICIJ ignores the narrow understanding of 'those most responsible' based on the negotiating history, subsequent practice of the parties, and views of the NCP and National Judges

46. The ICIJ errs in ignoring the ECCC negotiation history, subsequent practice of the contracting parties, and the views of the NCP and National Judges when determining the meaning of those most responsible. As noted in *AO An's Response to ICP Final Submission*, based on the ECCC negotiation history, subsequent pronouncements by the contracting parties, and the NCP's and National Judges' views, it is clear that the Court was created to prosecute only the top Khmer Rouge leadership.⁷⁸ The term 'leader' was originally restricted to the CPK's top echelon at the Centre, excluding zone-level and sector-level leaders.⁷⁹ The scope was subsequently widened to add 'most responsible' to enable the prosecution of Duch, who was in custody and indispensable to S-21, the most notorious prison in the DK.⁸⁰

47. Understood in its proper context, this limited expansion of the Court's jurisdiction subsumes Khmer Rouge officials who were indispensable in setting and implementing CPK policy and, comparatively, had a more significant position in the CPK and more significant role in the most serious crimes in 1975-1979.⁸¹ The limited expansion was not intended to include individuals like AO An. As explained in Section II (E), AO An was

⁷⁵ Case 004/2-D360, para. 699.

⁷⁶ E.g. Case 004/2-D359, para. 552.

⁷⁷ Case 004/2-D351/6, paras 91-98.

⁷⁸ Case 004/2-D351/6, paras 82-92, 98.

⁷⁹ Case 004/2-D351/6, paras 82, 84, 87.

⁸⁰ Case 004/2-D351/6, paras 85-86, 91.

⁸¹ Case 004/2-D351/6, para. 92.

not part of the CPK top echelon in the Centre, did not have authority to determine or interpret policy, and was not indispensable to the implementation of CPK policy. Furthermore, even if all prosecution allegations were accepted, AO An would have had a less significant position in the CPK and role in the most serious charged crimes when compared to other Khmer Rouge officials.

ii. The ICIJ fails to apply the principles of *in dubio pro reo* and strict construction

48. Even if a lack of clarity would exist after interpreting ‘those most responsible’,⁸² then the principle of *in dubio pro reo* and strict construction requires the narrowest definition to be applied in favour of AO An.⁸³ Despite mentioning these principles in Case 004/1,⁸⁴ the ICIJ fails to apply them here.

iii. The ICIJ views ‘those most responsible’ through the lens of JCE I and conflates the concept of personal jurisdiction with a mode of liability

49. The ICIJ appears to view ‘most responsible’ through the lens of JCE I, thereby incorrectly conflating the concept of personal jurisdiction with a mode of liability.⁸⁵ A finding of ‘most responsible’ cannot rest solely on AO An’s alleged membership in a broad JCE that potentially includes the entire chain of command from foot soldiers to CPK senior leaders. This interpretation would qualify all potential JCE members as those ‘most responsible’, which would defeat the object and purpose of Article 2(1) of the UN-RGC Agreement, which limits the court’s personal jurisdiction.

50. The ICIJ should have applied the criteria⁸⁶ to determine whether AO An is amongst those most responsible, as the NCIJ did,⁸⁷ and then – only once, and if, a positive finding was made – he should have examined criminal responsibility through modes of liability. Instead, the ICIJ assesses AO An’s role in the most serious crimes, like genocide, through the broad net of JCE, and then draws conclusions about personal jurisdiction. By doing so, he merely assesses liability for crimes and avoids conducting a proper assessment of

⁸² Case 004/2-**D351/6**, para. 98. The Defence argued in *AO An’s Response to ICP Final Submission* that on the basis of the drafting history and subsequent statements, there is no lack of clarity.

⁸³ *ECCC Internal Rules*, Rule 21(1); Cambodian Constitution, art. 38; *Decision on Immediate Appeal by KHIEU Samphan*, para. 31; *Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, *Judgement*, 1 Apr. 2011, para. 474, attached as App. 31; *Kokkinakis v. Greece*, ECtHR, 25 May 1993, para. 52, attached as App. 32.

⁸⁴ Case 004/1-**D308/3**, paras 26-36.

⁸⁵ E.g. Case 004/2-**D360**, paras 699, 706-711, 730, 826-831.

⁸⁶ Case 004/1-**D308/3/1/20**, para. 328; Case 004/2-**D359**, para. 428; Case 001-**F28**, para. 62.

⁸⁷ *NCIJ Closing Order*, paras 2, 17.

the criteria for ‘most responsible’. This backward and artificial approach effectively inflates AO An’s role in the most serious charged crimes.

51. For example, when finding that AO An was amongst those most responsible, the ICIJ specifically points to AO An’s role in the genocide of the Cham people in the Central Zone.⁸⁸ However, the ICIJ only provides evidence⁸⁹ of AO An’s alleged involvement in Sector 41, not Sectors 42 and 43.⁹⁰ He even admits that there is little evidence of AO An’s activities at the zone level⁹¹ or of his control over perpetrators in Sectors 42 and 43.⁹² Nevertheless, in the end, the ICIJ, through the lens of JCE,⁹³ holds that AO An had criminal responsibility for a zone-wide genocide and then determines that this responsibility is equal to the responsibility required to be one of ‘those most responsible’ for personal jurisdiction.⁹⁴
52. By applying JCE’s wide net of criminal responsibility, the ICIJ creates the illusion that AO An is amongst those most responsible. The ICIJ, in effect, bypasses the requirement for a proper assessment of personal jurisdiction.

iv. The ICIJ inexplicably limits his comparative analysis to IM Chaem and Duch

53. Without any explanation, the ICIJ fails to conduct a genuine comparison of AO An and other known Khmer Rouge officials concerning the following personal jurisdiction criteria: (a) level of responsibility, including rank, scope of authority, policy-making ability, role in implementing CPK policies, and role in the charged crimes; and (b) gravity of the charged crimes, including the number of victims and geographic and temporal scope. Instead, the ICIJ conducts a superficial, limited, and inaccurate comparison of AO An to only IM Chaem and Duch.⁹⁵ There is no ECCC law or jurisprudence (or other justification) restricting the comparative analysis required for personal jurisdiction assessment to only Khmer Rouge officials investigated, prosecuted, or convicted by the Court. The ICIJ’s failure to conduct a genuine comparison to other known Khmer Rouge officials, such as KE Pauk, *Ta Mok*, and SAO Sarun, is an error of law. If the ICIJ had

⁸⁸ Case 004/2-D360, paras 706-709, 730.

⁸⁹ The Defence explains in Sections II (E)(vi) and (F) that this evidence does not satisfy the standard of proof.

⁹⁰ Case 004/2-D360, paras 835, 848-849.

⁹¹ Case 004/2-D360, paras 252, 255, 260-262.

⁹² Case 004/2-D360, para 849.

⁹³ As explained in Section II (E)(vi), the ICIJ provides no evidence of AO An’s involvement in the alleged genocide in Sectors 42 or 43 through any modes of liability.

⁹⁴ Case 004/2-D360, para. 707, Count 1.

⁹⁵ Case 004/2-D360, para. 699.

done a genuine comparative analysis, as the NCIJ has done,⁹⁶ then he could not have found AO An to be one of those most responsible.

54. In sum, the ICIJ errs in interpreting ‘those most responsible’ in an overly broad manner. If he had applied the correct narrow understanding of personal jurisdiction, then he could not have found AO An to be amongst those most responsible. The Court’s jurisdiction is limited to (a) leaders who set policy or those indispensable to its implementation and dissemination; and (b) Khmer Rouge officials whose positions in the CPK and roles in the most serious DK-era crimes were more significant than others. As explained in Section II (E), AO An does not fall within the Court’s jurisdiction because, comparatively, he did not have a more significant position or role in the most serious DK-era crimes when compared to other Khmer Rouge officials.

C. Ground 4: The ICIJ applies the incorrect standard of proof

55. The ICIJ fails to apply the correct standard of proof for determining whether the Court has personal jurisdiction over AO An. The correct standard of proof for personal jurisdiction is equivalent to the standard of proof for the indictment: The CIJs must have evidence that is ‘sufficiently serious and corroborative to provide a certain level of probative force’⁹⁷ to establish more than a mere probability that AO An was one of those most responsible for the charged crimes.⁹⁸

56. Applying an identical standard of proof across all material elements of a Closing Order is consistent with international jurisprudence⁹⁹ and the principle of legal certainty. The determination of personal jurisdiction is an essential prerequisite for further proceedings,

⁹⁶ Case 004/2-**D359**, paras 511-520, 543-551.

⁹⁷ E.g. Case 002-**D427**, paras 1320-1326.

⁹⁸ *ECCC Internal Rules*, Rule 67(3)(c) (stating where ‘there is not sufficient evidence against the Charged Person’, the CIJs must issue a dismissal order); Cambodian Criminal Procedure Code (2007), art. 247(3) (stating 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 (France), art. 184. Although neither the *ECCC Internal Rules* nor the Cambodian Criminal Procedure Code (2007) defines the standard of ‘sufficient evidence’, the CIJs have done so in Cases 001, 002, and 004/1. Case 004/1-**D308/3/1/20**, paras 61-62; Case 004/1-**D308/3**, para. 2; Case 002-**D427**, paras 1321-1323; Case No. 001/18-07-2007-ECCC-OCIJ, *Closing Order*, **D99**, 8 Aug. 2008, para. 130, attached as App. 33. In Case 002, the CIJs interpreted ‘sufficient evidence’ to mean probability of guilt rather than mere possibility of guilt. Case 002-**D427**, para. 1323. 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. Case 002-**D427**, para. 1323; *see also* Chambon & Guery, *Droit et pratique de l’instruction préparatoire* (Paris: Dalloz, 2015), para. 613.12, attached as App. 34.

⁹⁹ *See Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-A, *Judgement*, 5 May 2009, para. 220, attached as App. 35 (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’).

and failure to properly assess the evidence at this stage creates a burden on the Defence and constitutes a waste of judicial resources.

57. Although the ICIJ sporadically references¹⁰⁰ or hints at the existence of a standard, especially when criticising the PTC,¹⁰¹ he never actually defines it. When examining the *ICIJ Closing Order*, it becomes clear that the ICIJ bends and stretches the standard of proof so that it is no longer recognisable.¹⁰² In the end, the standard applied is somewhere between *prima facie* and reasonable basis to believe – both of which are erroneous. If the ICIJ had applied the correct standard of proof in this case, then he could not have found the Court has personal jurisdiction over AO An.

D. Ground 5: The ICIJ wrongly creates and relies on a hierarchy of evidence instead of examining the substance of evidence

58. The ICIJ errs in creating and relying on a hierarchy of evidence based on origin and form, in which his WRIs reign supreme, and, thereby, in failing to fully assess the substance of the evidence.¹⁰³ Specifically, he fails to (a) examine the credibility of key witnesses and civil party applicants;¹⁰⁴ (b) consider the effects of the OCIJ investigators' dubious methods for extracting information, despite the fact that the Defence raised these errors in *AO An's Response to ICP Final Submission*,¹⁰⁵ (c) provide corroborative evidence in

¹⁰⁰ E.g. Case 004/2-**D360**, paras 130, 422, 705, 733, 740, 745, 752, 756, 793, 809, 816, 846, 849, 853.

¹⁰¹ Case 004/2-**D360**, para. 37(vii).

¹⁰² Although the examples of the ICIJ's misapplication of the standard are too numerous to include in full here, some of the most blatant examples concern his personal jurisdiction assessment. E.g. Case 004/2-**D360**, paras 252, 703 (The ICIJ states 'the evidence supports the conclusion' that AO An was deputy secretary of the Central Zone from late 1977 until the end of DK. To support his finding, the ICIJ relies on one witness, AO An's driver IM Pon, and hearsay evidence from another witness. He disregards statements by TO Sem, the wife of Sector 43 Secretary Sim, in which she indicates that AO An only held the position temporarily because her husband took over at least six months before the regime ended. Without explanation, the ICIJ declares that the statements of a cadre's wife discussing her husband's position and implicating his guilt are somehow less credible than AO An's driver's statements, even though drivers were not permanently assigned to individuals and often changed positions.); paras 255, 261-262, 705, 849 (The ICIJ concludes that there is 'sufficient evidence' that AO An 'increasingly took over Ke Pauk's functions as *de facto* acting Central Zone Secretary, due in some part to Ke Pauk's engagement in the military war effort'. In the very next sentence, the ICIJ admits that it is 'unclear when exactly and how long this *de facto* position was exercised; distinct instances of his use of that particular role could not be identified, either [*sic*]'. Later in his Closing Order, the ICIJ also finds AO An did not have effective control over Sectors 42 and 43. If the ICIJ admittedly has no evidence of when AO An entered the acting zone secretary role, for how long he held it, what his exact responsibilities were, any instances of AO An exercising power in this role, or any control over the other sectors in the zone, then certainly the requisite standard of proof could not be met.).

¹⁰³ Case 004/2-**D360**, paras 37(a), 123-128, 156.

¹⁰⁴ The Defence maintains that the civil party applicants are not yet civil parties because of the conflicting ICIJ and NCIJ orders. Case No. 004/2/07-09-2009-ECCC/OCIJ, *Order Rejecting Civil Party Applications*, **D361**, 16 Aug. 2018; Case No. 004/2/07-09-2009-ECCC/OCIJ, *International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants*, **D362**, 16 Aug. 2018.

¹⁰⁵ Case 004/2-**D351/6**, paras 130-182, 188-200, 212.

support of factual findings on personal jurisdiction; and (d) exercise caution with respect to hearsay evidence.

59. The ICIJ ignores the PTC's recent holding in Case 004/1 stating that an evidence hierarchy based on origin or form over substance is an error of law,¹⁰⁶ and he misconstrues the PTC's explanation about how the CIJs must fully assess the substance of evidence.¹⁰⁷ If the ICIJ had fully assessed the substance of the evidence, he could not have found that the standard of proof was satisfied and that the Court has personal jurisdiction over AO An.

i. The ICIJ errs in failing to apply the PTC's holding in Case 004/1

60. In the *ICIJ Closing Order (Indictment)*, the ICIJ misunderstands the PTC's holding in Case 004/1. He states the PTC's findings 'do not accurately reflect the treatment of evidence in civil law systems' and that 'these errors are of such a nature that the CIJs cannot simply acquiesce in the PTC's holdings'.¹⁰⁸ In defending his evidence hierarchisation based on provenance, the ICIJ distorts the PTC's findings.¹⁰⁹ When read in context, it is clear the PTC's criticism of the evidence assessment methodology in Case 004/1 is limited to the creation of and reliance on this hierarchy in place of a full assessment of all the evidence's substance.

61. The PTC's Case 004/1 holding on evidence assessment is consistent with its previous decisions in Case 004/2 and other ECCC jurisprudence. It is the role of the CIJs to fully

¹⁰⁶ Case 004/1-D308/3/1/20, para. 56.

¹⁰⁷ Case 004/1-D308/3/1/20, para. 52.

¹⁰⁸ Case 004/2-D360, para. 35.

¹⁰⁹ *E.g.* Case 004/2-D360, para. 37(a)(ii) (The ICIJ errs in concluding that the PTC 'engaged in unhelpful essentialising' by comparing the Cambodian judicial system to the French judicial system. Although the Defence agrees with the ICIJ that no two civil law systems are identical, it disagrees that a comparison to the French system is somehow misplaced. In fact, the Cambodian system is based on the French system, and thus comparisons are useful but not determinative.); para. 37(a)(iii) (The ICIJ misconstrues the PTC's holding about legally collected evidence enjoying the same presumption of reliability and errors in extrapolating from this holding that the PTC would consider torture-tainted evidence or give the same weight to an anonymous letter with the words, 'AO An did it!', as a WRI if the CIJs placed both items on the Case File. The ICIJ took the PTC's words out of context. If read in context – i.e. reading the sentences immediately before and after the sentence the ICIJ focuses on – it becomes apparent that the PTC is criticising how the ICIJ determined reliability based on a hierarchy of evidence, with his WRIs at the top of the hierarchy, and how he discarded whole categories of evidence based solely on the fact that he was not involved in taking the evidence. The PTC did not hold that all evidence is equal without further assessment of substance or that torture-tainted evidence is admissible.); para. 37(a)(iv) (The ICIJ misconstrues the PTC's statement about the ECCC's inquisitorial system being based on written proof. The ICIJ implies that the PTC is willing to 'content [itself] with a description of surface appearance' without engaging in the substance of the evidence. This statement could not be further from what the PTC held. Rather, the PTC emphasised on several occasions that the CIJs must assess the substance of evidence and its impact on their personal conviction about whether the standard of proof for personal jurisdiction or indictment is met. It held that origin and form of evidence are not determinative, and that credibility should be evaluated on a case-by-case basis.)

assess the substance, including the reliability, of the evidence at the Closing Order stage.¹¹⁰ The PTC has specified that reliability necessitates an examination of (i) the credibility¹¹¹ of witnesses and civil party applicants;¹¹² and (ii) the circumstances in which evidence is obtained.¹¹³ These examinations are precisely what the ICIJ fails to do, instead, choosing a form-over-substance approach with his hierarchy. Given the importance of the ECCC's search for the truth and the seriousness of the charged crimes,

¹¹⁰ In the Closing Order, the CIJs are tasked with determining whether there is sufficiently serious and corroborative evidence of the probability of AO An being one of those most responsible and of his guilt for the charged crimes, and in doing so, they must assess the reliability of evidence, including WRIs. *See ECCC Internal Rules*, Rule 67(3); Case No. 002/19-09-2007-ECCC/SC, *Appeal Judgement*, **F36**, 23 Nov. 2016, para. 314, attached as App. 36; Case No. 001/18-07-2007-ECCC/TC, *Trial Chamber response to portions of E114, E114-1, E131/1/9, E131/6, E136 and E158*, **E162**, 31 Jan. 2012, para. 3, attached as App. 37. This is well-established practice at the ECCC and has been followed in Case 001, Case 002, and Case 004/1. Case 004/1-**D308/3/1/20**, paras 52-59 (The PTC finds it is an error of law to 'make general assertions about the value of certain categories of evidence, thus creating a hierarchy of evidence based on its nature rather than on its substance'. Instead, the PTC prefers a 'case-by-case' assessment of credibility.); Case 004/1-**D308/3**, paras 206, 215; *see also* Case 002-**F36**, para. 372; Case 001-**E162**, para. 3. It is because of the CIJs' assessment that the Trial Chamber then considers that evidence cited in the Closing Order is entitled to a presumption of relevance and reliability. Case 002-**F36**, para. 372; Case 001-**E162**, para. 3.

¹¹¹ Credibility generally refers to whether an individual's statements about material facts are truthful. Sluiter et al., *International criminal procedure* ('*Sluiter et al.*') (1st edn., Oxford: Oxford University Press, 2013), p. 1025, attached as App. 38 ('Credibility may be defined as truthfulness and thus answer the question of whether the witness is testifying according to or against his or her beliefs, in other words, whether the witness is lying or not.'). When assessing credibility, the ECCC and other international tribunals have looked at factors such as the internal consistency and plausibility of individuals' statements, the consistency between different individuals' statements on the same material issue, the existence and quality of corroborative evidence, the individuals' potential motivations for providing evidence or their biases, and any physical abilities or other attributes of the individuals that may affect their truthfulness. *See* Case 004/1-**D308/3**, paras 206, 215; Case 002-**F36**, para. 268; *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, *Judgement* ('*Popović Appeal Judgement*'), 30 Jan. 2015, para. 132, attached as App. 39; *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, *Judgement*, 28 Nov. 2007, para. 194, attached as App. 40.

¹¹² Case 004/1-**D308/3/1/20**, para. 55 (referring to first-hand information from victims and civil party applicants, the PTC has explicitly held that 'the credibility of their evidence should be evaluated on a case-by-case basis' in the closing order); Case 004/1-**D308/3**, paras 206, 215 (discussing CIJs' assessment of reliability, including credibility, of two witnesses); Sluiter et al., p. 1025, ('Reliability is a wider concept which encompasses the concept credibility as well as other issues, including observational accuracy and authenticity. '); Klamberg, *Evidence in international criminal trials* (Leiden: Martinus Nijhoff publishers, 2013), p. 172, attached as App. 41 (stating credibility and reliability are components influencing probative value and weight but noting jurisprudence of *ad hoc* tribunals on these issues is somewhat inconsistent and often terms are used synonymously); *see also The Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, *Public Redacted Version, Decision on the Confirmation of Charges against Dominic Ongwen*, 23 Mar. 2016, para. 17, attached as App. 42.

¹¹³ Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC37), *Confidential Decision on AO An's Application to Annul Written Records of Interview of Three Investigators*, **D338/1/5**, 11 May 2017, paras 23-25 (recalling '[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'); Case No. 004/1/07-09-2009-ECCC/OCIJ (PTC28), *Considerations on IM Chaem's Application for Annulment of Transcripts and Written Records of Witnesses' Interviews*, **D298/2/1/3**, 27 Oct. 2016, paras 54, 59 (emphasising that 'the circumstances surrounding the witness interviews will be among the elements considered at a later stage during the assessment of evidence by the [CIJs], and, where necessary, by the [PTC] and the Trial Chamber', and recalling that 'the circumstances surrounding the recording of [...] testimony will be fully considered at the closing order stage, including eventually by the [PTC], and, should the case go to Trial, by the Trial Chamber').

the evidence supporting material facts, which establish the basis of indictment, must be credible on the whole.

ii. The ICIJ fails to assess the credibility of key witnesses and civil party applicants offering material evidence about whether the Court has personal jurisdiction over AO An

62. Ignoring the PTC and other ECCC jurisprudence, the ICIJ refuses to correct his approach to the evidence¹¹⁴ and fails to fully examine the substance and credibility of WRIs containing material facts related to personal jurisdiction. The ICIJ overlooks the serious credibility issues of key witnesses and civil party applicants, like PRAK Yut, YOU Vann, PEOU Sarom, PUT Kol, KEO Voeun, NHEM Chen, Ngauv, PENH Va, and NHIM Kol, on matters concerning personal jurisdiction. They lack credibility for assorted reasons: motives to cover up their own criminal activities,¹¹⁵ grave inconsistencies in their statements, underlying biases, and lack of corroborative evidence. The Defence raised these credibility issues in *AO An's Response to ICP Final Submission*,¹¹⁶ but without providing any reasoning, the ICIJ ignores them. The Defence incorporates these arguments by reference and summarises them below.

a) PRAK Yut

63. Throughout the *ICIJ Closing Order (Indictment)*, the ICIJ relies heavily, and at times almost exclusively, on evidence from PRAK Yut for material facts related to his determination on personal jurisdiction, including AO An's alleged position and authority, arrest and execution orders (e.g. for the Cham people), receipt of reports, appointment and removal of cadre, role in the purge of former cadre, and management of resources and personnel.¹¹⁷ PRAK Yut is not credible on these issues because her statements are inconsistent¹¹⁸ and often uncorroborated;¹¹⁹ she is motivated to lie,¹²⁰ and the OCIJ

¹¹⁴ Case 004/2-**D360**, paras 123-135.

¹¹⁵ Combs, 'Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions', 75.1.3 *Wash. and Lee L. Rev.* (2018), 223-300, pp. 259-260, attached as App. 43.

¹¹⁶ Case 004/2-**D351/6**, paras 127-182.

¹¹⁷ E.g. Case 004/2-**D360**, para. 241, fns 589-590; para. 244, fn. 594; para. 245, fns 596, 598; para. 246, fns 599-600; para. 248, fn. 605; para. 250, fn. 613; para. 256, fns 633-634, 636; para. 257, fn. 640; para. 259, fn. 652; para. 263, fns 660-662; para. 265, fns 663-665; para. 266, fns 675, 677; para. 268, fn. 682; para. 271, fn. 696; para. 275, fn. 718; para. 276, fns 720-721; para. 282, fn. 737; para. 293, fn. 765; para. 296, fn. 777; para. 297, fns 783-784; para. 302, fns 804-809; para. 303, fns 811, 814-815; para. 304, fn. 816; para. 318, fns 841-843; para. 324, fn. 874; para. 331, fn. 911; para. 364, fns 1029-1033, 1037; para. 395, fn. 1170; para. 423, fn. 1278; para. 429, fns 1326-1327, 1329; para. 444, fn. 1386; para. 620, fns 2095-2097; para. 633, fns 2152-2157; para. 634, fns 2163-2167; para. 635, fns 2170-2172.

¹¹⁸ PRAK Yut is not consistent across her 19 different statements to the OCIJ, Trial Chamber, and DC-Cam. In fact, the specific examples of PRAK Yut's inconsistencies are too numerous to list. The Defence has identified only the examples related to personal jurisdiction in **Annex D**.

investigators fed her inculpatory information when questioning her, ostensibly keen on generating incriminating evidence.¹²¹ The ICIJ briefly acknowledges these credibility issues,¹²² but relies on her regardless. In **Annex C**, the Defence illustrates the point at which PRAK Yut begins to alter her story to blame AO An and how her story fluctuates over time because of the influence of OCIJ investigators and PRAK Yut's attempts to cover up her lies. In **Annex D**, the Defence sets out a list of PRAK Yut's inconsistent statements on key issues related to personal jurisdiction.

64. By her own admission, PRAK Yut was a Khmer Rouge zealot¹²³ and district secretary with close ties to *Ta Mok*.¹²⁴ She was actively involved in the charged crimes in the

¹¹⁹ As explained in the *AO An's Response to ICP Final Submission*, other witnesses and civil party applicants, who provide evidence in Case 004 and who worked near or with PRAK Yut in 1977-1979, do not corroborate many of her statements about AO An's alleged roles and responsibilities. Further, so-called corroboration often turns out to be misrepresentations of witness or civil party applicant statements, mere hearsay from PRAK Yut, speculation, or the result of information fed to witnesses by the OCIJ investigators. Case 004/2-**D351/6**, paras 154-156.

¹²⁰ As explained in the *AO An's Response to ICP Final Submission* and incorporated by reference here, from the beginning of the investigations in Cases 002 and 004, PRAK Yut had motives to lie, particularly with respect to issues related to AO An's alleged roles and responsibilities in the charged crimes. She sought to protect herself and minimise her and her family members' roles. At some point between June 2011 and January 2012, PRAK Yut realised that there was a Case 004 and that she could be prosecuted. Upon seemingly realising that her alleged crimes may be exposed and that she was at risk of prosecution, PRAK Yut needed a scapegoat. AO An was the obvious, easy choice since he was already a suspect. The OCIJ investigators affirmed her choice of AO An as the scapegoat throughout the Case 004 investigation, consistently feeding her inculpatory information upon which she could further develop her web of lies. When PRAK Yut's accounts are examined side by side with the investigation timeline, her motives become clearer. The Defence notes that PRAK Yut's fear of prosecution was well founded since, in early 2012, an OCIJ investigator documented PRAK Yut's involvement in the alleged crimes and recommended that she, like IM Chaem, be considered for prosecution. Case 004/2-**D351/6**, paras 144-153.

¹²¹ *E.g.* **D117/70** (PRAK Yut WRI), Q37 ('Q: Besides removing all the old commune chiefs, did Grandfather An order you arrest people in your district?'), A44-A45 ('Q: Besides the arrests of those commune chiefs, do you recall if *Grandfather* An ordered the arrests of other people? A44: Yes, I received an order from *Grandfather* An to collect Cham people and LON Nol soldiers. I did not know what happened to them eventually. Q: Were the orders to collect those people given through letters or in meetings with *Grandfather* An? A45: Grandfather An gave the orders during the monthly meetings. During the meetings, *Grandfather* An gave the same orders to other district secretaries.'). **D219/484** (PRAK Yut WRI), A4 ('Q: Do you remember the number of Cham families living in each village? A4: No, I do not remember.'). A5-A6 ('Q: Do you want me to help you to remember this? A5: Yes. Investigator's note to PRAK Yut: According to the information we have: Chrak Sdau: 20 families, Veal Kriel: 30 families, Trean: 30 families, Trapeang Ta Sokh: 30 families, Chranieng: 30 families, Prathang: 15 families, Paen: 30 families, Tuol Chambak: 15 families, Trapeang Ampil: 20-30 families, Ta Khong: 20 families, Tuol Trach: 10 families, Poun: 22-23 families. On average, if there were 6 members in each family, the total number of Cham living in Trean Commune was approximately 1,600. Q: Do you think this is a reasonable number? A6: Yes, it is reasonable.'). A8 ('Q: Did you know that those Cham were arrested and killed? A8: Yes. I would like to clarify that I received orders from the sector level to arrest and kill all of those Cham. The orders I received were very clear about killing those Cham. After that, I sent those orders on to the commune level and my deputies at district level. I do not know how or where those Cham were killed. After the killings of the Cham people were completed, I received a report from my or the militia chief about the number of Cham they had killed. Then I sent that report to *Ta An* who was at the sector level.').

¹²² Case 004/2-**D360**, paras 229, 368, 454.

¹²³ **D6.1.721** (PRAK Yut WRI), A34 ('I was one of the high rank revolutionary because I had sacrificed everything for the revolution. I had no personal possession; and even my husband, I sacrificed him for the

Central Zone¹²⁵ and so dedicated to the revolution that those close to her believe she killed her own husband when he lost faith.¹²⁶ Because PRAK Yut provides material facts related to personal jurisdiction and because the ICIJ relies on her – often without corroboration – her credibility must be carefully assessed. The ICIJ errs in not doing so and in continuing to rely on her for his personal jurisdiction assessment.

b) YOU Vann

65. Rather than fully and objectively questioning PRAK Yut's credibility, the ICIJ instead relies on her to build the case against AO An. For example, he relies heavily on YOU Vann, PRAK Yut's former messenger and a Ro'ang Commune member in Kampong

revolution. When they arrested him, I did not shed a tear drop. [...] At that time the Sector secretary, KANG Chap, called me to tell that my husband would be arrested [...] It was not only the Sector secretary who called me to tell about my husband arrest; even Ta Mok, who was the Zone secretary, also called me to tell that my husband would be arrested [*sic*].'); **D219/234.1.2** (PRAK Yut DC-Cam Interview), EN 01064238-39, pp. 15-16 (PRAK Yut joined the revolution as an adolescent.), EN 01064294-95, pp. 71-72 ('Actually, there were many Party cadres, but I do not know why I survived until now. They praised me for managing to survive [...] This was because of our standpoint and sentiment in favour of the Party, without which I would have disappeared [...] I thought that I knew all the upper level leaders. They knew me. Even today everyone knows me. My name is PRAK Yut. I know all of them. So they thought I was a senior politician.');

D219/422.5 (NHIM Kol Transcript of WRI D107/7), EN 01136873, p. 15 ('[PRAK Yut] preferred being praised to being criticised. It is a kind of "preference for flattery." She behaved like that [...] Yes, she was illiterate, but she was very serious. She was decisive and serious. If she said that she would do something she meant it. No one could stop her.');

D219/322 (CHAN Sokchea WRI), A5 (CHAN Sokchea states she knew PRAK Yut had authority because everyone was afraid of her.).

¹²⁴ **PRAK Yut was a district secretary:** **D117/70** (PRAK Yut WRI), A23, A25-A28; **D6.1.730** (PRAK Yut WRI), EN 00364081, p. 5; **D179/1.2.5** (PRAK Yut Case 002 Transcript), EN 00774565, p. 66; **D219/234.1.2** (PRAK Yut DC-Cam Interview), EN 01064299, p. 76; **D107/5** (ORN Kim Eng WRI), A22; **D117/28** (KEO Voeun WRI), A11; **D117/31** (YOU Vann WRI), A15; **D219/800** (SAUR Saren WRI), A39, A41. **PRAK Yut was close to Ta Mok:** **D219/971** (PRAK Yut WRI), A35 (PRAK Yut admits she was very close to Ta Mok.).

¹²⁵ **PRAK Yut's alleged involvement in crimes:** **D179/1.2.6** (PRAK Yut Case 002 Transcript), EN 00775492, p. 62 ('There was no order from the upper level. I, myself, decided on this [re-] education. Q. So you decided, you didn't receive orders from anybody else. A: Yes, I made the decision. If the person cannot be educated, then the person would be sent to the sector for another education.');

D107/3 (KAK Sroeu WRI), EN 00787204, p. 5 ('Q: What role did Yeay Yut play in killing and arresting people from 1977 to 1979? A: Yeay Yut served as chairperson of Kampong Siem district, but she delegated the task of killing here to Ta Chea, her deputy.); **D117/42** (KHOEM Neary WRI), A14 ('Definitely, [Tuol Beng] was under her management in which she was on the committee of Kampong Siem.');

D117/53 (SUN Chean WRI), A22 ('Q: Did you ever see Ta Chea and PRAK Yut together at any arrests? A22: Yes, I did. Most of the time, PRAK Yut worked at her district office, but she also came to work with Ta Chea at his Vihear Thum Commune Office.');

D107/19 (Written Record of Investigation Action), EN 01109105-06, pp. 2-3 (The OCIJ investigator reports that PRAK Yut, the Kampong Siem District chief, ordered arrests, which were carried out by her subordinates. 'PRAK Yut has been depicted as a cruel person who, in addition to eliminating cadre in her district, allegedly ordered the arrests and executions of many other people for personal reasons [...] As IM Chaem, PRAK Yut was a vital component in the supervision and execution of purges in the zones.' The OCIJ investigator recommends that the OCP should consider including PRAK Yut on the list of suspects.).

¹²⁶ **D219/422.5** (NHIM Kol Transcript of WRI D107/7), EN 01136870-72, pp. 12, 14 ('Even her younger relatives, such as his [her] cousin, Rom, said, "Sister you are very decisive. You shot your husband to death." They chatted like that. I learned that. "Oh, Yeay Yuth, she shot her husband." That is all I know. I never saw Yeay Yuth's husband. I do not know what his face looked like [...] I heard them saying that Yeay Yuth was very decisive and dared to shoot her husband to death.');

D107/19 (Written Record of Investigation Action), EN 01109105, p. 2 (The OCIJ investigator reports that there are rumours of PRAK Yut having eliminated her husband because he wanted to leave the revolution.).

Siem District,¹²⁷ for material facts related to his determination on personal jurisdiction. These facts relate to: AO An's alleged position and authority, management of the sector military, presence at meetings, arrest and execution orders and reports (including of the Cham people), appointment and removal of cadre, management of resources and personnel, and authority regarding marriage.¹²⁸

66. The ICIJ also uses YOU Vann's statements to attempt to corroborate PRAK Yut's statements.¹²⁹ However, YOU Vann cannot corroborate PRAK Yut because she lacks credibility and has also been fed inculpatory information by OCIJ investigators, with the aim of generating incriminating evidence.¹³⁰ She is inconsistent on key issues¹³¹ and often merely regurgitates information told to her by PRAK Yut.¹³² Therefore, the ICIJ errs in

¹²⁷ **D117/31** (YOU Vann WRI), A15, A29.

¹²⁸ *E.g.* Case 004/2-**D360**, para. 244, fn. 594; para. 245, fns 596, 598; para. 246, fn. 599; para. 256, fns 633, 636, 638; para. 257, fn. 640; para. 259, fn. 653; para. 263, fns 660-62; para. 265, fns 663-65; para. 266, fns 674-675; para. 268, fn. 687; para. 296, fn. 782; para. 297, fns 783-784; para. 302, fns 805-808; para. 303, fns 811, 814-815; para. 304, fn. 816; para. 311, fn. 831; para. 316, fn. 839; para. 318, fns 841, 845; para. 353, fn. 1001; para. 354, fn. 1004; para. 423, fns 1279-1280; para. 427, fn. 1323; para. 429, fns 1327, 1329; para. 431, fn. 1337; para. 633, fn. 2152, 2157, 2161; para. 634, fn. 2163; para. 636, fn. 2173; para. 636, fn. 2175; para. 685, fns 2355, 2357-2358.

¹²⁹ *E.g.* Case 004/2-**D360**, para. 168, fn. 354; para. 173, fn. 366; para. 178, fn. 373; para. 210, fn. 479; para. 213, fn. 488; para. 229, fns 540-541; para. 235, fn. 562; para. 242, fn. 591; para. 243, fn. 593; para. 244, fn. 594; para. 245, fn. 596; para. 245, fn. 598; para. 246, fn. 599; para. 251, fn. 615; para. 256, fn. 633; para. 256, fn. 636; para. 257, fn. 640; para. 263, fns 660-662; para. 265, fns 663-665; para. 266, fn. 674; para. 266, fn. 675; para. 272, fn. 704; para. 297, fns 783-784; para. 302, fns 805-810; para. 303, fns 811-815; para. 318, fn. 841; para. 375, fn. 1084; para. 423, fn. 1284; para. 424, fn. 1293; para. 429, fns 1327-1329; para. 435, fn. 1347; para. 442, fns 1378-1379; para. 443, fn. 1380; para. 537, fn. 1794; para. 633, fns 2152, 2155-2157; para. 635, fns 2169-2170; para. 685, fn. 2355.

¹³⁰ *E.g.* **D117/31** (YOU Vann WRI), A26-A28 (The OCIJ investigator introduces ideas to YOU Vann about AO An's authority, particularly his attendance at meetings and travel with other persons to meetings. Further, the investigator suggests to her that PRAK Yut attended meetings in Prey Chhor District, the alleged location of AO An's office.); **D219/138** (YOU Vann WRI), A45 (The OCIJ investigator feeds the idea to YOU Vann that PRAK Yut had to ask permission from AO An to change commune chiefs. YOU Vann then speculates that the investigator must be correct.), A106 (The OCIJ investigator feeds the idea to YOU Vann that people reported killings to AO An.).

