

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

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**INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO AO AN'S SUMMARY OF
PRELIMINARY OBJECTIONS UNDER IR 89(1)**

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I. INTRODUCTION

1. The International Co-Prosecutor (“ICP”) hereby responds to the Summary of Ao An’s Preliminary Objections under Internal Rule 89(1) (“Preliminary Objections”).¹ Whilst the ICP has limited her response to the issues raised therein, where Ao An expanded upon these in his Appeal² of the Indictment³ to the Pre-Trial Chamber (“PTC”), she has responded as fully as possible in the pages available to the detail of these apparent arguments. She respectfully requests that she be afforded a further opportunity to respond in the event that the Trial Chamber (“TC”) invites Ao An to present additional submissions.

2. As detailed below, the ICP requests that Ao An’s preliminary objections be dismissed.⁴

II. PROCEDURAL HISTORY

3. On 19 December 2019, the PTC issued its “Considerations on Appeals Against Closing Orders”, disposing of the appeals against the differing legal conclusions of the two Co-Investigating Judges (“CIJs”) following completion of the investigation into crimes alleged against Ao An.⁵ These Considerations were notified to the TC Greffier and two TC Judges.⁶ In the three months following the PTC’s issuance of these Considerations, both the ICP⁷ and Ao An⁸ submitted a number of filings to the TC. Each of the ICP’s filings was submitted in hard copy with a courtesy electronic copy sent to the TC judges and parties.⁹ Whilst the TC Greffier has acknowledged receipt of these documents,¹⁰ none has been formally notified.

¹ Summary of Ao An’s Preliminary Objections Under IR 89(1), 20 Jan. 2020 (“Preliminary Objections”).

² **D360/5/1** Ao An’s Appeal Against the International Co-Investigating Judge’s Closing Order (Indictment), 19 Dec. 2018 (“Ao An Appeal”).

³ **D360** Closing Order (Indictment), 16 Aug. 2018 (“Indictment”).

⁴ As noted below, the ICP does not object to the removal of Count 3 (national crimes) from the Indictment.

⁵ **D359/24 & D360/33** Considerations. The ICIJ indicted Ao An for genocide, crimes against humanity, and violations of the 1956 Penal Code of Cambodia, while the NCIJ dismissed the case against him.

⁶ See Email notification from the Case File Officer, 19 December 2019, 4:53 p.m.

⁷ (i) [ICP’s] Request for Extension of the Rule 80 Deadline and a Trial Management Meeting, 26 Dec. 2019; (ii) [ICP’s] Response to Ao An’s Request Regarding the Seizure of Case 004/2, 6 Jan. 2020; (iii) [ICP’s] Rule 80 Witness and Expert List Submission with Confidential Annex A, 13 Jan. 2020; (iv) [ICP’s] Request that the [TC] Take Action to Obtain Access to the Case 004/02 (Ao An) Indictment and Case File, 4 Feb. 2020; (v) [ICP’s] Request for Clarification of the [TC’s] Email of 10 February 2020 (with public Annexes A-F), 13 Feb. 2020.

⁸ (i) Email from Göran Sluiter on 31 Dec. 2019 at 3:33 p.m., attaching a letter from the Defence Co-Lawyers to the TC Judges; (ii) Email from Kristin Rosella on 20 Jan. 2020 at 5:09 p.m., attaching the Preliminary Objections; (iii) Email from Kristin Rosella on 28 Jan. 2020 at 3:48 p.m., attaching Ao An’s Rule 80 Witness and Expert List.

⁹ Each filing was delivered to the TC in hard copy. With regard to courtesy copies, see (i) Email: “Filing to 004/2/07-09-2009-ECCC/TC Request for Extension of Time and Trial Management meeting” sent by the ICP on 27 Dec. 2019 at 3:36 p.m.; (ii) Email: “ICP Response to AO An’s letter re Seizure of the case by the Trial Chamber” sent by the ICP on 6 Jan. 2020 at 3:56 p.m.; (iii) Email: “Courtesy copy of ICP IR 80 (1) Submission” sent by the ICP on 13 Jan. 2020 at 2:25 p.m.; (iv) Email: “Courtesy copy of ICP Request to Trial Chamber to Take Action to Obtain Access to Case 004/2 (Ao An) Indictment and Case File” sent by the ICP on 4 Feb. 2020 at 3:39 p.m.; (v) Email: “Courtesy copy of the ICP’s Request for Clarification of the Trial Chamber’s Email of 10 February 2020 (with public Annexes A-F)” sent by the ICP on 13 Feb. 2020 at 4:34 p.m.

¹⁰ See (i) Email: “Information” sent by the TC Greffier and Legal Officer Suy-Hong Lim on behalf of the TC on 21 Jan. 2020 at 1:00 p.m. acknowledging receipt of the documents sent by the parties; (ii) Email: “Concerning ICP

III. APPLICABLE LAW

4. Under Internal Rule 89(1), parties may file preliminary objections concerning: a) the jurisdiction of the Chamber; b) any issue which requires the termination of prosecution; and/or c) nullity of procedural acts made after the indictment is filed.
5. Rule 76(7) states that “[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the [TC]”.
6. Rule 77(13) provides: “A decision of the [Pre-Trial] Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, the *default decision* of the Chamber *shall* be as follows: [...] b) As regards appeals against indictments issued by the [CIJs], that the [TC] *be seised* on the basis of the Closing Order of the [CIJs].”¹¹
7. Rule 79(1) provides that the TC shall be seised by an Indictment from the CIJs or the PTC.

IV. SUBMISSIONS

A. The Trial Chamber is lawfully seised of Case 004/2 on the basis of the Indictment and proceedings cannot be terminated

8. Ao An now concedes that, pursuant to Rules 77(13)(b) and (a) respectively, both the Indictment and the Dismissal Order stand as a result of a lack of a PTC supermajority to overturn either at the end of the appeals process.¹² However, he misunderstands the consequence of this situation. Contrary to Ao An’s claim that “the ECCC legal framework is incapable of resolving the impasse of two separate and opposing closing orders”,¹³ Rule 77(13)(b) *requires* that the TC be seised of the Indictment when the required supermajority is not attained. In short, the TC *shall be seised* on the basis of that Indictment under Rule 79(1).
9. Although the PTC Judges disagreed on the legality of each Closing Order, they unanimously agreed on the principle that, in the absence of a supermajority decision, the default position—enshrined in the ECCC Agreement and ECCC Law¹⁴—that the “investigation shall proceed”¹⁵ is “intrinsic to the ECCC legal framework”,¹⁶ and is “fundamental and

request dated 4 February 2020” sent by Suy-Hong Lim on behalf of the TC on 10 Feb. 2020 at 11:44 a.m.

¹¹ Emphasis added.

¹² Preliminary Objections, paras 18-19.