¹³¹ *Compare* **D219/702.1.87** (YOU Vann Case 002 Trial Transcript), EN 01438497, p. 56 (YOU Vann initially states she did not deliver messages from PRAK Yut to AO An because he was far away from where PRAK Yut was located, and she speculates that they communicated amongst themselves.); *with* EN 01438498, p. 57 (After having her recollection refreshed, YOU Vann changes her testimony and claims that occasionally she delivered letters to AO An who wrote replies.). *Compare* **D219/138** (YOU Vann WRI), A80 (Concerning alleged marriage instructions, YOU Vann first states PRAK Yut told her that AO An was the one who 'announced the rule that those who had married had to sleep together'.); *with* **D219/702.1.87** (YOU Vann Case 002 Transcript), EN 01438520-21, pp. 79-80 (YOU Vann states PRAK Yut was the person announcing rules on marriage.); *with* EN 01438521, p. 80 (After having her previous statement read to her, YOU Vann changes her answer and adds that AO An was the source of the instructions.); *and with* **D219/702.1.94** (YOU Vann Case 002 Transcript), EN 01431622-24, pp. 36-38 (A few days after, YOU Vann contradicts herself again and reiterates that PRAK Yut announced rules on marriage.).

¹³² *E.g.* **D219/138** (YOU Vann WRI), A66 ('Q: What was *Ta An's* deputy's name? A66: I heard from PRAK Yut that *Ta An's* deputy was *Ta An's* own wife. '); A80 ('Q: Who imposed the rule that a married couple had to sleep together? A80: PRAK Yut told me that *Ta An*, Sector Commander, announced the rule that those who had married had to sleep together. He said it was necessary to do that for national progress. I did not understand this. '); **D219/702.1.87** (YOU Vann Case 002 Transcript), EN 01438494, p. 53 ('Q. Can you tell us how you learned that the district military was involved in arrests? A. Because I was a messenger delivering messages to Prak Yut and that's what Prak Yut had told me. '), EN 01438499-500, pp. 58-59 ('<She> [PRAK Yut] went to

not fully examining the substance and credibility of YOU Vann's evidence and in failing to explain his reliance on her, especially given the fact that YOU Vann may have been influenced by PRAK Yut, who is motivated to cover up her own crimes.

c) PEOU Sarom, PUT Kol, and KEO Voeun

67. Further evidence of the ICIJ constructing the case around PRAK Yut's lies is his reliance¹³³ on the statements of PRAK Yut's relatives and members of her clique: PEOU Sarom, who was the former Krala Commune chief;¹³⁴ PUT Kol, who worked with PRAK Yut in both the Southwest Zone and Central Zone;¹³⁵ and KEO Voeun, who was a former cook for PRAK Yut and then promoted to deputy secretary of Krala Commune.¹³⁶
68. These individuals are not credible on issues related to AO An's roles and responsibilities because they have a motive to lie, namely, to blame AO An to protect PRAK Yut and their family name. Given their familial relationships with PRAK Yut, it is also likely they have recently seen and have spoken with PRAK Yut about the investigation.¹³⁷ Despite

Phnom Penh, but <she> went by car with Ta An. <She> told me that <she> went for <> a meeting, but I did not know the specific place where the meeting took place.'). Additionally, the timing of some of PRAK Yut's statements to YOU Vann is unclear because the OCIJ investigators failed to confirm how or when she obtained her information. Thus, the information may have been provided in 1975-1979 or in more recent years, as an attempt by PRAK Yut to support her web of lies. The Defence notes that elsewhere on the Case File, there is evidence of PRAK Yut contacting witnesses and discussing the investigation, and even, attempting to contact AO An: **D117/26** (PUT Kol WRI), A29; **D219/484** (PRAK Yut WRI), A15.

¹³³ **PEOU Sarom (Rom) (regarding AO An's alleged appointment and removal of cadre, arrest and execution orders, and involvement in the purge):** *E.g.* Case 004/2-D360, para. 256, fn. 633; para. 296, fn. 778; para. 297, fn. 783; para. 429, fn. 1327. **PUT Kol (regarding AO An's alleged attendance at meetings and arrest orders):** *E.g.* Case 004/2-D360, para. 244, fn. 594; para. 245, fn. 596; para. 246, fn. 599; para. 263, fn. 661; para. 296, fn. 778. **KEO Voeun (regarding AO An's supervision of worksites):** *E.g.* Case 004/2-D360, para. 353, fn. 1001.

¹³⁴ **PEOU Sarom (Rom):** **D117/70** (PRAK Yut WRI), A11 (PRAK Yut states PEOU Sarom is her relative.); **D117/24** (PEOU Sarom WRI), A2 (PEOU Sarom states her mother was PRAK Yut's aunt.); **D117/33** (PEOU Sarom WRI), A3 (PEOU Sarom refers to PRAK Yut as her elder cousin.); **D107/8** (NHIM Kol WRI), EN 00787219, p. 3 (NHIM Kol identifies Rom as Krala Commune Chairwoman.); **D117/26** (PUT Kol WRI), A19 (PUT Kol states Rom was the chief of Krala Commune.); **D117/42** (KHOEM Neary WRI), A12 (KHOEM Neary states Rom was Krala Commune Chief.); **D219/191** (KEO Voeun WRI), A3 (KEO Voeun identifies Rom as Krala Commune Chairwoman.).

¹³⁵ **PUT Kol:** **D117/26**, (PUT Kol WRI), EN 00977330, p. 2 (PUT Kol lists SAOM Ngin as her husband.); **D219/812** (Written Record of Acts of Investigations), EN 01321329, p. 2 ('During another assignment in the Kampot area we identified a person named PUT Kol, the spouse of Prak Yut's younger brother, SOAM Ghin. '); **D117/26**, (PUT Kol WRI), A1-A2, A7, A10 (PUT Kol worked with PRAK Yut in Kampot, in the Southwest Zone. When PRAK Yut was transferred to the Central Zone, PUT Kol followed her. PUT Kol stayed at Kampong Siem District Office with PRAK Yut for several months and followed PRAK Yut everywhere.).

¹³⁶ **KEO Voeun:** **D107/8** (NHIM Kol WRI), EN 00787220-21, pp. 4-5 (NHIM Kol states Voeun is like a daughter or granddaughter of PRAK Yut.); **D219/191** (KEO Voeun WRI), A3 (KEO Voeun states she cooked rice for PRAK Yut and people who came to attend meetings.); **D117/28** (KEO Voeun WRI), A12 (KEO Voeun cooked for PRAK Yut.).

¹³⁷ *E.g.* **D117/26** (PUT Kol WRI), A29 ('Even though I accompanied her to different places and met with commune chiefs, when they were in meetings I was not allowed to listen to what they were saying [...] I want to tell you that PRAK Yut telephoned me before the recent election. She told me to tell the truth about the Khmer Rouge regime and there was no need to hide anything.').

these risks, at no point did the OCIJ investigators critically interrogate these witnesses about mutual contacts and discussions of the investigation. Therefore, the evidence from these individuals lacks credibility, and the ICIJ errs in not scrutinising the substance of the WRIs and instead, blindly relying on them without explanation.

d) NHEM Chen

69. The ICIJ heavily relies on the uncorroborated statements of NHEM Chen, AO An's alleged bodyguard, to support his findings on personal jurisdiction, including that AO An announced a plan to starve the people in Sector 41; orchestrated the purge of former cadres in Sector 41; attended and held meetings, including military meetings; ordered arrests and executions and ensured his instructions were carried out; and coordinated the logistics for executions.¹³⁸
70. As explained in *AO An's Response to ICP Final Submission*,¹³⁹ NHEM Chen is not a credible witness on these issues. First, he was a child¹⁴⁰ in 1977-1979, which severely impacts his ability to precisely recall events 40 years later,¹⁴¹ and the accuracy of his memory¹⁴² is likely to have been negatively affected by the OCIJ investigators'

¹³⁸ E.g. Case 004/2-**D360**, para. 273, fns 712, 714; para. 276, fn. 722; para. 277, fns 723-726; para. 278, fns 727-729; para. 279, fns 731-733, 735; para. 283, fn. 739; para. 285, fn. 741; para. 286, fns 744-745; para. 287, fn. 746; para. 294, fn. 770; para. 299, fn. 792; para. 301, fns 800-803; para. 394, fns 1166-1168; para. 396, fns 1179-1180; para. 406, fns 1225-1226; para. 503, fn. 1656; para. 536, fn. 1789-1790; para. 546, fns 1822-1824; para. 589, fn. 1996.

¹³⁹ Case 004/2-**D351/6**, paras 170-176.

¹⁴⁰ **D219/731** (NHEM Chen WRI), A16 ('I was about 13 or 14 years old. '); **D219/731** (NHEM Chen WRI), A8 ('We were children; we did not know anything. '); **D219/731** (NHEM Chen WRI), A47 ('I do not remember well, because I was young at the time. '); **D219/731** (NHEM Chen WRI), A64 ('I did not know, because I was young. '); **D219/855** (NHEM Chen WRI), A41 ('At the time, I was very young. ').

¹⁴¹ Australian Law Reform Commission, 'ALRC Report 84: Children as Reliable Witnesses' in *Seen and heard: priority for children in the legal process* (1997), para. 14.20, attached as App. 44 ('However, children, and adults to a lesser degree, have significant memory loss after long delays. They recall less correct information over time while maintaining as a constant the inaccurate information. Studies demonstrate that ability to remember and describe an event accurately, both at the time of questioning and at later dates, can be dependent on interviewing method. '); Myers et al., 'Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony', *28 Pac. L.J.* 3 (1996), 3-91, p. 14, attached as App. 45 ('It goes without saying that memory can fade over time – a fact of life for adults as well as children. There is research indicating that young children's memory fades more quickly for some events than adult memory. ').

¹⁴² Fredin, *Children as Eyewitnesses: Memory recall and face recognition* (Lund: Lund University, 2011), pp. 20-21, attached as App. 46 (internal citations omitted) ('The general finding is that younger children are more suggestible than older children and that children generally are more suggestible than adults [...] Delay is a relevant factor in forensic settings because children commonly will not provide testimony about criminal acts until 21 weeks, months or even years after the original event. During this time, the child is exposed to many impressions. This could have an effect on her/his possibility to identify a suspect. Information stored in memory is likely to fade after long delays. The greatest loss of information occurs in the period immediately after an event. One factor that can increase children's suggestibility and the emergence of false memories is the investigator's use of focused rather than open-ended questions in an interview. ').

suggestive questioning.¹⁴³ Second, much of his evidence is speculation and hearsay,¹⁴⁴ as he had little understanding of the CPK structure¹⁴⁵ and rarely worked with AO An.¹⁴⁶ Further, it is well known that drivers, messengers, and bodyguards were not permitted to know matters central to the CPK and did not enter meeting facilities.¹⁴⁷ Finally, NHEM Chen's statements are uncorroborated and inconsistent with others who worked with him in 1976-1979.¹⁴⁸ The OCIJ investigators identified and interviewed these other adolescents in NHEM Chen's group, and none of them could confirm NHEM Chen's statements.¹⁴⁹ Accordingly, NHEM Chen cannot be considered a credible witness on issues about AO An's roles and responsibilities, and the ICIJ's heavy reliance without explanation on his statements, especially those that are uncorroborated, is an error of law.

e) CHOM Vong (Ngauv)

71. The ICIJ relies on Ngauv to support his findings on personal jurisdiction, in particular, AO An's alleged responsibility for purging enemies and former cadre; authority over

¹⁴³ *E.g.* **D219/855** (NHEM Chen WRI), A166-A172 (NHEM Chen recalls a meeting at Wat Ta Meak, in which 'they' – not AO An or the sector – instructed cooperative chiefs to lure former LON Nol soldiers to the meeting and identify themselves. It is not until the investigator suggests AO An is connected to the meeting that NHEM Chen stops referring to 'they' and begins to accuse AO An of giving the instructions.).

¹⁴⁴ *E.g.* **D219/855** (NHEM Chen WRI), A79-A81 ('Q: In your previous interview, document D219/732, at Answers 41 and 42, you said that *Ta An* received orders from the Zone to kill people. So, did he receive those orders from the Zone via that messenger verbally or in writing? Or how did they send the message from the Zone to *Ta An*? A 79: He received the orders in letters that the messenger delivered to him. Q: How did you know that that letters were about the killings? A80: I met and chatted with his bodyguard who said the sent a letter to the sector by a messenger.').

¹⁴⁵ **D219/731** (NHEM Chen WRI), A8, A47.

¹⁴⁶ **D219/731** (NHEM Chen WRI), A31, A82-A83; **D219/855** (NHEM Chen WRI), A6, A102, A104, A154.

¹⁴⁷ *E.g.* **D117/20** (LIM Seng WRI), A8, A10 (LIM Seng, an alleged driver for KE Pauk, explains that he, and other messengers and bodyguards, had to wait at another place outside of the meeting location and that they did not attend.); **D117/50** (IM Pon WRI), A54 (IM Pon, who was an alleged driver of AO An, explains that he saw and heard of sector meetings but did not know the subject matter discussed because the committee members met in a house.); **D219/870** (RY Nha WRI), A27 (RY Nha, who was allegedly a bodyguard in Sector 41, explains that he never joined a meeting chaired by AO An because '[w]e were just children; we had no rights to enter the sector office. We had no rights to join the meetings.');

D6.1.437 (KE Un), EN 00283341, p. 3 (KE Un, an alleged driver of KE Pauk, explains that KE Pauk drove himself to important meetings.).

¹⁴⁸ While allegedly acting as AO An's and then Sok's bodyguard, NHEM Chen claims he worked in the same unit as Poeun, Sal, Nhâ, and Khân/Khorn, among others. **D219/731** (NHEM Chen WRI), A19-A25; **D219/732** (NHEM Chen WRI), A1-A8.

¹⁴⁹ **D219/791** (BANG Pich WRI), A37-A39 (BANG Pich knew Chen, who lived at Tang Thlaeung Village and transplanted rice with him. Chen was not assigned to be in *Ta Sokh's* defence unit.); **D219/760** (PAT Poeun WRI), A9-A13 (PAT Poeun remembers names of some of his friends who were in the unit, including MEL Khan, PHAI Sal, CHOEM Chan, PAING Bech, and NHEM Chen. They were separated after six months. He does not know if some of his former friends were assigned to work as security at the Sector 41 Office. He also states he was not assigned to work in a security unit, and contradicting NHEM Chen, explains that '[t]hey did not let us know, see or hear anything. They did not let us want to know anything. They told us not to want to know about the work of the higher ups. They wanted us to focus on our work such as raising chickens and pigs. We were not allowed to get close to the Sector Office, which was surrounded by barbwire.');

D219/761 (MEL Khorm WRI), A9-A11 (MEL Khorm states Chen was a courier for Sokh, who was not a civilian, but had a big job. However, he does not corroborate NHEM Chen's evidence about AO An.); **D219/759** (PHAI Sal WRI), A22 (PHAI Sal cannot confirm NHEM Chen's statements about his work.).

sector travel, economics, and military; reporting to the zone level; issuance of arrest orders; and control over sector security matters and centres.¹⁵⁰

72. However, Ngauv lacks credibility on issues related to AO An's alleged roles and responsibilities because (a) as the head of Met Sop (Kor) security centre,¹⁵¹ he has motives to lie to avoid moral and legal responsibility, and (b) OCIJ investigators fed him inculpatory information through closed questions and other dubious methods.¹⁵²

73. The ICIJ himself finds that Ngauv is unreliable in relation to certain issues¹⁵³ but continues to rely on him without explanation for essential facts.¹⁵⁴ The Defence reiterates and incorporates its argument from *AO An's Response to ICP Final Submission*: if Ngauv is minimising his own participation in crimes, as asserted by the ICP and ICIJ, then there is no reason to believe his statements implicating AO An, his alleged superior, are more trustworthy than his other more exculpatory statements.¹⁵⁵ The ICIJ thus takes an illogical approach to this witness. He errs in not closely examining the substance of Ngauv's evidence and relying on it without explanation.

f) PENH Va and NHIM Kol

74. The ICIJ relies on the WRIs of PENH Va and NHIM Kol, who are civil party applicants, to support material facts relating to personal jurisdiction including: AO An's position, attendance at key meetings, supervision of worksites, appointment and removal of cadres, the formulation of execution policy and logistics, and the ordering of arrests and

¹⁵⁰ E.g. Case 004/2-**D360**, para. 214, fn. 489; para. 243, fn. 593; para. 256, fn. 637; para. 258, fns 642, 644-645, 649; para. 265, fns 664, 666; para. 266, fns 676-677; para. 272, fns 705-706; para. 273, fns 710, 713; para. 282, fn. 737; para. 285, fn. 742; para. 296, fns 778-780; para. 394, fn. 1169; para. 395, fns 1170-1177; para 396, fn. 1178.

¹⁵¹ **D219/504** (SAT Pheap WRI), A87; **D219/855** (NHEM Chen WRI), A27; **D117/54** (SOEUNG Lim WRI), A8.

¹⁵² E.g. **D117/56** (CHOM Vong WRI), A38 (The OCIJ investigator suggests to Ngauv that AO An was connected to Kor security centre.); **D219/442** (CHOM Vong WRI), A150-A152 (The OCIJ investigator suggests to Ngauv that transportation of prisoners between districts required permission from the sector secretary and that transportation between sectors required permission from the zone secretary.).

¹⁵³ E.g. Case 004/2-**D360**, para. 411 (The ICIJ finds Ngauv's statements regarding meetings with AO An are unreliable as he may be attempting to distance himself from the killing operations at Met Sop.).

¹⁵⁴ E.g. Case 004/2-**D360**, para. 272, fn. 706 (The ICIJ relies only on Ngauv and finds travel from Sector 41 into Sectors 42 or 43 required permission from AO An and the zone secretary.); para. 273, fn. 713 (The ICIJ relies only on Ngauv and finds AO An acknowledged during a meeting that people in Sector 41 were receiving inadequate food.); para. 395, fns 1171-1177 (The ICIJ relies only on Ngauv and finds Ngauv's reports to 'the sector' contained details of security conditions at the security centre, health of prisoners, agricultural production, the number of prisoners to arrive and depart, and their area of origin, and that after receiving reports from Ngauv, Aun reported to the sector committee.).

¹⁵⁵ Case 004/2-**D351/6**, para. 168; Case No. 004/2/07-09-2009-ECCC-OCIJ, *International Co-Prosecutor's Rule 66 Final Submission* ('ICP Final Submission'), **D351/5**, 21 Aug. 2017, para. 146; Case 004/2-**D360**, para. 411.

executions.¹⁵⁶ Given the testimonies of PENH Va and NHIM Kol are not taken under oath and given these individuals' inconsistent statements, their evidence concerning personal jurisdiction issues is not credible.

75. PENH Va's and NHIM Kol's WRIs were conducted without the other procedural safeguards that are in place for witness WRIs.¹⁵⁷ Notably, civil party applicants are not required to take an oath before providing a WRI, and there are no sanctions for false testimony.¹⁵⁸ Civil party applicants also have an interest in the case, the ability to participate in the investigation, access to the Case File materials through their lawyers, and are able to consult their lawyers before providing WRIs.¹⁵⁹ They are not prohibited from communicating with other civil party applicants,¹⁶⁰ as demonstrated by the fact that PENH Va actively assisted OCIJ investigators by connecting them to and locating other civil party applicants and witnesses.¹⁶¹ Finally, PENH Va¹⁶² and NHIM Kol¹⁶³ provide inconsistent statements. Therefore, they are not credible, and the ICIJ errs in not critically assessing the substance of their evidence and relying on it without explanation.

¹⁵⁶ **PENH Va**: *E.g.* Case 004/2-**D360**, para. 247, fns 601-603; para. 256, fns 633, 635; para. 263, fn. 661; para. 272, fn. 705; para. 274, fn. 717; para. 279, fn. 730; para. 288, fns 748-749; para. 293, fns 766-768; para. 296, fn. 778; para. 300, fn. 793; para. 309, fn. 828; para. 423, fn. 1279; para. 564, fn. 1904; para. 588, fn. 1994. **NHIM Kol**: *E.g.* Case 004/2-**D360**, para. 256, fn. 634; para. 259, fn. 652; para. 265, fn. 668; para. 266, fn. 674; para. 269, fn. 689; para. 297, fn. 784; para. 302, fn. 805; para. 303, fns 814-815; para. 318, fn. 841; para. 429, fns 1327-1329; para. 633, fn. 2152; para. 634, fn. 2163.

¹⁵⁷ *See* Case 002-**F36**, paras 313-314; Case No. 002/19-09-2007/ECCC/TC, *Decision on NUON Chea Defence Request Regarding Trial Chamber Practices When Examining Civil Parties and Witnesses*, **E336/3**, 9 Oct. 2015, para. 22, attached as App. 47.

¹⁵⁸ *ECCC Internal Rules*, Rules 23(4), 23bis, 24, 36; Case 002-**E336/3**, para. 21.

¹⁵⁹ *ECCC Internal Rules*, Rule 23 *ter*.

¹⁶⁰ *See ECCC Internal Rules*, Rules 23ter (allowing for group representation); 23quater (allowing for formation of victim associations).

¹⁶¹ **D219/227** (Written Record of Investigation Action), EN 01075666, p. 1 (PENH Va comes to the ECCC with Mr Chhen as a support person, speaks with investigators, and agrees to provide a WRI.); **D219/296** (Written Record of Investigation Action), EN 01095273-74, pp. 2-3 (PENH Va recommends a witness to the OCIJ investigators in off-record conversation.); **D219/530** (Written Record of Investigation Action), EN 01151024, p. 5 (PENH Va provides two additional witnesses to the OCIJ investigators during an off-record conversation.); **D219/619** (Written Record of Investigation Action), EN 01181173-174, pp. 2-3 (PENH Va actively assists the OCIJ investigators in locating witnesses and potential leads.).

¹⁶² *E.g. Compare* **D219/226** (PENH Va WRI), A32 (PENH Va states Comrade Meng not Comrade AOM An arranged the marriages.); *with* **D219/289** (PENH Va WRI), A10 (PENH Va states Comrade Aun, or An, arranged a marriage for Sot and Koan.).

¹⁶³ *E.g. Compare* **D219/422.4** (NHIM Kol Transcript of WRI D107/8), EN 01136840-41, pp. 60-61 ('Christian: (English) At the level of the sector? [...] NHIM Kol: (Khmer) I did not know anybody in the sector. I only heard of Ta An. Honestly speaking, I do not know what he looked like'); *with* **D219/422.4** (NHIM Kol Transcript of WRI D107/8), EN 01136840-841, pp. 60-61 ('Interpreter: (Khmer) Did you ever see him? NHIM Kol: (Khmer) Yes, I did. I saw him once when he came by a jeep. When he got off, I saw only his packs of rolled strong tobacco, and he said he was Ta An.').

iii. The ICIJ fails to consider the dubious methods used to extract evidence and relies on this contaminated evidence

76. In concluding the ECCC has personal jurisdiction over AO An, the ICIJ ignores the dubious methods and circumstances through which statements were extracted by OCIJ investigators from witnesses and civil party applicants. These methods include: (a) feeding inculpatory information to witnesses and civil party applicants;¹⁶⁴ (b) engaging in off-record conversations prior to taking the WRIs;¹⁶⁵ and (c) failing to question the witness or civil party applicant about the origin of the evidence.¹⁶⁶

iv. The ICIJ systematically fails to provide corroborative evidence to support findings

77. The ICIJ errs in systematically relying on a single, uncorroborated witness or civil party applicant's account to support material facts underlying his personal jurisdiction findings – an approach that is far from meeting the requisite standard of proof.¹⁶⁷ Although in Case

¹⁶⁴ E.g. Case 004/2-D360, para. 633, fns 2152 (citing **D219/484** (PRAK Yut WRI), A1). A4 ('Q: Do you remember the number of Cham families living in each village? A4: No, I do not remember.'). A5-A6 ('Q: Do you want me to help you to remember this? A5: Yes. Investigator's note to PRAK Yut: According to the information we have: Chrak Sdau: 20 families, Veal Kriel: 30 families, Trean: 30 families, Trapeang Ta Sokh: 30 families, Chranieng: 30 families, Prathang: 15 families, Paen: 30 families, Tuol Chambak: 15 families, Trapeang Ampil: 20-30 families, Ta Khong: 20 families, Tuol Trach: 10 families, Poun: 22-23 families. On average, if there were 6 members in each family, the total number of Cham living in Trean Commune was approximately 1,600. Q: Do you think this is a reasonable number? A6: Yes, it is reasonable.'). A8 ('Q: Did you know that those Cham were arrested and killed? A8: Yes. I would like to clarify that I received orders from the sector level to arrest and kill all of those Cham.'). **D219/138** (YOU Vann WRI), A51. A45 ('Q: Did PRAK Yut have the right to change those commune chiefs? Or did she have to ask permission of Ta An? A45: The order must have come from Ta An because he was Sector Chairperson.').

¹⁶⁵ E.g. Case 004/2-D360, para. 523, fn. 1727 (citing **D219/116** (PIN Pov WRI), A54 (PIN Pov states 'you told me that more than ten thousand people were killed there [security centre]. That could be correct'. This conversation is not properly recorded in the WRI.)).

¹⁶⁶ E.g. Case 004/2-D360, para. 255, fn 632 (citing **D107/5** (ORN Kim Eng WRI), A28 (At A27, ORN Kim Eng states AO An was KE Pauk's Secretary. The OCIJ investigator fails to ask about the basis of knowledge. The interview immediately ceases following this exchange. At A26 the witness admits that he never saw AO An.)); para. 252, fn. 620 (citing **D107/15** (BAN Siek WRI), EN 00841965, p. 3 (BAN Siek states AO An was deputy secretary of the Central Zone. The OCIJ investigator makes no attempt to establish the basis of knowledge, and the following question concerns another topic. At EN 00841967, p. 5, BAN Siek confirms that he never saw AO An and met him only post-1979, thereby rendering the source of his knowledge unclear.)).

¹⁶⁷ The ICIJ relies on the uncorroborated statements of the following witnesses and civil party applicants to determine various aspects of personal jurisdiction: **NHEM Chen**: E.g. Case 004/2-D360, para. 273, fns 712, 714; para. 276, fn. 722; para. 277, fns 723-726; para. 278, fns 727-729; para. 279, fns 731-733, 735; para. 283, fn. 739; para. 285, fn. 741; para. 286, fns 744-745; para. 287, fn. 746; para. 294, fn. 770; para. 299, fn. 792; para. 301, fns 800-803; para. 394, fns 1166-1168; para. 396, fns 1179-1180; para. 406, fns 1225-1226; para. 503, fn. 1656; para. 536, fns 1789-1790; para. 546, fns 1822-1824; para. 589, fn. 1996. **PRAK Yut**: para. 302, fn. 804; para. 318, fns 842-844; para. 363, fns 1028-1029; para. 364, fns 1030-1031, 1033-1337; para. 455, fn. 1406; para. 620, fns 2095-2098; para. 633, fns 2153-2154; para. 634, fns 2164-2168; para. 635, fns 2171-2172; para. 636, fn. 2175. **PENH Va**: para. 247, fn. 603; para. 293, fns 766-768; para. 300, fns 793, 795-797. **YOU Vann**: para. 311, fn. 831; para. 318, fn. 845; para. 427, fn. 1323; para. 431, fn. 1337; para. 633, fn. 2161; para. 636, fns 2173-2174; para. 685, fns 2357-2358. **PECH Chim**: para. 251, fn. 618; para. 279, fn. 730. **SARAY Hean**: para. 255, fn. 631. **OU Dav**: para. 259, fn. 655; para. 308, fns 825-827. **TOY Meach**: para. 267, fn. 680; para. 284, fn. 740; para. 318, fn. 846; para. 564, fn. 1907; para. 685, fns 2356, 2359. **TO Sem**: para. 271, fn. 702. **Ngauv**: para. 272, fn. 706. **SAUR Saren**:

002/1, the SCC held there is no general rule requiring a finding to be supported by more than one piece of evidence, it considered the presence of corroborative evidence significant when determining whether the Trial Chamber's findings were reasonable in terms of relevance and reliability.¹⁶⁸ The practice and jurisprudence at international tribunals also address the relevance of corroboration.¹⁶⁹ Similarly, the importance of corroboration is clear from the jurisprudence of other civil law national jurisdictions.¹⁷⁰

v. The ICIJ fails to exercise caution in relying on hearsay evidence

78. The ICIJ consistently relies on hearsay evidence, including from unknown sources,¹⁷¹ in making factual findings concerning the Court's personal jurisdiction over AO An.¹⁷²

para. 290, fns 754-759. **SENG Srun:** para. 298, fn. 791; para. 304, fn. 817; para. 491, fns 1596-1598. **KE Pich Vannak:** para. 300, fns 798-99. **HO Hocun:** para. 327, fn. 892; para. 344, fn. 963. **PHORN Sophal:** para. 330, fns 902-904; para. 347, fn. 980. **HONG Heng:** para. 332, fn. 912. **IM Pon:** para. 411, fn. 1237. **ORN Kim Eng:** para. 545, fn. 1820. **TOUCH Chamroeun:** para. 680, fn. 2333.

¹⁶⁸ Case 002-F36, paras 419, 424, 428-430, 433-435, 457, 474-476.

¹⁶⁹ Although at the ICC, there is not a *per se* rule of corroboration, it may be required in certain cases. See Rules of Procedure and Evidence of the International Criminal Court, ICC-PIDS-LT-02-002/13_Eng, 3-10 Sep. 2002, Rule 63(4), attached as App. 48 (stating chamber cannot *per se* require corroboration to prove any crime within the jurisdiction of the Court, particularly crimes of sexual violence); *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. 49 (refusing to confirm charges against defendant based on single uncorroborated account of anonymous witness about defendant's role in organisation); *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. 50 (finding where there was only single uncorroborated witness supporting specific allegation, evidence did not 'afford the necessary solid basis upon which a reasonable [chamber] could rely for proper conviction'); *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. 51 (following jurisprudence from ICTR, Pre-Trial Chamber I held that it generally attaches higher probative value to those parts of testimony which are corroborated).

¹⁷⁰ Best, 'Fair and Accurate Fact-Finding in Dutch Atrocity Crimes Cases' (University of Amsterdam: Amsterdam Center for International Law, 20 Oct. 2016), attached as App. 52; Code of Criminal Procedure, s342(2) (Netherlands), attached as App. 53 (stating '[t]he court may not find there is evidence that the defendant committed the offence as charged in the indictment exclusively on the basis of the statement of one witness').

¹⁷¹ The ICIJ relies on anonymous hearsay statements to make key findings regarding personal jurisdiction. *E.g.* Case 004/2-D360, para. 217, fn. 499 (The ICIJ finds there was a substantial increase in killings after AO An's arrival in the Southwest Zone and cites NHEM Chen, who states he only learned of the killing orders from an unnamed bodyguard who was allegedly KE Pauk's nephew.); para. 256, fn. 633 (The ICIJ finds AO An appointed and removed cadres and relies on PENH Va for this assertion. PENH Va states he 'learned of the arrests of the commune chiefs and their deputies by word of mouth.' PENH Va does not identify who made these statements.); para. 633, fn. 2155 (The ICIJ finds district cadres were ordered to compile a list of names of people to be arrested and executed and relies on PEOU Sarom. PEOU Sarom states 'an elder woman told me that the Cham people would not be spared,' but does not identify the woman.); para. 252, fn. 620 (Regarding AO An's role as deputy secretary of the Central Zone, the ICIJ relies on RHY Nor, who states he heard from the 'unit chief' that Ta An was deputy zone secretary. He was uncertain whether this chief was Chhoeun or Thy.); para. 256, fn. 633 (Regarding AO An's alleged appointment and removal of cadre, the ICIJ relies on PENH Va, who states '[he] learned of the arrests of the commune chiefs and their deputies by word of mouth.').

¹⁷² *E.g.* Case 004/2-D360, para. 256, fn. 633 (Regarding AO An's appointment and removal of cadres, the ICIJ relies on statements of YOU Vann and PENH Va, both of which are based on hearsay.); para. 256, fn. 636 (Regarding AO An's supervision of worksites, the ICIJ relies on the statement of YOU Vann who was provided information by PRAK Yut.); para. 257, fn. 640 (Regarding AO An having received reports from lower levels,

Although hearsay evidence may be admitted and considered, it should be given less probative value, and extra caution is needed when assessing it. The ICIJ did not exercise such caution.¹⁷³ The SCC in Case 002/1 held that hearsay from anonymous sources or double hearsay cannot establish an element of crime or mode of liability beyond reasonable doubt.¹⁷⁴ Although the Defence recognises the standard of proof is lower at the Closing Order stage than at trial, similar restraint must be applied with respect to this type of evidence when determining the sufficiency of evidence for personal jurisdiction or an indictment.

vi. Conclusion on Ground 5

79. In sum, the ICIJ errs in ignoring the PTC's recent Case 004/1 holding and continuing to take a form-over-substance approach to evidence assessment without a basis in the law. In failing to assess the evidence's substance, the ICIJ ignores serious credibility issues of key witnesses and civil party applicants, the dubious methods of evidence extraction by OCIJ investigators, the lack of corroborative material for personal jurisdiction findings, and the need to exercise caution when relying on hearsay evidence.

E. Ground 6: The ICIJ errs in finding that AO An had a more significant position in the CPK and role in the most serious crimes than other known Khmer Rouge officials

80. The ICIJ errs in finding that AO An had a more significant CPK position and role in the most serious crimes in the Central Zone and Sector 41 from 1977 to 1979 than other

the ICIJ relies on YOU Vann who obtained her information from Phen and Ni.); para. 258, fn. 642 (Regarding AO An's authority over district military, the ICIJ relies on YOU Vann who was told this information by Ni.); para. 316, fn. 839 (Regarding AO An's authority over Sector marriages and propagation of marriage policy, the ICIJ relies on YOU Vann who was told this information by PRAK Yut.); para. 633, fns 2152, 2156, 2157, 2159, 2161 (Regarding AO An's orders to arrest Cham people, the ICIJ relies on NHIM Kol who 'heard PRAK Yut tell Rom' about the instructions, and also on YOU Vann who was told this information by Khom.).

¹⁷³ The ICIJ relies on double hearsay representations to support his finding that AO An ordered the transport of people to be 'smashed'. *E.g.* Case 004/2-**D360**, para. 300, fn. 799 (The ICIJ states KE PICH Vannak saw ten trucks transporting people towards Wat Phnom Pros Phnom Srei and 'reported [this] incident to his father Ke Pauk, who then made inquiries with Vey Reap, a Military Division Chairman in the Central Zone, who stated that [...] "brother [Ao] An ... [gave] an order to transport those people there where they will be smashed.'" KE Pich Vannak received this information from his father, KE Pauk, who received it from Vey Reap. **D6.1.379** (KE Pich Vannak WRI), EN 00346157). The ICIJ also fails to exercise caution in relying on hearsay from non-credible or uncorroborated witnesses. *E.g.* Case 004/2-**D360**, para. 259, fn. 653 (The ICIJ finds AO An attended meetings in Phnom Penh. In doing so, he relies on YOU Vann's account which is hearsay from PRAK Yut, a non-credible biased witness. **D219/702.1.87** (YOU Vann Transcript), EN 01438499, 01438503, pp. 58, 62); para. 267, fn. 680 (The ICIJ finds AO An furthered the Sector cooperative system by travelling throughout Sector 41 to cooperatives, villages, and districts to evaluate performance. He relies only on hearsay evidence from TOY Meach who learned this information 'from the Commerce Office that arranged the supplies'. **D219/582** (TOY Meach WRI), A66-A68.); para. 330, fn. 906 (The ICIJ states one witness gave reports of rice distribution to his wife who then gave them to AO An. In fact, this evidence is hearsay from the witness' wife. **D219/435** (TOUCH Chamroeun WRI), A188-190, A196, A236-239).

¹⁷⁴ Case 002-**F36**, paras 441-42.

known Khmer Rouge officials. In fact, AO An held no significant positions in the Central Zone or Sector 41 and had no roles in any of the charged crimes. As explained in Section II (B)(iv), unlike the NCIJ, the ICIJ fails to conduct a genuine comparison of AO An to other known Khmer Rouge officials; instead, he inexplicably limits his comparative analysis to Duch and IM Chaem.¹⁷⁵

81. A substantive analysis of the evidence reveals that AO An did not decide or interpret CPK policy and that he was not instrumental in the dissemination or implementation of these policies in the Central Zone or Sector 41. Moreover, he did not plan, orchestrate, or lead a purge of former Central Zone cadre or civilians from late 1976 to February 1977. AO An was not the acting secretary of the Central Zone in KE Pauk's absence. He did not hold the positions of *de jure* or *de facto* deputy secretary of the Central Zone or *de jure* or *de facto* secretary of Sector 41. And, even if he had held these positions, they would not have been significant positions in the CPK when compared to those of other known Khmer Rouge officials. Finally, AO An was not responsible for genocide in the zone, the alleged marriages or rapes in Prey Chhor or Kampong Siem Districts, or the charged crimes at the crime sites. Even if there were sufficient evidence of his responsibility, the evidence supporting the ICIJ's calculation of and conclusions about the number of victims in the Central Zone is insufficient. Therefore, AO An is not amongst those most responsible and within the Court's personal jurisdiction.

i. AO An did not determine or interpret CPK policy

82. The authority to determine CPK policies and their means of implementation or interpretation was limited to the Standing Committee and General Staff in Phnom Penh,¹⁷⁶ of which AO An was not a member. Neither the ICIJ nor the ICP have provided any evidence to the contrary.

ii. AO An was not instrumental to the implementation of CPK policies compared to other Khmer Rouge officials

83. Contrary to the ICIJ's findings, AO An was not 'a major player in the DK structure' or a 'willing and driven participant in the brutal and criminal implementation' of its

¹⁷⁵ Case 004/2-D360, para. 699.

¹⁷⁶ Case 004/2-D359, paras 464, 523; **D1.3.15.1** (Craig Etcheson, Hierarchy of DK), paras 11, 19; **D1.3.20.1** (CPK Statute dated 1976), art. 23.

policies.¹⁷⁷ Compared to Khmer Rouge officials, like Duch, KE Pauk, *Ta Mok*, and SAO Sarun, AO An was not instrumental in the implementation of CPK policies.

84. First, AO An did not directly communicate with the Standing Committee or General Staff in Phnom Penh. Neither the ICIJ nor the ICP have provided any evidence of AO An sending direct communications (via telegram or messenger) to Phnom Penh. AO An was also not a leader of an Autonomous Sector, like SAO Sarun, who had elevated status in the DK and received orders directly from senior officials on the Standing Committee in Phnom Penh, as admitted by the ICIJ.¹⁷⁸ In his findings regarding personal jurisdiction, the NCIJ emphasised the direct link between the Centre and Autonomous Sector secretaries.¹⁷⁹
85. Second, AO An did not determine which cadre from the Central Zone or Sector 41 would be sent to S-21, and there is no evidence of him communicating or coordinating with Duch or others in Phnom Penh regarding these matters. Neither the ICIJ nor the ICP have provided any evidence to the contrary. If AO An were instrumental to CPK policy implementation, such decisions would have been within his area of responsibility.
86. Third, the ICIJ also fails to provide sufficiently serious and corroborative evidence that AO An attended high-level Standing Committee meetings in Phnom Penh¹⁸⁰ with senior leaders, like POL Pot and NUON Chea, and instead, overstates the evidence relating to a single stopover in Phnom Penh during the trip from the Southwest Zone to the Central Zone.¹⁸¹ And, even if AO An had attended¹⁸¹ general meetings in Phnom Penh with hundreds of other cadre, his attendance would not have meant that he was a member of

¹⁷⁷ Case 004/2-**D360**, para. 712.

¹⁷⁸ Case 004/2-**D360**, para. 160 (The ICIJ finds Autonomous Sector secretaries, e.g. from Autonomous Sectors 105, 106, 505, and Kampong Som City, bypassed zone-level leaders and reported directly to the Centre in Phnom Penh.); *see also* **D6.1.141** (SAO Sarun WRI), EN 00278695-96 (SAO Sarun was the Secretary of Autonomous Sector 105 and discusses direct communications and meetings with POL Pot and NUON Chea.).

¹⁷⁹ Case 004/2-**D359**, paras 272-273.

¹⁸⁰ In addition to the stopover, the ICIJ often vaguely refers to ‘meetings in Phnom Penh’, relying on one uncorroborated witness and failing to provide any sufficient evidence of the details surrounding these meetings. Case 004/2-**D360**, para. 259, fn. 653 (The ICIJ relies on only YOU Vann’s Case 002 trial testimony in which she provides uncorroborated hearsay evidence from PRAK Yut, a non-credible witness. PRAK Yut told YOU Vann that she and AO An took monthly car trips to attend meetings in Phnom Penh, but YOU Vann did not know the specific location of meetings, whom they met, or any other details.).

¹⁸¹ E.g. Case 004/2-**D360**, paras 243-44, fns 594-595 (The ICIJ relies on PECH Chim, who is inconsistent in his accounts, stating he travelled with AO An to the Central Zone but not that AO An was at a meeting, and mentioning only short instructions being given. The ICIJ further relies on PRAK Yut, who in three of her four cited statements, denies that the stopover meeting took place, and on YOU Vann, who provides inconsistent statements as to whether AO An attended the meeting and, where she does make this claim, does so based on hearsay. Finally, PUT Kol and DEUR Ran both note that there was a stopover in Phnom Penh, but they state that they do not know why and do not mention a meeting taking place.).

the Standing Committee or General Staff or that he determined CPK policies or their means of implementation and dissemination.¹⁸²

87. Finally, the ICIJ has not provided sufficient evidence of AO An conducting or leading political, security, or military meetings or trainings in Sector 41 or the Central Zone to disseminate or implement CPK policies,¹⁸³ and even if he had or was present, this does not mean he was a key implementer, or otherwise most responsible. Moreover, if AO An had attended or spoken at meetings, these meetings would have concerned economics and improving the living conditions for the people; they would not have concerned political, security, or military matters.¹⁸⁴

¹⁸² Hundreds of cadre potentially attended the Phnom Penh stopover. If attendance were sufficient to determine personal jurisdiction, then all of these cadre would need to be investigated and prosecuted by the Court. *E.g.*: **D118/259** (PECH Chim WRI), A70 (PECH Chim states ‘[a]ll the people transferred to the Central Zone participated in that meeting.’). The following witnesses confirm they too were present at the Phnom Penh stopover, but they do not state that a meeting took place: **D219/762** (SARAY Hean WRI), A36-A38 (SARAY Hean recalls a ‘quick stop’ to ‘refuel’.); **D117/26** (PUT Kol WRI), A1-A2, A5-A7 (PUT Kol states PRAK Yut was also present at the stopover); **D117/27** (DEU Raun WRI), A1 (DEU Raun states PRAK Yut was also present at the stopover.); **D117/28** (KEO Vooun WRI), A5, A8 (KEO Vooun states PRAK Yut was also present at the stopover.); **D117/29** (MEN Nun WRI), A4-A5 (MEN Nun states PRAK Yut was also at the stopover.); **D117/39** (TO Sem WRI), A8, A20 (TO Sem recalls only a two-hour stop in Phnom Penh ‘for lunch’.).

¹⁸³ The ICIJ points to only a handful of alleged meetings about politics, security, or military in Sector 41, each supported by a single uncorroborated witness or civil party applicant. Often these individuals lack credibility, as explained in Section II (D)(ii). Moreover, the ICIJ often reframes the same meeting to support different findings without indicating that it is the same meeting, thereby distorting the number of meetings that potentially occurred. *See, e.g.* Case 004/2-**D360**, para. 246, fn. 600 (Regarding a meeting at which AO An supposedly appointed district secretaries and ordered them to assign district military and security personnel, the ICIJ relies only on the non-credible evidence of PRAK Yut.); para. 247, fns 601-03 (Regarding a meeting in March 1977 at Wat Ta Meak, at which AO An allegedly announced that he was the new Secretary of Sector 41, the ICIJ relies only on the non-credible account of PENH Va.); paras 275, 298, 491, fns 719, 790-91, 1595 (Regarding an alleged Wat Au Trakuon meeting, the ICIJ relies only on SENG Srun.); para. 283, fn. 739 (Regarding ‘regular meetings’ at which AO An ordered subordinates to arrest enemies, the ICIJ relies only on the non-credible evidence of NHEM Chen.); para. 287, fn. 746 (Regarding a meeting ‘convened’ by AO An ‘about killing plans’ where he ordered Ngauv and other subordinates to ‘carry out the “1977 plans”’, the ICIJ relies only on NHEM Chen.); para. 301, fns 800-03 (Regarding a meeting at Wat Ta Meak in ‘April or May 1977’ at which AO An ordered subordinates to identify certain people and trick others into coming forward, the ICIJ relies only on NHEM Chen.); para. 293, fns 766-68 (Regarding a meeting at Wat Ta Meak at which AO An ‘accused the Central Zone cadres of betrayal’ and warned that ‘more people will die from a soundless war’ than from the B-52s, the ICIJ relies only on PENH Va.); para. 302, fn. 804 (Regarding ‘monthly [sector] meetings’ at which AO An allegedly ordered district secretaries to identify and arrest ‘people to be smashed’, the ICIJ relies only on PRAK Yut.); para. 364, fns 1030-31 (Regarding meetings at which AO An instructed PRAK Yut to identify and list ‘certain categories of people’, the ICIJ relies only on PRAK Yut.); para. 311, fn. 831 (Regarding a meeting at which AO An allegedly ordered his district and commune chiefs to identify, for ‘purging’, ‘bad people’, those with ‘affiliations’, and ‘people of different ethnicities’, the ICIJ relies only on YOU Vann.); para. 465, fn. 1463 (Regarding an early 1977 meeting in Kang Meas District where ‘enemies’ were discussed, and after which arrests allegedly increased, the ICIJ relies only on SAMRET Muy, who is ‘not fully sure’ that he saw AO An at the meeting.); para. 589, fn. 1996 (Regarding AO An’s alleged leading of military meetings at Wat Ta Meak, the ICIJ relies only on NHEM Chen.); para. 636, fn. 2173 (Regarding a meeting ‘chaired by AO An’ at which YOU Vann was ‘instructed to make a second list of Cham names’, the ICIJ relies only on YOU Vann.).

¹⁸⁴ *E.g.* **D78** (CHIN Sinal WRI), A1-A4 (CHIN Sinal states AO An attended monthly meetings at Anlong Chrey Dam where he spoke about the completion of the dam construction.); **D117/31** (YOU Vann WRI), A24-A26 (YOU Vann states, ‘sometimes – once or twice per month’, AO An attended meetings with PRAK Yut and the

iii. AO An did not plan, orchestrate, or lead a purge of former Central Zone cadre or civilians in late 1976 to February 1977

88. The ICIJ errs in concluding that AO An planned, orchestrated, and led a purge of the former Central Zone cadre and civilians in late 1976 to February 1977.¹⁸⁵ First, he ignores sufficient evidence from witnesses and civil party applicants with direct knowledge demonstrating that the purge happened before the arrival of the Southwest Zone cadre and AO An,¹⁸⁶ that KE Pauk and Oeun were the only ones left when the Southwest cadre arrived in the Central Zone,¹⁸⁷ and that the Southwest Zone cadre came to fill vacant positions.¹⁸⁸ The principle of *in dubio pro reo* must be applied, and thus, it cannot be determined that AO An planned, orchestrated, or led a purge.
89. Second, when finding that AO An and the Southwest Zone cadre arrived in the Central Zone in late 1976 to February 1977, the ICIJ relies on witnesses and civil party applicants who provide non-credible, inconsistent accounts or vague and indeterminate time references, or they lack direct knowledge about the transfer.¹⁸⁹ Additionally, he relies on

commune and village chiefs of Kampong Siem District, during which farming was discussed. YOU Vann states she never heard discussions about arrests during these meetings.); **D117/50** (IM Pon WRI), A56 (The OCIJ investigator asks IM Pon whether he ever heard AO An's meetings with PRAK Yut and Sim, or with KE Pauk at the Zone, and also whether AO An spoke about the purge of cadre during meetings. IM Pon states he did not, and that the only topics he heard discussed were the dams, canals and worksites. He did not hear about arrests.); **D117/53** (SUN Chean WRI), A25-A26 (SUN Chean states he only saw AO An once from a distance at a worksite, and that, in meetings, he only ever heard instructions for people to work hard, but never instructions to lower-level cadre to identify enemies.); **D219/731** (NHEM Chen WRI), A68-A70 (NHEM Chen states AO An attended a meeting at Wat Batheay where he spoke about construction and food rations. It was only when NHEM Chen went to Wat Batheay with Sok – not AO An – that there were 'orders to kill'.).

¹⁸⁵ Case 004/2-**D360**, paras 212-17, 242-45, 276.

¹⁸⁶ **D117/19** (TEP Pauch WRI), A8; **D117/24** (PEOU Sarom WRI), A24; **D219/284** (PEOU Sarom WRI), A34; **D117/27** (DEU Raun WRI), A4; **D117/31** (YOU Vann WRI), A14; **D117/57** (KEAN Lei WRI), A7-A8; **D117/62** (KONG Yoeun WRI), A2; **D219/285** (HO Hoeun WRI), A7; **D118/259** (PECH Chim WRI), A167; **D6.1.650** (PECH Chim WRI), EN 00379172-73, pp. 7-8; **D6.1.690** (PECH Chim WRI), A9; **D6.1.386** (BAN Siek WRI), EN 00360752, p. 4; **D117/35** (BAN Siek WRI), A28-A29; **D219/136** (THAN Yang WRI), A5, A7.

¹⁸⁷ **D6.1.386** (BAN Siek WRI), EN 00360752, p. 4; **D117/35** (BAN Siek WRI), A28, A63.

¹⁸⁸ **D117/62** (KONG Yoeun WRI), A2; **D118/259** (PECH Chim WRI), A167; **D219/285** (HO Hoeun WRI), A7; **D6.1.650** (PECH Chim WRI), EN 00379172-73, pp. 7-8; **D6.1.690** (PECH Chim WRI), A9.

¹⁸⁹ Case 004/2-**D360**, paras 242-43, fns 591, 593. The ICIJ primarily relies on PRAK Yut, YOU Vann, PECH Chim, SANN Son, PHANN Chhen, TO Sem, and NHEM Chen. However, PRAK Yut, YOU Vann and NHEM Chen are not credible, as explained in Section II (D)(ii). **PRAK Yut** and **PECH Chim**: Moreover, the ICIJ ignores serious inconsistencies in the accounts of PRAK Yut, which the Defence explains in Section II (D)(ii)(a) and **Annex D**, and PECH Chim, who oversaw Chamkar Andaung Rubber Plantation in Sector 42. **D6.1.650** (PECH Chim WRI), EN 00379170-711, pp. 5-6 (After being asked closed questions by the OCIJ investigator, PECH Chim states he was appointed as District 105's interim secretary in late 1976 or early 1977; later he adds that he did not hear about any purge during this period; and finally, he states he was transferred to Chamkar Andaung rubber plantation in February 1977. The OCIJ investigator fails to ask follow-up questions.); *with* **D118/259** (PECH Chim WRI), A168-A171 (After being fed inculpatory information by the OCIJ investigator about AO An's transfer, PECH Chim adds that he arrived in February 1976 and that AO An arrived at the same date.); *with* **D219/702.1.103** (PECH Chim Case 002 Transcript), EN 01444540-41, 01444599-600, pp. 8-9, 67-68 (When testifying in Case 002, PECH Chim struggles to clearly define the date and can only confirm his previous statement after having his recollection refreshed.). **SANN Son**: Furthermore, SANN Son lacks direct

Duch's testimony and on S-21 entry dates to attempt to satisfy the requisite standard.¹⁹⁰ Finally, the ICIJ references the *Revolutionary Flag* reporting on the progress of the purge in the Central Zone, but these documents do not discuss the arrival of the Southwest Zone cadre or AO An.¹⁹¹

90. Third, without sufficient evidence, the ICIJ concludes that the reason for the Southwest Zone cadre's transfer was to conduct a purge of former cadre and civilians in the Central Zone.¹⁹² In fact, at best, the transfer was to undertake new work assignments, which the ICIJ admits in passing.¹⁹³ The majority of the witnesses and civil party applicants relied upon by the ICIJ simply refer to the Southwest Zone cadre coming as replacements,¹⁹⁴ do not provide any information establishing to the requisite standard that the purpose of the transfer was to purge the incumbent cadre,¹⁹⁵ or do not have direct knowledge of this matter.¹⁹⁶

knowledge of AO An's transfer. **D107/2** (SANN Son WRI) A5-A7, A11 (SANN Son states the Southwest Zone group arrived in early 1977, but he never heard about AO An.). **PHANN Chenn:** PHANN Chenn's account is vague, simply providing that *Ta Mok* sent him to the Central Zone, and he contradicts the ICIJ's finding. **D219/41** (PHANN Chhen WRI), A3, A7, A30 (PHANN Chenn states it was difficult to remember the date of PECH Chim's transfer and speculates it was in early 1977.). **TO Sem:** TO Sem does not provide any timeline reference in relation to the Southwest Zone's transfer. **D117/39** (TO Sem WRI), A6-A8. **Remaining accounts:** The other witnesses and civil party applicants provided by the ICIJ refer to vague or indeterminate time periods. **D107/7** (NHIM Kol WRI), EN 00787213, p. 3 (NHIM Kol states PRAK Yut arrived during the dry season in 1977.); **D117/32** (NHEM Kol WRI), A2 (NHEM Kol states the Southwest Zone cadre came at the end of 1976 or early 1977.); **D219/171** (NHIM Kol WRI), A2 (NHIM Kol states the Southwest Zone cadre arrived in the dry season in late 1976 or 1977.); **D117/26** (PUT Kol WRI), A2 (PUT Kol states many cadre of the Southwest Zone came in the dry season of 1977, around March.).

¹⁹⁰ Case 004/2-**D360**, para. 215, fn. 491; para. 247, fn. 604 (Relying primarily on Duch, the ICIJ concludes that because cadre, like Central Zone secretary KOY Thuon and his closest subordinates, were sent to S-21 as of early 1977, the purge must be attributed to the Southwest Zone cadre and AO An. However, this is mere speculation, as Duch only refers to the internal purges in a general manner and KOY Thuon's arrest and S-21 confession in early 1977, but he does not provide any evidence about the actions or transfer of the Southwest Zone cadre. The S-21 entry dates also do not link the Southwest Zone cadre or AO An to the alleged purge, but rather, merely show that certain individuals were no longer present in the Central Zone at specific times.).

¹⁹¹ Case 004/2-**D360**, para. 216, fn. 498.

¹⁹² Case 004/2-**D360**, para. 214, fns 489-90.

¹⁹³ Case 004/2-**D360**, para. 243.

¹⁹⁴ E.g. **D219/435** (TOUCH Chamroeun WRI), A65-67, A139-142 (TOUCH Chamroeun states he did not know why the former cadre were changed. Only after a leading question, he states the Southwest Zone cadre came to replace the cadre at the district- and zone-level.); **D117/71** (PRAK Yut WRI), A69 (PRAK Yut states she recalls meeting the previous district secretary and replaced him. This does not mean the goal of the Southwest Zone group's transfer was to purge the incumbent cadre.); **D219/285** (HO Hoeun), A7 (HO Hoeun states the purge occurred before the Southwest Zone cadre arrived. They were sent as replacements.).

¹⁹⁵ E.g. **D219/504** (SAT Pheap), A13-15 (SAT Pheap states some former cadre were arrested after the arrival of the Southwest Zone cadre and others were arrested before.); **D6.1.386** (BAN Siek WRI), EN 00360752, p. 4 (When asked about why and how former cadre were purged, BAN Siek states he had no idea about this.); **D219/442** (CHOM Vong WRI), A38 (Ngauv states many people, who had been accused of betraying the party, were arrested at the time. This does not mean the goal of the Southwest Zone group's transfer was to undertake the purge of the incumbent cadre.).

¹⁹⁶ E.g. **D219/331** (PHAN Sophal WRI), A1-A3, A13-A17 (PHAN Sophal worked in a sector mobile unit and lacks direct evidence about the alleged purge.); **D219/226** (PENH Va WRI), A2, A13 (PENH VA, a civil party

91. Fourth, as explained in Section II (E)(ii), the ICIJ overstates the evidence relating to the alleged planning meeting for the purge in Phnom Penh, which in fact was merely a stopover during the Southwest Zone cadre's trip to the Central Zone.
92. Finally, the ICIJ provides no other sufficient evidence of AO An ordering or participating in the purge in Sector 41.¹⁹⁷ As discussed in Sections II (E)(v)(b)(1), there is no sufficient evidence that AO An received orders from KE Pauk regarding the purge, that AO An ordered district secretaries to identify and execute people who complained about their working and living conditions,¹⁹⁸ or that AO An had the incumbent Central Zone cadre systematically purged and replaced.¹⁹⁹ Therefore, the ICIJ fails to provide serious and corroborative evidence that AO An planned, orchestrated, or led the purge of the incumbent cadre or civilians in the Central Zone.

iv. AO An did not have significant positions or authority in the Central Zone

93. AO An did not hold significant zone-level positions during the DK. He was not the acting secretary in the Central Zone when KE Pauk was absent and was not the *de jure* or *de facto* deputy zone secretary. He also did not have authority to make decisions or determine the means of CPK policy dissemination or implementation in the Central Zone. As explained below, the ICIJ's findings that AO An held these positions or had zone-level authority are not based on sufficiently serious and corroborative evidence. Even if AO An had held these positions, he could still not be considered amongst those most responsible.

a) AO An was not the acting secretary of the Central Zone when KE Pauk was absent

94. The ICIJ finds that AO An served as acting Central Zone secretary during periods when KE Pauk was absent from the zone.²⁰⁰ Yet, when examining the substance of the evidence, it is clear these findings are erroneous and not based on serious and

applicant, was a member of a textile unit in Prey Totueng. He did not know who gave the order to arrest the former cadre and speculates on how the Southwest Zone cadre must have issued this order.); **D219/293** (CHEAM Pao WRI), A1, A5-A8, A10 (CHEAM Pao, a civil party applicant, was about 15 years old when the Khmer Rouge came to power; worked in a commune mobile unit in early 1977; and lacks direct knowledge about the alleged purge.).

¹⁹⁷ Case 004/2-**D360**, paras 281-88, fns 737-52.

¹⁹⁸ Case 004/2-**D360**, para. 275, fns 718-19.

¹⁹⁹ Case 004/2-**D360**, paras 293-98, fns 765-91.

²⁰⁰ Case 004/2-**D360**, para. 255.

corroborative evidence. The ICIJ even admits that ‘no witnesses identify specific instances of when or how long he [AO An] held such a role’.²⁰¹

95. The ICIJ finds that AO An was acting zone secretary beginning around October 1978 until the fall of the regime, *i.e.* the last three months of the DK.²⁰² Even if true, this short tenure would not weigh in favour of AO An being amongst those most responsible, as required for personal jurisdiction. Furthermore, the evidence supporting this three-month tenure is not serious and corroborative, as three of the four witnesses relied on are inconsistent, contaminated by OCIJ investigators, or have motives to lie.²⁰³
96. In addition to the lack of sufficient evidence about when AO An was acting zone secretary, there is no direct evidence that AO An actually acted in KE Pauk’s absence.²⁰⁴ None of the witnesses provide direct evidence regarding: (a) when or whether KE Pauk may have delegated decision-making power to AO An during these absences;²⁰⁵ (b) how AO An received orders, communications, supervision, or direction from the Centre regarding the exercise of authority; (c) how AO An reported back to the Centre; (d) how AO An sent orders, communications, or directions to others in Sectors 42 and 43 to supervise or exercise authority over them; (e) whether AO An carried out these alleged zone duties from Prey Totueng District or Kampong Cham town or whether other sector secretaries or cadre in KE Pauk’s office visited and reported to AO An during these periods; or (f) AO An leading zone-level meetings or meetings occurring between AO An and other sector secretaries or cadre from KE Pauk’s office.

²⁰¹ Case 004/2-**D360**, paras 255, 262, 705.

²⁰² Case 004/2-**D360**, para. 255.

²⁰³ Case 004/2-**D360**, para. 255, fns 630-32 (The ICIJ relies on SARAY Hean, KE Pich Vannak, ORN Kim Eng, and IM Pon. **SARAY Hean:** When closely examining the evidence, it is clear that SARAY Hean speculates about AO An’s position and regurgitates information from the OCIJ investigators. Moreover, SARAY Hean is unable to provide any examples of specific instances in which AO An took over KE Pauk’s duties. **KE Pich Vannak:** KE Pich Vannak’s testimony is not credible, as he is the son of KE Pauk, and thus, may be motivated to lie to minimise his father’s role. Moreover, he fails to provide any details of AO An’s actions in this role. **ORN Kim Eng:** Finally, ORN Kim Eng’s testimony is inconsistent. He first states AO An was in charge when KE Pauk was absent, and then later states he never heard that AO An was KE Pauk’s zone under-secretary, even noting *Ta Moeun* or Hen replaced KE Pauk in his absence.)

²⁰⁴ **D117/35** (BAN Siek WRI), A37 (BAN Siek states he does not know who substituted for KE Pauk when he was absent from the zone.); **D117/39** (TO Sem WRI), A16 (TO Sem states KE Pauk never went to work outside of the jurisdiction of the zone.); **D117/50** (IM Pon WRI), A69 (The OCIJ investigator pointedly asks IM Pon to provide examples of when KE Pauk was absent and AO An replaced him. IM Pon merely answers that when KE Pauk was absent, AO An arranged the work at worksites and ministries in Kampong Cham and met people there, but that this was not regular.); **D118/259** (PECH Chim WRI), A217 (PECH Chim states he does not know whether AO An acted as the officer-in-charge when KE Pauk was absent.); **D219/762** (SARAY Hean WRI), A29-A30 (SARAY Hean states he did not know of any times when AO An took charge of KE Pauk’s work when he was absent.)

²⁰⁵ **D117/18** (PECH Chim WRI), A3-A5 (PECH Chim states KE Pauk made decisions alone and that he sent reports to him even when he was absent. AO An only had authority to make decisions with regard to Sector 41.)

97. Finally, the ICIJ ignores evidence contrary to his findings without explanation. The evidence on the Case File indicates that KE Pauk had absolute power at all times and that other cadre (not AO An) were in charge during KE Pauk's absences.²⁰⁶ Pursuant to the principle of *in dubio pro reo*, it cannot be determined that AO An held the role of acting zone secretary in KE Pauk's absence.

b) AO An was not the de jure deputy zone secretary

98. The ICIJ concludes it is highly likely that AO An was deputy secretary of the Central Zone from late 1977 until the end of DK.²⁰⁷ He finds that at a meeting in February 1977 in Kampong Cham, KE Pauk first announced that AO An was the second deputy secretary²⁰⁸ and then later, after Kang Chap's removal – the exact date of which is not established²⁰⁹ – AO An became the first deputy secretary.²¹⁰

99. However, to support his findings,²¹¹ the ICIJ relies on unsubstantiated, and often contaminated,²¹² testimonies merely stating that AO An held such a position.²¹³ The ICIJ

²⁰⁶ **D6.1.707** (SUON Kanil WRI), EN 00390075, p. 3 (SUON Kanil states when KE Pauk was absent, people came to meet Suor, then Nhean, Sen and Moeun.); **D29** (SUON Kanil WRI), EN 00716229, p. 5 (SUON Kanil states Moeun, the chief of the Central Zone office, was in charge when KE Pauk was absent and before him Suor, Sen and Nhean.); **D107/15** (BAN Siek WRI), EN 00841966, p. 4 (BAN Siek states Moeun was the only one who could be in charge when KE Pauk was absent.); **D117/18** (PECH Chim WRI), A3-A5 (PECH Chim states KE Pauk made decisions alone, and PECH Chim sent reports to him even when he was absent.); **D117/19** (TEP Pauch WRI), A12, A14 (TEP Pauch states Sim and Chên were deputies of KE Pauk; he never heard of AO An.); **D117/35** (BAN Siek WRI), A37, A65 (BAN Siek states he does not know who substituted KE Pauk when he was absent from the zone and that AO An could not have entered Sectors 42 and 43 to arrest people.); **D117/66** (ORN Kim Eng WRI), A10, A13 (ORN Kim Eng states Moeun or Hen carried out KE Pauk's duties when he was absent.); **D118/259** (PECH Chim WRI), A219 (PECH Chim states that Chhâm, who worked in KE Pauk's Zone Office, was the officer in charge when KE Pauk was absent.); **D219/504** (SAT Pheap WRI), A110 (SAT Pheap states he does not know if AO An ever held a position at the zone level.); **D219/704** (KIM Koeun WRI), A42 (KIM Koeun did not know if AO An was on the zone committee.); **D219/774** (OUM Seng WRI), A66 (OUM Seng did not know name of anyone in the Central Zone apart from KE Pauk.).

²⁰⁷ Case 004/2-**D360**, paras 250, 252, 261, 703, 705.

²⁰⁸ Case 004/2-**D360**, para. 251.

²⁰⁹ Case 004/2-**D360**, para. 704.

²¹⁰ Case 004/2-**D360**, para. 252.

²¹¹ Case 004/2-**D360**, para. 252, fns 620-21.

²¹² Case 004/2-**D360**, para. 252, fns 620-21 (The ICIJ relies on BAN Siek's and IM Pon's accounts. However, it is only following the OCIJ investigator's closed questions that BAN Siek states AO An was KE Pauk's deputy. With respect to IM Pon, the OCIJ investigator, through a series of closed questions, feeds the idea to him that AO An was deputy zone secretary until the end of the DK.).

²¹³ **D6.1.652** (PECH Chim WRI), EN 00380139, p. 9 (PECH Chim only states AO An was KE Pauk's deputy. The OCIJ investigator fails to ask follow-up questions.); **D6.1.707** (SUON Kanil WRI), EN 00390076, p. 4 (SUON Kanil only states AO An became deputy. The OCIJ investigator fails to ask follow-up questions.); **D29** (SUON Kanil WRI), EN 00716227, p. 3 (SUON Kanil states AO An was the deputy secretary in the Central Zone, but when the OCIJ investigator asks him about AO An's daily tasks, he replies that he does not know because AO An was doing his tasks in the sector.); **D117/18** (PECH Chim WRI), A2 (PECH Chim states AO An was KE Pauk's deputy but fails to provide information about AO An's duties in this position, and the OCIJ investigator fails to ask follow-up questions.); **D117/35** (BAN Siek WRI), A15 (Following an OCIJ's investigator's closed question, BAN Siek states AO An was KE Pauk's deputy. The OCIJ investigator fails to ask follow-up questions to determine the origin of this evidence.); **D117/39** (TO Sem WRI), A14 (TO Sem

provides no evidence at all regarding AO An's appointment date,²¹⁴ why AO An received a promotion, or what his duties were in this position.²¹⁵ The ICIJ also fails to explain how he reconciles the conflicting evidence regarding the duration of AO An's alleged tenure as zone deputy secretary.²¹⁶

100. Finally, the ICIJ illogically finds AO An had *de jure* responsibility for security matters in the Central Zone; yet, he admits there is no evidence of AO An exercising authority over security centres in Sectors 42 and 43.²¹⁷

c) AO An was not the de facto deputy zone secretary

101. The ICIJ erroneously finds that AO An exercised *de facto* powers as deputy secretary in the Central Zone.²¹⁸ First, the ICIJ determines that AO An administered and oversaw construction projects throughout the Central Zone.²¹⁹ However, there is no serious and

states AO An was the deputy without providing any details about his duties. The OCIJ investigator fails to ask follow-up questions to determine the origin of this evidence.); **D117/50** (IM Pon WRI), A29, A75 (After the OCIJ investigator feeds him information, IM Pon confirms AO An was KE Pauk's deputy secretary. The OCIJ investigator fails to ask follow-up questions to determine the origin of his knowledge.); **D118/259** (PECH Chim WRI), A156, A162, A165, A208, A216 (PECH Chim only states AO An was KE Pauk's deputy. The OCIJ investigator fails to ask follow-up questions.); **D219/178** (KUCH Ra WRI), A6 (KUCH Ra, a soldier located in Kampong Cham Province, states AO An was KE Pauk's deputy; that he saw AO An joining meetings; but that he never attended meetings himself. The OCIJ investigator fails to ask follow-up questions to determine the origin of this evidence.); **D219/249** (SUON Kanil WRI), A4 (SUON Kanil states AO An was the deputy, without giving details about his duties in this position. The OCIJ investigator fails to ask follow-up questions.); **D219/355** (BAN Siek WRI), A9 (After the OCIJ investigator suggests that AO An conducted meetings in the Central Zone, BAN Siek states AO An was KE Pauk's deputy but that he never met AO An in the Central Zone or any other zone committee members. The OCIJ investigator fails to ask follow-up questions to determine the origin of this evidence.); **D219/870** (RY Nha WRI), A33-34, A37 (RY Nha states during meetings at the dam worksite, he assumed that AO An was zone deputy chief and that he does not know what AO An was responsible for.); **D219/702.1.75** (BAN Siek Case 002/02 Transcript), EN 01409566-67, pp. 53-54 (After the prosecution suggests to BAN Siek that AO An was KE Pauk's deputy secretary, he replies in the affirmative. The prosecution fails to ask follow-up questions to determine the origin of this evidence.).

²¹⁴ Case 004/2-**D360**, para. 704 (The ICIJ merely finds that after KANG Chap was transferred to the New North Zone at an unknown date, AO An became deputy secretary in the Central Zone.).

²¹⁵ The witnesses fail to provide details as to AO An's responsibilities in this position. *E.g.* **D29** (SUON Kanil WRI), EN 00716227, p. 3 (SUON Kanil states AO An was the deputy secretary in the Central Zone, but when the OCIJ investigator asks him about AO An's daily tasks, he states he does not know.); **D117/18** (PECH Chim WRI), A3 (When the OCIJ investigator asks PECH Chim about AO An's duties as zone deputy secretary, he responds that AO An was zone deputy secretary but did not have the power to make decisions.); **D219/178** (KUCH Ra WRI), A6-A7 (KUCH Ra states AO An was KE Pauk's deputy and a member of the zone committee; however, he does not know about the committee's work.); **D219/870** (RY Nha WRI), A45 (RY Nha states he does not know about AO An's responsibilities as zone deputy secretary.).

²¹⁶ Case 004/2-**D360**, para. 252, fns 621, 623 (The ICIJ provides evidence from IM Pon, who states AO An remained the zone deputy secretary until the end of the DK, and TO Sem, who states AO An was demoted about six months before the Vietnamese arrived and was replaced by Sim. Without explanation or reason, the ICIJ concludes IM Pon's testimony is more reliable than TO Sem's. IM Pon was a driver who only occasionally worked with AO An while TO Sem was the wife of the promoted cadre offering inculpatory evidence of her husband.).

²¹⁷ Case 004/2-**D360**, para. 261.

²¹⁸ Case 004/2-**D360**, paras 259, 260, 703-05.

²¹⁹ Case 004/2-**D360**, para. 259, fn. 650; para. 267, fn. 670.

corroborative evidence to support this conclusion, as the ICIJ only relies on the unsubstantiated and uncorroborated account of CHAN Sang²²⁰ and AO An's own declarations about working on construction matters.²²¹ Furthermore, the ICIJ ignores exculpatory evidence about 1 January Dam, which was allegedly a zone-led worksite.²²² The ICIJ also concludes AO An visited other sectors and worksites throughout the Central Zone.²²³ However, there is no credible evidence that AO An travelled outside of Sector 41 to *oversee* worksites, and the three witnesses relied upon by the ICIJ only discuss visits to sites, not AO An controlling or administering the sites.²²⁴

102. Second, the ICIJ finds AO An provided workers and resources from Sector 41 to worksites throughout the Central Zone,²²⁵ but a close analysis of the evidence's substance does not support this finding.²²⁶ Further, such a finding would be more indicative of a lower role and not a role indicating AO An was amongst those most responsible.

²²⁰ **D117/21** (CHAN Sang WRI), A15-A16 (CHAN Sang only states AO An was the chairman of the 5 January dam, located in Sector 43 and that she met him during a meeting to celebrate the closing of the site.); **D219/179** (CHHAN Sang WRI), A12 (CHHAN Sang states AO An was responsible for the 5 January dam, but she does not know what his duties were.).

²²¹ **D219/847.1** (AO An DC-Cam Statement), EN 01373576-77, 01373580-81, 01373583, pp. 52-53, 56-57, 59 (AO An states he worked at the 1 January Dam and other worksites, but after a series of closed questions by the interviewer, he states he merely led the workforces of Sector 41 in these locations.).

²²² There is significant evidence supporting the fact that the 1 January Dam was actually controlled by KE Pauk and not AO An. If AO An had zone-level authority, as found by the ICIJ, AO An should have had a role at this dam. **D6.1.379** (KE Pich Vannak WRI), EN 00346149-50, pp. 5-6 (KE Pich Vannak states he accompanied his father, KE Pauk, to prepare a plan to build the 1 January Dam, which was under the control of the Central Zone committee composed of KE Pauk, Sreng, Tol and Ch n.); **D6.1.384** (TEP Poch WRI), EN 00351703, p. 5 (TEP Poch states KE Pauk took the lead in the construction of the 1 January Dam worksite.); **D6.1.410** (MEAS Laihuo WRI), EN 00244165, p. 5 (MEAS Laihuo states KE Pauk came to inspect the 1 January Dam.); **D6.1.437** (KE Un WRI), EN 00283343-00283344, pp. 5-6 (KE Un, KE Pauk's driver, states he accompanied KE Pauk at the 1 January Dam worksite almost every day.); **D6.1.675** (IENG Chham WRI), EN 00410235-37, pp. 8-10 (IENG Chham states the master plan of the 1 January Dam was set by KE Pauk, who presided over the opening ceremony of the worksite.); **D6.1.722** (PRAK Yut WRI), A18 (PRAK Yut states the 1 January Dam was the project of the Central Zone under the control of KE Pauk.); **D219/702.1.96** (OR Ho Case 002 Transcript), EN 01503143, 01503146, pp. 32, 35 (OR Ho was a worker at the 1 January and 6 January Dams. He states KE Pauk was assigned from the upper echelon to be in charge. He does not mention AO An.).

²²³ Case 004/2-**D360**, para. 259, fn. 651.

²²⁴ **D117/21** (CHAN Sang WRI), A15-A16 (CHAN Sang states she met AO An during a meeting to celebrate the closing of the 5 January Dam.); **D219/179** (CHHAN Sang WRI), A12 (CHHAN Sang states AO An was responsible for the 5 January Dam, but she does not know what his duties were.); **D117/50** (IM Pon WRI), A41 (IM Pon states AO An went to the 1 January Dam and 6 January Dam. The OCIJ investigator fails to ask the witness follow-up questions to determine the origin of this evidence.); **D219/731** (NHEM Chen WRI), A72-A79 (NHEM Chen states AO An visited Chamkar Leu (Sector 42), Kampong Thom (Sector 43), and Phnom Penh. He does not mention any worksites.).

²²⁵ Case 004/2-**D360**, para. 259, fn. 652.

²²⁶ Case 004/2-**D360**, para. 259, fn. 652 (The ICIJ relies on AO An's DC-Cam Statement, in which he merely states they took forces and mobile units from Sector 41, Sector 42, and Sector 43 to build the 1 January Dam and the 6 January Dam. He further relies on SAT Pheap's and NHIM Kol's account. However, SAT Pheap only states the dam (unclear which one) was a zone project to which each nearby sector had to send workers but does not mention AO An. NHIM Kol states he sometimes travelled to other districts to take food there, but he does not mention AO An.). The ICIJ also fails to address conflicting evidence. *E.g.* **D6.1.722** (PRAK Yut WRI),

103. Third, the ICIJ infers that AO An must have been deputy zone secretary because he attended meetings in Phnom Penh and zone-level meetings in Kampong Cham to plan the purge.²²⁷ However, as explained in Section II (E)(ii), (E)(iv)(c), the evidence does not support this finding to the requisite standard of proof. The ICIJ also determines that AO An was deputy zone secretary because of his alleged attendance at zone-level military meetings and appointment of a commander in Regiment 71 in Division 117.²²⁸ Yet, these findings are not supported by direct, serious, and corroborative evidence.²²⁹ Moreover, the ICIJ fails to provide any additional sufficient evidence of AO An addressing zone-level security matters, including at the alleged zone security centre, Wat Phnom Pros.²³⁰
104. Finally, the ICIJ provides no other evidential justification for his finding that AO An was *de facto* deputy zone secretary.²³¹ He uses AO An's alleged position as deputy zone secretary to make several findings without providing any reasoned evidential basis.²³²

A16-A17, A19-A20, A22 (PRAK Yut states she was requested by Comrade Sreng, and not AO An, to send workers from Kampong Siem district to the 1 January Dam worksite.).