¹³ Preliminary Objections, para. 20. *See also* para. 17.

¹⁴ ECCC Agreement, arts 5(4), 7(4); ECCC Law, art. 23 new.

¹⁵ **D359/24 & D360/33** Considerations, paras 106-107, 111-112, 116-117 (unanimous).

¹⁶ **D359/24 & D360/33** Considerations, paras 106, 114 (unanimous).

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determinative.”¹⁷ The PTC Judges stressed that this default position “cannot be overridden or deprived of its fullest weight and effect by convoluted interpretative constructions, taking advantage of possible ambiguities in the ECCC Law and Internal Rules to render this core principle of the ECCC Agreement meaningless.”¹⁸ They explained that its purpose was to “secure[] effective justice” and to “avoid procedural stalemates that would, *inter alia*, hamper the effectiveness of proceedings”.¹⁹

10. The only interpretation of Rules 77(13) and 79(1) that correctly implements the ECCC Law and ECCC Agreement is, therefore, the one sending Case 004/2 to trial on the basis of the Indictment. Rule 77(13)(b) is thus *lex specialis* vis-à-vis Rule 77(13)(a) where the PTC failed to achieve a supermajority to overturn the Indictment. Supreme Court Chamber (“SCC”) jurisprudence supports this outcome:

If, for example, the [PTC] decides that neither [CIJ] erred in proposing to issue an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the [PTC] is unable to achieve a supermajority on the consequence of such a scenario, ‘the investigation shall proceed.’²⁰

Although the SCC discussed this scenario in the context of the CIJs referring the proposed issuance of conflicting closing orders to the PTC under the formal disagreement settlement mechanism, the substantive outcome is equally applicable here where the PTC did not attain a supermajority on whether either CIJ erroneously issued his Dismissal Order or Indictment.²¹ To find otherwise would do exactly what the PTC Judges unanimously warned against: depriving the default position in Rule 77(13)(b) of its fullest weight and effect,²² leading to a “manifestly unreasonable legal result”.²³

11. The mandatory provisions of these Rules are further supported by the purpose of the ECCC Agreement and ECCC Law, which is to “[bring] to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes”,²⁴ as well as the evidence of the expressed intentions of the UN and RGC at the time they concluded the ECCC Agreement.²⁵

¹⁷ D359/24 & D360/33 Considerations, para. 112 (unanimous).

¹⁸ D359/24 & D360/33 Considerations, para. 112 (unanimous).

¹⁹ D359/24 & D360/33 Considerations, para. 111 (unanimous).

²⁰ Case 001-F28 Duch AJ, para. 65 *citing* ECCC Law, art. 23 new; ECCC Agreement, art. 7(4); IR 72(4)(d).

²¹ See also D427/11/30 IS Closing Order Decision, para. 274.

²² See *supra*, para. 9.

²³ D359/24 & D360/33 Considerations, para. 112 (unanimous).

²⁴ ECCC Agreement, art. 1 (emphasis added); ECCC Law, art. 1 (emphasis added).

²⁵ D324.30 Letter from UN Secretary General to Prime Minister H.E. Hun Sen, 19 Apr. 2000, Annexed Note from Hans Corell to Secretary General, Subject: Urgent call from Cambodia – Options to settle differences between investigating judges/prosecutors, 19 Apr. 2000, EN 01326090 (On the same day that the UN first provided the article 7(4) wording to the RGC, Hans Corell Under Secretary General for Legal Affairs and Legal Counsel of the UN recorded a conversation with Deputy Prime Minister Sok An, the RGC’s chief negotiator, rejecting his call to

Moreover, only this interpretation conforms with Cambodian and international law applicable to the ECCC, which require the ECCC organs to ensure that the investigations and prosecutions of crimes within its jurisdiction are genuine and effective.²⁶

12. Thus, the Rules, ECCC Law, ECCC Agreement, and SCC and PTC jurisprudence, *all* mandate that the case *must* proceed to trial on the basis of the Indictment in the absence of a PTC supermajority reversing it. The way forward is clear and cannot be overridden by Ao An's invocation of the *in dubio pro reo* principle, as there is no "doubt" to resolve.²⁷ Moreover, *in dubio pro reo* is inapplicable to questions of procedure such as this, where the question is whether the relevant texts should be interpreted so as to send an accused to trial. *In dubio pro reo* is a corollary of the presumption of innocence, and one aspect of the requirement that guilt must be found *at trial* beyond reasonable doubt.²⁸ It denotes a default finding in the event that factual doubts are not removed by the evidence.²⁹ Put another way, it is mainly a rule of proof and not one of legal interpretation. In the rare event that it applies to questions of law, the principle deals primarily with doubt regarding *substantive* criminal law as it is this, not procedure, that determines the accused's guilt.³⁰

13. In any event, its narrow applicability to dilemmas of law is limited to doubts that remain after *interpretation* using the civil law rules, that is, upon taking into account the language of the provision, its place in the system (including its relation to the main underlying principles), and its objective.³¹ The fact that a particular scenario is not expressly covered by a legal text does not render it "unregulated"³² or raise "doubt" from which a defendant always profits. As

have a supermajority requirement to *approve* the continuation of an investigation or prosecution. Hans Corell explained that the disagreement mechanism as drafted meant "you would need a super majority to stop the investigation or prosecution"; **D324.36** Statement by Under Secretary General Hans Corell Upon Leaving Phnom Penh on 17 March 2003, 17 Mar. 2003, EN 01326112. *See also* David Scheffer in M. Cherif Bassiouni (ed), "The Extraordinary Chambers in the Courts of Cambodia", *International Criminal Law*, Third Edition, Vol. III, 2008, p. 246 (David Scheffer, United States Ambassador at Large for War Crimes Issues and heavily involved in the negotiations, expressed the same view: "The only way the prosecution or investigation is *halted* is if the [PTC] decides by supermajority vote that it should end. The rationale behind this procedure is that it prevents one [CIJ] or one Co-Prosecutor from blocking an investigation or prosecution, respectively, by failing to reach agreement with his or her counterpart or simply derailing an investigation or prosecution due to political or other kinds of influence." (emphasis added)).

²⁶ **D359/24 & D360/33** Considerations, paras 110-111 (unanimous).

²⁷ Preliminary Objections, paras 17, 20-21.

²⁸ All accused persons, including Ao An, enjoy the presumption of innocence unless and until they are convicted by a supermajority of the TC judges. *See* ECCC Law, art. 35 new; Cambodian Constitution, art. 38; IRs 21, 98(4); Case 001-**F28 Duch** AJ, para. 33; Case 002-**E50/3/1/4** KS SCC Release Decision, para. 31; **D359/24 & D360/33** Considerations, para. 163 (unanimous); *Kayishema & Ruzindana* AJ, para. 107; *Limaj* AJ, para. 21.

²⁹ *See e.g.* Case 002-**E50/3/1/4** KS SCC Release Decision, para. 31; Case 003-**D87/2/1.7/1/1/7** PTC Nexus Decision, para. 65; *Stakić* TJ, para. 416.

³⁰ *See e.g.* Rome Statute, art. 22(2); *Gbagbo & Goudé* Prior Recorded Testimony Appeal Decision, para. 83.

³¹ Case 002-**E50/3/1/4** KS SCC Release Decision, para. 31; *Čelebići* TJ, para. 413; Case 004/1-**D308/3** Closing Order, para. 26.

³² *Contra* Preliminary Objections, para. 17.

the SCC held, “*in dubio pro reo* will usually be unnecessary [when] addressing legal *lacunae*”.³³

14. Whilst it is the ICP’s position that no legal *lacunae* are present here, when a procedural question is not addressed by the Rules, Rule 2 directs the ECCC decision-making bodies to decide the question in keeping with Cambodian law and relevant procedural rules, and with respect for the rights of *all* parties. These relevant rules include article 23 new of the ECCC Law, which mandates that the “investigation shall proceed”. Notably, Rule 2 does not provide for an automatic default finding in favour of the accused. Instead, it requires that attention be paid to Rule 21 which the SCC has confirmed “does not [...] automatically grant the Accused an advantage in every concrete situation arising on the interpretation of the Internal Rules”. The relevant consideration is that the interpretation does not infringe fundamental rights of the accused.³⁴ Read in its entirety, Rule 21 requires that the ECCC Law and Rules be interpreted so as to safeguard the interests not only of accused, but also victims, and that ECCC proceedings must “preserve a balance between the rights of the parties”. It is a fundamental tenet of the law of the ECCC³⁵ and international tribunals,³⁶ as well as the French and Cambodian legal processes,³⁷ that, pursuant to the principle of equality, fair trial rights not only belong to the defence, but to all parties to the proceedings, including the victims *and* the prosecution who act on behalf of and in the interests of Cambodian society and all of humanity. To always defer to an accused on procedural matters would have a chilling effect on the administration of justice.³⁸

³³ Case 002-**E50/3/1/4** KS SCC Release Decision, para. 31.

³⁴ See e.g. Case 002-**E50/2/1/4** NC and IT SCC Release Decision, para. 39; Case 002-**E50/3/1/4** KS SCC Release Decision, para. 30; Case 002-**E154/1/1/4** Decision on Ex-Parte Communications Appeal, para. 14.

³⁵ IR 21(1). See further United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res 40/34, 29 Nov. 1985, Principle 4 (“Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”).

³⁶ *Aleksovski* Decision on Evidence Admissibility Appeal, para. 25. See also *Zigiranyirazo* Decision on Prosecution Reopening of Case, para. 18; *Karemera* Decision on Indictment Severance, para. 26.

³⁷ France: French Code of Criminal Procedure (“FCCP”), Article préliminaire (“La procédure pénale doit être équitable et contradictoire et préserver l’équilibre des droits des parties. [...] L’autorité judiciaire veille [...] à la garantie des droits des victimes au cours de toute procédure pénale.” Unofficial translation: “Criminal proceedings must be equitable and adversarial and preserve the balance between the rights of the parties. [...] The judicial authorities shall ensure victims’ rights throughout criminal proceedings”); Conseil Constitutionnel, No. 95-360, 2 Feb. 1995, para. 5 (“Considérant [...] que le principe du respect des droits de la défense constitue un des principes fondamentaux reconnus par les lois de la République [...]; qu’il implique, notamment en matière pénale, l’existence d’une procédure juste et équitable garantissant l’équilibre des droits des parties”. Unofficial translation: “Considering [...] that the principle of respect for the rights of the defence constitutes one of the fundamental principles recognised by the law [of France]; that it implies, in criminal matters, the existence of a just and equitable procedure which guarantees a balance between the rights of the parties”). See also Pradel, J., *Manuel de Procédure Pénale* (14th edition), 1 Jul. 2008, p. 141 [“le parquet est une partie originale à ce procès, une partie différente des autres, car il défend les intérêts de la société.” Unofficial translation: “The prosecutor is an original party to this process, a party different from the others, because he defends the interests of society.”]. Cambodia: Cambodian Code of Criminal Procedure (“CCCP”), art. 4 (“Criminal actions are brought by Prosecutors for the general interests of the society.”).

³⁸ *Boddaert v. Belgium*, para. 39; *Neumeister v. Austria*, para. 21; CCCP, art. 2.

15. Contrary to Ao An's position, if all procedural uncertainty were to be permitted to automatically benefit the accused to the point of terminating proceedings, this would violate Cambodian (and French) procedural law. In Cambodian procedure, the causes of extinction of criminal action are explicitly listed in article 7 of the Cambodian Code of Criminal Procedure ("CCCP") and are limited to the death of the accused, expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata*.³⁹ The SCC and TC have both held that it follows that the ECCC has no authority to order termination for other reasons.⁴⁰ Jurisprudence at the international level⁴¹ also establishes an extremely high threshold for the termination or stay of proceedings.⁴²

16. Finally, the ECCC Agreement provides that: "[General Assembly Resolution 57/228] recognized the legitimate concern of the Government and the people of Cambodia in the *pursuit of justice and national reconciliation, stability, peace and security*".⁴³ This requires the ECCC judges and Chambers both to seek the truth about what happened in Cambodia⁴⁴ and to ensure a meaningful participation for the victims of the crimes committed as part of the pursuit of national reconciliation.⁴⁵ The PTC has previously determined that "the inclusion of Civil Parties in proceedings is in recognition of the stated pursuit of national reconciliation".⁴⁶ Yet, dismissing Case 004/2 at this stage would violate the specific rights afforded to the civil parties within the ECCC framework, including the right to participate in court proceedings, to have their stories heard, and to seek reparations.⁴⁷ It would also constitute an affront to the many

³⁹ Cambodia: CCCP, art. 7. See further, with regard to French procedural law, FCCP, art. 6.

⁴⁰ Case 002-E138/1/10/1/5/7 Decision on IT Release Appeal, paras 38-39; Case 002-E116 Decision on NC Fairness Objections, paras 16-17.

⁴¹ ECCC Law, art. 33 new.

⁴² Terminations or stays of proceedings have occasionally been granted by other international tribunals, but examples are few and reflect situations in which discontinuance is considered to be the *only* remedy capable of ensuring the fairness of proceedings or otherwise imperative in the interests of justice. See e.g. *Karadžić* Stay Decision, para. 4 (acknowledging that the extreme remedy of a stay of proceedings may be granted where serious violations of the accused's human rights render a fair trial impossible); *Lubanga* Jurisdiction Decision, para. 30.

⁴³ ECCC Agreement, preamble (emphasis added).