²²⁷ Case 004/2-D360, para. 259.

²²⁸ Case 004/2-D360, para. 260. The Defence notes that the ICIJ admits it is unclear whether AO An attended regular zone-level military meetings as a sector secretary or zone member.

²²⁹ Case 004/2-D360, para. 260, fns 657-58 (The ICIJ relies on NIB Kimheng, NHEM Chen, KUCH Ra, and BAN Siek. However, NIB Kimheng merely states the first office of Division 117 was located in Kampong Cham Provincial Town; there is no mention of AO An. NHEM Chen, who is not credible, states AO An went to military meetings in Kampong Cham, but his basis of knowledge is unclear because he admits not traveling with AO An to these meetings. KUCH Ra states he saw AO An many times going to meetings in Kampong Cham Province with KE Pauk, but his basis of knowledge is also unclear, as he did not join the meetings. BAN Siek states SON Sen was the Zone Chairman and the Military Commander, but he does not mention any meetings.).

²³⁰ Case 004/2-D360, paras 542-44, fns 1807-09 (The ICIJ admits Wat Phnom Pros was under the control of KE Pauk and CHHIT Choecun until the end of the DK. He fails to provide sufficiently serious evidence supporting his finding that AO An planned, with the Central Zone committee, to send people to this security centre.); para. 545, fn. 1820 (The cited evidence from NHEM Chen and KE Pich Vannak demonstrates AO An had almost no role in relation to Wat Phnom Pros. NHEM Chen, who is not credible, states when letters were issued to arrest people from the East Zone, they would be arrested, placed at AO An's place, and sent for execution at Phnom Pros Phnom Srei. He does not state who issued the letters, but rather, is speculating. KE Pich Vannak's uncorroborated, non-credible evidence is also not sufficient to satisfy the standard of proof. KE Pich Vannak is motivated to lie to protect his father and his family's name.); para. 555 (There is no sufficient evidence that AO An visited the site.).

²³¹ Case 004/2-D360, para. 849 (The ICIJ acknowledges there is not sufficient evidence to conclude that AO An had control over the perpetrators of the alleged genocide in Sector 42 and Sector 43.). The Defence submits there is little, if any, evidence of AO An participating in zone-level meetings or receiving and implementing orders from KE Pauk on a zone-wide basis. There is no evidence of AO An appointing any sector or district secretaries in Sectors 42 and 43, visits to Sector 41 by zone-level, Sector 42, or Sector 43 messengers, or any evidence of AO An's messengers travelling to Kampong Cham town or other sectors to deliver or receive telegrams or reports.

²³² Case 004/2-D360, para. 719 (AO An was a central participant in the widespread and systematic attack against the civilian population.); para. 826 (AO An was aware of all CPK activities in his sector and zone.); para. 834 (AO An oversaw the implementation of CPK marriage policy.).

These findings do not meet the requisite standard of proof because they are not based on sufficiently serious and corroborative evidence.²³³

105. Even if AO An were the deputy zone secretary, it would not mean he was amongst those most responsible and within the Court's personal jurisdiction. The ICIJ only finds that AO An held this position for a short period, at most from late 1977 until the end of the DK – about one year. This short period would not demonstrate that AO An held a significant position or role in relation to the administration, decision-making process, or dissemination or implementation of CPK policies at the zone level. Thus, AO An would not qualify as one of those most responsible for the charged crimes.

v. AO An did not have significant positions or authority in Sector 41

106. As discussed in the subsections below, an analysis of the evidence's substance does not reveal that AO An was the *de jure* or *de facto* secretary of Sector 41 or that he had authority to decide the means of CPK policy dissemination or implementation in Sector 41. Even if AO An had this position or authority, it would not mean he was amongst those most responsible.

107. The Defence notes that when determining AO An's position, role, and authority in Sector 41, the ICIJ repeatedly overstates and misrepresents the evidence,²³⁴ and he often uses language that does not accurately reflect the evidence²³⁵ – a failure in his duty to search impartially for the truth.

²³³ Code of Criminal Procedure (France), art. 184 (providing that orders issued by an investigating judge 'state the legal qualification of the actions he [the person under judicial investigation] is charged with and state precisely the grounds for which there is or is not sufficient evidence against him').

²³⁴ For example, the ICIJ mischaracterises the evidence concerning Kampong Siem District and represents it as evidence of AO An's authority over all districts in Sector 41. *E.g.* Case 004/2-D360, para. 633 (After considering PRAK Yut's uncorroborated evidence about lists of Cham people being made in Kampong Siem District, the ICIJ states: 'there is evidence that lists of Cham were also made in Kang Meas and Cheung Prey Districts; it can be inferred that this was also on [AO] An's orders'. No evidence on the Case File supports this conclusion.). Additionally, the ICIJ infers AO An ordered arrests and executions from the mere occurrence of these events, and with no evidence of AO An actually issuing orders. *E.g.* Case 004/2-D360, para. 295, fn. 774 (In connection with the alleged arrest of Met Sop, the ICIJ relies on accounts from TOY Meach, KHUN Saret, SAT Pheap, SOEUNG Lim, and DUONG Sim. However, neither TOY Meach nor KHUN Saret mention AO An having a role in the arrest or execution of Sop or Sop's network. SAT Pheap merely states Sop was arrested by 'sector cadres' with no specific reference to AO An. SOEUNG Lim, KUNG Ting, and DUONG Sim state Sop was arrested when the Southwest Zone cadres arrived but do not mention any orders from AO An.).

²³⁵ At times, the ICIJ even appears to deliberately use techniques to avoid conceding, based on the evidence, that AO An lacks authority. *E.g.* Case 004/2-D360, para. 295, fn. 775 (When describing AO An's order for the arrest and execution of Sop and his clique, the ICIJ uses the passive voice and states Ngauv 'was appointed to replace Sop'. In the context of the paragraph, this language leads the reader to believe that AO An replaced Sop with Ngauv. In fact, the evidence does not support this conclusion.).

a) AO An was not the de jure secretary of Sector 41

108. The ICIJ's determination that AO An was *de jure* Sector 41 secretary²³⁶ is not based on sufficient evidence. There is no serious and corroborative evidence of KE Pauk appointing AO An to this position, the exact date on which and the specific location where the appointment occurred, or the reasons for AO An's appointment.²³⁷ Additionally, there is insufficient evidence – *i.e.* only a single uncorroborated, non-credible civil party applicant statement – that AO An announced he held the sector secretary position in March 1977 during a meeting at Wat Ta Meak.²³⁸ The ICIJ fails to provide sufficient evidence that AO An was *de jure* Sector 41 secretary.

b) AO An was not the de facto secretary of Sector 41

109. The ICIJ fails to establish to the requisite standard that AO An had *de facto* authority as Sector 41 secretary: AO An did not receive or implement orders from KE Pauk or the Central Zone committee about any matters in Sector 41 or report about the situation in Sector 41 to KE Pauk. He did not appoint district secretaries, commune secretaries, or other key personnel in Sector 41, and he did not have authority to remove, replace, or punish these individuals. AO An did not issue orders to or authorise the actions of these individuals, and he did not receive reports from them. Finally, AO An did not participate

²³⁶ Case 004/2-D360, paras 245-49, 703.

²³⁷ Case 004/2-D360, para. 245, fn. 598. (The ICIJ relies on PRAK Yut and PECH Chim, neither of whom provide credible, consistent, and corroborated evidence. Part of the evidence attributed to PRAK Yut is from the OCIJ investigator feeding her inculpatory information. **D117/70** (PRAK Yut WRI), A20, A23. Furthermore, as explained in Section II(D)(ii)(a) and **Annexes C and D**, the ICIJ ignores the fact that PRAK Yut is motivated to lie and has contradicted herself on several occasions regarding AO An's position in Sector 41. Similarly, PECH Chim is inconsistent on both the occurrence of the appointment and the date. *Compare* **D219/702.1.99** (PECH Chim Case 002/02 Transcript), EN 01418921, p. 75 (PECH Chim declares that during the meeting in Kampong Cham with KE Pauk, KE Pauk allocated responsibility to the districts. He does not mention AO An's appointment.); *with* **D117/18** (PECH Chim WRI), A1 (PECH Chim states he was sent to Phnom Penh in February 1977.); *with* **D6.1.651** (PECH Chim WRI), EN 00379306, p. 6 (PECH Chim states he was transferred to the Central Zone in Kampong Cham on 12 February 1977.); *with* **D118/259** (PECH Chim WRI), A169, A173 (PECH Chim states he travelled to Phnom Penh and arrived in the Central Zone on 14 February 1976, on the same day as AO An.). The ICIJ unsuccessfully attempts to corroborate PRAK Yut's and PECH Chim's evidence with non-credible statements from YOU Vann and PUT Kol. YOU Vann explains she never attended a meeting in Kampong Cham or with any senior ranking people and does not mention AO An's alleged appointment. She admits PRAK Yut told her about various individuals' positions. PUT Kol only speaks about AO An having the title of secretary but does not provide information about AO An's appointment, details of his activities or evidence about attending a meeting in Kampong Cham town. She has close ties with PRAK Yut and may be altering her story to protect PRAK Yut.).

²³⁸ Case 004/2-D360, para. 247, fn. 603 (The ICIJ relies on PENH Va, who states AO An announced he was the new secretary of Sector 41 during a meeting in a pagoda in Chrey Vien Commune. He attempts to corroborate PENH Va's non-credible account with evidence on the removal date of AO An's predecessor, *Ta Taing*. However, this evidence is not directly relevant and does not corroborate the account.).

in or lead meetings about politics, security, or military matters. Contrary to the ICIJ's finding, AO An did not exercise the statutory powers of sector secretaries.²³⁹

(1) AO An did not receive, implement, or report on zone-level orders in Sector 41

110. The ICIJ erroneously finds that, as Sector 41 secretary, AO An received, implemented, and reported on orders from KE Pauk or the Central Zone committee to arrest and kill former cadre and enemies in Sector 41.²⁴⁰ In addition, he errs in finding that, on KE Pauk's orders or after consultation with him, AO An plotted to replace former cadre and to transport people from the East Zone to Sector 41 for execution.²⁴¹ There is very little credible evidence, if any, of AO An, or any of his alleged subordinates, communicating directly or indirectly with KE Pauk or other zone-level cadre, *e.g.* through meetings, telegrams, or KE Pauk's subordinates. Despite all the contemporaneous documents on the Case File, not one document records a meeting between AO An and KE Pauk or anyone else at the zone level.²⁴²

111. Furthermore, the ICIJ again fails to examine the substance of the evidence on which he bases these findings. Instead, he relies on (a) non-specific witness statements about AO An attending 'monthly meetings' with KE Pauk,²⁴³ (b) uncorroborated, non-credible statements from NHEM Chen²⁴⁴ about KE Pauk giving AO An arrest orders at a meeting

²³⁹ Case 004/2-D360, para. 256.

²⁴⁰ Case 004/2-D360, paras 257, 276-78, 394.

²⁴¹ Case 004/2-D360, paras 297, 309, 394.

²⁴² There is only one DK-era telegram on the Case File referring to both AO An and KE Pauk. This document does not demonstrate that AO An received orders from KE Pauk. **D1.3.13.1** (Telegram 32, 29 Mar. 1978).

²⁴³ Case 004/2-D360, para. 276, fn. 721 (The ICIJ relies on accounts from NHEM Chen, PECH Chim, PRAK Yut, and BAN Siek, which are non-specific and, in some cases, non-credible. Furthermore, the statements of PRAK Yut, BAN Siek, and PECH Chim do not corroborate NHEM Chen's accounts. **NHEM Chen**: NHEM Chen is not a credible witness, as explained in Section II(D)(ii)(d), and his statements are inconsistent. *E.g. compare D219/731* (NHEM Chen WRI), A31, A33, A35-A36 (NHEM Chen claims he sometimes accompanied AO An to Kampong Cham for meetings with KE Pauk but 'did not know when there would be a meeting'; he admits that he was not allowed to attend 'secret meetings'.); *with D219/855* (NHEM Chen WRI), A5 (NHEM Chen revises his account of the meetings' frequency and states KE Pauk and AO An held a 'comprehensive meeting' in Kampong Cham exactly once a month.). **PECH Chim**: PECH Chim mentions monthly meetings but does not mention AO An or instructions from KE Pauk. Instead, he states KE Pauk worked closely with his wife, Soeun, her younger sibling-in-law, Oeun, and his right-hand man, Chham. **D117/18** (PECH Chim WRI), A7-A9; **D118/259** (PECH Chim WRI), A59-A60. **PRAK Yut**: PRAK Yut states she attended zone meetings held by KE Pauk once every three months; the issues concerned economy, culture, and social work. She does not mention AO An and actually admits she forgot all the names of Sector 41 Committee members. **D6.1.730** (PRAK Yut WRI), EN 00364082, pp. 5-6; **D117/71** (PRAK Yut WRI), A56-57. **BAN Siek**: BAN Siek never states he attended monthly meetings with AO An, but rather, mentions that AO An was on the zone committee. **D107/15** (BAN Siek WRI), EN 00841965, p. 3; **D6.1.386** (BAN Siek WRI), EN 00360756-57, pp. 8-9.).

²⁴⁴ The ICIJ also overstates and misrepresents NHEM Chen's knowledge of these events, as NHEM Chen admits he was not always present for meetings and could not hear discussions. *E.g. D219/731* (NHEM Chen WRI), A34 (NHEM Chen claims he sometimes 'stood close' and then sometimes far from AO An in meetings, but nevertheless, somehow, he was 'able to hear the discussions, because [he] concentrated on listening'.);

in Kampong Cham,²⁴⁵ about KE Pauk, AO An, and zone committee members devising a plan to invite incumbent cadre to fake ‘study sessions’ to arrest and kill them,²⁴⁶ and about AO An receiving written ‘kill orders’ from KE Pauk ‘every one to three months’;²⁴⁷ and (c) uncorroborated, non-credible statements from PRAK Yut about AO An’s alleged ‘consultation’ with KE Pauk.²⁴⁸

112. Finally, contrary to the ICIJ’s findings,²⁴⁹ AO An did not report to the zone level regarding arrests and executions in Sector 41. The ICIJ fails to cite any witnesses who specifically confirm that AO An made these reports, and he does not sufficiently establish a pattern or practice for how reporting worked in the Central Zone.²⁵⁰ Rather, the ICIJ makes broad reference to two other sections in the *ICIJ Closing Order (Indictment)*, neither of which support his findings.²⁵¹ The ICIJ erroneously relies on AO An’s alleged *de jure* status to draw conclusions about his *de facto* position, and therefore, fails to provide sufficient evidence of AO An receiving, implementing, or reporting on KE Pauk’s orders.

(2) AO An did not have authority to appoint district secretaries, commune secretaries, or other key personnel in Sector 41

113. The *ICIJ Closing Order (Indictment)* finds that AO An appointed district secretaries²⁵² and other cadre at the sector, district, and commune levels.²⁵³ However, the

D219/855 (NHEM Chen WRI), A108-A112 (NHEM Chen admits he never heard AO An explaining the subjects of the zone military/division meeting.), A203-A205 (When AO An was speaking at the meeting in Kampong Cham, NHEM Chen admits he ‘missed listening to him at that time. I went out of the meeting to relieve myself. When he was talking, I was relieving myself [...] He did talk, but I did not know what he talked about.’ When the other sector secretaries spoke about steps to ‘achieve the plan set by the Party’, NHEM Chen also states he was ‘not interested in listening to their reports’.).

²⁴⁵ Case 004/2-**D360**, para. 277, fns 723-26 (The ICIJ provides only NHEM Chen’s account.).

²⁴⁶ Case 004/2-**D360**, para. 278, fns 727-29 (The ICIJ misleadingly cites BAN Siek’s statements to corroborate NHEM Chen. However, in the referenced statements, BAN Siek admits to not knowing whether the upper echelon was informed about purges conducted by the lower echelon and makes no mention of AO An, KE Pauk, or any discussion of a plan involving such sessions.).

²⁴⁷ Case 004/2-**D360**, para. 277, fn. 726 (The ICIJ relies only on NHEM Chen, who provides hearsay and speculation.).

²⁴⁸ Case 004/2-**D360**, para. 297, fn. 784 (The ICIJ relies exclusively on PRAK Yut, who lacks credibility. The other individuals, YOU Vann and NHIM Kol, do not actually refer to a consultation and do not corroborate PRAK Yut.).

²⁴⁹ Case 004/2-**D360**, para. 257.

²⁵⁰ Case 004/2-**D360**, para. 257 (The ICIJ assumes AO An reported to zone level because such a practice was ‘in line with the vertical reporting structure within the CPK’.).

²⁵¹ Case 004/2-**D360**, para. 257, fn. 641 (The ICIJ refers to Section 6.1.5 and Section 6.3.4.2 of the Closing Order. The first referenced section deals only with the general ‘statutory powers of zones and sectors in DK’, and does not mention AO An at all, and the second referenced section focuses on ‘re-education’ and ‘killing of enemies’ but cites no evidence about AO An’s alleged reporting.).

²⁵² Case 004/2-**D360**, para. 246.

ICIJ provides no serious or corroborative evidence to support these findings, and the evidence provided is almost exclusively related to one district, Kampong Siem District, and from one non-credible witness, PRAK Yut,²⁵⁴ whom he occasionally attempts to corroborate with statements from YOU Vann, PEOU Sarom, PENH Va, SUON Kanil, and PRAK Ny.²⁵⁵ However, the ICIJ misrepresents and overstates the evidence from these individuals, as none of them have direct evidence of AO An appointing PRAK Yut or any other cadre at the district or commune levels.²⁵⁶

114. The ICIJ also finds that AO An delegated economic work to various cadre in the sector.²⁵⁷ However, even assuming *arguendo*, that the evidence underlying this finding were serious and corroborative, which it is not,²⁵⁸ it does not support the conclusion that AO An had authority to appoint key personnel, and thus, *de facto* authority over Sector 41. The authority to delegate economic work is not equivalent to the authority to appoint district and commune secretaries. Rather, it is more indicative of AO An possessing a lower-level position involving economics and not being sector secretary.

²⁵³ Case 004/2-**D360**, para. 256.

²⁵⁴ Case 004/2-**D360**, para. 246, fn. 600.

²⁵⁵ Case 004/2-**D360**, para. 256, fn. 633; para. 423, fn. 1278.

²⁵⁶ **YOU Vann**: YOU Vann offers no evidence about district-level appointments, and she speculates that PRAK Yut's orders to change commune chiefs came from AO An. She did not personally witness these orders or appointments or attend meetings where they may have been discussed, but rather, she heard from Khom that new commune chiefs were needed. **D219/138** (YOU Vann WRI), A45, A47. **PEOU Sarom**: PEOU Sarom admits PRAK Yut told her about AO An's appointment to Sector 41 secretary. She does not discuss the appointment of other district- or commune-level cadre. Although she states AO An appointed PRAK Yut to be Kampong Siem District secretary, the origin of the evidence is unclear (likely hearsay from PRAK Yut), as she does not appear to have attended the meeting where this happened. The OCIJ investigator fails to ask PEOU Sarom about the origin of her evidence. The Defence reiterates that hearsay evidence from PRAK Yut cannot be used to corroborate evidence from PRAK Yut. **D117/24** (PEOU Sarom WRI), A6, A7, A11. **PENH Va**: PENH Va states AO An announced his own position at a meeting, but he does not mention AO An appointing others. He speculates about AO An and Aun giving orders to arrest former cadres in Sector 41, but he does not mention anything about the appointment of replacements. **D219/226** (PENH Va WRI), A10, A13. **SUON Kanil and PRAK Ny**: Both witnesses discuss PRAK Yut controlling Kampong Siem District, but they say nothing about AO An appointing her. **D6.1.697** (SUON Kanil WRI), EN 00384428, p. 7; **D6.1.707** (SUON Kanil WRI), EN 00390076, p. 4; **D219/26** (PRAK Ny WRI), A26.

²⁵⁷ *E.g.* Case 004/2-**D360**, para. 271 (The ICIJ finds AO An requested *Ta Am* to supervise Sector 41 workers at 1 January Dam and sent Sim to construct 6 January Dam.); para. 330 (The ICIJ finds AO An assigned *Ta Chhin* to be in charge of sector mobile units at Anlong Chrey Dam.).

²⁵⁸ Case 004/2-**D360**, para. 271, fns 701-702 (The ICIJ finds AO An delegated *Ta Am* to supervise workers from Sector 41 at the 1 January Dam worksite and cites only insufficient evidence from SAT Pheap and TO Sem.); para. 330, fn. 902 (The ICIJ finds AO An assigned *Ta Chhin* to be in charge of sector mobile units at Anlong Chrey Dam and cites only insufficient evidence from PHORN Sophal.).

(3) AO An did not have authority to remove, replace, or punish district secretaries, commune secretaries, or other key personnel

115. The ICIJ repeatedly finds that AO An had authority to remove, replace, and punish cadre in Sector 41.²⁵⁹ However, he fails to explain whether ‘remove’ means transfer cadre between positions; dismiss or demote cadre from positions; or arrest, execute, or punish them, and instead, he generally combines all actions together to create an illusion of AO An having significant authority. He also combines together all types of cadre, failing to distinguish between sector, district, and commune cadre. When these actions are broken down, it becomes clear that there is no serious or corroborative evidence that AO An had authority to remove, replace, or punish cadre in Sector 41.

116. In Sections II (E)(iii), (v)(c), the Defence addresses the ICIJ’s factual errors regarding AO An’s role in the alleged purge or removal of former Central Zone cadre and security matters; thus, these errors are not addressed here. Here, the Defence will focus on the ICIJ’s factual errors concerning key individuals’ removal, including Met Sop, *Ta Am*, and PRAK Yut.²⁶⁰ The ICIJ fails to provide sufficient evidence of AO An ordering, or otherwise being involved in, their removal or replacement, which would have been a key aspect of a sector secretary’s job.

117. The ICIJ grossly misrepresents the evidence when concluding that AO An ordered the arrest and execution of Met Sop²⁶¹ and replaced him with Ngauv.²⁶² There is no serious

²⁵⁹ Case 004/2-**D360**, paras 214, 256, 293-294, 297.

²⁶⁰ Case 004/2-**D360**, paras 295, 296, 423.

²⁶¹ The ICIJ relies on seven witnesses to support his finding that AO An ordered the arrest and execution of Met Sop. Case 004/2-**D360**, para. 295, fn. 774. **TOY Meach:** TOY Meach is the only witness who even mentions AO An in connection with Met Sop’s arrest, with the ICIJ blatantly ignoring parts of his statement that demonstrate his severely limited personal knowledge. **D219/582** (TOY Meach WRI), A102, A109-A110 (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.). **KHUN Saret, Rv Nhor, SAT Pheap, SOEUNG Lim, KUNG Ting and DUONG Sim:** The other six witnesses cited by the ICIJ only discuss Met Sop being arrested at some point during the DK era and do not attribute the arrest to AO An. **D93** (KHUN Sareth WRI), EN 00746822 (KHUN Sareth does not know what happened to Met Sop, only saw him taken away by car.); **D219/870** (RY Nhor WRI), A52, A107-108 (RY Nhor speculates AO An ‘would’ have given the order because he was the highest-ranking cadre. However, the witness admits at A109 that he does not know whether anyone else had the right to arrest people and, at A110, says he is unsure about the timing of the arrest as he did not work there.); **D219/460** (SAT Pheap WRI), A8 (SAT Pheap only states Met Sop was arrested, and does not mention AO An.); **D117/54** (SOEUNG Lim WRI), A8 (SOEUNG Lim does not mention AO An, only recalling that ‘Sup’, the first Security Chairman, was arrested and taken to be killed by the Southwest Zone cadre.); **D3/13** (KUNG Ting WRI), A4 (KUNG Ting similarly does not mention AO An, stating only that ‘Sop was arrested when the southwest people arrived’.); **D3/15** (DUONG Sim WRI), A6 (AO An is not mentioned, with DUONG Sim only recalling Sop ‘was arrested by the Southwest people’.).

²⁶² Case 004/2-**D360**, para. 295, fn. 775 (The ICIJ misrepresents the statements of seven witnesses (SAT Pheap, NAI Seu, KUNG Ting, Duong Sim, SOEUNG Lim, NHEM Chen, and PRAK Yut) to support his finding that Ngauv ‘was appointed to replace Met Sop’. He deliberately uses passive voice to create ambiguity and permit

and corroborative evidence supporting the finding that AO An was responsible for Met Sop's removal or Ngauv's appointment.

118. Additionally, the ICIJ finds that in mid-1977, AO An ordered the arrest, torture, and execution of *Ta Am*, the Sector 41 office chief.²⁶³ The ICIJ admits that there is conflicting evidence about the date of *Ta Am*'s arrest but fails to explain how he arrived at his mid-1977 determination.²⁶⁴ Upon an examination of the evidence's substance, it is clear that the ICIJ's finding is based solely on hearsay evidence and speculation²⁶⁵ and that the ICIJ misrepresents several witness and civil party accounts about *Ta Am*'s arrest.²⁶⁶ This flawed assessment is compounded by the fact the ICIJ ignores evidence that the order to arrest *Ta Am* was actually issued by the Southwest Zone, not AO An.²⁶⁷

119. Similarly, in relation to PRAK Yut's removal or transfer from the Central Zone to the Northwest Zone, the ICIJ ignores evidence – from PRAK Yut herself – that *Ta Mok*, not AO An, moved her to the Northwest Zone.²⁶⁸ Again, the ICIJ deliberately uses language to conceal the lack of evidence of AO An's involvement in PRAK Yut's removal.²⁶⁹ There is also insufficient evidence of AO An appointing PRAK Yut's replacement.²⁷⁰

(4) AO An did not issue orders to or authorise the actions of district secretaries, commune secretaries, or 'subordinates'

120. The ICIJ incorrectly finds that AO An ordered district secretaries or 'subordinates' to identify and target certain groups; directed them to arrest and kill former cadre, ordinary

misleading inferences about AO An's role. None of the cited witnesses state that AO An appointed Ngauv. At most, they note that Ngauv replaced Met Sop without mentioning AO An.)

²⁶³ Case 004/2-D360, para. 296.

²⁶⁴ Case 004/2-D360, para. 296, fn. 777.

²⁶⁵ Case 004/2-D360, para. 296, fn. 778 (The ICIJ relies solely on hearsay from SAT Pheap, who heard from Aun's messenger that AO An gave the order; Ngauv, who did not know who gave the order but assumes it was AO An after the OCIJ investigator feeds him information; and PENH Va, who recalls hearing Aun arrested Am, and speculates replacements were made by AO An.)

²⁶⁶ Case 004/2-D360, para. 296, fn. 778 (The ICIJ misrepresents evidence from Ngauv, IM Pon, PEOU Sarom, PUT Kol, and PENH Va, all of whom mention *Ta Am*'s arrest but not AO An ordering it.)

²⁶⁷ D117/70 (PRAK Yut WRI), A46 (PRAK Yut, the wife of *Ta Am*, states a letter from the Southwest Zone ordered his arrest.)

²⁶⁸ PRAK Yut does not mention AO An when she discusses her removal and transfer to Battambang in 1978, but rather infers that *Ta Mok* ordered it. D117/71 (PRAK Yut WRI), A72 (PRAK Yut states she met *Ta Mok* when she arrived in Battambang.); D219/971 (PRAK Yut WRI), A4-A7 (PRAK Yut states she was sent to Battambang, where she asked *Ta Mok* why she was brought here and where *Ta Mok* sent her to Chipang.)

²⁶⁹ Case 004/2-D360, para. 423.

²⁷⁰ Case 004/2-D360, para. 423, fns 1286-1288 (The ICIJ relies on NHIM Kol, IM Pon and Ngauv, none of whom suggest that AO An appointed PRAK Yut's replacement.)

civilians, and Cham people; and authorised beatings of people during interrogations.²⁷¹ He fails to provide sufficiently serious and corroborative evidence of a clear chain of command in Sector 41 and of orders on any matter to any district secretary. The evidence underpinning the ICIJ's findings about AO An's orders to district secretaries is almost exclusively from PRAK Yut's testimony, which is not sufficiently serious and corroborative.²⁷²

121. First, the ICIJ refers to 'a strict chain of command with AO An at the top'.²⁷³ However, the supporting evidence does not establish this strict chain of command to the requisite standard, and again, the ICIJ relies on PRAK Yut's non-credible account.²⁷⁴ PRAK Yut's personal knowledge is limited to Kampong Siem District, and her accounts of other district secretaries receiving orders are inconsistent and result from the OCP refreshing her recollection.²⁷⁵ The other witnesses cited by the ICIJ may have seen, but

²⁷¹ Case 004/2-**D360**, paras 275, 279, 281-284, 287, 294, 299, 301-302, 311, 364, 394, 427, 429, 463, 503, 564, 633-634, 636.

²⁷² *E.g.* Case 004/2-**D360**, para. 364, fn. 1030 (The ICIJ relies almost exclusively on PRAK Yut.). When the ICIJ refers to other evidence, it is often hearsay or fails to corroborate PRAK Yut's claims. *E.g.* Case 004/2-**D360**, para. 302, fn. 805 (The ICIJ provides evidence from YOU Vann, who only heard that PRAK Yut was following orders from AO An. She does not recall accompanying PRAK Yut when she took lists to the sector and only heard from Phen that there were meetings after which people disappeared. YOU Vann also recalls delivering letters between AO An and PRAK Yut but does not confirm she was privy to their contents. Furthermore, the ICIJ relies on NHIM Kol, who recalls making arrests of LON Nol people based on lists of names but does not mention AO An.); para 302, fn. 807 (The ICIJ again relies on YOU Vann, who recalls PRAK Yut received a direct order from AO An regarding arrests of certain people. The OCIJ investigator fails to ask the witness follow-up questions about the basis of her knowledge. This is particularly concerning, as many of YOU Vann's assertions in this WRI are based on information received from PRAK Yut, Phen and Ni.); para. 429, fn. 1326 (The ICIJ relies on CHIN Sinal, who confirms only that 'Khmer Rouge leaders' saw the 'difficult' living conditions at the dam worksite, and 'ordered the group chiefs to monitor those patients who were perceived as enemies or spies'. He speculates these instructions came from the upper echelon but does not mention either PRAK Yut or AO An. This evidence is completely irrelevant to the ICIJ's finding and does not corroborate PRAK Yut.); para. 634, fn. 2163 (The ICIJ again relies on NHIM Kol, who recalls overhearing PRAK Yut tell Rom to check whether any Cham remained and report back to her but does not mention that this order was passed down from AO An. He also again relies on YOU Vann, who recalls communications between PRAK Yut and AO An for which she was not present.).

²⁷³ Case 004/2-**D360**, para. 282.

²⁷⁴ Case 004/2-**D360**, para. 282, fn. 737.

²⁷⁵ **D219/702.1.94** (PRAK YUT Case 002/2 Transcript), EN 01431666-67, 01431686, 01431690-91, pp. 80-81, 100, 104-105 (PRAK Yut attempts to exculpate herself, insisting she was not involved in the killings in her district, did not carry out the order herself, had no authority to make decisions, simply relayed orders to her subordinates, and did not fully grasp the situation in the district. In order to distance herself from personal responsibility for the executions, she claims the order came from AO An and that she merely reported back to him after the lower levels carried it out. She also recounts attending a meeting with 'four district committees' at which AO An told them to kill the Cham people, but no other witnesses recall this event, and moreover, PRAK Yut later recants this evidence, being pressured by the Prosecutor into repeating it.); **D219/702.1.95** (PRAK Yut Case 002/2 Transcript), EN 01441014-15, 01441018, pp. 5-6, 9 (Prompted by the Prosecutor, PRAK Yut confirms her previous testimony. She recalls receiving an order 'either to smash to or to kill the people'. However, she is inconsistent on whether other district secretaries received the same order.), EN 01441019-20, pp. 10-11 (The Prosecutor ignores that PRAK Yut specifically says that, for other districts, she did not know

did not hear, conversations between AO An and others, like Ngauv and Aun; these witnesses do not corroborate PRAK Yut or establish a ‘strict chain of command’.²⁷⁶

122. Second, the ICIJ relies on four witnesses to find that AO An ordered district secretaries to identify and execute people who complained about their living and working conditions.²⁷⁷ However, when the substance of the evidence is closely examined, it is clear that only PRAK Yut supports this finding,²⁷⁸ and her non-credible account alone cannot constitute sufficiently serious and corroborative evidence. Similarly, where the ICIJ finds AO An ordered PRAK Yut and others to arrest and kill all the Cham people,²⁷⁹ he only refers to non-credible evidence about Kampong Siem District from PRAK Yut; there is no evidence regarding other districts.²⁸⁰

123. Third, the ICIJ blatantly misrepresents the evidence when he purports to draw links between AO An and other district secretaries, such as Kan and Phim. For example, the ICIJ finds AO An provided instructions to Kan in Kang Meas District and other ‘district chiefs’ in Sector 41 on ‘purge operations’ and ‘other sector affairs’.²⁸¹ He refers to another section of the *ICIJ Closing Order (Indictment)* that does not support this finding.²⁸² The ICIJ also engages in speculation rather than factual determination, stating

about the orders and did not recall these details until her recollection was refreshed.), EN 01441041-42, pp. 32-33 (The Prosecutor refreshes PRAK Yut’s recollection with her previous testimony on orders.).

²⁷⁶ E.g. **D219/800** (SO Saren WRI), A160-A164 (SO Saren recalls seeing Ngauv come to AO An’s office and seeing them talk together, but ‘did not know about their work’); **D219/504** (SAT Pheap WRI), A87 (SAT Pheap states Ngauv reported to AO An, however, 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.); **D219/837** (SO Saren WRI), A113 (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 meetings.); **D219/442** (CHOM Vong WRI), A206 (Ngauv does not mention AO An or the chain of command and only assumes prisoners were taken to be killed, as he did not see them return, and clarifies that his answer on this issue in his previous interview was not recorded correctly.).

²⁷⁷ Case 004/2-**D360**, para. 275, fn. 718 (citing PRAK Yut, HOK Hoeun, BAO Troab, and CHIN Sinal).

²⁷⁸ Case 004/2-**D360**, para. 275, fn. 718. (PRAK Yut is the only witness cited who implicates AO An. The other witnesses cited only discuss poor working conditions and assert that visiting sector-level cadre were aware of these conditions. There is no mention of either AO An or his alleged authority over district secretaries.).

²⁷⁹ Case 004/2-**D360**, para. 634.

²⁸⁰ Case 004/2-**D360**, para. 634, fn. 2163 (None of the evidence corroborates PRAK Yut. NHIM Kol provides hearsay evidence about PRAK Yut but does not mention AO An. YOU Vann recalls PRAK Yut going ‘to talk with Ta An about the replacement of the commune chiefs’ but did not accompany PRAK Yut.).

²⁸¹ Case 004/2-**D360**, para. 463.

²⁸² Case 004/2-**D360**, para. 463, fn. 1454 (The ICIJ refers to Section 6.3.4.2. Within this Section, there are vague references made to AO An giving orders to ‘subordinates’, Aun, or Ngauv. However, neither Kan nor other ‘district chiefs’ are specifically mentioned. The only reference made in this section to ‘district secretaries’ is at para. 282, which cites evidence only related to PRAK Yut.).

that ‘[a]s District Secretary, Phim would have received orders from [AO] An relating to the arrest and killing of enemies’.²⁸³

124. Fourth, the ICIJ also finds that AO An issued orders to particular subordinates, such as Aun, Sok, and Ngauv – *e.g.* regarding arrests, ‘killing plans’, and interrogations at security centres.²⁸⁴ However, a proper examination of the evidence’s substance reveals that these individuals may have undertaken certain tasks or responsibilities, but AO An did not order or authorise them to do so.²⁸⁵

125. Finally, the ICIJ, at times, refers to unidentified ‘subordinates’ and announcements or instructions at general meetings to find that AO An had authority in Sector 41.²⁸⁶ These findings frequently rely on uncorroborated witnesses who allegedly attended meetings with AO An but have questionable knowledge of their contents because of their age or position (*e.g.* NHEM Chen)²⁸⁷ or their inconsistent testimony (*e.g.* YOU Vann).²⁸⁸ The Defence submits that any recollections of general announcements to unknown people about unspecified topics, even if true, are not sufficient evidence to find that AO An gave orders to subordinates.

(5) AO An did not receive reports from district or commune secretaries or ‘subordinates’

126. The ICIJ erroneously finds that AO An was ‘aware of all CPK activities in his sector and zone’ due to the CPK’s ‘rigorous system’ of ‘communication and reporting’²⁸⁹ and that he monitored the progress of killing operations through the reports provided to him.²⁹⁰ Throughout his Closing Order, the ICIJ references AO An receiving reports from

²⁸³ Case 004/2-D360, para. 503 (This paragraph refers back to paragraph 282, which provides no sufficient evidence linking AO An and Phim, whether directly or indirectly.).

²⁸⁴ *E.g.* Case 004/2-D360, paras 279, 282, 287, 427.

²⁸⁵ Case 004/2-D360, para. 279, fn. 735 (The ICIJ relies on NHEM Chen’s uncorroborated, non-credible account. TOY Meach and NHIM Kol do not corroborate NHEM Chen. They state that Aun and PRAK Yut respectively gave arrest orders and decided the fate of arrested village deputies, but they do not mention AO An’s authorisation.); para. 282, fn. 737. The remaining evidence provided by the ICIJ is hearsay from non-credible, uncorroborated witnesses, NHEM Chen and YOU Vann. Case 004/2-D360, para. 287, fn. 746 (The ICIJ only relies on NHEM Chen, who fails to specify whether he personally attended the meeting about orders and heard ‘killing plans’ being discussed.); para. 427, fn. 1323 (The ICIJ only relies on YOU Vann, who is prompted by the OCIJ investigator and who states she heard AO An ‘empowered Phon to beat people during questioning’.).

²⁸⁶ *E.g.* Case 004/2-D360, paras 283, 294, 299, 301, 311, 636.

²⁸⁷ *E.g.* Case 004/2-D360, para. 283, fn. 739; para 299, fn. 792; para. 301, fns 800-803.

²⁸⁸ *E.g.* Case 004/2-D360, para. 311, fn. 831; para. 636, fn. 2175.

²⁸⁹ Case 004/2-D360, paras 719, 826.

²⁹⁰ Case 004/2-D360, paras 830, 835.

district secretaries,²⁹¹ unspecified subordinates, or lower echelons,²⁹² but he fails to provide sufficient and corroborative evidence.²⁹³

127. In fact, the ICIJ is only able to identify two individuals, PRAK Yut²⁹⁴ and Ngauv,²⁹⁵ involved in reporting. The evidence of the existence and content of these supposed reports is again primarily based on PRAK Yut's non-credible statements.²⁹⁶ Her testimony about reports she made to AO An is supported only by hearsay evidence from YOU Vann²⁹⁷ and statements from other witnesses and civil party applicants which are misrepresented – in fact, they fail to mention AO An at all.²⁹⁸ Moreover, the ICIJ acknowledges the inconsistencies in PRAK Yut's evidence on this point,²⁹⁹ but nonetheless, continues

²⁹¹ Case 004/2-D360, paras 263, 266, 431. The ICIJ's broad findings that AO An received reports from 'the districts', or from district secretaries, are again based on evidence relating only to PRAK Yut and Kampong Siem District. Typically, this evidence consists only of non-credible statements from PRAK Yut herself, supported by often non-corroborative, misrepresented, and hearsay evidence. *E.g.* Case 004/2-D360, para. 263, fn. 662 (The ICIJ relies on YOU Vann, who recalls delivering letters between AO An and PRAK Yut and heard a name list was passed on to AO An. However, the ICIJ conveniently omits YOU Vann's statement that the letters were about economic work. YOU Vann also explicitly says that some reports did not include information about persons who disappeared or were sent to be 're-fashioned' or to security offices. Furthermore, the ICIJ relies on SAUR Saren who recounts occasionally taking letters, not reports, to the districts for AO An, but he admits he did not know what they were. He merely speculates that AO An 'typed up letters that went to Sokh, and then had them sent to the districts'; he did not know their contents.); para. 431, fn. 1337 (The ICIJ relies only on YOU Vann, who only heard from PRAK Ny that he reported to AO An.).

²⁹² Case 004/2-D360, paras 257, 285, 396.

²⁹³ The ICIJ relies on uncorroborated statements about reports coming from Kampong Siem District. *E.g.* Case 004/2-D360, para. 257, fn. 640 (The ICIJ cites evidence from only PRAK Yut and YOU Vann about Kampong Siem District.). The ICIJ further relies on vague and speculative evidence. *E.g.* Case 004/2-D360, para. 285, fn. 741 (The ICIJ relies on NHEM Chen, who recalls delivering sealed envelopes from Ngauv to AO An but has no basis for knowing their contents. The ICIJ ignores NHEM Chen's admitted lack of knowledge in relation to arrests and executions of people in Sector 41.); para. 396, fns 1178-79 (The ICIJ relies on NHEM Chen, who states he does not know the content of the letters and has no clear basis of knowledge about reports concerning killings. He further relies on Ngauv, who merely speculates that soldiers prepared detailed reports for the 'sector level' but does not mention AO An.).

²⁹⁴ Case 004/2-D360, paras 297, 303, 364, 429, 635.

²⁹⁵ Case 004/2-D360, paras 279, 285, 395.

²⁹⁶ *E.g.* Case 004/2-D360, para. 364, fns 1031, 1037; para. 635, fn. 2171 (The ICIJ only relies on PRAK Yut.).

²⁹⁷ *E.g.* Case 004/2-D360, para. 429, fn. 1327 (The ICIJ provides hearsay evidence from YOU Vann. **D219/702.1.87** (YOU Vann Case 002/2 Transcript), EN 01438507-08 (YOU Vann recalls compiling a list of names and that Khom told her that PRAK Yut sent the names to AO An.); para. 635, fn. 2170 (The ICIJ again provides hearsay from YOU Vann. **D219/138** (YOU Vann WRI), A55 (YOU Vann heard from Phen that he had reported to PRAK Yut, who in turn reported to AO An about the 'disappearance' of people on the name lists.)).

²⁹⁸ *E.g.* Case 004/2-D360, para. 297, fn. 783 (The ICIJ relies on POV Sarom, who recalls a village chief being arrested by sector-level cadre and being personally ordered by Nan to prepare a list of names, but she does not mention PRAK Yut or reporting procedures.); para. 303, fn. 815 (The ICIJ relies on NHIM Kol, who is not credible, and PECH Chim. NHIM Kol recalls giving records on statistics to Rom, who passed these on to Ta Nan, who was in charge of the district, but NHIM Kol does not mention PRAK Yut or AO An on this issue. PECH Chim states reports were sent from the Kraing Ta Chan security centre to the sector through the district, but he does not mention PRAK Yut or AO An.); para. 429, fn. 1327 (The ICIJ relies on POV Sarom, who recalls meeting with village chiefs and telling them to prepare lists of names, but does not mention AO An, and on NHIM Kol, who states the village chiefs had to report to the district or the commune before making an arrest, but he does not mention PRAK Yut or AO An.).

²⁹⁹ *E.g.* Case 004/2-D360, para. 635.

relying on her. At multiple stages, he admits YOU Vann provides contrary evidence, but he fails to explain why this evidence is not discounted or set aside as unreliable.³⁰⁰

128. Similarly, the evidence supporting the ICIJ's finding that Ngauv sent written reports to AO An confirming executions at Met Sop security centre is insufficient, as it consists only of NHEM Chen's non-credible account.³⁰¹ The ICIJ's repeated finding that Ngauv visited the sector office (frequently or on a weekly basis) to report to Aun and AO An is based on testimonies from witnesses who were not present at those meetings³⁰² and on non-credible evidence from Ngauv himself.³⁰³

(6) AO An did not lead sector-level meetings about politics, security, or military

129. As explained in Section II (E)(ii), the ICIJ errs in finding that AO An led sector-level meetings or trainings about politics, security, or military matters because the evidence is not sufficiently serious and corroborative. The evidence on the Case File, at most, demonstrates that AO An may have attended general meetings with hundreds of other cadre or led a few sector-level meetings on economics. This does not prove to the requisite standard that AO An was *de facto* sector secretary.

130. Accordingly, the ICIJ fails to provide sufficiently serious and corroborative evidence that AO An was the *de facto* secretary of Sector 41. He does not establish to the required standard that AO An received, implemented, or reported on orders from KE Pauk or other zone committee members; that AO An appointed or removed district and commune secretaries or other key personnel; that AO An issued orders to or received reports from district and commune secretaries or other key cadre; or that AO An led sector-level meetings about politics, security, or military matters.

³⁰⁰ Case 004/2-D360, para. 297, fn. 783; para. 303, fn. 815.

³⁰¹ Case 004/2-D360, para. 279, fn. 733 (The ICIJ only relies on NHEM Chen, who states he delivered sealed envelopes from Ngauv to AO An, but only speculates about their content.).

³⁰² E.g. Case 004/2-D360, para. 285, fn. 742 (The ICIJ relies on Ngauv, who states he made a record of data to report to Aun, who reported to the sector office chairman, but he does not specifically mention AO An.); para. 395, fn. 1170 (The ICIJ relies on NHEM Chen, who recalls AO An calling Ngauv to a meeting at the sector, but he does not describe its contents or state he attended it.).

³⁰³ Case 004/2-D360, para. 395, fns 1171-76 (The ICIJ relies on Ngauv, who recounts reporting to the Sector Office Chairman Aun about the number of prisoners, and has speculative or hearsay knowledge of these reports being passed by soldiers to AO An.).

c) AO An did not have authority over security matters or centres in Sector 41 and was rarely, if ever, seen there

131. The ICIJ errs in finding that AO An exercised authority over security matters including through control of security centres in Sector 41.³⁰⁴ In fact, AO An was rarely, if ever, seen at these centres, and there is no serious and corroborative evidence demonstrating AO An gave orders to security centre chiefs,³⁰⁵ received reports on security matters,³⁰⁶ or authorised the transport of prisoners.³⁰⁷
132. To support his finding that AO An regularly visited security centres in Sector 41,³⁰⁸ the ICIJ provides evidence, which the Defence maintains is insufficient, for only three of the seven sites.³⁰⁹ He acknowledges there is no evidence of AO An visiting Kok Pring execution site,³¹⁰ Wat Angkuonh Dei or Tuol Beng,³¹¹ Wat Batheay,³¹² and Wat Phnom Pros.³¹³
133. Moreover, to support his finding that AO An ordered Ngauv to do whatever is necessary to kill all enemies before 1978, the ICIJ only relies on NHEM Chen's

³⁰⁴ Case 004/2-D360, para. 257.

³⁰⁵ Case 004/2-D360, paras 282, 287.

³⁰⁶ Case 004/2-D360, paras 257, 285, 396.

³⁰⁷ Case 004/2-D360, para. 279.

³⁰⁸ Case 004/2-D360, para. 286.

³⁰⁹ **Met Sop**: Case 004/2-D360, paras 410-411, fns 1237-1239. The ICIJ errs in finding that IM Pon's account, according to which he never drove AO An to Met Sop, is unreliable, and ignores another testimony where NHEM Chen contradicts himself and states he never saw AO An going to Met Sop. Instead, the ICIJ relies on NHEM Chen's account, which states he accompanied Sok to Kor. The ICIJ also cites Ngauv, who actually states he worked at Met Sop for several months and never saw or knew that AO An went there. The ICIJ erroneously and inexplicably finds Ngauv's statement is not credible. **Wat Au Trakuon**: Case 004/2-D360, para. 491, fns 1595-97. To support his conclusion that AO An visited Wat Au Trakuon security centre at least once, the ICIJ relies on only two witnesses: NHEM Chen, who states AO An went to Wat Au Trakuon but fails to provide any details; and SENG Srun, who states he attended a meeting at Wat Au Trakuon pagoda with Kin, Pheap, Han and Kan, where AO An spoke for several hours. This evidence is insufficient to find that AO An exercised authority over this security centre. The ICIJ also ignores exculpatory evidence indicating that AO An never went to Wat Au Trakuon. *E.g.* **D117/50** (IM Pon WRI), A50-A52 (IM Pon states he never drove AO An to any security centres in the Sector.); **D117/64** (THONG Kim Khun WRI), A18 (After being interviewed about Peam Chikang Commune [the location of Wat Au Trakuon], THONG Kim Khun states he never saw or met AO An.); **D117/63** (SAY Doeun WRI), A28 (SAY Doeun stated that he never saw AO An at the Kang Meas District office.). **Wat Ta Meak**: Case 004/2-D360, para. 588, fns 1994-95. The ICIJ relies on PENH Va, who speculates about AO An visiting prisoners at Wat Ta Meak; NHEM Chen, who states he went to the meeting at Wat Ta Meak with AO An but that the meeting was on economics and not on killings and arrests; and SAUR Saren, who states Aun led meetings at Wat Ta Meak that *Ta* An attended, but admits he was young and did not listen to what was discussed.

³¹⁰ Case 004/2-D360, para. 384.

³¹¹ Case 004/2-D360, para. 455.

³¹² Case 004/2-D360, para. 535.

³¹³ Case 004/2-D360, para. 555.

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uncorroborated non-credible account.³¹⁴ And, he provides no sufficient evidence to conclude that AO An disseminated purge orders to his subordinates, including Ngauv.³¹⁵ He also provides no evidence of AO An communicating with other security chiefs.³¹⁶

134. Furthermore, the ICIJ provides no sufficiently serious and corroborative evidence that AO An monitored and received reports on security matters from lower echelons³¹⁷ or Ngauv³¹⁸ or that AO An sent a personal messenger to collect written reports about killings.³¹⁹ The evidence supporting this finding is based on hearsay, speculation, or is uncorroborated.³²⁰ The ICIJ also provides no evidence of visits by or reports from any other security chiefs.

135. Finally, regarding AO An authorising vehicles to transport prisoners between security centres, the ICIJ relies on NHEM Chen's uncorroborated, non-credible testimony³²¹ and speculation from others.³²² Therefore, the ICIJ has not demonstrated to the requisite

³¹⁴ Case 004/2-**D360**, para. 287, fn. 746 (The ICIJ relies only on NHEM Chen, who states that, during a meeting at Kor, AO An ordered attendees to do whatever had to be done in accordance with 1977 plans. The OCIJ investigator fails to ask follow-up questions about the basis of this knowledge.)

³¹⁵ Case 004/2-**D360**, para. 282, fn. 737 (The ICIJ relies on PRAK Yut, who does not mention Ngauv; SAUR Saren, who states 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 he did not know what they were talking about; SAT Pheap, who only admits he saw Ngauv driving his vehicle to the sector office and provides speculation; and Ngauv, who only states he reported to Aun and speculates about prisoners being killed (correcting a previous statement).)

³¹⁶ E.g. **Wat Au Trakuon**: Case 004/2-**D360**, para. 463. The ICIJ fails to provide evidence that AO An communicated with Kan (Kang Meas District's Secretary), Han (Wat Au Trakuon's chief), or the Long Sword militia on security matters. To support his finding that Kan and the other district chiefs in Sector 41 received instructions from and reported to AO An about purge operations and other sector affairs, the ICIJ refers to paragraph 294 of the *ICIJ Closing Order (Indictment)* which does not mention Kan, Han, or the issuance of orders. **Wat Batheay**: Case 004/2-**D360**, para. 503. The ICIJ fails to provide evidence that AO An communicated with Khim, the alleged former chief of Wat Batheay, or Phim, the Batheay District Secretary, and relies exclusively on uncorroborated account of NHEM Chen. The ICIJ merely assumes or speculates that, as district secretary, Phim would have received orders from AO An relating to the arrest and killing of enemies. **Wat Phnom Pros**: Case 004/2-**D360**, paras 542-43, 545. The ICIJ finds Phnom Pros was under KE Pauk's and Chooun's control but provides no evidence of AO An's communications with them.

³¹⁷ Case 004/2-**D360**, para. 257, fn. 640 (The ICIJ provides evidence primarily regarding Kampong Siem District and relies almost exclusively on PRAK Yut's uncorroborated and non-credible testimonies. PRAK Yut states she reported to AO An but she is unable to provide details regarding the form of the reports, their frequency, and their content. E.g. **D117/72** (PRAK Yut WRI), A5; **D117/73** (PRAK Yut WRI), A5, A7, A10, A15; **D219/702.1.95** (PRAK Yut Transcript), EN 01441027, 01441043-44, 01441046, pp. 18, 34-35, 37. The ICIJ attempts to provide corroboration but relies on YOU Vann, who provides hearsay evidence. **D219/138** (YOU Vann WRI), A49, A55, A106.)

³¹⁸ Case 004/2-**D360**, para. 285, fn. 742 (To support his finding that Ngauv made frequent visits to report to AO An, the ICIJ cites two witnesses, SAT Pheap and SAUR Saren, who fail to offer details about the number, the length, and the reasons of the visits, or what may have been reported during the visits.)

³¹⁹ Case 004/2-**D360**, para. 285, fn. 741; para. 396, fn. 1178 (The ICIJ relies exclusively on NHEM Chen's uncorroborated, non-credible account.)

³²⁰ Case 004/2-**D360**, para. 257, fn. 640; para. 285, fns 741-742; para. 396, fn. 1178.

³²¹ Case 004/2-**D360**, para. 279, fns 731-732 (The ICIJ relies only on NHEM Chen, who is not credible and is led by OCIJ investigators.)

³²² Case 004/2-**D360**, para. 288, fns 748-749 (The ICIJ relies on PENH Va, who states 'they' drove people to Comrade Sop's office and speculates the order must have come from AO An; KHUTH Khy, who states AO An

standard that AO An controlled the Sector 41 security centres or had authority over security matters.

d) AO An did not have authority over the Sector 41 military

136. The ICIJ erroneously finds AO An ‘exercised complete civilian and military authority over the sector.’³²³ To demonstrate AO An’s supposed military authority, the ICIJ primarily relies on four witnesses,³²⁴ who do not provide any details about AO An’s role in the sector military,³²⁵ who do not even mention AO An in their statements,³²⁶ and who provide uncorroborated or contaminated evidence (explained below). When the substance of the evidence is fully examined, it becomes clear that the ICIJ’s findings are not based on sufficiently serious and corroborative evidence.

137. First, the ICIJ finds that the district military, including PRAK Ny, reported to AO An, through the sector military, verbally or in writing about those to be killed³²⁷ and that AO An received reports from the sector military.³²⁸ However, the ICIJ fails to provide sufficient evidence establishing the military command structure at the district or sector levels,³²⁹ and to support his findings, he relies only on YOU Vann’s uncorroborated, non-

attended the garage and had him repair trucks, but does not mention AO An’s authorisation to transport prisoners; TOY Meach, who states a jeep belonging to the sector office was used to transport arrested persons but does not mention AO An’s authorisation; and SAT Pheap, who states she saw Aun’s vehicle but does not mention AO An’s alleged authorisation.)

³²³ Case 004/2-**D360**, paras 256, 258.

³²⁴ Case 004/2-**D360**, para. 258, fns 642-49 (The ICIJ relies on YOU Vann, Ngauv, SAUR Saren, and NHEM Chen.).

³²⁵ **D219/138** (YOU Vann WRI), A98 (YOU Vann provides hearsay evidence when she states she heard the sector military referred AO An’s orders to the district military.); **D219/435** (TOUCH Chamroeun WRI), A197, A200-A202 (TOUCH Chamroeun states AO An was in charge of the sector military but no basis of knowledge is provided.)

³²⁶ **D118/259** (PECH Chim WRI), A112 (PECH Chim states the sector military reported to the sector secretary; no mention of AO An.); **D219/442** (CHOM Vong WRI), A115, A125-A126, A138 (Ngauv does not know who was in charge of the military. He saw Sok giving orders to military personnel, and since no one was in charge of the military when the Vietnamese arrived, Sok took charge of it.); **D219/837** (SO Saren WRI), A37-A38 (SO Saren states Hum was responsible for the Sector 41 military and then Bang Tri; he did not know to whom the military chairperson reported; no mention of AO An.); **D219/731** (NHEM Chen WRI), A14 (NHEM Chen states Hum was the military chairman.); **D219/870** (RY Nhor WRI), A49, A81 (RY Nhor states the sector secretary was in charge of the sector military but admits he does not know the sector structure, and later states Sok was the military chief.).

³²⁷ Case 004/2-**D360**, para. 431.

³²⁸ Case 004/2-**D360**, para. 258.

³²⁹ Case 004/2-**D360**, paras 296, 562 (The ICIJ finds Chhoeun (KHUON Pek) was the Sector 41 Military Logistics Office Chairman, and Sok and Hum were the Sector 41 Military Chairmen at different times. No detailed information is provided on the sector military’s functioning, the location of its military base, and the reporting system between echelons. For instance, while soldiers from Sector 41 were deployed to fight the Vietnamese at the Thai border, there is no evidence of AO An coordinating this operation with KE Pauk.).

credible hearsay evidence³³⁰ and other accounts based on hearsay or speculation.³³¹ The ICIJ also ignores evidence indicating that military cadre did not report through the normal channels in the Central Zone.³³² Furthermore, the ICIJ indicates that AO An held meetings with the sector military to discuss security and defence matters, including at Wat Ta Meak.³³³ Yet, a close analysis of this evidence reveals that none of the cited witnesses, except for NHEM Chen,³³⁴ who is not credible, state AO An convened meetings with the sector military.³³⁵ There is simply no serious and corroborative evidence to find the district and sector military reported to AO An.

138. Second, the ICIJ finds AO An ordered the arrest and execution of Hum, the Sector 41 military chairman, because he had sexual relations with AO An's sister in law.³³⁶ However, the supporting evidence is merely speculation³³⁷ and lacks reliable details about the circumstances in which the arrest and execution occurred.³³⁸ The ICIJ also concludes AO An personally appointed the Sector 41 military chairman, Sok, to replace Hum.³³⁹ Yet, the ICIJ omits critical information, like the date or location of appointment, and

³³⁰ Case 004/2-D360, para. 431, fn. 1337 (citing **D219/138** (YOU Vann WRI), A106 (The OCIJ investigator fails to ask follow-up questions about the frequency of this reporting system, or whom from the district or sector military reported to AO An.)).

³³¹ Case 004/2-D360, para. 258, fn. 644 (The ICIJ relies on Ngauv, who states he never saw reports from the military and did not know how the military reported to AO An. Ngauv assumes it was written and oral. **D219/442** (CHOM Vong WRI), A118, A120. Furthermore, the ICIJ relies on YOU Vann, who heard from Ny that he reported to AO An verbally or in writing about killings, *via* the sector military. **D219/138** (YOU Vann WRI), A106-A107.).

³³² **D219/774** (OUM Seng WRI), A22, A25-A30, A53-A55, A58, A61-A63, A65, A75-A78, A107, A132-133, A136-138, A140 (OUM Seng, a regiment commander in the Central Zone, states he directly reported to KE Pauk. He would meet KE Pauk maybe once a month and sometimes once every two months to receive instructions. OUM Seng does not state AO An was at these meetings or that he reported to AO An. In fact, he admits he was not very familiar with AO An or his position during the DK; he only heard AO An was 'Com'); **D6.1.726** (KHUM Kim WRI), A2, A8, A13 (KHUM Kim, a regiment commander of the Division 230, states he reported to Yoeun and the division commander, but did not report to any senior leader, and does not know about reporting to the Centre.).

³³³ Case 004/2-D360, paras 258, 589.

³³⁴ **D219/855** (NHEM Chen WRI), A93, A103.

³³⁵ **D219/800** (SO Saren WRI), A217-A218; **D219/442** (CHOM Vong WRI), A100-A103, A126, A128, A130; **D219/837** (SO Saren WRI), A24-A29, A33; **D219/138** (YOU Vann WRI), A49, A96.

³³⁶ Case 004/2-D360, para. 296.

³³⁷ Case 004/2-D360, para. 296, fn. 782 (The ICIJ relies on speculation from SAUR Saren, who does not know who ordered Hum's arrest but assumes it was AO An; and NHEM Chen, who states Hum was arrested but does not mention any execution or who ordered the arrest.).

³³⁸ Case 004/2-D360, para. 296, fn. 782 (The ICIJ relies on YOU Vann, who states AO An arrested Hum and had him killed because he committed a moral offense with a female medical practitioner. The OCIJ investigator fails to ask follow-up questions about the origin of this evidence, the order's form (verbal or in writing), and the location of arrest and execution. Additionally, the ICIJ relies on NHEM Chen, who states AO An ordered Hum's arrest because he committed a moral misconduct. The OCIJ investigator also fails to ask follow-up questions to determine the origin of this evidence or identify the date and location of the arrest.).

³³⁹ Case 004/2-D360, para. 258.

relies only on NHEM Chen's non-credible contaminated evidence and SAT Pheap's hearsay evidence.³⁴⁰

139. Third, the ICIJ finds AO An ordered the Sector 41 military units to deploy or dispatch troops outside of Sector 41.³⁴¹ Yet, none of the witnesses or other evidence state that AO An gave these orders.³⁴² Rather, NHEM Chen affirms such orders came from the Centre and the zone.³⁴³ The ICIJ also finds AO An ordered the sector military to transport prisoners to the Sector 41 security centre or to Wat Au Trakuon, where they would be executed,³⁴⁴ but he relies on two witness who provide non-credible and hearsay evidence.³⁴⁵ Further, he errs in concluding AO An ordered the military to transport people at Wat Phnom Pros and smash them,³⁴⁶ by relying only on KE Pich Vannak's uncorroborated, biased evidence.³⁴⁷ Similarly, relying on only one uncorroborated account, the ICIJ erroneously finds sector military units were deployed to carry out agricultural and construction works.³⁴⁸ The ICIJ also cites non-credible witnesses who provide insufficient evidence to find that AO An ordered the sector military to arrest Cham people, former Lon Nol soldiers and officials, Vietnamese, and other 'no good elements' in Kampong Siem District.³⁴⁹

³⁴⁰ Case 004/2-**D360**, para. 258, fn. 643 (The ICIJ relies on NHEM Chen and SAT Pheap. NHEM Chen states AO An assigned Sok to be the sector commander, but only after the OCIJ investigator feeds him this information. **D219/855** (NHEM Chen WRI), A250, A270-A272. SAT Pheap states he learned from a friend that Sok was the sector military chairman and worked under the leadership of the secretary; he does not mention who appointed him. **D219/504** (SAT Pheap WRI), A41, A53.).

³⁴¹ Case 004/2-**D360**, para. 258.

³⁴² Case 004/2-**D360**, para. 258, fn. 645 (citing **D219/855** (NHEM Chen WRI), A93-A98, A100-A104, A116-A117; **D219/800** (SO Saren WRI), A217-A218; **D219/731** (NHEM Chen WRI), A97; **D219/442** (CHOM Vong WRI), A101-A104, A126, A128, A130; **D219/837** (SO Saren WRI), A24-A25, A27, A28-A29, A33; **D219/138** (YOU Vann WRI), A49, A54, A56 A96); para. 258, fn. 646 (citing **D219/855** (NHEM Chen WRI), A116-A122, A246; **D117/10** (KHIM Choeung WRI), A24; **D219/294** (MUOL Eng WRI), A182-A184; **D1.3.13.1** (Telegram 32 entitled 'To Missed Committee 870'), EN 00208256, p. 1).

³⁴³ **D219/855** (NHEM Chen WRI), A98, A116 (NHEM Chen states the Centre or zone originally ordered the deployment of the troops along the border, and when there was a request from the Centre, the soldiers would be deployed to protect the district and unions at Andaung Kraloeng and a cotton farm in Chamkar Leu District.).

³⁴⁴ Case 004/2-**D360**, para. 294, fn. 771.

³⁴⁵ **D219/732** (NHEM Chen WRI), A23-A26, A35 A50 (In addition to being a non-credible witness, NHEM Chen states AO An ordered the military to tell security to execute about 40 prisoners in Kor security office, but the OCIJ investigator fails to ask follow-up questions about his basis of knowledge on the form and means of disseminating the orders.); **D219/582** (TOY Meach WRI), A100-A101 (TOY Meach provides hearsay evidence when he states he heard that, on AO An's orders, people were sent to Wat Au Trakuon.).

³⁴⁶ Case 004/2-**D360**, para. 300.

³⁴⁷ Case 004/2-**D360**, para. 300, fn. 799 (relying on KE Pich Vannak's uncorroborated account).

³⁴⁸ Case 004/2-**D360**, para. 258, fn. 649 (relying on Ngauv's uncorroborated account).

³⁴⁹ Case 004/2-**D360**, para. 303, fn. 811 (The ICIJ relies on PRAK Yut and YOU Vann. **YOU Vann**: YOU Vann states Phon was in charge of the district army and his deputy was Phaen, but she does not mention the sector military or who ordered the arrests. **D219/702.1.87** (YOU Vann Transcript), EN 01438494-96, 01438508-09, 01438512, pp. 53-55, 67-68, 71; **D117/31** (YOU Vann WRI), A32, A35; **D219/702.1.94** (YOU Vann

140. Lastly, the ICIJ erroneously finds Sok, the sector military chairman, was AO An's right-hand.³⁵⁰ He supports his finding with SAUR Saren's uncorroborated account.³⁵¹ Therefore, the ICIJ has not established to the requisite standard that AO An exercised authority over the sector military during the DK.

e) AO An did not have authority over logistical and transportation resources or people's movement in Sector 41

141. The ICIJ fails to provide sufficiently serious and corroborative evidence that AO An: (a) managed the movement of personnel and supplies; (b) coordinated logistical infrastructure and authorised vehicles to transport prisoners between security centres; (c) oversaw the transport of East Zone people to Sector 41; and (d) had authority to issue travel permits. First, the ICIJ erroneously finds that AO An 'managed the movement of personnel and supplies' throughout Sector 41.³⁵² To support this finding, he relies on evidence that is contradictory,³⁵³ based on hearsay,³⁵⁴ or inaccurate.³⁵⁵ Similarly, he again misrepresents evidence or ignores contradictory evidence when implying that AO An played an important role in facilitating the transfer of personnel and supplies.³⁵⁶

142. Second, the ICIJ errs in finding that AO An coordinated the logistical infrastructure to transport prisoners between security centres³⁵⁷ and authorised the use of Sector 41 vehicles to this effect.³⁵⁸ As explained in Section II (E)(v)(c), the evidence relied upon is miscited, uncorroborated, inconsistent, or pure speculation. Further, in finding that the

Transcript), EN 01431628, p. 42. **PRAK Yut**: PRAK Yut does not discuss AO An's orders to the sector military. **D219/120** (PRAK Yut WRI), A17, A28; **D117/71** (PRAK Yut WRI), A50; **D117/73** (PRAK Yut WRI), A5, A7, A10; **D219/702.1.94** (PRAK Yut Transcript), EN 01431666-67, pp. 80-81.).

³⁵⁰ *ICIJ Closing Order*, para. 562.

³⁵¹ *ICIJ Closing Order*, para. 562, fn. 1899 (relying exclusively on SAUR Saren's uncorroborated account).

³⁵² Case 004/2-**D360**, para. 256, fn. 636.

³⁵³ *Compare D179/1.2.4* (PRAK Yut Case 002 Transcript), EN 00774126-27, pp. 94-95 (PRAK Yut states a dam was built in Prey Chhor District.); *with D219/120* (PRAK Yut WRI), A88-A89 (PRAK Yut states AO An never asked for labour forces at Anlong Chrey Dam and that she does not recall the construction of Sector 41 dam in Prey Chhor District.).

³⁵⁴ **D219/138** (YOU Vann WRI), A74 (YOU Vann provides hearsay information from PRAK Yut.).

³⁵⁵ **D179/1.2.4** (PRAK Yut Case 002 Transcript), EN 00774128, p. 95; **D219/138** (YOU Vann WRI), A70.

³⁵⁶ Case 004/2-**D360**, para. 272, fn. 704 (The ICIJ misrepresents evidence from TOUCH Chamroeun, SAT Pheap, KIM Koeun, KHEANG Thai, YOU Vann, and PENH Va. TOUCH Chamroeun merely states AO An received reports on the quantity of rice distributed to the ministries. SAT Pheap states he did not discuss logistics with AO An, and later recalls that to make a request for seed rice, the district secretary had to directly contact the sector office. KIM Koeun recalls keeping a record of supplies at the sector warehouse and reporting back to Aun; he does not mention AO An on this issue. He only mentions he heard of AO An in response to a leading question. KHEANG Thai recalls Aun giving orders from the sector level to the districts about supplies. YOU Vann recalls village chiefs had to issue authorisation letters for travel but does not mention AO An. Finally, PENH Va recalls workers had to ask for permission from the unit chairman to eat porridge at another cooperative.).

³⁵⁷ Case 004/2-**D360**, para. 288, fn. 748.

³⁵⁸ Case 004/2-**D360**, para. 288, fn. 749.

vehicles for prisoner transport were the same as those AO An drove to meetings,³⁵⁹ the ICIJ ignores contradictory evidence³⁶⁰ and relies on evidence that is inconsistent,³⁶¹ speculative,³⁶² and hearsay.³⁶³

143. Third, the ICIJ finds that AO An ‘played a significant role’ in the transfer of Cham people from the East Zone to the Central Zone, that AO An ‘coordinated and personally oversaw operations’ to transport people from the East Zone to security centres in the Central Zone, and that resources from Sector 41 were used in this process.³⁶⁴ He bases these findings, in part, on AO An’s alleged positions as *de jure* Sector 41 Secretary and Zone Deputy Secretary,³⁶⁵ which the Defence disputes in Sections II (E)(iv) and (v). Further, two of the four witnesses cited in support of ‘AO An’s personal oversight’³⁶⁶ make no reference to AO An.³⁶⁷ The other evidence is speculation, inconsistent, and hearsay.³⁶⁸

144. Lastly, the ICIJ finds that AO An oversaw the issuance of travel permits within Sector 41³⁶⁹ and between other sectors.³⁷⁰ However, the majority of the evidence provided does not mention AO An’s role in authorising travel, but instead, references others in charge of travel.³⁷¹ Ngauv, who is not credible, is the sole witness underlying this finding.³⁷² In

³⁵⁹ Case 004/2-**D360**, para. 288, fn. 751.

³⁶⁰ **D219/686** (KHUTH Khy WRI), A103-A104 (KHUTH Khy states AO An’s jeep was an American jeep and distinguishes it from the blue jeep that was used to transport prisoners.).

³⁶¹ **D107/7** (NHIM Kol WRI), EN 00787214, p.4 (referring to a ‘jeep vehicle’); **D219/752** (LOR Venghuor WRI), A30, A38, A45 (referring to Jeep A1 and A2); **D219/802** (Hong Heng WRI), A32 (referring to a soldier-colour jeep); **D219/800** (SO Saren WRI), A89 (describing an American-style white Jeep).

³⁶² **D219/315** (SAT Pheap WRI), A30-A34 (SAT Pheap states she saw AO An being driven to attend meetings every day but did not know about AO An’s work; she speculates as she only saw AO An from afar.).

³⁶³ **D219/504** (SAT Pheap WRI), A89, A91 (SAT Pheap provides double hearsay evidence.); **D219/802** (HONG Heng WRI), A52 (HONG Heng never saw but only heard about transport of prisoners from unnamed people.).

³⁶⁴ Case 004/2-**D360**, paras 309, 637.

³⁶⁵ Case 004/2-**D360**, para. 637.

³⁶⁶ Case 004/2-**D360**, para. 309, fn. 828 (The ICIJ relies on NHEM Chen, ORN Kim Eng, MUOK Sengly, and SAUR Saren.).

³⁶⁷ **D117/66** (ORN Kim Eng WRI), A7; **D219/502** (MUOK Sengly WRI), A24-A25.

³⁶⁸ **D219/800** (SO Saren, WRI), A216 (SO Saren did not know whether AO An gave the order.); **D219/855** (NHEM Chen, WRI), A140, A159, A160-A164 (NHEM Chen fails to specify who transported people or who was the source of his information; he did not hear AO An talking about sending the sector trucks to transport people from the East Zone; he does not know who was coordinating the transport of people by the river; and he heard the zone trucks had arrived to collect the people.); **D219/498** (PENH Va WRI), A16 (PENH Va may have heard from his younger brother-in-law about the killing of East Zone cadre.); **D219/776.1.1** (SAUR Saren DC-Cam Statement), EN 01309894-95, pp. 44-45 (SAUR Saren speculates AO An issued the order.).

³⁶⁹ Case 004/2-**D360**, paras 256, 272, fns 637, 705 (relying only on Ngauv.); para. 272, fn. 705 (PENH Va, KEAN Ley, and PRAK Yut only discuss the general ‘need for travel permits at sector, district and commune levels’.).

³⁷⁰ Case 004/2-**D360**, para. 272, fn. 705.

³⁷¹ E.g. **D219/226** (PENH Va WRI), A14 (PENH Va states Comrade Sreng issued him a travel permit.); **D117/57** (KEAN Ley WRI), A16 (KEAN Ley recalls the commune issued him a travel permit.); **D219/792.1.3**

sum, based on the above reasons, the ICIJ fails to provide sufficiently serious and corroborative evidence that AO An maintained logistical control over the movement of resources and personnel in Sector 41.

f) Even if AO An were Sector 41 secretary or had some authority at the sector level, this does not mean he was amongst those most responsible

145. Even if AO An were the sector secretary and had authority in Sector 41, he would not be considered amongst those most responsible for the charged crimes. Sector 41 was a small geographical area, and the secretary had few direct subordinates. Moreover, when examining the CPK as a whole, a sector-level position is at best a mid-level position that did not allow for independent decision-making or determinations about the means of implementation or dissemination of CPK policies.

vi. AO An had no role in the alleged genocide of the Cham people

146. The ICIJ fails to provide sufficiently serious and corroborative evidence that AO An had a role in the alleged genocide of the Cham people of Kampong Cham Province. In addition to the legal errors set out in Section III (I), AO An did not significantly contribute to the CPK policy allegedly targeting the Cham people; share (or have) the specific intent to commit genocide; or plan, order, or instigate genocide. Relying almost exclusively on PRAK Yut – a non-credible witness – the ICIJ errs in finding that AO An ordered subordinates, in particular district secretaries in Sector 41, to identify, list, arrest, and kill the Cham people; that he monitored and managed the progress of these orders through reports; and that he was involved in the transfer of Cham people from the East Zone.³⁷³

147. First, the ICIJ fails to provide sufficient evidence that AO An ordered subordinates, namely district secretaries, to identify (through lists or otherwise), arrest, and kill the Cham people.³⁷⁴ He cites almost exclusively the uncorroborated, non-credible statements of PRAK Yut and YOU Vann, who only provide information about Kampong Siem District.³⁷⁵ Then, the ICIJ incorrectly and without basis infers from PRAK Yut's

(PRAK Yut Case 002/02 Transcript), EN 01441488, p. 48 (PRAK Yut mentions only commune and district authorisation for travel permits.).

³⁷² **D219/442** (CHOM Vong WRI), A134-A136.

³⁷³ Case 004/2-**D360**, paras 302-03, 633-37.

³⁷⁴ Case 004/2-**D360**, paras 302-03, 633-37.