⁴⁴ See e.g. IR 55(5), 87(4); Case 002-D164/3/6 SMD Appeal Decision, para. 35; Case 003-D120/3/1/8 Considerations on Appeal re Striking Supplementary Submission, para. 36 (on p. 37) (Judges Beauvallet and Baik). Cass. Crim., 6 Jul. 1966, No. 66-90.134 ("alors que la juridiction de renvoi est sur le point d'être saisie et que l'intérêt de la manifestation de la vérité continue, jusqu'au jugement à intervenir". Unofficial translation: "while the trial court is on the verge of being seised and the interesting in ascertaining the truth continues until such time as a [trial] judgment is rendered"); Cass. Crim., 19 Jun. 1979, No. 78-92.277 ("Attendu [...] qu'il appartient aux juges correctionnels d'ordonner les mesures d'information qu'ils constatent avoir été omises et qu'ils déclarent utiles à la manifestation de la vérité". Unofficial translation: "Whereas it behoves the trial judges to order investigative measures that they find have been omitted and determine to be useful for the ascertainment of the truth"). See further *Karadžić & Mladić* Indictment Review Decision, para. 3 ("International criminal justice [...] must pursue its mission of revealing the truth about the acts perpetrated and suffering endured, as well as identifying and arresting those accused of responsibility").

⁴⁵ Case 002-D411/3/6 Civil Party Application Appeal Decision, paras 64-65.

⁴⁶ Case 002-C11/53 Civil Party Appeal Participation Decision, para. 37.

⁴⁷ IRs 23(1), 80(2).

men and women who came forward to provide evidence to the CIJs, and amount to a failure to deliver any measure of justice to tens of thousands of victims who have waited over four decades for accountability.

B. Whether Ao An was senior and/or most responsible is not justiciable before the TC

17. The ICIJ held that Ao An was a Khmer Rouge official “most responsible” for crimes committed during the Democratic Kampuchea (“DK”) era.⁴⁸ Ao An’s assertion that the TC now lacks personal jurisdiction over him because he is neither a “senior leader” nor one of those “most responsible” for DK crimes⁴⁹ overlooks clear SCC jurisprudence,⁵⁰ already recognised repeatedly by the TC,⁵¹ that this matter is not jurisdictional in nature.⁵² Rather, it is “*exclusively* a policy decision” within the sole discretion of the Co-Prosecutors and CIJs,⁵³ and the TC has “no need to embark upon any assessment” of it.⁵⁴ The only truly jurisdictional question the TC must confirm is that Ao An was a Khmer Rouge official.⁵⁵

18. Thus Ao An raises no justiciable issues. He has never disputed that he was a Khmer Rouge official, and confirms it again in these preliminary objections.⁵⁶ Nor has he alleged “bad faith, or a showing of unsound professional judgement” on the part of the CIJs to trigger the “extremely narrow” residual review power of the TC.⁵⁷

C. The ICP does not contest Ao An’s Preliminary Objection regarding National Crimes

19. The Co-Prosecutors have consistently maintained the position,⁵⁸ upheld by the PTC,⁵⁹ that pursuant to article 3 new of the ECCC Law, the ECCC may exercise jurisdiction over the crimes set out in the 1956 Penal Code, including premeditated homicide,⁶⁰ and is not barred from doing so by the 10-year statute of limitations found in article 109 of that Code.⁶¹ This is because this

⁴⁸ **D360** Indictment, paras 697-712.

⁴⁹ Preliminary Objections, paras 22-28.

⁵⁰ Case 001-**F28** Duch AJ, para. 79.

⁵¹ Case 002-**E465** Case 002/02 TJ, fn. 37; Case 002-**E313** Case 002/01 TJ, fn. 31.

⁵² Case 001-**F28** Duch AJ, paras 62-81.

⁵³ Case 001-**F28** Duch AJ, paras 63, 74-75, 77-79, 80-81 (quote at 80, emphasis added).

⁵⁴ Case 001-**F28** Duch AJ, para. 81.

⁵⁵ Case 001-**F28** Duch AJ, para. 61.

⁵⁶ Preliminary Objections, paras 25-26.

⁵⁷ Case 001-**F28** Duch AJ, para. 80.

⁵⁸ The ICP respectfully refers the TC to the Co-Prosecutors’ previous submissions: Case 002-**E51/5/3/1**, paras 12-17 and Case 002-**E51/7/1**.

⁵⁹ Case 002-**D427/1/30** IS Closing Order Decision, paras 271-292, 297. *See also* **D359/24** & **D360/33** Considerations, paras 599-603 (International Judges).

⁶⁰ 1956 Penal Code, arts 501, 506.

⁶¹ 1956 Penal Code, art. 109 provides, in relevant part, that “[a] perpetrator shall not be punishable in respect of a felony committed more than ten years previously”. *See also* 1956 Penal Code, art. 111 (indicating that the prescriptive period starts to run at the time the alleged acts were committed) and arts 112-114 (providing that any act of investigation or of prosecution interrupts the time limit, which resumes after the last such act (in the case of a felony), for a new period of 10 years). (Unofficial translation and summaries used previously by the TC. *See*

statute of limitations was suspended until at least 24 September 1993 as a result of the conditions in Cambodia, preventing any effective investigation or prosecution of Ao An. These conditions, attributable to the Khmer Rouge, include the lack of a functioning judicial system during the DK period and in the People's Republic of Kampuchea between 1979 and 1982. Thereafter, until the Kingdom of Cambodia was created by the promulgation of its Constitution on 24 September 1993, domestic prosecutorial and investigative capacity was significantly impeded.⁶² Therefore, the extension of the statute of limitations by the Cambodian National Assembly in 2001 and 2004, respectively for 20⁶³ and then 30 years,⁶⁴ did not violate the principle of legality.⁶⁵ Moreover, an accused's right to equality before the law is not violated by the prosecution of national crimes at the ECCC,⁶⁶ and the Cambodian Constitutional Council's determination that articles 3 and 3 new of the ECCC Law did not breach any constitutional rights is final, binding, and may not be reviewed by this Court.⁶⁷

20. However, the ICP did not seek Ao An's indictment for national crimes,⁶⁸ and does not object to the removal of Count 3 from the Indictment. The ICP believes that Ao An's criminal conduct is better described when legally characterised as the international crimes of genocide and crimes against humanity ("CAH"). Further, by characterising this conduct only as international crimes, unnecessary litigation can be avoided with a view to ensuring expeditious proceedings. The ICP notes that when the same issue came before the TC in Case 001, the judges failed to achieve the necessary votes for a decision.⁶⁹

D. The ECCC has jurisdiction over Joint Criminal Enterprise ("JCE")

21. Ao An is incorrect in his assertion⁷⁰ that the TC has no jurisdiction to try Ao An's conduct charged under JCE, which amounts to commission under article 29 new of the ECCC Law.⁷¹

Case 002-E187 TC Statute of Limitations Decision, fn. 13).

⁶² Case 002-D427/1/30 IS Closing Order Decision, paras 285-286, *citing, inter alia*, Case 001-E187 TC Statute of Limitations Decision, paras 14, 16-17, 27, 29 (confirming that statutes of limitation do not run where the judicial institutions are not functioning), 19-20, 25 (findings of the three Cambodian TC Judges regarding lack of judicial capacity in Cambodia until at least 24 September 1993). *See also* D359/24 & D360/33 Considerations, paras 599-601, 603 (International Judges).

⁶³ ECCC Law, art. 3.

⁶⁴ ECCC Law, art. 3 new.

⁶⁵ Case 002-D427/1/30 IS Closing Order Decision, para. 287; D359/24 & D360/33 Considerations, para. 602.

⁶⁶ Case 002-D427/1/30 IS Closing Order Decision, paras 288-292.

⁶⁷ Case 002-D427/1/30 IS Closing Order Decision, paras 279-280.

⁶⁸ D351/5 ICP's Rule 66 Final Submission, paras 636-638.

⁶⁹ Case 001-E187 TC Statute of Limitations Decision, in which the three-Judge majority of Judge Nil Nonn, Judge Thou Mony and Judge Ya Sokhan found that the statute of limitations had been suspended until at least 1993, whereas Judge Silvia Cartwright and Judge Jean-Marc Lavergne concluded that the limitation period had expired in 1989, and that the purported extension in 2001 was therefore impossible.

⁷⁰ Preliminary Objections, para. 30; D360/5/1 Ao An Appeal, paras 171-174.

⁷¹ Case 001-E188 Duch TJ, para. 511; Case 002-E100/6 TC JCE Decision, para. 22; Case 002-E313 Case 002/01 TJ, para. 690; Case 002-E465 Case 002/02 TJ, para. 3706; Case 002-D97/15/9 PTC JCE Decision, para. 49.

The SCC,⁷² TC,⁷³ and PTC⁷⁴ have consistently held that JCE I existed in customary international law (“CIL”) by 1975, and was both foreseeable and accessible. This is confirmed by the judicial chambers of all the other international criminal tribunals that have examined the question,⁷⁵ most notably the ICTY Appeals Chamber in *Tadić*,⁷⁶ as well as post-World War II cases (including, but not limited to,⁷⁷ those analysed in *Tadić*), the Nuremberg and Tokyo Charters,⁷⁸ Control Council Law No. 10 (“CCL 10”),⁷⁹ and the unanimous affirmation of the Nuremberg Charter and judgment by the UN General Assembly in 1946.⁸⁰

22. As to the Indictment’s articulation of the JCE, the TC has held that it is bound by the content and scope of the Indictment and has no power to amend alleged defects.⁸¹ In any event, Ao An demonstrates no breach of the legality principle in the ICIJ’s articulation of the material elements of JCE.⁸² The Indictment correctly⁸³ held that it is sufficient to identify JCE participants by categories or groups of persons,⁸⁴ and clearly defined the JCE group to include Ke Pauk, Ao An, and other CPK cadres.⁸⁵ As to the geographic scope of the JCE,⁸⁶ Ao An fails to articulate how it is erroneous to find that an accused participated in the implementation of a common criminal plan spanning a larger geographical territory than the one in which the crimes the accused is charged with occurred. In any event, Ao An is indicted for crimes throughout the Central Zone—specifically, the genocide of the Cham.⁸⁷ Finally, Ao An’s assertions regarding

⁷² Case 002-**F36** Case 002/01 AJ, paras 775-789, 807-810, 1093.

⁷³ Case 001-**E188** *Duch* TJ, para. 512; Case 002-**E100/6** TC JCE Decision, para. 22; Case 002-**E313** Case 002/01 TJ, para. 691; Case 002-**E465** Case 002/02 TJ, para. 3707.

⁷⁴ Case 002-**D97/15/9** PTC JCE Decision, paras 57-69, 72.

⁷⁵ See e.g. *Tadić* AJ, paras 185-229; *Tolimir* AJ, paras 281-283; *Karemera* JCE Decision, paras 12-16; *Brima* AJ, paras 72-80; *Ayyash* Applicable Law Decision, paras 237-238.

⁷⁶ *Tadić* AJ, paras 195-220.

⁷⁷ See also e.g. *Justice Case*, TWC Vol. III, pp. 956, 985, 1063, 1081, 1093-1095, 1123, 1128, 1155-1156, 1175-1177; *RuSHA Case*, TWC Vol. V, pp. 103, 106; *Klein et al.*, pp. 46-52; *Buck et al.*, pp. 39-41; *Golkel et al.*, pp. 45-47; *Rohde et al.*, pp. 54-55.

⁷⁸ Nuremberg Charter, art. 6; Tokyo Charter, art. 5 (applicable to all crimes).

⁷⁹ CCL 10, art. II(2).

⁸⁰ Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), 11 Dec. 1946.

⁸¹ Case 002-**E74** TC Ten Motions Response, p. 2.

⁸² Preliminary Objections, para. 30.

⁸³ *Contra* Preliminary Objections, para. 30; **D360/5/1** Ao An Appeal, para. 175.

⁸⁴ **D360** Indictment, para. 115. See further Case 001-**E188** *Duch* TJ, para. 508; Case 002-**E313** Case 002/01 TJ, para. 692; Case 002-**E465** Case 002/02 TJ, para. 3708; *Brđanin* AJ, para. 430; *Prlić* AJ, para. 1522; *Nizeyimana* AJ, para. 318; *Justice Case*, TWC Vol. III, pp. 1155-1156 (“the defendant’s court [...] was merely an instrument in the program of the *leaders of the Nazi State* of persecution and extermination. That the number the defendant could wipe out within his competency was smaller than the number involved in the mass persecutions and exterminations by the *leaders* whom he served, does not mitigate his contribution to the *program of those leaders*.” (emphasis added)); *Einsatzgruppen*, TWC Vol. IV, pp. 15-16.

⁸⁵ **D360** Indictment, paras 195, 824.

⁸⁶ Preliminary Objections, para. 30; **D360/5/1** Ao An Appeal, para. 176.

⁸⁷ **D360** Indictment, Count 1, EN 01580615 relying on paras 590-677. See further **D359/24** & **D360/33** Considerations, para. 632.

the alleged conflation of the common purposes of different JCE groups⁸⁸ raise mixed questions of fact and law to be dealt with at the end of trial proceedings.⁸⁹

E. The ECCC has jurisdiction over Planning

23. Contrary to Ao An's contention,⁹⁰ the TC has jurisdiction to try Ao An's conduct charged under planning, a mode of responsibility listed in article 29 new of the ECCC Law. The TC has consistently held that planning existed as a mode of responsibility in CIL by 1975, and was both foreseeable and accessible.⁹¹ This is confirmed by the Nuremberg and Tokyo Charters,⁹² the IMT Judgment,⁹³ CCL 10,⁹⁴ and the *Medical Case*.⁹⁵ Planning was also criminalised by articles 223, 239 and 290 of the 1956 Penal Code.⁹⁶ The absence of planning in some international instruments, such as the Genocide Convention or the Rome Statute, has no bearing on its crystallisation as a mode of responsibility.