³⁷⁵ Case 004/2-**D360**, para. 302, fns 804-805, 807; para. 303, fn. 811; para. 633, fns 2153-2154; para. 634, fns 2163, 2168; para. 636, fns 2173-2176. Concerning orders, the ICIJ relies almost exclusively on uncorroborated and non-credible statements of PRAK Yut. He attempts to corroborate her accounts with statements of non-credible witnesses YOU Vann and NHIM Kol. However, neither NHIM Kol nor YOU Vann corroborate PRAK

testimony that AO An ordered all district secretaries in Sector 41 to make lists of the Cham people; and misrepresents other individuals' testimony in an attempt to support this conclusion.³⁷⁶

148. Second, the ICIJ fails to provide sufficient evidence that AO An monitored and managed the progress of the alleged killing of the Cham people through reports or lists he received from subordinates.³⁷⁷ The ICIJ again relies almost exclusively on the same non-credible, uncorroborated evidence from PRAK Yut.³⁷⁸
149. Third, the ICIJ concludes that because of AO An's position in Sector 41 and the Central Zone, he necessarily played a significant role in planning the transfer of the Cham people from the East Zone to the Central Zone, where they were allegedly killed.³⁷⁹ In Sections II (E)(iv) and (E)(v), the Defence demonstrated that there is no sufficient evidence to find that AO An was the *de jure* or *de facto* secretary in Sector 41 secretary or the Central Zone deputy secretary. The ICIJ also fails to provide any sufficient evidence linking AO An to the transfer and killing of Cham people from the East Zone³⁸⁰ and only briefly discusses this issue in connection to Sector 42,³⁸¹ over which he admits AO An did not have authority.³⁸²
150. Therefore, there is no serious and corroborative evidence that AO An had any role in the alleged genocide of the Cham people. He was not involved in the identification,

Yut. With respect to a 'second list' being ordered, the ICIJ relies solely on the non-credible testimony of YOU Vann.

³⁷⁶ E.g. Case 004/2-**D360**, para. 633, fn. 2162 (the ICIJ relies on SAY Doeun, whose account is effectively uncorroborated as SENG Srun's evidence is misrepresented or unreliable. **D219/702.1.85** (SAY Doeun Case 002/02 Transcript), EN 01474965-66, pp. 71-72; **D219/702.1.88** (SENG Srun Case 002/02 Transcript), EN 01406854-56, pp. 55-57 (SENG Srun provides hearsay evidence in relation to a list of Cham people and does not mention AO An.); **D6.1.700** (SENG Srun WRI), A3, A8, A10, A12 (SENG Srun does not mention AO An in relation to a list of Cham people.)).

³⁷⁷ Case 004/2-**D360**, para. 303, fns 814-815; para. 633, fns 2157, 2161; para. 635, fns 2169-2172.

³⁷⁸ Case 004/2-**D360**, para. 303, fns 814-815 (The ICIJ attempts to corroborate PRAK Yut with evidence from non-credible witnesses and civil party applicants, YOU Vann, NHIM Kol, and PECH Chim. NHIM Kol provides information about the arrests only in relation to PRAK Yut and does not link them to AO An. PECH Chim provides information in relation to Kraing Ta Chan and does not mention AO An. During the Case 004 investigation, YOU Vann stated that AO An received reports about the killings only after leading questions by the OCIJ investigator and provides hearsay evidence from Phen about PRAK Yut reporting to AO An. After having her recollection refreshed, she later testified in Case 002 that she delivered messages between PRAK Yut and AO An once in a while. She later explained that when she was the chief of the mobile unit, she submitted reports to PRAK Yut but did not specify that PRAK Yut then reported to AO An.); paras 633, 635 fns 2157, 2169-2170 (The ICIJ fails to corroborate PRAK Yut with evidence from YOU Vann.); para. 633, fn. 2161 (The ICIJ refers exclusively to YOU Vann's uncorroborated account.); para. 635, fns 2171-2172 (The ICIJ refers exclusively to PRAK Yut's uncorroborated account.).

³⁷⁹ Case 004/2-**D360**, para. 637.

³⁸⁰ Case 004/2-**D360**, para. 637 (The ICIJ does not present any evidence to support his finding.).

³⁸¹ Case 004/2-**D360**, paras 656, 660.

³⁸² Case 004/2-**D360**, para. 849.

arrest, or killing of the Cham people in Kampong Cham Province. He also did not plan, order, or instigate these actions, or significantly contribute to any shared plan, and he did not control individuals allegedly carrying out others' orders.

vii. AO An had no role in the forced marriages or alleged rape in Prey Chhor and Kampong Siem Districts

151. In addition to the legal errors raised in Sections III (G) and (H) concerning forced marriage and other inhumane acts, the ICIJ fails to provide sufficient evidence that AO An significantly contributed to the CPK policy on marriage and increased population or that he planned, ordered, instigated, or participated in the marriages or alleged rape in Prey Chhor and Kampong Siem Districts.

152. The ICIJ fails to provide evidence that AO An regulated or supported CPK policies on marriage or increased population,³⁸³ oversaw their implementation in Kampong Siem and Prey Chhor Districts;³⁸⁴ presided over wedding ceremonies;³⁸⁵ or chaired meetings on marriage.³⁸⁶ The ICIJ primarily relies on AO An's alleged positions as Sector 41 secretary and Central Zone deputy secretary to support these findings, but, as explained in Sections II (E)(iv) and (E)(v), there is insufficient evidence demonstrating AO An held these positions.

153. In relation to his finding that AO An chaired meetings on marriages,³⁸⁷ the ICIJ relies on uncorroborated and unspecific evidence,³⁸⁸ and he misrepresents the evidence of one witness who discusses only marriage policy in Sector 42, with no mention of AO An.³⁸⁹ Furthermore, to support his finding concerning AO An leading a late 1977 meeting at Wat Ta Meak about marriage and children, the ICIJ again relies on uncorroborated evidence³⁹⁰ or offers so-called corroboration with non-credible hearsay evidence.³⁹¹

³⁸³ Case 004/2-**D360**, paras 224-232, 314-319.

³⁸⁴ Case 004/2-**D360**, paras 224.

³⁸⁵ Case 004/2-**D360**, para. 224, 319, 685, fns 853, 2355-2359.

³⁸⁶ Case 004/2-**D360**, para. 314.

³⁸⁷ Case 004/2-**D360**, para. 314, fn. 835 (The ICIJ provides evidence only from SAT Pheap and SARAY Hean.).

³⁸⁸ **D219/504** (SAT Pheap WRI), A25, A27-A28 (SAT Pheap provides little detail of AO An's alleged public statements about marriage. It is not until the OCIJ investigator feeds him inculpatory information about 'forced marriages' that the witness mentions 'marriage planning' and 'POL Pot's plan'.).

³⁸⁹ **D219/762** (SARAY Hean WRI), A1-A2, A135-A137.

³⁹⁰ Case 004/2-**D360**, para. 315, fns 836-838 (relying exclusively on SAT Pheap's uncorroborated account.).

³⁹¹ Case 004/2-**D360**, para. 316, fn. 839 (YOU Vann provides hearsay evidence and fails to corroborate SAT Pheap's account. **D219/138** (YOU Vann WRI), A80; **D219/702.1.87** (YOU Vann Case 002/02 Transcript), EN 01438521, p. 80).

Similarly, he fails to provide sufficient evidence of AO An presiding over wedding ceremonies.³⁹²

154. Moreover, the ICIJ errs in finding that AO An announced a policy regarding the consummation of marriages.³⁹³ To support his finding that the ‘newlywed couples were specifically instructed to consummate their marriages’ in Kampong Siem and Prey Chhor Districts, the ICIJ relies on unspecific testimony that fails to connect AO An to any instructions³⁹⁴ or that implicates others.³⁹⁵ Thus, the ICIJ has not provided evidence satisfying the requisite standard to support his finding that AO An was responsible for the marriages or rape in Kampong Siem or Prey Chhor Districts.

viii. AO An had no role in the charged crimes at the crime sites

155. Given AO An’s lack of authority, position, and responsibility in Sector 41 and the Central Zone and given his lack of conduct and presence at the alleged crime sites,³⁹⁶ the ICIJ errs in finding that AO An is criminally responsible for the crimes alleged through the modes of liability charged. AO An did not plan, order, or instigate any crimes at the charged crimes sites; he did not significantly contribute to a common plan; and he did not control those allegedly carrying out others’ orders. Finally, AO An did not have the requisite knowledge or intent to commit the charged crimes.

ix. Conclusion on Ground 6

156. Therefore, the ICIJ errs in finding that AO An had a more significant position in the CPK and more significant role in the charged crimes than other known Khmer Rouge cadre. As explained above, AO An did not decide or interpret CPK policy and was not instrumental in the dissemination or implementation of these policies in the Central Zone. Moreover, he did not plan, orchestrate, or lead a purge of former Central Zone cadre or civilians from late 1976 to February 1977. AO An did not hold the alleged positions in the Central Zone or Sector 41. Even if he had held these positions, they are not significant

³⁹² Case 004/2-**D360**, para. 228, fn. 530 (Among all the witnesses and civil party applicants cited by the ICIJ, only YOU Vann, who is not credible, states AO An married couples on two occasions.); para. 685, fn. 2355 (The ICIJ relies on non-credible witnesses PRAK Yut and YOU Vann.); para. 685, fn. 2356 (The ICIJ relies exclusively on TOY Meach’s uncorroborated account.); para. 685, fns 2357-2358 (The ICIJ relies exclusively on YOU Vann’s uncorroborated account.); para. 685, fn. 2359 (The ICIJ relies exclusively on TOUCH Chamroeun’s uncorroborated account.).

³⁹³ Case 004/2-**D360**, paras 316, 686-87, 831.

³⁹⁴ Case 004/2-**D360**, para. 686, fn. 2360 (None of the witnesses cited by the ICIJ state that AO An gave specific instructions to consummate marriage.).

³⁹⁵ Case 004/2-**D360**, para. 686, fn. 2361 (The ICIJ relies on MUOK Sengly, who implicates PRAK Yut as the one who encouraged couples to ‘create babies for Angkar’.).

³⁹⁶ Sections II(E)(iv), (v) and (viii).

CPK positions when compared to those of other known Khmer Rouge officials, like KE Pauk, *Ta Mok*, Duch, and SAO Sarun. Finally, AO An had no role in the alleged genocide of the Cham people in Kampong Cham Province, the alleged forced marriages or rape in Prey Chhor or Kampong Siem Districts, or the charged crimes at the crime sites.

F. Ground 7: The ICIJ errs in finding that the charged crimes were of sufficient gravity

157. The ICIJ errs in finding that the gravity of the charged crimes was sufficient for the Court to have personal jurisdiction over AO An.³⁹⁷ The evidence provided by the ICIJ is almost exclusively from Sector 41, a small geographic area. Furthermore, there is insufficient evidence to support the ICIJ's calculations of victim numbers in the Central Zone or Sector 41. Finally, 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.

i. The ICIJ primarily provides evidence concerning a small geographic area

158. As explained in Section II (E)(v) above, the majority of the evidence provided by the ICIJ concerns AO An's alleged level of responsibility and role in the charged crimes in Sector 41³⁹⁸ – a small geographic area compared to other areas controlled by other cadre, like KE Pauk (Central Zone)³⁹⁹ and *Ta Mok* (Southwest Zone, West Zone, Northwest Zone).⁴⁰⁰ This small geographic area does not support the ICIJ's determination that AO An was amongst those most responsible.

ii. The ICIJ fails to provide sufficient evidence to support his calculations of high victim numbers in the Central Zone or Sector 41

159. There is insufficient evidence to support the ICIJ's findings on the alleged victim numbers attributable to AO An as a result of the charged crimes in Sector 41 and the Central Zone.⁴⁰¹ Although the Defence appreciates the ICIJ's attempt to adopt a

³⁹⁷ Case 004/2-D360, paras 706-08.

³⁹⁸ Even when examining the evidence concerning Sector 41, the majority of this evidence primarily relates to only three districts (Kampong Siem, Prey Chhor, and Kang Meas).

³⁹⁹ **D6.1.1105** (Kiernan, *The Pol Pot regime: race, power, and genocide in Cambodia under the Khmer Rouge*, 1975-79), pp. 91, 278; **D6.1.659** (PECH Sokha WRI), EN 00403007, p. 7; **D3/19** (VORNG Sokun WRI), A13; **D107/5** (ORN Kim Eng WRI), A4; **D107/13** (LONG Sokhai WRI), EN 00804711, p. 4.

⁴⁰⁰ **D6.1.1105** (Kiernan, *The Pol Pot regime: race, power, and genocide in Cambodia under the Khmer Rouge*, 1975-79), pp. 87, 392, 417; **D219/193** (VAT Phat WRI), A208, A215.

⁴⁰¹ Case 004/2-D360, paras 350, 383, 407, 452, 490, 533, 582.

conservative approach to calculating victim numbers,⁴⁰² it submits that his approach is still based on guesswork⁴⁰³ and fails to result in victim numbers that satisfy the requisite standard of proof.

iii. The ICIJ fails to impute genocidal acts to AO An through the charged modes of liability

160. The ICIJ fails to apply the legal requirements to impute genocidal acts committed in Sector 42 and Sector 43 to AO An through the charged modes of liability. As a result, the ICIJ erroneously includes deaths of Cham people from Sectors 42 and 43 in the total number of genocide victims.

161. The ICIJ finds AO An is liable for 17,115 deaths of Cham people throughout the Central Zone.⁴⁰⁴ To calculate this number, the ICIJ includes deaths of Cham people in Sectors 42 and 43.⁴⁰⁵ However, the ICIJ provides no evidence that AO An is liable for genocide in Sectors 42 or 43 through planning,⁴⁰⁶ ordering,⁴⁰⁷ instigating,⁴⁰⁸ or superior responsibility.⁴⁰⁹ He also finds there is no evidence of AO An ‘actively exercising authority over security centres in Sectors 42 and 43’.⁴¹⁰

162. Moreover, the ICIJ fails to apply the legal requirements to hold AO An liable for genocide in Sectors 42 and 43 through JCE. To hold a JCE member liable for crimes committed by physical perpetrators who were non-JCE members, it must be shown that the crime can be imputed to at least one JCE member, and that this member, when using a physical perpetrator, acted to further the common purpose.⁴¹¹ In the *ICIJ Closing Order (Indictment)*, the alleged perpetrators of genocidal acts in Sectors 42 and 43 are, in all but one case, unnamed.⁴¹² The ICIJ fails to identify the cadre overseeing the deaths of Cham people in Sectors 42 and 43; offers no explanation as to how these crimes relate to any JCE member; and makes no attempt to link crimes committed by unnamed perpetrators to

⁴⁰² Case 004/2-**D360**, paras 137-154.

⁴⁰³ Case 004/2-**D360**, paras 142-144, 150-154.

⁴⁰⁴ Case 004/2-**D360**, paras 618, 709, 814.

⁴⁰⁵ Case 004/2-**D360**, paras 618, 663, 667, 675-677.

⁴⁰⁶ Case 004/2-**D360**, para. 835.

⁴⁰⁷ Case 004/2-**D360**, para. 839.

⁴⁰⁸ Case 004/2-**D360**, para. 843.

⁴⁰⁹ Case 004/2-**D360**, para. 849.

⁴¹⁰ Case 004/2-**D360**, paras 261, 262. It is notable that AO An is not indicted for CAH in Sectors 42 or 43.

⁴¹¹ Case 004/2-**D360**, para. 120; Case 002-**E313**, para. 693; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, *Judgement* (‘*Brđanin Appeal Judgement*’), 3 Apr. 2007, para. 413, attached as App. 54.

⁴¹² Case 004/2-**D360**, paras 670-671 (The ICIJ names only one perpetrator, a militiaman, in his findings on Cham killings in Sectors 42 and 43. It is questionable that this low-level cadre would be considered a member of the JCE, and there is no effort to impute his actions to a JCE member.)

an identifiable JCE member. Therefore, these crimes cannot be attributed to the JCE group or AO An via JCE liability.

163. In sum, the ICIJ errs in counting the Cham people's deaths in Sectors 42 and 43 among the total number of victims and in his personal jurisdiction findings. Accordingly, he errs in finding that the charged crimes are of sufficient gravity and thus that AO An is amongst those most responsible for the DK-era crimes.

G. Conclusion for Grounds 2-7

164. For the reasons above, the Defence submits that the ICIJ commits numerous legal and factual errors in finding that AO An is amongst those most responsible for the DK-era crimes and within the Court's personal jurisdiction. These errors invalidate the *ICIJ Closing Order (Indictment)*, and thus, the PTC must overturn it and dismiss the case.

III. GROUNDS 8 TO 17 CONCERNING THE ICIJ'S ERRORS ON SUBSTANTIVE LAW

165. The *ICIJ Closing Order (Indictment)* contains significant legal errors relevant to the ICIJ's assessment of personal and subject matter jurisdiction. While some errors have already been considered by the PTC and other chambers, the Defence notes the PTC is not bound by *stare decisis*.⁴¹³

A. Ground 8: The ICIJ incorrectly applies Customary International Law in violation of the principle of legality

166. The ICIJ's flawed application of CIL stems from his incorrect method for determining CIL and his overreliance on the jurisprudence of the *ad hoc* tribunals.⁴¹⁴ Such errors result in violations of the principle of legality⁴¹⁵ and insufficient reasoning⁴¹⁶ throughout the *ICIJ Closing Order (Indictment)*.

167. The ICIJ's legal findings must be grounded in CIL applicable in 1975-1979.⁴¹⁷ However, the ICIJ fails to demonstrate that his legal findings are rooted in the widespread

⁴¹³ Case 004/1-D308/3, para. 10.

⁴¹⁴ E.g. Case 004/2-D360, paras 63-120.

⁴¹⁵ Case 001-F28, paras 91, 95, 96 (holding the 'international principle of legality, with its focus on guarantee of human rights in criminal proceedings, is connected to general principles of law concerning prohibition of retroactive crimes and punishments'); Rome Statute, art. 22; Cassese, *International Criminal Law* ('Cassese') (2nd edn., Oxford: Oxford University Press, 2008), pp. 36-51, attached as App. 55.

⁴¹⁶ Case 002-D97/15/9, paras 57, 73 (holding where the CIJs relied solely on *ad hoc* tribunal jurisprudence to determine CIL, such an approach was 'insufficiently reasoned in this respect'); Case 001-F28, para. 97; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, *Judgement*, 29 Nov. 2002, para. 193 attached as App. 56 (holding 'it would be wholly unacceptable [...] to convict an accused person on the basis of a prohibition which, taking into account the specificity of [CIL] and allowing for the gradual clarification of the rules of criminal law is either insufficiently precise to determine the conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time').

⁴¹⁷ Case 004/2-D360, para. 63.

and consistent practice of states (State practice) undertaken in the belief that the conduct is permitted, required, or prohibited by international law (*opinio juris*) during 1975-1979.⁴¹⁸ In particular, he overlooks the need to discern sufficient evidence of State practice.⁴¹⁹ Instead, his CIL findings are derivative, as he passively adopts CIL assertions espoused in the judicial decisions of the *ad hoc* tribunals.⁴²⁰ By over-relying on the jurisprudence of the *ad hoc* tribunals and by failing to consider other sources of CIL, the *ICIJ Closing Order (Indictment)* is insufficiently reasoned.⁴²¹

168. The decisions of the *ad hoc* tribunals are flawed sources of CIL for the following reasons: (a) the statutes of the *ad hoc* tribunals did not result from multi-lateral State consultations and did not represent international consensus on substantive ICL;⁴²² (b) the *ad hoc* tribunals were created to address specific contextual circumstances and focused on a time period subsequent to 1975-1979; (c) the *ad hoc* tribunals maintained the express ability to depart from CIL;⁴²³ (d) the *ad hoc* tribunals took an *opinio juris* approach to interpreting CIL, diminishing the need for State practice;⁴²⁴ and (e) the *ad hoc* tribunals were not subject to well-developed written law or legislative structures, thus judges

⁴¹⁸ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* ('*North Sea Cases*'), 1969 ICJ 3, 20 Feb. 1969, para. 77, attached as App. 57; Case 002-**D97/15/9**, para. 53 (citing *North Sea Cases*, para. 77); Degan, 'On the Sources of International Criminal Law' ('*Degan*'), 4(1) *Chinese J. of Int'l L.* (2005), 45-83, p. 65, attached as App. 58.

⁴¹⁹ E.g. Case 004/2-**D360**, paras 63-120. The ICIJ appears to follow the SCC approach, which has previously sought to diminish the importance of State practice, in favour of an *opinio juris* driven approach to interpreting CIL. Case 001-**F28**, para. 93. This approach represents a departure from the traditional and well-established ICJ approach to interpreting CIL which, in and of itself, is representative of a CIL rule during 1975-1979. The requirement for widespread and consistent State practice should remain central to all interpretations of CIL, as set out by the ICJ in the *North Sea Cases*, para. 77. Even if the SCC's approach to determining CIL is deemed correct, the Defence avers that the ICIJ does not meet the threshold of sufficient State practice to sustain his determinations of CIL. See also Kok, *Statutory Limitations in International Criminal Law* ('*Kok*') (T.M.C. Asser Press, 2007), pp. 320-327, attached as App. 59 (discussing the differences between *opinio juris* and State practice approaches to determining CIL).

⁴²⁰ E.g. Case 004/2-**D360**, paras 63-120. The ICIJ passively relies upon the *ad hoc* tribunals' determinations of CIL. This reliance on *ad hoc* tribunal jurisprudence is often secondary, as the ICIJ cites ECCC jurisprudence which has, in turn, overly relied on *ad hoc* tribunals. Case 004/2-**D360**, para. 63 (noting '[w]hile the jurisprudence of the *ad hoc* tribunals established since the 1990s is not binding in proceedings before the ECCC, the Chambers of the ECCC have relied heavily on their holdings in relation to elements of crimes and modes of liability').

⁴²¹ Case 002-**D97/15/9**, paras 57, 73; Case 001-**F28**, para 97.

⁴²² Powderly, 'Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?', in Darcy & Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010), p. 22, attached as App. 60 ('Looking at the Statute of the ICTY, it is fair to say that it is illustrative of the frenzied efforts of several individuals.').

⁴²³ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, *Judgement* ('*Tadić Appeal Judgement*'), 15 Jul. 1999, para. 296, attached as App. 61 (holding 'as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting [CIL], unless an intention to depart from [CIL] is expressed in the terms of the Statute, or from other authoritative sources').

⁴²⁴ Case 001-**F28**, para. 93; Kok, pp. 321-327.

resorted to judicial creativity to fill gaps in the law.⁴²⁵ In sum, the *ad hoc* tribunals are not representative of CIL, certainly not in 1975-1979, and should not, without further research, reasoning, and consideration of alternatives, be relied upon by the ECCC.

169. The ICIJ fails to justify his reliance on the *ad hoc* tribunals or to consider alternative sources of law that may better reflect CIL during 1975-1979. For example, the ICIJ insufficiently considers ICC law. 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.⁴²⁶

170. Examples of errors resulting from the ICIJ's CIL determinations are present throughout the grounds of appeal described below. By no means are these examples exhaustive, rather they are indicative of the deep structural issues within the foundations of the ICIJ's reasoning on CIL. The Defence avers that the ICIJ's CIL errors must be viewed cumulatively as an overall failure to respect the principle of legality.

B. Ground 9: JCE is not a mode of liability applicable at the ECCC

171. The ICIJ errs in his reliance on JCE as a mode of liability. JCE did not exist as a mode of liability under CIL or Cambodian law during 1975-1979.

172. The ICIJ fails to provide evidence of widespread and consistent State practice to demonstrate that JCE was a mode of liability applicable under CIL during 1975-1979. JCE is based on common law doctrine⁴²⁷ and was judicially created at the ICTY to address the unique circumstances facing the Tribunal.⁴²⁸ The authorities relied upon by the ICTY to justify creating JCE,⁴²⁹ and those subsequently relied upon by the ECCC,⁴³⁰ are far too limited and insignificant to satisfy the ICJ's requirements for CIL.⁴³¹

173. The ICIJ ignores compelling evidence of widespread and consistent State practice indicating that JCE is not CIL. Most notably, the international community did not

⁴²⁵ Degan, p. 48; Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2006), p. 16 attached as App. 62 ('[T]he progress of [CIL] in this field has at times taken place at the expense of some of the fundamental guarantees due to any accused person and the principle of legality might at times have failed to curb judicial creativity').

⁴²⁶ Parties and Signatories to the Rome Statute, p. 2, attached as App. 63.

⁴²⁷ Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law' ('Guilfoyle'), 64 *Current Legal Problems* (2011), 255-86, p. 264, attached as App. 64.

⁴²⁸ *Tadić Appeal Judgement*, paras 189-193 (holding that the creation of JCE was 'dictated by the object and purpose of the Statute').

⁴²⁹ E.g. *Tadić Appeal Judgement*, paras 195-229.

⁴³⁰ E.g. Case 002-D97/15/9, paras 36-89.

⁴³¹ *North Sea Cases*, para. 77.

recognise the existence of JCE as CIL in the Rome Statute.⁴³² In particular, the ICC's doctrine of co-perpetration is an alternative mode of liability that could be relied upon at the ECCC.⁴³³ Co-perpetration more closely aligns with civil law⁴³⁴ and is clearly defined in the Rome Statute,⁴³⁵ and its essential contribution requirement necessitates an objective assessment that a perpetrator has a *de minimis* level of control over the execution of the crime.⁴³⁶ As a result, co-perpetration ensures a higher threshold than JCE for individual responsibility and draws a stronger delineation between liability as a perpetrator, as opposed to liability as a mere accomplice. This higher threshold for responsibility required by co-perpetration more closely aligns with the object and purpose of the ECCC Law to prosecute only those individuals most responsible.

174. At the very least, it remains unsettled whether JCE or the ICC's co-perpetration is more representative of CIL.⁴³⁷ Where there is uncertainty regarding the applicable CIL, the ICIJ must apply the law which favours the accused. Therefore, the ICIJ errs in his reliance on JCE as a mode of liability in the case.

C. Ground 10: If JCE were an applicable mode of liability, the ICIJ fails to adequately define and apply its parameters

175. By defining and applying the JCE in an overly broad manner, the ICIJ fails to clearly define the JCE group, erroneously expands the geographical scope of the JCE, and conflates different common purposes of multiple JCE groups.⁴³⁸ First, the ICIJ describes the JCE group as 'Ke Pauk, Ao An, and other CPK cadres [who] shared the common

⁴³² *Lubanga Decision on Confirmation of Charges*, paras 335-341.

⁴³³ Rome Statute, art. 25(3)(a); *Lubanga Decision on Confirmation of Charges*, paras 322-338.

⁴³⁴ *The Prosecutor v. Katanga and Chui*, Case No. ICC-01/04-01/07, *Decision on the Confirmation of Charges* ('*Katanga Decision on Confirmation of Charges*'), 30 Sep. 2008, para. 496, attached as App. 65 (discussing co-perpetration as largely inspired by the works of the German scholar Claus Roxin, and thus as a doctrine that originated in civil law).

⁴³⁵ Rome Statute, art. 25(3)(a).

⁴³⁶ *The Prosecutor v. Abu Garda*, ICC-02/05-02/09, *Decision on the Confirmation of Charges*, 8 Feb. 2010, para. 160, attached as App. 66; *Lubanga Decision on Confirmation of Charges*, paras 342-48; Guilfoyle, p. 265.

⁴³⁷ Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise', in Darcy & Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010), p. 190, attached as App. 67 (stating neither co-perpetratorship nor JCE is CIL, but '[t]he ICTY has chosen [JCE], although there is merit also in co-perpetratorship').

⁴³⁸ *Brđanin Appeal Judgement*, para. 430 ('In establishing [the elements of a JCE], the Chamber must, among other things: identify the plurality of persons belonging to the JCE, (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a [JCE]; and characterize the contribution of the accused in this common plan.');

Nizeyimana v. The Prosecutor, Case No. ICTR-00-55C-A, *Judgement*, 29 Sep. 2014, para. 325, attached as App. 68. See also Fry, *The Contours of International Prosecutions* (The Hague: Eleven International, 2015), pp. 37-80, attached as App. 69 (discussing the legal requirements for indictments at international courts and tribunals and the importance of specificity).

purpose of implementing, in the Central Zone of DK, [...] CPK policies.’⁴³⁹ This description, in particular the vagueness of the term ‘other CPK cadres’, fails to identify a functional group.⁴⁴⁰ It is unclear how far the group extends up and down the chain of command or who were its key participants.⁴⁴¹

176. Second, the geographical scope of the JCE does not reflect the crimes for which the ICIJ indicts AO An.⁴⁴² The ICIJ describes a common purpose to implement CPK policy across the entire Central Zone.⁴⁴³ Yet, the crimes he attributes to AO An through JCE I liability only relate to Sector 41.⁴⁴⁴ The ICIJ fails to 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.⁴⁴⁵ Thus, the ICIJ’s description of the JCE as functioning across the Central Zone is not reflective of the facts and crimes described in the *ICIJ Closing Order (Indictment)*.

177. Third, the ICIJ conflates the different common purposes of different JCE groups.⁴⁴⁶ He defines the common purpose of the JCE as ‘implementing, in the Central Zone of DK, the following CPK policies’.⁴⁴⁷ In doing so, he combines the common purposes of: (a) the

⁴³⁹ Case 004/2-**D360**, para. 195.

⁴⁴⁰ *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, *Judgement* (‘*Krajišnik Appeal Judgement*’), 17 Mar. 2009, para. 157, attached as App. 70 (holding ‘inasmuch as the Trial Chamber included persons in the JCE merely by reference to the JCE “rank and file consist[ing] of local politicians, military and police commanders, paramilitary leaders, and others”, its identification of the JCE members is impermissibly vague’); *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-A, *Judgement* (‘*Stanišić and Simatović Appeal Judgement*’), 9 Dec. 2015, paras 86-87, attached as App. 71.

⁴⁴¹ The ICIJ recognises that the Khmer Rouge regime functioned as a strictly hierarchical structure with a vertical reporting system. The term ‘other CPK cadres’ is too broad to dispel ambiguity as to where the alleged JCE fell or how it functioned within this system. *E.g.* Case 004/2-**D360**, paras 157, 257, 623.

⁴⁴² *Stanišić and Simatović Appeal Judgement*, paras 82-88 (‘[D]etermining the existence and scope of a common criminal purpose shared by a plurality of persons (including its geographical and temporal limits) was a necessary prerequisite’ and ‘the Trial Chamber’s consideration of the common criminal purpose and the plurality of persons as alleged in the Indictment does not show that it allowed for the possibility that [...] Stanišić’s and Simatović’s *mens rea* could have comprised a temporally and/or geographically reduced common criminal purpose or a smaller number of participants to the JCE.’); *Krajišnik Appeal Judgement*, para. 157 (holding ‘the reference to the geographical scope (“regions and municipalities of the Bosnian Serb Republic”) is too broad to dispel the ambiguity as to whom the Trial Chamber found was a rank and file JCE member”).

⁴⁴³ Case 004/2-**D360**, para. 195.

⁴⁴⁴ Case 004/2-**D360**, paras 320-596, 638-655, 678-696.

⁴⁴⁵ While the ICIJ indicts 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. *See* Ground 7, Section II (F)(iii).

⁴⁴⁶ *Tadić Appeal Judgement*, para. 227 (holding a JCE requires ‘[t]he existence of a common plan, design or purpose which amounts to or involves the commission of a crime’); *Stanišić and Simatović Appeal Judgement*, paras 82, 88-89 (holding the Trial Chamber erred in law by failing to analyse how the evidence and facts would establish the existence and scope of a common criminal purpose shared by a plurality of persons).

⁴⁴⁷ Case 004/2-**D360**, para. 195.

senior leadership of the CPK who designed CPK policy, as outlined in Case 002,⁴⁴⁸ and (b) the JCE to which AO An allegedly belonged.⁴⁴⁹ Consequently, the ICIJ overly relies on evidence of a common purpose and intent to commit crimes emanating from the Case 002 JCE to satisfy the legal requirements of JCE in the case at hand.⁴⁵⁰ The ICIJ thus fails to adequately define and apply the parameters of the JCE in relation to AO An.

D. Ground 11: Planning is not a mode of liability applicable at the ECCC

178. The ICIJ relies on erroneous Trial Chamber jurisprudence to apply planning as a mode of liability.⁴⁵¹ The Trial Chamber relied primarily on the jurisprudence of the *ad hoc* tribunals and failed to provide evidence of widespread and consistent State practice to find that planning was a mode of liability applicable under CIL during 1975-1979.⁴⁵²

179. Planning did not exist as a mode of liability under CIL during this period. For instance, while planning or preparing a war of aggression was criminalised under Article 6(a) of the Charter of Nuremberg IMT and Article 5(a) of the Charter of Tokyo IMT, it was limited to crimes against peace and did not extend to other crimes within the IMTs' jurisdiction.⁴⁵³ Similarly, the Genocide Convention contains no reference to planning.⁴⁵⁴ The Rome Statute also contains no reference to planning or preparing as a mode of liability for war crimes, CAH, or genocide.⁴⁵⁵ Thus, the inclusion of planning as a mode of liability in the *ICIJ Closing Order (Indictment)* is an error of law, as there is no proof that it existed under CIL in 1975-1979.

E. Ground 12: Superior responsibility is not an applicable mode of liability in AO An's case, and even if it were, the ICIJ misapplies the legal elements

180. First, the ICIJ errs in this case in relying on superior responsibility as an applicable mode of liability under CIL during 1975-1979.⁴⁵⁶ Although the ECCC previously found

⁴⁴⁸ Case 002-**E313**, paras 724, 777, 804, 835; Case 002/19-09-2007/ECCC/TC, *Summary of Judgement*, 16 Nov. 2018, paras 6, 42-43, 45-47, 49, 56-58, attached as App. 72.

⁴⁴⁹ Case 004/2-**D360**, para. 195.

⁴⁵⁰ *E.g.* Case 004/2-**D360**, paras 195-232. When discussing the existence of the JCE common purpose, the ICIJ overly relies upon evidence of general CPK policy, as opposed to establishing the actual existence and scope of a common purpose amongst the alleged JCE members in the present case.

⁴⁵¹ Case 004/2-**D360**, para. 101.

⁴⁵² Case No. 001/18-07-2007/ECCC/TC, *Judgement*, **E188**, 26 Jul. 2010, paras 518-519; Case 002-**E313**, paras 697-698.

⁴⁵³ Cryer et al., *An Introduction to International Criminal Law and Procedure* ('Cryer et al.') (3rd edn., Cambridge: Cambridge University Press, 2014), pp. 379-380, attached as App. 73 (discussing planning as a mode of liability at the IMTs).

⁴⁵⁴ Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 Dec. 1948, attached as App. 74.

⁴⁵⁵ Rome Statute, art. 25.

⁴⁵⁶ Case 004/2-**D360**, paras 104-09.

that superior responsibility may apply to civilian commanders, these decisions failed to provide sufficient CIL evidence in 1975-1979, which would support the applicability of superior responsibility to civilian commanders *outside* of an international armed conflict.⁴⁵⁷ Thus, charges against civilians under superior responsibility must be linked to an international armed conflict. To indict AO An under superior responsibility, as a civilian leader outside the context of an international armed conflict, would breach the principle of legality.

181. Second, even if superior responsibility were applicable, the ICIJ incorrectly applies the legal elements for this mode of liability.⁴⁵⁸ The ICIJ relies solely on *ad hoc* tribunal jurisprudence to reject the causation requirement.⁴⁵⁹ However, the existence of a causation requirement is supported by evidence of CIL (generally applicable to superior responsibility) which the ICIJ ignores.⁴⁶⁰ Second, the ICIJ applies the incorrect *mens rea* for superior responsibility,⁴⁶¹ ignoring evidence of a higher *mens rea* threshold for civilian commanders under the Rome Statute.⁴⁶² The Defence recalls that where there is doubt regarding CIL, the ICIJ must apply that which favours the accused.

F. Ground 13: The ECCC does not have jurisdiction to prosecute national crimes committed between 1975 – 1979

182. The ECCC does not have jurisdiction to prosecute AO An for the crime of premeditated homicide under the 1956 Cambodian Penal Code, as the statute of limitations for the prosecution of national crimes committed during 1975-1979 has expired.⁴⁶³ The ICP agrees with the Defence that AO An should not be indicted for

⁴⁵⁷ E.g. Case 002-D427/2/15, paras 190-232; Case 002-D427/1/30, paras 413-460; Case 001-E188, paras 476-477; Case 002-E313, paras 718-719.

⁴⁵⁸ Case 004/2-D360, paras 104-109.

⁴⁵⁹ Case 004/2-D360, para 105 (finding ‘[a]ccording to the jurisprudence of the *ad hoc* tribunals, it is not necessary to prove a causal link between a superior’s failure to prevent the subordinate’s crimes and the occurrence of these crimes’).

⁴⁶⁰ Protocol I Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 Jun. 1977, art. 86 (1), attached as App. 75 (stating ‘[t]he High Contracting Parties and the Parties to the conflict shall repress grave breaches and take measures necessary to suppress all other breaches of the Conventions or of this Protocol which result from a failure to act when under a duty to do so’); Rome Statute, art. 28 (‘[w]ith respect to superior and subordinate relationships [...] a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control as a result of his or her failure to exercise control properly over such subordinates’).

⁴⁶¹ Case 004/2-D360, para. 106 (finding ‘the superior must have known or had reason to know’).

⁴⁶² Rome Statute, Article 28(b) (requiring ‘[t]he superior either knew, or consciously disregarded information which clearly indicated’).

⁴⁶³ The Defence references and incorporates its arguments in Case No. 004/07-09-2009-ECCC/OCIJ, *Application to Seize the Pre-Trial Chamber with a View to Annulment of the Judicial Investigation due to Lack of Subject Matter Jurisdiction*, D258, 30 Jul. 2015, paras 18-34.

national crimes, although for different reasoning.⁴⁶⁴ Similarly, the Trial Chamber failed to reach the required supermajority vote and then held that the accused in Case 002 could not be prosecuted for national crimes.⁴⁶⁵

183. National crimes committed in Cambodia during 1975-1979 are subject to a statutory limitation period of 10 years.⁴⁶⁶ Given that the crimes in the *ICIJ Closing Order (Indictment)* were allegedly committed within the territory of Cambodia from approximately late 1976 or early 1977 until at least 6 January 1979,⁴⁶⁷ the 10-year limitation period expired, at the very latest, on 6 January 1989.

184. There is no evidence to suggest the statutory limitation period was interrupted: (a) there was no ‘act of investigation or prosecution’ that would interrupt the time limit under Articles 112 and 114 of the 1956 Cambodian Penal Code;⁴⁶⁸ (b) there were no exceptional circumstances that could justify a suspension of the limitation period at any point since 6 January 1979;⁴⁶⁹ (c) the Cambodian legislature did not adopt prospective legislation aimed at enabling the prosecution of offences that would otherwise be time barred,⁴⁷⁰ and (d) the limitation period expired prior to the adoption of Article 3 *new* of the ECCC Law, thus any purported extension of the limitation period in ECCC Law would be retroactive and has no effect.⁴⁷¹

185. Furthermore, if uncertainty over the limitation period exists, any doubt concerning its application to national crimes committed in 1975-1979 must be resolved in AO An’s

⁴⁶⁴ Case 004/2-**D351/5**, paras 636-638.