F. The ECCC has jurisdiction over Superior Responsibility as defined in the Indictment

24. Ao An misinterprets the law in asserting that the superior responsibility applicable to civilian commanders outside international armed conflict ("IAC") did not form part of CIL in the DK era.⁹⁷ The TC⁹⁸ and PTC⁹⁹ have consistently held that superior responsibility, applicable to both military and civilian superiors, was recognised under CIL by 1975, and was both foreseeable and accessible. Of the pre-1975 cases analysed by these Chambers, a significant number concerned civilian superiors.¹⁰⁰ While they related to a period of IAC, superior responsibility centres on the responsibility of the individual, not on the IAC context,¹⁰¹ and Ao An fails to demonstrate that the use of superior responsibility depended on the existence of such

⁸⁸ Preliminary Objections, para. 30; **D360/5/1** Ao An Appeal, para. 177.

⁸⁹ Case 002-**E306** Further Information on Preliminary Objections, para. 2.

⁹⁰ Preliminary Objections, para. 31; **D360/5/1** Ao An Appeal, paras 178-179.

⁹¹ Case 001-**E188** *Duch* TJ, paras 473-475, 478; Case 002-**E313** Case 002/01 TJ, para. 697; Case 002-**E465** Case 002/02 TJ, para. 3704. *See also* Case 001-**F28** *Duch* AJ, para. 138.

⁹² Nuremberg Charter, art. 6; Tokyo Charter, art. 5 (applicable to all crimes).

⁹³ Case 001-**F28** *Duch* AJ, para. 138 *citing* IMT Judgment, pp. 279-341. *See especially*, pp. 292, 297-298, 300.

⁹⁴ CCL 10, arts II(1)(a), II(2)(d).

⁹⁵ *Medical Case*, TWC Vol. II, pp. 198 (Karl Brandt), 240 (Rudolf Brandt), 271 (Gerhard Rose).

⁹⁶ *See* Case 001-**E188** *Duch* TJ, para. 474; Case 002-**E465** Case 002/02 TJ, fn. 12338; **D359/24** & **D360/33** Considerations, para. 587 (International Judges).

⁹⁷ Preliminary Objections, para. 32; **D360/5/1** Ao An Appeal, paras 180-181.

⁹⁸ Case 001-**E188** *Duch* TJ, paras 476-478; Case 002-**E313** Case 002/01 TJ, paras 714, 718-719; Case 002-**E465** Case 002/02 TJ, paras 3704, 3725.

⁹⁹ Case 002-**D427/1/30** IS Closing Order Decision, paras 413-460; Case 002-**D427/2/15** NC and IT Closing Order Decision, paras 190-232. *See also* **D359/24** & **D360/33** Considerations, paras 592-593 (International Judges).

¹⁰⁰ *See e.g.* The 1919 Report of the Commission on Responsibility of Authors of the War and on Enforcement of Penalties, p. 121; *Pohl Case*, TWC Vol. V, pp. 1051-1056; *Medical Case*, TWC Vol. II, p. 206; *Ministries Case*, TWC Vol. XII, pp. 17-18, Vol. XIV, pp. 545-546 (Gottlob Berger); *Roehling Case*, TWC Vol. XIV, pp. 1135-1136, 1140.

¹⁰¹ **D359/24** & **D360/33** Considerations, para. 594 (International Judges) and citations therein; *Hadžihasanović and Kubura* Command Responsibility Decision, para. 20.

a conflict. Indeed, this Chamber has applied this mode of responsibility to CAH and genocide without requiring a nexus to IAC.¹⁰²

25. Ao An fails to demonstrate¹⁰³ any compelling reason to depart from the established jurisprudence of this Chamber that (i) “causation”¹⁰⁴ is not a material element of superior responsibility in CIL;¹⁰⁵ and (ii) the applicable *mens rea* is that the superior “must have known, or have had reason to know” that a crime was about to be or had been committed by his subordinate.¹⁰⁶ Despite the thorough analysis of post-World War II law by the ECCC Chambers,¹⁰⁷ nowhere does Ao An cite *any* pre-1975 authority to support his contentions. The Rome Statute¹⁰⁸ does not consistently reflect CIL,¹⁰⁹ particularly in the 1975-1979 period.

G. The ECCC has jurisdiction over Other Inhumane Acts as defined in the Indictment

26. The SCC,¹¹⁰ PTC¹¹¹ and TC¹¹² have all confirmed that by 1975, other inhumane acts (“OIA”) was criminalised under CIL as a residual category of CAH, and was foreseeable and accessible. This finding is supported by post-World War II law and jurisprudence.¹¹³ Contrary to Ao An’s contention,¹¹⁴ there is no requirement that the conduct underlying OIA be criminalised under international law at the time of commission and to do so would render the category meaningless.¹¹⁵ The act or omission must simply be sufficiently similar in nature and

¹⁰² See e.g. Case 002-**E313** Case 002/01 TJ, paras 177, 898, 917, 939; Case 002-**E465** Case 002/02 TJ, paras 301, 4179, 4187-4197, 4200, 4335. See also *Hadžihasanović* Jurisdiction Decision, para. 75 (discussing the existence of superior responsibility: “[t]he ‘acts under the draft code’ included genocide, which can be committed in the absence of an armed conflict [...]”).

¹⁰³ Preliminary Objections, para. 32; **D360/5/1** Ao An Appeal, para. 181.

¹⁰⁴ That it is necessary to prove a causal link between a superior’s failure to prevent or punish the subordinate’s crimes and the occurrence of these crimes.

¹⁰⁵ Case 001-**E188** *Duch* TJ, paras 538-547; Case 002-**E313** Case 002/01 TJ, paras 715-721; Case 002-**E465** Case 002/02 TJ, paras 3725-3726. The ICP notes that a causation requirement would sit uncomfortably with the obligation to punish, which occurs *after* commission of the crime.

¹⁰⁶ Case 001-**E188** *Duch* TJ, para. 543; Case 002-**E313** Case 002/01 TJ, para. 715; Case 002-**E465** Case 002/02 TJ, para. 3725.

¹⁰⁷ See e.g. Case 002-**D427/1/30** IS Closing Order Decision, paras 413-460; **D359/24 & D360/33** Considerations, paras 592-594 (International Judges) and citations therein.

¹⁰⁸ Rome Statute, art. 28(b)(i) (requiring “[t]he superior either knew, or consciously disregarded information which clearly indicated [...]”).

¹⁰⁹ Rome Statute, art. 21; *Katanga and Ngudjolo Chui* Confirmation Decision, paras 506-508; *Šainović* AJ, para. 1648; **D359/24 & D360/33** Considerations, para. 588 (International Judges).

¹¹⁰ Case 002-**F36** Case 002/01 AJ, paras 567, 576-586.

¹¹¹ Case 002-**D427/1/30** IS Closing Order Decision, paras 371, 385-388, 395-396, 398; Case 002-**D427/2/15** NC and IT Closing Order Decision, paras 130-131, 156-165; **D257/1/8** Forced Marriage Considerations: International Judges, para. 9 (on pp. 26-27).

¹¹² Case 001-**E188** *Duch* TJ, para. 367; Case 002-**E313** Case 002/01 TJ, para. 435; Case 002-**E465** Case 002/02 TJ, para. 723.

¹¹³ See e.g. *Eichmann*, para. 204; *Ministries Case*, TWC Vol. XIV, pp. 339, 991-992; *Medical Case*, TWC Vol. II, pp. 174-180, 198; Nuremberg Charter, art. 6(c); Tokyo Charter, art. 5(c); CCL 10, art. II(1)(c); 1950 Nuremberg Principles, Principle VI(c).

¹¹⁴ Preliminary Objections, para. 33; **D360/5/1** Ao An Appeal, paras 187-189.

¹¹⁵ Case 002-**F36** Case 002/01 AJ, para. 584; Case 002-**E313** Case 002/01 TJ, para. 436; Case 002-**E465** Case 002/02 TJ, paras 725-726; Case 002-**D427/1/30** IS Closing Order Decision, paras 371, 378; Case 002-**D427/2/15**

gravity to other enumerated CAH.¹¹⁶ Ao An provides *no* support for a requirement of underlying criminality and premises his arguments on ICTY jurisprudence that either (i) has been overturned,¹¹⁷ or (ii) supports the ECCC jurisprudence.¹¹⁸ As a corollary of the lack of criminality requirement, the SCC has made clear¹¹⁹ that there is no need to stipulate “material elements” for the underlying conduct.¹²⁰

27. Finally, Ao An identifies¹²¹ no error in the *mens rea* standard applied by the Indictment,¹²² which is not materially different from the TC’s previous articulations,¹²³ and higher than that confirmed by the SCC and applied by the TC in Case 002/02.¹²⁴ He merely quotes from the 2002 ICC Elements of Crimes—which, as noted, do not necessarily reflect CIL¹²⁵—without pointing to any evidence demonstrating that the *mens rea* therein reflects CIL between 1975 and 1979.¹²⁶

H. The ECCC has Jurisdiction over Forced Marriage as an Other Inhumane Act

28. Ao An’s contention¹²⁷ that the TC has no jurisdiction over forced marriage as an OIA is unfounded. As demonstrated above, there is no requirement to separately establish the “underlying criminality” or to specify the “elements” of forced marriage.¹²⁸ Ao An’s arguments

NC and IT Closing Order Decision, para. 156.

¹¹⁶ Case 002-**F36** Case 002/02 AJ, paras 584-586; Case 001-**E188** *Duch* TJ, para. 367; Case 002-**E313** Case 002/01 TJ, paras 438, 440; Case 002-**E465** Case 002/02 TJ, paras 725-726; Case 002-**D427/1/30** IS Closing Order Decision, paras 395-396; Case 002-**D427/2/15** NC and IT Closing Order Decision, paras 160-162; **D257/1/8** Forced Marriage Considerations: International Judges, paras 10, 15 (on pp. 27-30); *Krajišnik* AJ, para. 331; *Brima* AJ, para. 198.

¹¹⁷ **D360/5/1** Ao An Appeal, fns 476, 478, 489 citing *Stakić* TJ, paras 719, 721 (*overturned proprio motu* by *Stakić* AJ, paras 313-317).

¹¹⁸ **D360/5/1** Ao An Appeal, fns 476, 478 citing *Kordić & Čerkez* AJ, para. 117 (*see also* paras 472, 545-546, 573, 996, 1002, 1006 finding no violation of the *nullum crimen* principle where the elements for OIA were met, including for rape as a “serious attack on human dignity”) and *Kupreškić* TJ, paras 563, 618 (*see also* paras 566, 623, 818-822, 830-832 relying on international human rights standards to convict the accused of OIA).

¹¹⁹ Case 002-**F36** Case 002/01 AJ, para. 589.

¹²⁰ Preliminary Objections, para. 33; **D360/5/1** Ao An Appeal, para. 189.

¹²¹ Preliminary Objections, para. 33; **D360/5/1** Ao An Appeal, paras 190-191.

¹²² **D360** Indictment, para. 80 (“the perpetrator must have deliberately performed the act or omission with the intent to inflict serious bodily or mental harm or commit a serious attack upon the human dignity of the victim at the time of the act or omission, or knew that the act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity.”).

¹²³ Case 001-**E188** *Duch* TJ, para. 371; Case 002-**E313** Case 002/01 TJ, para. 437.

¹²⁴ Case 002-**F36** Case 002/01 AJ, para. 580; Case 002-**E465** Case 002/02 TJ, para. 724 (requiring only that “the act or omission was performed intentionally”). This is the error in the Indictment’s description of the *mens rea* element for OIA (*see supra*, fn. 122). The CAH of OIA is a residual category, and it would be illogical to include a *mens rea* element not found in other CAH (*e.g.* deportation and enslavement do not require proof that the perpetrator intended or was aware of the likely harm the deportation or enslavement would cause the victims). Such a requirement would lead to absurd results, as it would treat perpetrators intentionally committing the same act differently depending upon their own subjective view of the harm the act was likely to inflict.

¹²⁵ *See supra*, para. 25.

¹²⁶ **D360/5/1** Ao An Appeal, para. 190.

¹²⁷ Preliminary Objections, para. 34; **D360/5/1** Ao An Appeal, paras 192-193.