⁴⁶⁵ Case No. 001/18-07-2007/ECCC/TC, *Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes*, **E187**, 26 Jul. 2010, paras 27-35, 39-56, attached as App. 76. The Defence concurs with the reasoning of the International Judges in this decision.

⁴⁶⁶ Royaume Du Cambodge Code Pénal et Lois Penales (1956) (‘1956 Cambodian Penal Code’), arts 109, 111, 112, 114, attached as App. 77; Code of Criminal Procedure of the Kingdom of Cambodia (1964), art. 37, attached as App. 78; Case No. 001/18-07-2007-ECCC-OCIJ, *Information about the 1956 Penal Code of Cambodia and Request Authentication of an Authoritative Code*, **E91/6**, 17 Aug. 2009, attached as App. 79; Case No. 001/18-07-2007-ECCC-OCIJ, *Letter from the Office of the Council of Ministers about the 1956 Penal Code of Cambodia*, **E91/6/1**, 19 Aug. 2009, attached as App. 80.

⁴⁶⁷ Case 004/2-**D360**, para. 195.

⁴⁶⁸ Case 001-**E187**, para. 12.

⁴⁶⁹ Case 001-**E187**, paras 27, 31-35 (noting substantial evidence to suggest that the Cambodian legal system was functioning post-1979).

⁴⁷⁰ Case 001-**E187**, paras 43-49.

⁴⁷¹ Case 001-**E187**, paras 50-54. An attempt to extend the limitation period under Article 3 *new* would represent a retroactive reinstatement of the right to prosecute, in violation of Article 15 of the ICCPR and the principle of legality.

favour.⁴⁷² Therefore, the ICIJ errs in indicting AO An for premeditated homicide, and these charges should be dismissed.

G. Ground 14: The ICIJ fails to apply the correct legal requirements for other inhumane acts

186. The ICIJ rejects the need to establish underlying criminality for an act to be an other inhumane act and applies the incorrect *mens rea* for this category of crimes. This results in the ICIJ's erroneous findings that AO An can be held responsible for other inhumane acts of rape, forced marriage, and inhumane conditions of detention and mistreatment of prisoners.

i. Underlying criminality is required for other inhumane acts

187. The ICIJ relies on erroneous ECCC jurisprudence to hold that underlying criminality is not essential for an act to be an other inhumane act.⁴⁷³ To qualify as an other inhumane act, the underlying conduct of the act must be criminalised under CIL.⁴⁷⁴

188. The ECCC's jurisprudence regarding other inhumane acts is wrong for the following reasons: First, the purpose of other inhumane acts is to include crimes under CIL which may have been omitted when codifying laws or which develop progressively over time, without the need to amend instruments of international law.⁴⁷⁵ Thus, it is central to the purpose of other inhumane acts to establish underlying criminality. Second, by neglecting the requirement of underlying criminality, the ICIJ permits a subjective and nebulous backdoor to criminal punishment, in violation of the principle of legality.⁴⁷⁶ Third, other inhumane acts require that an act is of a similar nature and gravity to the enumerated

⁴⁷² Given the inability of the Trial Chamber Judges to reach a unanimous decision on this issue, there is potential for a similar divergence of opinion in the present case should it proceed to trial. To avoid unnecessary delay and confusion going forward, and to facilitate the preparation of AO An's defence, this issue must be resolved in favour of the accused. Case 001-E187, para. 4, fn. 6; paras 54-56.

⁴⁷³ Case 004/2-D360, para. 81.

⁴⁷⁴ The Defence references and incorporates its arguments in Case No. 004/07-09-2009-ECCC/OCIJ, *TA An's Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage* ('AO An's Forced Marriage Annulment Application'), A259, 19 Dec. 2014, paras 27-32.

⁴⁷⁵ Eboe-Osuji, *International Law and Sexual Violence in Armed Conflict* ('Eboe-Osuji') (Leiden: Martinus Nijhoff Publishers, 2012), p. 243, attached as App. 81.

⁴⁷⁶ *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgement ('Stakić Trial Judgement'), 31 Jul. 2003, para. 719, attached as App. 82 (citing *Prosecutor v. Stakić*, Case No. IT-97-24-T, *Decision on Rule 98 bis Motion for Judgement of Acquittal*, 31 Oct. 2002, para. 131); *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 Dec. 2004, para. 117, attached as App. 83 (observing 'the potentially broad range of the crime of inhumane acts may raise concerns as to the possible violation of the *nullum crimen principle*'); *Prosecutor v. Kupreškić, et al*, Case No. IT-95-16-T, Judgement ('Kupreškić Trial Judgement'), 14 Jan. 2000, para. 563, attached as App. 84 (holding '[t]here is a concern that this [other inhumane acts] category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the "specificity" of criminal law'); Cassese, pp. 36-37; Eboe-Osuji, p. 239.

CAH.⁴⁷⁷ It is insufficient to rely primarily on international human rights law, as human rights violations are not comparative in nature or gravity to violations of ICL, and not every human rights violation requires criminal investigation.⁴⁷⁸

189. Even if underlying criminality were not a requirement of other inhumane acts, the ICIJ errs in finding ‘it is not necessary to stipulate any elements of the conduct that is alleged to amount to [an other inhumane act].’⁴⁷⁹ By failing to specify the elements of the conduct alleged to amount to other inhumane acts, the ICIJ undermines the principle of legality and AO An’s right to adequately prepare his defence.⁴⁸⁰ Under this approach, the ICIJ conflates separate and distinct acts, such as rape and forced marriage, in order to satisfy the gravity requirement of other inhumane acts.⁴⁸¹

ii. The ICIJ applies the incorrect *mens rea* standard for other inhumane acts

190. According to CIL, and reflected in the ICC Elements of Crimes, the *mens rea* for other inhumane acts requires that: (a) the perpetrator intended to cause great suffering or serious injury; and (b) the perpetrator was aware of the factual circumstances that established the character of the act.⁴⁸² The ICIJ fails to apply this *mens rea* requirement for other inhumane acts or to consider the ICC law and jurisprudence.⁴⁸³

191. Taking the example of rape, the ICIJ concludes that AO An ‘announced a policy that married couples had to “*sleep together*” in order to “*produce children*” for “*national progress*”.’⁴⁸⁴ This does not demonstrate that AO An had the necessary *mens rea* to commit rape. There is a distinction between encouraging population growth and intent to cause coercive sexual assault. The ICIJ also does not explain how AO An intended to cause great suffering or serious injury specifically through the underlying act of rape.

⁴⁷⁷ Case 002-F36, para. 586.

⁴⁷⁸ *Kupreškić Trial Judgement*, para. 618 (holding ‘[a]lthough the realm of human rights law is dynamic and expansive, not every denial of a human right may constitute a crime against humanity’); *Stakić Trial Judgement*, para. 721; Cryer et al., pp. 14-15 (describing the differences between ICL and international human rights law); *see, e.g.* Ground 15.

⁴⁷⁹ Case 004/2-D360, paras 81-82. While the ICIJ states ‘[i]t may however be necessary to establish the parameters of the underlying conduct in order to determine whether it was foreseeable and accessible to the charged person’, this fails to uphold the principle of legality to a necessary standard for a criminal conviction.

⁴⁸⁰ The ICIJ notes that legal certainty necessitates that the nature and gravity of alleged other inhumane acts are compared with other CAH and norms of international law. However, the Defence submits it would be impossible to carry out this comparison sufficiently without stipulating the elements of acts alleged to be other inhumane acts. Case 004/2-D360, para. 83.

⁴⁸¹ Case 004/2-D360, paras 692-696, 820-822.

⁴⁸² ICC Elements of Crimes, art. 7(1)(k); *Katanga Decision on Confirmation of Charges*, para. 455.

⁴⁸³ Case 004/2-D360, para. 80.

⁴⁸⁴ Case 004/2-D360, para. 316.

Furthermore, the ICIJ provides no evidence to show that AO An was aware of the factual circumstances that established the character of the act *i.e.* no evidence suggests that AO An was aware, or even informed, that married couples were being subjected to rape.⁴⁸⁵ Thus, the ICIJ fails to apply the correct *mens rea* to charge rape as an other inhumane act and, under the correct standard, it cannot be established that AO An intended to commit acts of rape.

H. Ground 15: Forced marriage is not a crime under the jurisdiction of the ECCC

192. Relying on erroneous ECCC jurisprudence, the ICIJ errs in finding⁴⁸⁶ that forced marriage qualifies as a crime under other inhumane acts.⁴⁸⁷ Forced marriage was not a crime under CIL or the 1956 Cambodian Penal Code during 1975-1979.⁴⁸⁸ Moreover, the Court's previous reliance on human rights law to establish the criminality of forced marriage under CIL is erroneous.⁴⁸⁹

193. Even if the ICIJ were not required to demonstrate the underlying criminality of forced marriage, he fails to show that forced marriage is of a similar nature and gravity to the enumerated CAH, and incorrectly conflates distinct acts of forced marriage and rape to elevate the perception of gravity related to forced marriage.⁴⁹⁰ Moreover, alleged forced marriage during 1975-1979 is not clearly distinguishable from arranged marriage, which was an accepted and common practice in Cambodia.⁴⁹¹

⁴⁸⁵ At best, if accepting forced marriages occurred, it could be alleged that rape was a foreseeable result of forced marriage. However, foreseeability, absent intent to cause great suffering through and knowledge of the underlying acts, would only permit rape to be charged through JCE III liability, which does not apply at the ECCC.

⁴⁸⁶ Case 004/2-D360, para. 84.

⁴⁸⁷ The Defence reiterates and incorporates by reference its arguments in paragraphs 27 to 49 of *AO An's Forced Marriage Annulment Application*.

⁴⁸⁸ Nguyen, 'Untangling Sex, Marriage, and Other Criminalities in Forced Marriage', 6 *Goettingen J. of Int'l L.* (2014), 13-46, pp. 14-15, attached as App. 85; Eboe-Osuji, p. 228 ('[T]here is no evidence that forced marriage has been recognised under [CIL] as a crime or in any of the other sources of international law identified in article 38(I) of the Statute of the ICJ.'). Forced marriage was not codified in the Rome Statute, demonstrating it had not reached widespread international acceptance as a crime under CIL as late as 1998.

⁴⁸⁹ Compare Case 004/2-D360, paras 83-84 (citing Case 002-D427, para. 1314) with *Stakić Trial Judgement*, para. 721.

⁴⁹⁰ Case 004/2-D360, paras 229, 690, 691, 696, 820-822.

⁴⁹¹ Jain, 'Forced Marriage as a Crime against Humanity, Problems of Definition and Prosecution', 6 *Journal of Int'l Criminal Justice* (2008), 1013-32, p. 1023, attached as App. 86; Heuveline & Poch, 'Do Marriages Forget their Past? Marital Stability in Post-Khmer Rouge Cambodia', 43(1) *Demography* (Feb. 2006), pp. 1, 3, attached as App. 87.

I. Ground 16: The ICIJ fails to correctly define and apply the elements of genocide

194. The ICIJ rejects the requirement to establish a contextual element of genocide, fails to demonstrate that the Cham people were targeted positively, as such, and fails to apply the *mens rea* for genocide to AO An. Such errors result in the ICIJ's erroneous determination that AO An can be held responsible for genocide and thus is within the Court's personal jurisdiction.

195. As a preliminary observation, the Defence notes that the ICIJ indicts AO An with genocide '[a]gainst the Cham of Kampong Cham Province',⁴⁹² which includes Central Zone and East Zone, and finds that AO An 'was involved in the planning of the purge of the East Zone, during which Cham were killed'.⁴⁹³ However, AO An is not charged with any facts or crimes in the East Zone. The PTC has held that "[i]n a civil law system, only facts which have been charged beforehand can be considered for indictment" and "the charging process [is] a requirement for subsequent indictment."⁴⁹⁴ Thus, the ICIJ errs in indicting AO An for genocide against the Cham of Kampong Cham Province.

i. The ICIJ rejects the requirement to establish the existence of a contextual element of genocide

196. Relying solely on the jurisprudence of the *ad hoc* tribunals, the ICIJ rejects the CIL requirement for a contextual element of genocide.⁴⁹⁵ The ICIJ fails to examine alternative sources of CIL which support this requirement, notably the ICC Elements of Crimes.⁴⁹⁶ By overlooking this requirement, the ICIJ lowers the threshold for the crime.⁴⁹⁷ Further, the CIL requirement for a contextual element of genocide is consistent with the object and purpose of the ECCC Law.⁴⁹⁸

⁴⁹² Case 004/2-D360, p. 409.

⁴⁹³ Case 004/2-D360, para. 637.

⁴⁹⁴ Case 004/1-D308/3/1/20, para. 110 (quoting Case No. 004/1/07-09-2009-ECCC/OCIJ (PTC52), *Decision on the International Co-Prosecutor's Appeal of Decision on Request for Investigative Action Regarding Sexual Violence at Prison No. 8 and in Bakan District*, D365/3/1/5, 13 Feb. 2018, para. 35).

⁴⁹⁵ Case 004/2-D360, para. 86 ('There is no requirement that the alleged conduct took place in the context of a manifest pattern of similar conduct. Similarly, the existence of a State (or other) policy or plan to commit genocide is not an element of the crime of genocide.').

⁴⁹⁶ ICC Elements of Crimes, art. 6(a)(4) (requiring, for genocide to have occurred, that the conduct in question 'took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'); *The Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* ('Al Bashir Decision on Prosecution Application for Arrest Warrant'), 4 Mar. 2009, paras 123-24, 133, attached as App. 88.

⁴⁹⁷ Cryer et al., p. 220 (noting the contextual element requires an objective threshold of scale and gravity, reflecting the seriousness of the crime). If there were any uncertainty surrounding the CIL requirement for a contextual element, the ICIJ should have applied the law that favours the accused.

⁴⁹⁸ ECCC Law, art. 1.

ii. The ICIJ does not demonstrate that the Cham people were positively identified and targeted ‘as such’

197. The ICIJ fails to apply the correct *mens rea* for genocide, requiring that a perpetrator must define the victim group positively.⁴⁹⁹ This error results in the ICIJ’s erroneous determination that AO An and the JCE group had the necessary intent to commit genocide against the Cham people.

198. To satisfy the requirements of ‘as such’,⁵⁰⁰ the perpetrator must target the protected group through positive identification, by reference to the group’s particular identity, as opposed to through negative identification, by reference to a lack of particular identity or characteristics.⁵⁰¹ The ICIJ implicitly rejects this *mens rea* requirement for genocide by failing to demonstrate the Cham people were targeted positively; instead he attempts to show they were targeted negatively, as part of a broad victim group.⁵⁰² The ICIJ finds that the Khmer Rouge regime intended to create a classless, atheist, and ethnically homogenous society.⁵⁰³ He also finds that all those who lacked the necessary characteristics to be included in this society were perceived as antithetical to the regime’s goals, labelled ‘enemies’, and negatively targeted as such.⁵⁰⁴ Thus, he fails to conclude

⁴⁹⁹ While the ICIJ recognises the requirement for positive identification, he fails to apply it. Case 004/2-**D360**, para. 89.

⁵⁰⁰ *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, *Judgement*, 9 Jul. 2004, para. 53, attached as App. 89 (noting ‘the Trial Chamber was correct in interpreting “as such” to mean that the proscribed acts were committed against the victims *because of* their membership in the protected group’); *The Prosecutor v. Musema*, Case No. ICTR-96-13-T, *Judgement*, 27 Jan. 2000, para. 165, attached as App. 90.

⁵⁰¹ *Prosecutor v. Stakić*, Case No. IT-97-24-A, *Judgement* (‘*Stakić Appeal Judgement*’), 22 Mar. 2006, paras 16-28, attached as App. 91 (holding ‘[t]he term “as such” has great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity. Yet when a person targets individuals because they lack a particular national, ethnical, racial, or religious characteristic, the intent is not to destroy particular groups with particular identities as such, but simply to destroy individuals because they lack certain national, ethnical, racial or religious characteristics’); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, *Judgement*, 24 Mar. 2016, para. 541, attached as App. 92; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, *Judgement* (‘*Brđanin Trial Judgement*’), 1 Sep. 2004, para. 685, attached as App. 93; *Al Bashir Decision on Prosecution Application for Arrest Warrant*, para. 135; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, *Judgement Volume I* (‘*Popović Trial Judgement Volume I*’), 10 Jun. 2010, para. 809, attached as App. 94; *Prosecutor v. Jelisić*, Case No. IT-95-10-T, *Judgement*, 14 Dec. 1999, para. 70, attached as App. 95 (holding ‘it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community’).

⁵⁰² Case 004/2-**D360**, para. 208 (‘The CPK’s objective was manifold; it sought to eliminate all opposition to the regime, prohibit religion, abolish class society, in order to create a politically and ideologically pure party and society.’); para. 597 (‘The CPK leadership sought to establish a classless, atheist and ethnically homogenous society by abolishing all ethnic, national, religious, class, and cultural differences.’); para. 598 (‘[I]n practice, the CPK’s definition of a reactionary religion extended to all religions, including Buddhism and Islam.’); para. 608 (‘Another Cham witness was told by a “mid-level Angkar representative” that “there would be no New People, no Base people, no Javanese or no Cham, but one Khmer population”.’).

⁵⁰³ Case 004/2-**D360**, para. 597.

⁵⁰⁴ Case 004/2-**D360**, para. 205 (‘In practice, enemy activities was interpreted broadly and often arbitrarily.’); para. 206 (‘People were often considered to be enemies not for their acts, but for the mere suspicion that they

that the Cham people and others were positively targeted because of their specific identities. This process of negative identification fails to satisfy the *mens rea* requirement for genocide.

iii. The ICIJ fails to apply the *mens rea* for genocide to AO An and to demonstrate that he possessed specific intent

199. The ICIJ fails to apply the *mens rea* for genocide to AO An and to demonstrate that he personally possessed specific genocidal intent.⁵⁰⁵ To prove an individual's state of mind by inference, it must be the only reasonable inference available on the evidence.⁵⁰⁶ While the Defence disputes the evidence in the *ICIJ Closing Order (Indictment)*, even if taken at its highest, it does not lead to the only reasonable inference that AO An possessed genocidal intent.⁵⁰⁷

200. First, AO An was neither a senior leader of the CPK nor an architect of the alleged genocide.⁵⁰⁸ Further, there is no direct evidence that he conceived, knew of, or intended to take part in a plan or policy to commit genocide against the Cham people.

201. Second, genocidal intent is not the only reasonable inference available when examining AO An's alleged actions. The CPK functioned as a strict hierarchical system, and orders to target the regime's enemies were passed down from senior CPK leadership as general instructions.⁵⁰⁹ Considering AO An was not a senior CPK leader and that he

did not share the values of the CPK or might potentially be disloyal in the future.');

para. 220 ('Ke Pauk reported to Pol Pot regarding the situation of enemies in the Central (old North) Zone, naming Cham people, former Lon Nol soldiers, and Lon Nol sympathizers as enemies.');

para. 716 ('[T]he CPK identified, targeted, and systematically purged particular categories of people perceived as potential threats to the DK regime or to have views otherwise incompatible with CPK doctrine. These included Central Zone cadres, people forcibly relocated from urban areas, former soldiers and other officials of Khmer Republic, people from the East Zone, the Cham, and others with religious, ethnic, political, economic or national identities perceived to be a threat to the CPK's goals to refashion Cambodian society.');

⁵⁰⁵ *Prosecutor v. Krstić*, Case No. IT-98-33A, *Judgement* ('*Krstić Appeal Judgement*'), 19 Apr. 2004, para. 134, attached as App. 96 (holding '[g]enocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established'); *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, *Judgement* ('*Kvočka Appeal Judgement*'), 28 Feb. 2005, paras 109-10, attached as App. 97 (holding for crimes of specific intent, 'participants in a basic or systemic form of [JCE] must be shown to share the required intent of the principal perpetrators'); *The Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement and Sentence*, 25 Feb. 2010, para. 453, attached as App. 98.

⁵⁰⁶ *Krstić Appeal Judgement*, para. 41; *Brđanin Trial Judgement*, para. 970.

⁵⁰⁷ Case 004/2-D360, paras 633-37 (The ICIJ's discussion regarding AO An's role and involvement in genocide is limited to these paragraphs.).

⁵⁰⁸ *Popović Trial Judgement Volume I*, para. 1410, (considering a lack of genocidal intent could be inferred given the accused was not an architect of the genocidal operation); *Popović Appeal Judgement*, paras 2005-2007.

⁵⁰⁹ Case 004/2-D360, paras 157, 623 (finding '[a]s the CPK's system of vertical communications prohibited horizontal communications, it is virtually impossible that lower levels could have planned and carried such a widespread and well-coordinated arrest and killing operation among themselves').

may have only received orders from above,⁵¹⁰ evidence that he allegedly ordered the creation of lists, arrests, and killings of the Cham people or that he allowed Sector 41 resources to be used to transport the Cham people from the East Zone,⁵¹¹ does not lead to the only reasonable inference that he possessed genocidal intent. Based on this evidence, another reasonable inference could be that AO An's 'blind dedication' to the CPK party may have led him to 'doggedly pursue' the execution of his tasks without genocidal intent.⁵¹² The ICIJ fails to provide evidence that AO An executed, passed along, or acceded to his orders with the specific intent to commit genocide.

202. Third, evidence that AO An may have been aware, through reports or his participation at meetings, that the Cham people were being arrested and killed would not infer genocidal intent.⁵¹³ At best, it would demonstrate that AO An may have possessed knowledge of crimes against the Cham people. Yet, knowledge alone does not satisfy the strict requirements of genocidal intent.⁵¹⁴

J. Ground 17: The ICIJ fails to include genocide in the JCE group's common purpose

203. The ICIJ fails to include genocide in the JCE group's common purpose. To impose liability through JCE I, the common purpose must involve or amount to the crime in question,⁵¹⁵ in order for the group members to intend its commission.⁵¹⁶

204. First, not only does the ICIJ not explicitly include genocide in JCE's common purpose, but it is also not mentioned in his 'factual findings on the [JCE]'.⁵¹⁷ At no point does the ICIJ argue that the JCE's common purpose involved or amounted to genocide, making it impossible to suggest that the JCE members intended to commit the crime. At

⁵¹⁰ Case 004/2-D360, para. 697.

⁵¹¹ Case 004/2-D360, paras 633-637.

⁵¹² *Popović Trial Judgement Volume I*, para. 1414 ('Having considered and weighed all of the above factors individually and cumulatively, the Trial Chamber is not satisfied that the only reasonable inference to be drawn from Nikolić's acts is that he shared the genocidal intent. Another reasonable inference is that Nikolić's blind dedication to the Security Service led him to doggedly pursue the efficient execution of his assigned tasks in this operation, despite its murderous nature and the genocidal aim of his superiors. '); *Popović Appeal Judgement*, para. 516; *Krstić Appeal Judgement*, para. 134 (finding knowledge of the accused that resources under his control were being used to facilitate genocide 'cannot support an inference of genocidal intent').

⁵¹³ Case 004/2-D360, paras 635-636.

⁵¹⁴ *Krstić Appeal Judgement*, paras 129, 133-134 (holding 'knowledge on the part of Radislav Krstić, without more, is insufficient to support the further inference of genocidal intent').

⁵¹⁵ *Tadić Appeal Judgement*, para. 227; *Brđanin Appeal Judgement*, para 418; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, *Judgement* ('*Krnojelac Appeal Judgement*'), 17 Sep. 2003, para. 31, attached as App. 99.

⁵¹⁶ Case 002-F36, paras 1053-1054; *Krnojelac Appeal Judgement*, paras 111-112; *Kvočka Appeal Judgement*, paras 109-110; *Tadić Appeal Judgement*, para. 196; *Brđanin Appeal Judgement*, para. 418; *Stakić Appeal Judgement*, para. 65.

⁵¹⁷ Case 004/2-D360, paras 195-232 (describing part of the JCE's common purpose as the implementation of CPK policies through the targeting of specific groups, but not including genocide specifically).

best, the common purpose described by the ICIJ suggests that genocide may have been a foreseeable result of implementing the CPK's plan to target specific groups, thus amounting to JCE III liability, which has been rejected by the ECCC.⁵¹⁸

205. Second, from the ICIJ's factual findings, it cannot be inferred that genocide formed part of the common purpose shared by the JCE group members; instead he overly relies on evidence of genocidal intent from outside the JCE group.⁵¹⁹ The ICIJ is conflating different JCE groups and common purposes and using this evidence to satisfy the JCE requirements in AO An's case. However, even if taking the evidence at its highest, the ICIJ fails to demonstrate that a JCE, which may have involved AO An, specifically intended to undertake a common purpose involving or amounting to genocide. Differing JCE groups existed during the Khmer Rouge regime,⁵²⁰ and while CPK policy was conceived by the higher-ranking Case 002 group, it is likely the lower-level perpetrators would have been merely used to implement it.⁵²¹ Thus, cadre in Sector 41 would have been several steps removed from the genocidal intent of the campaign's alleged architects.⁵²²

K. Conclusion for Grounds 8-17

206. In light of these substantive legal errors, the Defence requests the PTC to dismiss the charges over which there is no subject-matter jurisdiction and dismiss the case against AO An for lack of personal jurisdiction.

IV. GROUND 18: THE ICIJ ERRS OR ABUSES HIS DISCRETION IN FAILING TO DISMISS OR STAY CASE 004/2 TO SAFEGUARD THE FAIRNESS AND INTEGRITY OF PROCEEDINGS AND AO AN'S RIGHTS

207. From the outset of the judicial investigation up to, and including, the issuance of a Closing Order, the ICIJ had a positive duty to take such measures as were necessary to safeguard the fairness and integrity of current and future proceedings in Case 004/2 and

⁵¹⁸ Case 002-D97/15/9, paras 75-83.

⁵¹⁹ Evidence of genocidal intent from outside of Sector 41 and the Central Zone does not demonstrate that alleged killings of the Cham people were carried out by the JCE group in the present case, with the intent to commit genocide as part of a common purpose. Case 004/2-D360, paras 597-615.

⁵²⁰ Compare Case 004/2-D360, para. 195 ('Ke Pauk, AO An and other CPK cadres shared the common purpose of implementing, in the Central Zone of DK, the following CPK policies.');

⁵²¹ Case 004/2-D360, para. 623 (finding '[a]s the CPK's system of vertical communications prohibited horizontal communications, it is virtually impossible that lower levels could have planned and carried such a widespread and well-coordinated arrest and killing operation among themselves');

⁵²² para. 195 (finding the common purpose of an alleged Central Zone JCE was the implementation of CPK policy).

⁵²² *Popović Trial Judgement Volume I*, para. 1410; *Popović Appeal Judgement*, paras 2005-07.

AO An's rights.⁵²³ The supermajority voting rule undermined AO An's presumption of innocence throughout the investigation. Further, a catalogue of errors, omissions and malpractices violated basic fair trial standards, including AO An's right to counsel, right to be informed of the charges against him, right to prepare an effective defence, right to equality of arms, and right to appeal. The Court's budgetary crisis and future financial uncertainty – with no contingency plan in the event of a breakdown – places AO An's rights and the Court's integrity in further jeopardy. Whilst each violation undermines AO An's ability to receive a fair trial, the *cumulative impact* of these violations undermines the fairness and integrity of proceedings in a manner that is egregious and irreparable, rendering a fair trial at the ECCC impossible. In **Annex E**, the Defence provides the relevant procedural history concerning the fair trial rights violations discussed in this Section.

208. The CIJs' conduct in relation to their duty to safeguard the fairness and integrity of proceedings is subject to appellate review.⁵²⁴ The Defence avers that the ICIJ's failure to dismiss (or stay) the case against AO An, despite the cumulative harm to its fairness and integrity, was based on a patently incorrect conclusion of fact occasioning a miscarriage of justice, or in the alternative, so unfair and unreasonable as to constitute an abuse of the ICIJ's discretion. The duty to safeguard the fairness and integrity of proceedings and AO An's fundamental rights now falls on the PTC.⁵²⁵ Consequently, the Defence requests that the PTC overturn the *ICIJ Closing Order (Indictment)* and dismiss AO An's case.

A. The ICIJ had a duty to safeguard judicial independence, fairness, and integrity of proceedings and AO An's rights

209. The ECCC must 'exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law'.⁵²⁶ The CIJs are the primary guarantors of fairness and integrity of proceedings.⁵²⁷ The ICIJ has previously held that maintaining the integrity of proceedings is the 'primary responsibility'⁵²⁸ and 'fundamental obligation',⁵²⁹

⁵²³ Case No. 004/2/07-09-2009-ECCC-OCIJ, *Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for YIM Tith*, **D349/6**, 11 Aug. 2017, para. 67. Note that the duty falls on both CIJs, however this appeal only lies against the ICIJ's conduct in this regard.

⁵²⁴ Case 004/1-**D308/3/1/20**, para. 21.

⁵²⁵ Case 004/2-**D360**, para. 44.

⁵²⁶ UN-RGC Agreement, art. 12; ECCC Law, art. 33 *new*.

⁵²⁷ Case 004/2-**D349/6**, paras 17-18.

⁵²⁸ Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on Suspect's Request for Five Documents*, **D226/1**, 3 Nov. 2014, para. 9.

of the CIJs. Moreover, the CIJs have recognised that their mandate to safeguard the fairness and integrity of proceedings requires them to look at the case as a whole, beyond the timeframe of the investigation.⁵³⁰ However, whereas their assessment must be forward looking, their opportunity to safeguard proceedings ends with the issuance of the Closing Order.⁵³¹ Thus, not only do the CIJs have the jurisdiction to adjudicate on any matters where there is an impact on the fairness of current or future proceedings,⁵³² they have a positive duty to ‘take the necessary measures’ to redress it.⁵³³ Their intervention must be sufficient to safeguard the proceedings against all harm and anticipated threats.⁵³⁴ In the event of irreparable harm or serious threat to proceedings, the CIJs have a duty to terminate proceedings by dismissing the case or ordering a permanent stay.⁵³⁵ A failure to redress harm or prevent such a threat is a clear dereliction of the ICIJ’s duty and role as guarantor of fairness and integrity.

B. The supermajority rule violated AO An’s presumption of innocence

210. AO An’s presumption of innocence has been violated throughout the investigation as a result of the application of the supermajority voting rule.⁵³⁶

211. The presumption of innocence places the burden of proof on the prosecution.⁵³⁷ In all criminal courts this means that a case may only proceed if the trier of fact agrees – either

⁵²⁹ Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on YIM Tith’s Urgent Request for the International Co-Investigating Judge to Reconsider the Disclosure of Case 004 Witness Statements in Case 002/02*, **D229/3**, 12 Aug. 2015, para. 26.

⁵³⁰ Case No. 004/07-09-2009-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, para. 52 (‘Our perspective as Investigating Judges cannot merely be focused on the timeline needed until the closing order as the end to our own mandate. Other than the chambers of the ECCC who are seised of a case only upon either an appeal or motion (PTC, SCC), or by an indictment (Trial Chamber), the work of the OCIJ is open-ended and involves the initial construction of a case, if there is any.’).

⁵³¹ Case 004/2-**D360**, para. 44.

⁵³² Case 004/2-**D349/6**, paras 17-18.

⁵³³ Case 004/2-**D349/6**, para. 67.

⁵³⁴ *Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, *Judgement* (‘*Kajelijeli Appeal Judgement*’), 23 May 2005, paras 255, 324, attached as App. 100 (‘Any violation of the accused’s rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the ICCPR.’).

⁵³⁵ 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. 101; *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. 102; *see also Prosecutor v. Slobodan 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. 103; *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 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. 104.

⁵³⁶ UN-RGC Agreement, art 7(4); *ECCC Internal Rules*, Rules 71(4)(c), 72(4)(d), 77(13). When the PTC fails to reach a supermajority of votes, the default position for AO An’s case is that the prosecution continues.

⁵³⁷ *ECCC Law*, art. 35 *new*; *ECCC Internal Rules*, Rules 21(d), 87(1); ICCPR, art. 14(2).

by majority or unanimity – with the merits of the prosecution’s case. In AO An’s case, the burden has been reversed by allowing the investigation and prosecution to proceed despite opposition from a majority of judges.

212. Before the start of the judicial investigation, the majority of PTC Judges ruled that the case against AO An should not proceed.⁵³⁸ Nevertheless, the case was sent to the CIJs.⁵³⁹ During the investigation, the same PTC majority held, at every opportunity, that the Court lacked jurisdiction.⁵⁴⁰ Yet, the investigation continued. At the end of the investigation, the NCIJ dismissed the case,⁵⁴¹ and yet, the ICIJ still issued an indictment.⁵⁴² In other words, from the outset, the majority of judges have consistently ruled to dismiss the case against AO An, but the majority view has been frustrated by a minority of judges, namely, the International Judges. Despite nominal equality between judges,⁵⁴³ the minority (international) view has dictated the direction of the case – a situation only possible because of a presumption-of-innocence-defying supermajority rule as applied to the PTC. Anyone familiar with the UN-RGC negotiations knows that the supermajority rule was adopted because international negotiators did not trust the Cambodian Judges to remain independent.⁵⁴⁴ This is naive and ill conceived:⁵⁴⁵ either the Cambodian Judges are *equal*,

⁵³⁸ Disagreement No. 001/18-11-2008/ECCC/PTC, *Annex I: Public Redacted Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71*, **D1/1.3**, 18 Aug. 2009, *Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy*, paras 18-19.

⁵³⁹ Case 004-**D1/1.3**, paras 17, 45.

⁵⁴⁰ E.g. Case No. 004/07-09-2009-ECCC/OCIJ (PTC21), *Confidential Considerations on AO An’s Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigative Action concerning Forced Marriage*, **D257/1/8**, 17 May 2016, *Opinion of the PTC National Judges*, paras 11-15; Case No. 004/07-09-2009-ECCC/OCIJ (PTC24), *Confidential Considerations on Appeal Against Decision on AO An’s Fifth Request for Investigative Action*, **D260/1/1/3**, 16 Jun. 2016, *Opinion of the PTC National Judges*, paras 27-30; Case No. 004/07-09-2009-ECCC/OCIJ (PTC23), *Confidential Considerations on AO An’s Application for Annulment of Investigative Action Related to Wat Ta Meak*, **D263/1/5**, 15 Dec. 2016, *Opinion of the PTC National Judges*, paras 41-42; Case No. 004/07-09-2009-ECCC/OCIJ (PTC27), *Confidential Considerations on AO An’s Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges Relating to Tuol Beng*, **D299/3/2**, 14 Dec. 2016, *Opinion of the PTC National Judges*, paras 35-39; Case 004/2-**D343/4**, *Opinion of the PTC National Judges*, paras 15-19.

⁵⁴¹ Case 004/2-**D359**, paras 554-555.

⁵⁴² Case 004/2-**D360**, EN 01580615-21, pp. 409-415. Document numbers reveal that the *NCIJ Closing Order (Dismissal)* was placed on the Case File prior to the *ICIJ Closing Order (Indictment)*, and in any event the ICIJ was clearly well aware of the NCIJ’s long-held position on jurisdiction.

⁵⁴³ ECCC Law, art. 12.

⁵⁴⁴ According to ECCC scholars, John Ciorciari and Anne Heindel, Scheffer advanced the supermajority requirement to “manage a Cambodian majority on the bench (if that proved to be the endgame)” and to establish “the minimum threshold of international oversight in the decision-making process of the judges”. Ciorciari & Heindel, *Hybrid Justice* (1st edn, USA: The University of Michigan Press, 2014), **D297.1**, p. 22; Cambodia Tribunal Monitor & Center for International Human Rights, Northwestern University School of Law, ‘Composite Chronology of the Evolution and Operation of the Extraordinary Chambers in the Courts of Cambodia’, p. 7, attached as App. 105; see also Human Rights Watch, ‘Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement’, 30 Apr. 2003, p. 5, attached as App. 106.

or they are not. If they are, then their majority view must be respected. If they are not equal because of their perceived lack of independence, then the case must be dismissed for violating AO An's right to an independent judiciary.⁵⁴⁶ The supermajority rule is the product of political compromise that, in its application to AO An's case, undermines his presumption of innocence in a manner that no other national or international criminal court has done in modern times. It is inconceivable that this compromise was meant to apply to the detriment of a Charged Person's fair trial rights.

C. Errors, omissions and malpractices violating AO An's procedural rights

213. In the course of the judicial investigation in Case 004/2, AO An's procedural rights were violated by numerous errors, omissions, and malpractices, rendering his right to effective participation in the investigation an illusion. These violations must be considered (or re-considered) in the context of the entire judicial investigation.⁵⁴⁷
214. AO An was denied the *right to be represented by counsel of his choice*⁵⁴⁸ for four and half months, from 22 March 2012 until 9 August 2012.⁵⁴⁹ On 15 July 2011, DSS

⁵⁴⁵ Note to File from Katarina Grenfell re 27 Mar. 2002 meeting with Japanese government, 1 Apr. 2002, attached as App. 107 (summarising meeting and noting Ralph Zacklin believes supermajority is extremely complex and burdensome mechanism and that UN had never been happy with it); Note to Messrs. Prendergast and Knutsson from Hans Corell re preparations for meeting with three States involved in Khmer Rouge tribunal, 26 Jan. 2000, attached as App. 108; Letter from Human Rights Watch to UN Secretary-General re supermajority rule, 19 Jun. 2000, attached as App. 109; Note to File from Stadler Trengove re 11 Nov. 1999 meeting reviewing progress of negotiations with Cambodian government, 16 Nov. 1999, attached as App. 110.

⁵⁴⁶ ECCC Law, art. 10 *new*; ECCC Internal Rules, Rule 14(1); ICCPR, art. 14(1).

⁵⁴⁷ Case 002-**E313**, paras 40-41; *see The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings"* ('Lubanga Redacted Decision on Defence Application Seeking a Permanent Stay'), 7 Mar. 2011, paras 165-166, attached as App. 111; *The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006* ('Lubanga Judgment on Appeal against Decision on Defence Challenges to Jurisdiction'), 14 Dec. 2006, paras 28-29, 37, attached as App. 112; *The Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, *Decision on "Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'"* ('Bemba Decision on Defence Request for Leave to Appeal'), 24 Jul. 2015, para 12, attached as App. 113; *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, *Decision* ('Barayagwiza Decision'), 3 Nov. 1999, paras 73, 76-77, attached as App. 114; *Prosecutor v. Nikolić*, Case No. IT-94-2-PT, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal* ('Nikolić Decision on Defence Motion Challenging Exercise of Jurisdiction'), 9 Oct. 2002, para. 111, attached as App. 115; *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, *Reasons on the Defence Motion for Stay of the Proceedings for Abuse of Process* ('Hartmann Reasons on Defence Motion for Stay'), 3 Feb. 2009, para. 4, attached as App. 116.

⁵⁴⁸ ECCC Law, art. 24 *new*; ECCC Internal Rules, Rules 21(1)(d) and 22(1); ICCPR, art. 14(3)(d); Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on Motion and Supplemental Brief on Suspect's Right to Counsel*, **D122/6**, 17 May 2013, para. 76 ('[A] fundamental right that may only be restricted under certain clearly defined circumstances [...] and following clearly defined processes.');

Prosecutor v. Martić, Case No. IT-95-11-PT, *Decision on Appeal Against Decision of Registry*, 2 Aug. 2002, attached as App. 117; *The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Decision on the "Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves" and on the "Urgent Request for the Appointment of a Duty Counsel" filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively*, 29 Jun.

approved Richard Rogers' application to be placed on the DSS List.⁵⁵⁰ On 22 March 2012, AO An selected Rogers from the DSS List as his International Co-Lawyer of choice.⁵⁵¹ The procedure for Rogers' selection as AO An's International Co-Lawyer and his admission to the BAKC followed established practice endorsed by the CIJs, BACK, and the OA.⁵⁵² The OA refused to provide Rogers with a Legal Services Contract until it was ordered to do so by the ICIJ in February 2014.⁵⁵³ From 22 March 2012 until 20 February 2014, the OA (through the Head of DSS) took extraordinary steps to obstruct Rogers' assignment as AO An's International Co-Lawyer.⁵⁵⁴ The PTC rebuked the OA's reasoning as illegal, erroneous and irrelevant.⁵⁵⁵ The four and a half month delay was both arbitrary and deliberately obstructionist, and amounts to constructive denial of AO An's right to be represented by counsel of his choice. It also had repercussions on other fair trial rights – including the CIJs' refusal to consider a key Defence motion on the grounds that it bore Rogers' name,⁵⁵⁶ undue delay in proceedings, and the needless diversion of Defence time and resources.

2007, paras 9, 24-25, 52-53, attached as App. 118; *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, *Decision Relating to the Assignment of Counsel*, 27 Jul. 1999, p. 3, attached as App. 119; *The Prosecutor v. Gérard Ntakirutimana*, Case No. ICTR-96-10-T/ICTR-96-17-T, *Decision on the Motions of the Accused for Replacement of Assigned Counsel/Corr.*, 11 Jun. 1997, p. 5, attached as App. 120.

⁵⁴⁹ Although Rogers was not assigned as AO An's counsel until February 2014, Göran Sluiter was assigned as Foreign Co-Lawyer on 9 August 2012.

⁵⁵⁰ Letter to Richard J. Rogers re Application for Foreign Lawyers, Approval by DSS, 15 Jul. 2011, attached as App. 121.

⁵⁵¹ AO An formally confirmed his selection of Rogers from the DSS list by signing: (a) DSS Form 7: Request for Engagement/Assignment of Co-Lawyers on 26 March 2012, attached as App. 122; (b) Power of Attorney, signed on 31 March 2012, attached as App. 123; and (c) Letter re Right to Select Lawyers, dated 20 May 2012, attached as App. 124.

⁵⁵² Letter to Patricia O'Brien, 8 Jun. 2012, attached as App. 125.

⁵⁵³ Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on the Recognition of Lawyer for Suspect TA An*, **D122/12**, 24 Feb. 2014; see also Case No. 10-07-2013-ECCC/PTC, *Decision on the "Appeal Against Dismissal of Richard Rogers' Application to be Placed on the List of Foreign Co-Lawyers ('Decision on Rogers' Appeal')*, Doc. No. 8, 6 Feb. 2014, attached as App. 126.

⁵⁵⁴ These included revoking the July 2011 decision to place Rogers on the DSS List on 30 May 2012, refusing a renewed application to be placed on the DSS List on 25 June 2013, seeking to recuse PTC Judge Downing from deciding on an appeal against the latter refusal, making unsubstantiated accusations against Rogers' ethics and motives and refusing Rogers the opportunity to respond to them, along with other forms of time-wasting and obstructionism. A full review and detailed history of the OA's obstructionism in this matter may be found in, and is hereby incorporated by reference from *Decision on Rogers' Appeal*, paras 2-39.

⁵⁵⁵ *Decision on Rogers' Appeal*, paras 58-84; see also para. 85 (where the PTC considered it 'unnecessary to further examine' the lack of procedural fairness, lack of good faith and bias on the part of the Head of DSS).

⁵⁵⁶ Case No. 004/07-09-2009-ECCC-OCIJ, *Response to Letter to the Co-Investigating Judges and the Co-Prosecutors Concerning the Failure of the Co-Investigating Judges to Grant Access to the Case File to the Co-Lawyers for Ta An*, **D122/7/1**, 13 Jun. 2013.

215. AO An was denied the *right to be informed promptly and in detail of the nature and cause of the charge against him*⁵⁵⁷ for at least three years after he was officially notified of the prosecution. On 29 February 2012, the Reserve ICIJ notified AO An that ‘he is named as a suspect in the ongoing judicial investigation’, and informed him of his rights (including the right to access the case file).⁵⁵⁸ Nevertheless, AO An was not informed of the charges against him, or of the facts underpinning the charges, until 27 March 2015.⁵⁵⁹ For three years, the Defence was consistently denied access to the Case File⁵⁶⁰ – an error of law according to the PTC International Judges.⁵⁶¹ This represents an unacceptable departure from the CIJs’ obligation to provide this information ‘promptly’,⁵⁶² placed AO An at a serious disadvantage vis-à-vis the ICP, and caused him to suffer unnecessary stress and anxiety. The delay was based on a formulaic interpretation of the IRs, rather than a pragmatic approach called for by international jurisprudence.⁵⁶³ The CIJs did not invoke any legitimate interests to justify shutting AO An out of the investigation.⁵⁶⁴ Moreover, following the issuance of separate and opposing Closing Orders, AO An is

⁵⁵⁷ *ECCC Internal Rules*, Rule 21(d); *see also ECCC Internal Rules*, Glossary, which defines ‘charged person’ as ‘any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal of the case’.

⁵⁵⁸ Case No. 004/07-09-2009-ECCC/OCIJ, *Notification of Suspect’s Rights [Rule 21 (1)(D)]*, **D110**, 29 Feb. 2012.

⁵⁵⁹ Case 004-**D242**, EN 01096767, p. 8.

⁵⁶⁰ Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on the Ta An Defence Requests to Access the Case File and Take Part in the Judicial Investigation*, **D121/4**, 31 Jul. 2013; Case No. 004/07-09-2009-ECCC-OCIJ, *Preliminary Decision on Request for Reconsideration of International Co-Investigating Judge’s Decision to Refuse Ta An Access to the Case File*, **D121/4/5**, 17 Apr. 2014; Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on Request for Reconsideration of International Co-Investigating Judge’s Decision on the Ta An Defence Requests to Access the Case File and Take Part in Judicial Investigation*, **D121/4/6**, 22 Apr. 2014; Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on Ta An’s Motion requesting (1) Access to All Decisions concerning Access to Case File and (2) Clarification of Criteria for Classification of Documents*, **D217/1**, 3 Sep. 2014; Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on Ta An’s Motion Requesting (1) Access to the Supplementary Submissions and (2) Clarification Regarding Parties’ and Suspects’ Access to the Case File*, **D218/1**, 2 Oct. 2014.

⁵⁶¹ Case 004-**D121/4/1/4**, *Opinion of Judges Chang-Ho Chung and Rowan Downing*, paras 17, 25-29.

⁵⁶² ICCPR, art. 14; *Human Rights Council General Comment no. 32*, para. 31 (stating ‘[t]he right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such’).

⁵⁶³ Case 004-**D121/4/1/4**, *Opinion of Judges Chang-Ho Chung and Rowan Downing*, para 19, 25 (citing *Adolf v Austria*, ECtHR, 26 Mar. 1982, para. 30 (holding that human rights law ‘favours a substantive, rather than a formal, conception of charge [and] impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a charge’)); *see also Foti v Italy*, ECtHR, 10 Dec. 1982, para. 52, attached as App. 127; *see also Kangasluoma v Finland*, ECtHR, 20 Jan. 2004, para. 26, attached as App. 128.

⁵⁶⁴ *See In the matter of El Sayed*, Case No. CH/PTJ/2010/005, *Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr. El Sayed Dated 17 March 2010 and Whether Mr. El Sayed has Standing before the Tribunal*, 17 Sep. 2010, para. 53, attached as App. 129.

once again deprived of clear and certain knowledge of the nature and cause of the charges against him.⁵⁶⁵

216. Throughout the investigation, AO An was systematically denied the *right to prepare an effective defence*⁵⁶⁶ and was placed at a significant disadvantage to the ICP in violation of the *principle of equality of arms*.⁵⁶⁷ The ICP enjoyed access to the Case File from the outset and was able to actively participate in shaping the judicial investigation.⁵⁶⁸ The Defence was unable to follow the investigation as it unfolded, to provide CIJs with timely assistance in their duty to gather exculpatory evidence,⁵⁶⁹ or to identify, alert to, and challenge procedural defects as they arose, leaving AO An in a concrete and permanent disadvantage vis-à-vis the ICP.⁵⁷⁰ By March 2015, AO An was presented with an all-but-completed Case File, his *ex post facto* requests dismissed as being too late,⁵⁷¹ too removed from the already formed case theory,⁵⁷² or beyond the Court's means.⁵⁷³ His challenges to investigative malpractices were at best regarded as unfortunate,⁵⁷⁴ but by that time too entrenched to remedy. Furthermore, throughout her *Final Submission*, the

⁵⁶⁵ See Ground 1.

⁵⁶⁶ ECCC Law, art. 35 *new*; UN-RGC Agreement, art. 13; ICCPR, art. 14.

⁵⁶⁷ *Human Rights Council General Comment no. 32*, paras 8, 13, 32, 39, 62.

⁵⁶⁸ See, e.g. Case No. 004/07-09-2009-ECCC/OCIJ, *International Co-Prosecutor's Request for Investigative Action Regarding Case 004 Crime Sites in Central Zone and Responsibility of Suspect Ta An*, **D41**, 15 Jun. 2011; Case No. 004/07-09-2009-ECCC/OCIJ, *International Co-Prosecutor's Investigative Request*, **D216**, 22 Aug. 2014; Case No. 004/07-09-2009-ECCC-OCIJ, *Co-Prosecutors' Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, **D65**, 18 Jul. 2011; Case No. 004/07-09-2009-ECCC/OCIJ, *Co-Prosecutors' Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence*, **D191**, 24 Apr. 2014.

⁵⁶⁹ *ECCC Internal Rules*, Rule 55(5).

⁵⁷⁰ See *Salduz v. Turkey* ('*Salduz*'), ECtHR, 27 Nov. 2008, para. 50, attached as App. 130 (holding '[f]airness of the trial is likely to be seriously prejudiced by an initial failure to comply with [fair trial rights] provisions').

⁵⁷¹ Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on AO An's Fifth Request for Investigative Action*, **D260/1**, 10 Nov. 2015, paras 16, 23, 25; Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on AO An's Amended Third Request for Investigative Action*, **D189/2**, 20 Sep. 2016, paras 30, 32-33; Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on AO An's Sixth Request for Investigative Action*, **D276/1**, 12 Oct. 2016, paras 18-20, 25-28, 31-41.

⁵⁷² Case 004-**D260/1**, paras 17, 24-25; Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on AO An's Amended Fourth Request for Investigative Action*, **D244/1**, 17 Oct. 2016, paras 21-23; Case No. 004/07-09-2009-ECCC-OCIJ (PTC), *Appeal Against the Decision on AO An's Sixth Request for Investigative Action*, **D276/1/1/1**, 9 Nov. 2016, paras 2, 19, 28-31; Case No. 004/07-09-2009-ECCC/OCIJ, *Decision on AO An's Seventh Request for Investigative Action*, **D277/1**, 8 Dec. 2016, paras 42-43, 50, 57-58; Case No. 004/07-09-2009-ECCC-OCIJ, *Decision on AO An's Tenth Request for Investigative Action*, **D311/1**, 16 Dec. 2016, paras 14, 20-21, 30, 47, 65; Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC35), *Confidential Decision on Appeal Against the Decision on AO An's Twelfth Request for Investigative Action*, D320/1/1/4, 16 Mar. 2017, paras 25-28.

⁵⁷³ Case 004-**D276/1**, para. 30 (holding 'a request to identify and interview all family members of Ke Pauk and Ta Mok who held official or unofficial positions in Sector 41 is overly broad. I am not prepared to commit resources to undertake such a labour-intensive investigative activity'); see also Case 004-**D277/1**, paras 51-56.

⁵⁷⁴ Case No. 004/07-09-2009-ECCC/OCIJ, *Decision on AO An's Request for Translation and Transcription of Audio-Recordings and to Place Certain Documents on the Case File*, **D274/1**, 9 Aug. 2016, paras 21, 24, 27-28, 52, 61-64, 66-67; see also Case No. 004/2/07-02-2009-ECCC-OCIJ, *Decision on AO An's Thirteenth Request for Investigative Action*, **D345/1**, 16 Mar. 2017, paras 15-19.

NCP refers to (and incorporates by reference) documents from the IR 71 disagreement between the Co-Prosecutors.⁵⁷⁵ None of the referenced or incorporated materials have been disclosed to the Defence,⁵⁷⁶ which amounts to a denial of adequate facilities to prepare his defence.⁵⁷⁷

217. AO An was denied the opportunity to examine witnesses against him and obtain the presentation and examination of witnesses on his behalf under the same conditions as evidence against him.⁵⁷⁸ The Defence identified a significant number of errors, inaccuracies and investigative malpractices contained in WRIs,⁵⁷⁹ which are the primary form of evidence and enjoy a presumption of reliability.⁵⁸⁰ Over half of all WRIs pertaining to AO An's case do not have corresponding audio recordings,⁵⁸¹ in line with CIJs' instructions.⁵⁸² The PTC denied AO An's request to annul unrecorded WRIs.⁵⁸³ As a result, AO An has no opportunity to identify errors and inaccuracies in unrecorded WRIs, or to rebut the presumption of their reliability.⁵⁸⁴ Similarly, at least three investigators' malpractices⁵⁸⁵ have contaminated the majority of relevant witness' evidence with preconceived inculpatory narratives, suppressed potentially exculpatory

⁵⁷⁵ Case No. 004/2/07-09-2009-ECCC-OCIJ, *Final Submission Concerning Ao An Pursuant To Internal Rule 66*, **D351/4**, 18 Aug. 2017, paras 3, 5-9, 11, 28, 37.

⁵⁷⁶ *Decision on AO An's Urgent Request for Disclosure*, paras 4-6, 19-20.

⁵⁷⁷ ECCC Law, art. 35(b) *new*; ICCPR, art. 14(3)(b); *Human Rights Council General Comment no. 32*, para. 33 (stating '[e]xculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence').

⁵⁷⁸ ECCC Law, art. 35 *new*; UN-RGC Agreement, art. 13; ICCPR, art. 14; *Human Rights Council General Comment no. 32*, paras 33, 39.

⁵⁷⁹ Case No. 004/07-09-2009-ECCC/OCIJ, *Request for the Translation and Transcription of Audio Recordings and to Place Certain Documents on the Case File*, **D274**, 11 Nov. 2015, paras 2-3, Annexes A and B (including the inappropriate use of leading questions on contentious issues, the failure to record exculpatory evidence or evidence capable of undermining witnesses' accounts, the exaggeration of supposedly incriminatory evidence, the inaccurate recording of witnesses' accounts to make them appear artificially coherent, the general misrepresentation of witnesses' evidence, the conducting of staged and 'off the record' interviews, and the presence and participation of unidentified individuals' during interviews).

⁵⁸⁰ Case 004/2-**D338/1/5**, paras 16, 20, 24-25.

⁵⁸¹ Of the 354 WRIs that the Defence has determined as being relevant to the case against AO An, at least 195 have no corresponding audio record.

⁵⁸² Case No. 004/07-09-2009-ECCC-OCIJ, *Instructions on Conduct of Witness Interviews*, **D116**, 3 Dec. 2012, EN 00867630, p. 1 (AO An was unable to challenge this as he had no access to or knowledge of such instructions.).

⁵⁸³ Case No.004/07-09-2009-ECCC/OCIJ, *Decision on AO An's Application to Annul Non-Audio Recorded Written Records of Interview*, **D296/1/1/4**, 30 Nov. 2016, paras 26-27.

⁵⁸⁴ Case 004/2-**D338/1/5**, paras 16, 20, 24-25.

⁵⁸⁵ Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC 37), *Application to Annul Written Records of Interview of Three Investigators*, **D338/1/2**, 9 Feb. 2017, paras 3, 22, 27-31 (including the feeding of inculpatory information to witnesses or civil party applicants, the failure to follow up on exculpatory leads, the failure to objectively test inculpatory statements, and the improper practice of off-record conversations).

leads, and permanently altered the witness' recollection of events.⁵⁸⁶ The bulk of this contamination took place prior to AO An being given access to the Case File. Moreover, key witnesses subsequently had their WRIs disclosed in Case 002, allowing the ICP to examine, shape their evidence, and build his case against AO An during the trial proceedings held without AO An's participation.⁵⁸⁷ This contamination of key evidence has rendered AO An's right to examine these witnesses in a subsequent trial illusory (even more so if witnesses die or are unable to testify).⁵⁸⁸

218. AO An has been effectively deprived of the *right to appeal*⁵⁸⁹ with respect to the OCIJ denials of his investigative requests. Having rejected the ICP's *Third Introductory Submission* from the outset,⁵⁹⁰ the national majority on the PTC bench maintained a consistent position that no investigative actions should be allowed in AO An's case.⁵⁹¹ This position resulted in the PTC denying all of AO An's appeals regarding investigative requests, irrespective of the arguments raised, whilst the investigation proceeded regardless.⁵⁹² Blanket restrictions of fundamental rights without legitimate justification, as in AO An's case, have been consistently found to constitute a violation of those rights by international human rights bodies and courts.⁵⁹³

⁵⁸⁶ In its decision on the Defence's application, the PTC found that the presumption of investigators' impartiality had not been successfully rebutted by the Defence, but it held nothing on the effect of investigators' contamination of evidence on AO An's procedural rights. Case No. 004/2/07-09-2009-ECCC/OCIJ, *Decision on AO An's Application to Seize the Pre-Trial Chamber with a View to Annulment of Written Records of Interview of Three Investigators*, **D338/1**, 23 Jan. 2017, paras 6-8.

⁵⁸⁷ For further detail on the Defence's position, see Case No. 004/07-09-2009-ECCC/OCIJ (PTC), *Appeal Against Order on AO An's Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, **D284/1/2**, 15 Jan. 2016, paras 2-5. The Defence incorporates its arguments by reference. This appeal was not properly considered by the PTC as it was dismissed as inadmissible.

⁵⁸⁸ E.g. Witness KE Un, who was KE Pauk's driver, died on 18 August 2010. **D219/702.1.141** (KE Un alias Aok WESU Report), EN 01105066, p. 1; **D6.1.437** (KE Un WRI), EN 00283339-46, pp. 1-8. E.g. Witness KE Pich Vannak's death was confirmed by his mother, SOU Soeun, in Case 002/02 cross examination on 5 June 2016. KE Pich Vannak was KE Pauk's son. **D6.1.379** (KE Pich Vannak), EN 00346145-62, pp. 1-18.

⁵⁸⁹ UN-RGC Agreement, art. 12(2); ECCC Law, arts 33 *new*, 36 *new*; *ECCC Internal Rules*, Rules 21, 74; ICCPR, art. 14(5).

⁵⁹⁰ Case No. 001/18-11-2008-ECCC/PTC, *Annex II: Excerpt of the Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71*, **D11.1**, 18 Aug. 2009, attached as App. 131; Case 004-**D1/1.3**, *Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy*.

⁵⁹¹ Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC33), *Decision on Appeal Against the Decision on AO An's Sixth Request for Investigative Action*, **D276/1/1/3**, 16 Mar. 2017, paras 25-30; Case 004-**D257/1/8**, paras 1-15; Case 004-**D263/1/5**, paras 41-42 (citing Opinions of Judge PRAK Kimsan, Judge NEY Thol, and Judge HUOT Vuthy, dated 17 Aug. 2009, that 'AO An is not a senior leader of Democratic Kampuchea nor one of those most responsible for the crimes'); Case 004/2-**D320/1/1/4**, paras 15-20; Case No. 004/2/07-09-2009-ECCC/OCIJ (PTC36), *Confidential Decision on Appeal Against the Decision on AO An's Tenth Request for Investigative Action*, **D343/4**, 26 Apr. 2017, paras 14-19; see also Case 004-**D299/3/2**, paras 34-39.

⁵⁹² Section IV(B).

⁵⁹³ *Hirst v. the United Kingdom (No. 2)*, ECHR, 6 Oct. 2005, para. 82, attached as App. 132 (holding '[s]uch a general, automatic and indiscriminate [blanket] restriction on a vitally important Convention right must be seen

D. Financial uncertainty threatens fairness and integrity of proceedings

219. In May 2017, both CIJs expressed their ‘deep concerns’ over the funding arrangements currently in place for the ECCC and opined that ‘the current situation and the outlook going forward have now become incompatible with the basic principles of fair trial, the rule of law and judicial independence’.⁵⁹⁴ The precariousness of the Court’s funding mechanism has been a constant issue since its inception.⁵⁹⁵ A premature closure (or unregulated limbo) of the Court would leave the ICIJ’s indictment to ‘hang over’ AO An in perpetuity and is ‘not compatible with the basic demands of the rule of law’ and ‘raises fundamental questions of fairness’ for the Defence.⁵⁹⁶ In other words, the CIJs (and now the PTC) are precluded from sending a case to trial if there is a tangible risk of insufficient funding to complete trial proceedings and any subsequent appellate review.⁵⁹⁷
220. According to information published by the OA in October 2018,⁵⁹⁸ donor-pledged funding for 2018 is \$12.5 million short of the Court’s needs, whilst the actual budget shortfall (based on received funds) is \$17.41 million. Thus, even if all pledges are met

as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1’); *see Alajos Kiss v. Hungary*, ECtHR, 20 May 2010, para. 42, attached as App. 133.

⁵⁹⁴ Case 004/2-**D349**, para. 1.

⁵⁹⁵ In August 2007, the UN Secretary General warned that the ECCC would be unable to meet its mandate because of identified ‘significant shortfalls in staffing and the budget’. Case 004/2-**D349**, para. 24 (citing UN General Assembly Report of the Secretary-General on the Khmer Rouge trials, A/62/304, 27 Aug. 2007, para. 1, 42). In 2012, the UN Secretary General highlighted the Court’s ‘acute financial crisis that could jeopardise the future operations’. Case 004/2-**D349**, para. 25 (citing UN General Assembly Report of the Secretary-General, *Khmer Rouge trials*, A/67/380, 19 Sep. 2012, p.1). In 2013, funding shortfalls led to the Court’s inability to pay national staff, and a series of staff walkouts and strikes. Case 004/2-**D349**, para. 27 (citing UN General Assembly Report of the Secretary-General, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/68/532, 16 Oct. 2013, paras 3, 36). In 2015, the funding crisis brought the UN Secretary General to plead that ‘financial failure of the Chambers would constitute a renewed tragedy in the quest for justice for the people of Cambodia’. Case 004/2-**D349**, para. 30 (citing UN General Assembly Report of the Secretary-General, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia*, A/70/403, 30 Sep. 2015, para. 46). In 2016, the UN reported a funding shortfall that was ‘likely to seriously affect the activities of the Extraordinary Chambers as a whole’. Case 004/2-**D349**, para. 31 (citing UN General Assembly Report of the Secretary-General, *Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia* (*Request for a subvention to the ECCC*, 16 Aug. 2016’), A/71/338, 16 Aug. 2016, para. 39). During the 2017 budget negotiations, the OA opined that ‘the funding outlook had never been so dire’, that ‘future budget negotiations would be a struggle beyond the usual level of arduousness’ and that the Court was ‘in danger of falling victim to an accidental closure because the funding might simply stop’. Case 004/2-**D349/6**, para. 25.

⁵⁹⁶ Case 004/2-**D349**, paras 52-54.

⁵⁹⁷ Case 004/2-**D349**, para. 58; *Prosecutor v. Hinga Norman*, Case No. SCSL-20040140AR72(E), *Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)*, 13 Mar. 2004, paras 26, 28, 30, attached as App.134; *see also* Justice Geoffrey Robertson’s separate opinion in which he states secure funding for the entire court is essential to safeguard defence rights and judicial independence.

⁵⁹⁸ ECCC Completion Plan, Rev. 18, 30 Sep. 2018, paras 13, 16.

and the full \$8 million UN subvention is applied,⁵⁹⁹ the Court will still be underfunded by \$4.5 million. Pledges are not sufficient to assuage concerns, not only because the pledges may not materialise into actual contributions, but more importantly because of ‘the practice of the UN Controller to release advance payments only once a signed agreement regarding a donation has been received, not on the basis of mere pledges’.⁶⁰⁰ In August 2018, the Defence requested an update on the Court’s finances from the OA.⁶⁰¹ On 12 December, the Chief of DSS responded, indicating that the budgetary shortfall as of December 2018 is USD 1,454,000.⁶⁰² Nevertheless, it is unclear how the indicated shortfall was calculated on the basis of the figures provided, as the numbers do not add up.⁶⁰³ When asked, the Chief of DSS was unable to explain the discrepancy.

221. Not only has the budget been squeezed below what the CIJs consider to be adequate for the timely completion of Case 004/2,⁶⁰⁴ the UN and donors have demonstrated that they are incapable of meeting the agreed budget. Moreover, the UN has admitted that it cannot guarantee adequate financing for the Court in the future.⁶⁰⁵ The UN also believes that there is no legal requirement forcing it and the RGC to guarantee funding for the ECCC during its lifetime.⁶⁰⁶ The UN has also acknowledged that there is no available funding mechanism to address unforeseen operational contingencies.⁶⁰⁷ Nor has the UN put in place a contingency plan or exit strategy in the event of financial default.⁶⁰⁸ Thus, the donors’ position on the Court’s underfunding is an ‘admission of failure by states to

⁵⁹⁹ UN General Assembly, *Special subjects relating to the proposed programme budget for the biennium 2018-19*, A/RES/72/262, 16 Jan. 2018, pp. 5-6, attached as App. 135 (Note that the Court had originally asked for \$10.4 million.).

⁶⁰⁰ Case 004/2-**D349/6**, para. 25.

⁶⁰¹ Letter to H.E. Tony Kranh and Mr. Knut Rosandhaug re Status of Budget in Case 004/2, 27 Aug. 2018, attached as App. 136.

⁶⁰² Letter to Co-Lawyers for Mr. AO An re Status of Budget in Case 004/2, 12 Dec. 2018, attached as App. 137.

⁶⁰³ The sum of all funds received results in a USD 2.82 million shortfall; the sum of all funds pledged results in a USD 0.54 million shortfall.

⁶⁰⁴ ECCC Completion Plan, Rev. 17, 30 Jun. 2018, para. 19 (stating ‘staffing cover of the Office is now so threadbare that even minor staff turnover seriously impacts the Office’s institutional memory and its ability to keep to the projected timelines’).

⁶⁰⁵ Case No. 004/2/07-09-2009-ECCC-OCIJ, *Office of Administration’s Submission on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, **D349/3**, 5 Jun. 2017, para. 13.

⁶⁰⁶ Case No. 004/2, *Annex I: Observations of the United Nations Secretariat in Relation to the Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2*, **D349/3.1.1**, para. 17.

⁶⁰⁷ Case 004/2-**D349**, para. 31 (citing *Request for a subvention to the ECCC*, 16 Aug. 2016, para. 30).

⁶⁰⁸ Case 004/2-**D349/3**, para. 26.

live up to what is expected of them under treaties or resolutions they themselves created'.⁶⁰⁹

222. In August 2017, the CIJs vowed to 'take the necessary measures, should matters deteriorate again to a degree that in [their] view judicial independence, fairness, and the integrity of the proceedings are threatened'.⁶¹⁰ In light of the ongoing budgetary shortfall, lack of adequate assurances from donors and the UN Secretary General's admission that voluntary contributions were 'projected to decline further',⁶¹¹ the CIJs' own threshold for intervening has clearly been met. The ICJ's failure to stay or dismiss the case on this basis alone is a breach of his duty.

E. Cumulative impact of violations results in irreparable harm

223. The cumulative impact of fair trial right violations described above undermines the fairness of proceedings in a manner that is egregious and irreparable, rendering a fair trial for AO An impossible. The accumulation of multiple fair trial violations can have an impact greater than the sum of its parts.⁶¹² With each individual violation, there is an erosion of the overall legitimacy of proceedings.⁶¹³ In assessing the overall fairness of proceedings, judges have a duty to consider individual fair trial violations in the overall context of the entire investigative stage, as well as the cumulative impact of all violations on AO An's ability to receive a fair trial.⁶¹⁴

224. AO An was excluded from accessing or participating in the investigation for five and half out of seven and a half years of the total investigative span. During this time, whilst

⁶⁰⁹ Case 004/2-D349/6, para. 28.

⁶¹⁰ Case 004/2-D349/6, para. 67.

⁶¹¹ *Request for a subvention to the ECCC*, 16 Aug. 2016, para. 38, attached as App. 138.

⁶¹² *The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, *Judgement*, 7 Jul. 2006, para. 114, attached as App. 139; *Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-A, *Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date*, 12 May 2009, para. 30, attached as App. 140; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, *Decision on Accused's Motion for New Trial for Disclosure Violations*, 3 Sep. 2012, paras 14-19, attached as App. 141; *see also Ibrahim and Others v. the United Kingdom*, ECtHR, 13 Sep. 2016, paras 250-51, attached as App. 142; *Barberà, Messegué and Jabardo v. Spain*, ECtHR, 6 Dec. 1998, para. 89, attached as App. 143; *Barayagwiza Decision*, para. 73.

⁶¹³ *The Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, *Concurring Separate Opinion of Judge Eboe-Osuji* ('*Bemba Concurring Separate Opinion of Judge Eboe-Osuji*'), 14 Jun. 2018, para. 89, attached as App. 144 ('An isolated material error of law or fact or procedure may not readily be seen as amounting to miscarriage of justice, yet a catalogue of rampant little errors of law or fact or procedure may in their accumulated weight or harassing minions or in their proportion, amount to unfairness rising to miscarriage of justice; when their joint or several incidence overwhelms the fitness of the proceedings and its resulting judgment or sentence to stand up as a reliable expression of justice.').

⁶¹⁴ Case 002-E313, paras 40-41; *Lubanga Redacted Decision on Defence Application Seeking a Permanent Stay*, paras 165-66; *Lubanga Judgment on Appeal against Decision on Defence Challenges to Jurisdiction*, paras 28-29, 37; *Bemba Decision on Defence Request for Leave to Appeal*, para 12; *Barayagwiza Decision*, paras 73, 76-77; *Nikolić Decision on Defence Motion Challenging Exercise of Jurisdiction*, para. 111; *Hartmann Reasons on Defence Motion for Stay*, para. 4.

the ICP enjoyed the full spectrum of participatory rights and was able to shape the investigation and build his case against AO An, the latter enjoyed no rights at all. When, in February 2012, following a leak and public discussion of his alleged crimes, AO An was finally informed of his prosecution at the ECCC, he had to wait another three years before he learned of the exact nature and cause of the charges against him. One Court official informed him of his right to be represented by counsel of his choice, whilst another arbitrarily denied him that right for four and a half months. When he was finally granted access his Case File, AO An found that the case theory was already formed and most of the evidence to support it had been collected, leaving him with a mere illusion of participation in the investigation.

225. With the supermajority rule effectively rendering his presumption of innocence meaningless, AO An set about attempting to establish his innocence. His attempts to obtain exculpatory evidence were frustrated by a judge who, pressured by a chronic lack of funding and donor pressure to conclude the investigation,⁶¹⁵ found that such evidence did not fit into his already established theory of the case, and were in any case too late or too costly to execute. All attempts to appeal against such denials were frustrated by a blanket rejection of all appeals relating to investigative requests by the PTC's three National Judges. Meanwhile, witness evidence on the Case File had already been contaminated by the errors and sloppiness of investigators, or by the witness' examination at trial in Case 002. Despite proven errors in WRIs, more than half of the witness interviews were never audio-recorded, making their veracity impossible to verify. The same WRIs may one day form the basis of the ICP's case at trial – the witnesses themselves being dead or too infirm to testify. To make matters worse, the NCP's Final Submission was based on arguments and materials that were not disclosed to the Defence.

226. At the end of the investigation, AO An was presented with two contradictory Closing Orders, becoming the first known person in history to have his case dismissed and sent for trial at the same time. Once again, he is left to guess the nature and cause of the charges against him.

227. With a Court chronically underfunded, AO An now faces the unenviable prospect of having an indictment hover indefinitely over him, with no possibility to defend himself against the most serious criminal accusations known to humankind. The accumulated

⁶¹⁵ Case 004/2-D349/6, paras 19-27, 48-56.

weight of this ‘catalogue of rampant little [or more significant] errors of law or fact or procedure’ clearly amounts to ‘unfairness rising to miscarriage of justice’.⁶¹⁶ In such cases ‘their joint or several incidence overwhelms the fitness of the proceedings and its resulting judgment or sentence to stand up as a reliable expression of justice’.⁶¹⁷

F. Permanent stay or dismissal is the only adequate remedy

228. Article 2(3)(a) of the ICCPR requires this Court to ensure that persons whose rights or freedoms are violated have effective remedies.⁶¹⁸ The CIJs have previously held that their power to stay proceedings to protect their integrity and fairness is beyond doubt.⁶¹⁹ The PTC has held that where there has been serious mistreatment of a charged person or an egregious violation of their right to a fair trial, the Court *must* permanently stay proceedings.⁶²⁰ The SCC has held that ‘egregious violations of [the defendant’s] rights which would prove detrimental to the ECCC’s integrity’ must give rise to appropriate remedies, including the possibility of not putting the accused on trial.⁶²¹ In a similar vein, the SCC has expressed that where circumstances incapacitate the ability of the Court to guarantee a trial driven by law, all proceedings must be terminated.⁶²²

229. The investigation is a bedrock on which the rest of the case is constructed, and ‘fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with [fair trial rights] provisions’.⁶²³ In the context of the entire investigation, violations of AO An’s procedural rights have left him in a permanent disadvantage to the ICP. The cumulative impact of these violations and threats to the Court’s integrity has reached the threshold beyond which a fair trial is no longer possible. The situation is further exacerbated by the prospect of proceedings breaking down or being stuck in permanent limbo should the Court’s financial woes continue. For these reason, no remedy other than a dismissal or permanent stay would suffice to undo the prejudice caused.

⁶¹⁶ *Bemba Concurring Separate Opinion of Judge Eboe-Osuji*, para. 89.

⁶¹⁷ *Bemba Concurring Separate Opinion of Judge Eboe-Osuji*, para. 89.

⁶¹⁸ *Kajelijeli Appeal Judgement*, paras 255, 324.

⁶¹⁹ Case 004/2-**D349/6**, para. 16.

⁶²⁰ Case 002-**D264/2/6**, para. 27; *see also* Case 004/2-**D349/6**, paras 16-17; *see also* *Nikolić Decision on Defence Motion Challenging Exercise of Jurisdiction*, para. 111; *Hartmann Reasons on Defence Motion for Stay*, para. 4.

⁶²¹ Case 001-**F28**, paras 393-399.

⁶²² Case 002-**E284/4/8**, para. 75; *see also* *Lubanga Redacted Decision on Defence Application Seeking a Permanent Stay*, paras 164–66; *Barayagwiza Decision*, para. 108.

⁶²³ *Salduz*, paras 50, 54 (holding ‘[t]he evidence obtained during this stage determines the framework in which the offence charged will be considered at trial’).

G. Conclusion for Ground 18

230. In light of the foregoing, the Defence respectfully submits that the ICIJ had a duty to stay or dismiss the case against AO An to safeguard his fundamental rights and the Court's integrity and failed to do so. This failure was based on an error of fact, namely, his failure to appreciate the individual and cumulative impact of procedural violations and threats to the court's integrity on AO An's ability to receive a fair trial. Alternatively, the ICIJ abused his discretion by choosing not to stay or dismiss Case 004/2 in full awareness of the circumstances underpinning his duty to terminate proceedings and his power to do so. According to the ICIJ, the responsibility for safeguarding Case 004/2 proceedings and AO An's fair trial rights now falls on the PTC.⁶²⁴ To this end, the Defence requests the PTC to overturn the *ICIJ Closing Order (Indictment)* and dismiss AO An's case.

CONCLUSION AND RELIEF REQUESTED

231. For the reasons stated above, the *ICIJ Closing Order (Indictment)* contains numerous legal and factual errors regarding the Court's personal and subject matter jurisdiction and serious violations of AO An's fair trial rights. Accordingly, the Defence respectfully requests the PTC to: (a) admit this *Appeal*; and (b) dismiss the case against AO An.

232. Additionally, the Defence requests the PTC to reclassify this *Appeal* as a public document, with any necessary redactions to safeguard the personal information of AO An, witnesses, and civil party applicants.

Respectfully submitted,


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Co-Lawyers for AO An

Signed 19 December 2018, Phnom Penh, Kingdom of Cambodia

⁶²⁴ Case 004/2-D360, paras 44-45.