¹²⁸ *See supra*, para. 26.

as to whether the nature and gravity is similar to other CAH—including (i) the interrelationship between the factual circumstances of forced marriages and forced consummation and (ii) the distinction between pre- and post-1975 practices—all involve mixed questions of law and fact, which will only be ripe for assessment at the end of trial.¹²⁹

I. The ECCC has jurisdiction over Genocide as defined in the Indictment

29. The ECCC has jurisdiction over the crime of genocide.¹³⁰ While claiming that the Indictment omits the requirement of the contextual elements,¹³¹ again only by reference to the 2002 ICC Elements of Crimes,¹³² Ao An fails to demonstrate that such a requirement existed under CIL by 1975, particularly given it (i) does not appear in the Genocide Convention, (ii) has been rejected by the ICTY Appeals Chamber as “not mandated by [CIL]” during the 1990s,¹³³ and (iii) was not adopted by the TC despite its thorough analysis of the law as it stood in 1975.¹³⁴

30. The Indictment made no legal error in its definition of the protected group (the Cham), or as to *mens rea*.¹³⁵ It expressly acknowledged that the group must be positively identified¹³⁶ and targeted for destruction “as such”.¹³⁷ Moreover, it showed that Ao An and other JCE members targeted the Cham in ways specifically related to their identity as a distinct ethnic and religious group, with the intent to destroy the group “as such”,¹³⁸ just as the TC did in Case 002/02.¹³⁹

J. Ao An’s fair trial rights have been protected throughout the proceedings

31. Ao An grounds his objection on Rule 89(1)(b), alleging fair trial violations during the investigation so egregious and irreparable that their cumulative impact renders a fair trial impossible.¹⁴⁰ However, the TC’s previous jurisprudence makes clear that preliminary objections alleging defects in the investigation are generally not admissible at this stage of proceedings, under Rule 89(1)(b), or at all. Where possible,¹⁴¹ any such objections must be

¹²⁹ **D359/24 & D360/33** Considerations, para. 160 (unanimous); **D257/1/8** Forced Marriage Considerations: International Judges, para. 18 (on p. 31); Case 002-**D427/1/30** IS Closing Order Decision, para. 397; Case 002-**E306** Further Information on Preliminary Objections, para. 2.

¹³⁰ See e.g. ECCC Law, art. 4; Case 002-**E465** Case 002/02 TJ, paras 784-789.

¹³¹ Preliminary Objections, para. 35; **D360/5/1** Ao An Appeal, para. 196.

¹³² See *supra*, para. 25.

¹³³ *Krstić* AJ, paras 223-224.

¹³⁴ Case 002-**E465** Case 002/02 TJ, paras 784-804.

¹³⁵ *Contra* Preliminary Objections, para. 35; **D360/5/1** Ao An Appeal, paras 197-198.

¹³⁶ **D360** Indictment, paras 88-89.

¹³⁷ **D360** Indictment, paras 85, 88, 94, 98.

¹³⁸ **D360** Indictment, paras 195, 218, 220, 302-303, 305, 311, 313, 818.

¹³⁹ See e.g. Case 002-**E465** Case 002/02 TJ, paras 3228, 3345, 3993.

¹⁴⁰ Preliminary Objections, paras 36-40; **D360/5/1** Ao An Appeal, paras 207-218, 223-230.

¹⁴¹ The TC has exceptionally permitted review where (1) the accused did not have the opportunity to detect the procedural defect before the opening of the Trial; or (2) it appeared necessary to safeguard the fairness of the trial proceedings. See e.g. Case 002-**E306/5** TC Decision on Deportation, paras 5-6.

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raised before an indictment becomes final, and the Rules do not envisage the TC's examination of the procedural correctness of the judicial investigation upon being seised of a case.¹⁴² Rule 76(7) states that no such procedural defects may be raised before the TC, and under Rule 89(1)(c), the TC may only consider the nullity of procedural acts made "after the indictment was filed". In any event, as set out above,¹⁴³ the TC has no power to terminate proceedings except on grounds foreseen by article 7 of the CCCP, which do not include alleged defects in the judicial investigation, and procedural rules established at international level demonstrate an extremely high threshold for the grant of termination (or stay) of proceedings.

32. In this case, Ao An had ample opportunity to detect the alleged defects before the Indictment became final. Indeed, Ao An's complaints regarding (i) access to the casefile, equality of arms and the right to be informed of the charges during the investigation,¹⁴⁴ (ii) the right to instruct counsel of his own choosing,¹⁴⁵ (iii) alleged malpractice of investigators¹⁴⁶ and (iv) the supposed "presumption-of-innocence-defying" supermajority voting rule and corollary default position that the "investigation shall proceed"¹⁴⁷ have all been previously litigated by him before the PTC and ultimately dismissed.¹⁴⁸ Moreover, Ao An misrepresents the reasons for the ICIJ's denials of his requests for investigative action. They were not dismissed either due to lack of funding or donor pressure, or because the requested evidence "did not fit into [the ICIJ's] already established theory of the case",¹⁴⁹ but rather because they were *inter alia* not relevant,¹⁵⁰ too speculative,¹⁵¹ not sufficiently precise,¹⁵² unnecessarily cumulative,¹⁵³ impossible to obtain due to a lack of cooperation/participation by third parties,¹⁵⁴ or almost entirely unfounded.¹⁵⁵ Each time Ao An appealed these denials to the PTC, those appeals were

¹⁴² IR 76(7); Case 002-E116 Decision on NC Fairness Objections, paras 15, 17; Case 002-E74 TC Ten Motions Response, p. 2.

¹⁴³ See *supra*, para. 15.

¹⁴⁴ Preliminary Objections, para. 37; **D360/5/1** Ao An Appeal, paras 215-217, 224, 229.

¹⁴⁵ Preliminary Objections, para. 37; **D360/5/1** Ao An Appeal, paras 214, 224.

¹⁴⁶ Preliminary Objections, para. 38; **D360/5/1** Ao An Appeal, paras 58, 63, 66, 68, 72, 76, 79, 95, 217, 225.

¹⁴⁷ Preliminary Objections, para. 38; **D360/5/1** Ao An Appeal, paras 207, 210-212, 225.

¹⁴⁸ See e.g. **Access to the Case File: D359/24 & D360/33** Considerations, para. 164; **D121/4/1/4** Considerations on Ao An's Case File Access Appeal; **Right to Counsel: D359/24 & D360/33** Considerations, para. 166; **Alleged investigator malpractice: D338/1/5** Decision on Application to Annul WRIs of Three Investigators; **D296/1/1/4** Decision on Application to Annul Non-Audio-Recorded WRIs; **D359/24 & D360/33** Considerations, para. 164; **Supermajority: D359/24 & D360/33** Considerations, para. 163.

¹⁴⁹ Preliminary Objections, para. 38; **D360/5/1** Ao An Appeal, paras 216, 225.

¹⁵⁰ See e.g. **D260/1**, paras 12-24; **D276/1**, para. 33; **D300/2**, para. 15; **D311/1**, para. 65; **D320/1**, paras 11-14.

¹⁵¹ See e.g. **D276/1**, paras 23-24, 41, 49; **D277/1**, paras 21, 24; **D244/1**, paras 18-21.

¹⁵² See e.g. **D276/1**, paras 18, 30-32, 34-35, 47, 52; **D277/1**, paras 18, 22-23; **D320/1**, paras 15-17, 19-20; **D189/2**, para. 26.

¹⁵³ See e.g. **D276/1**, paras 38-40; **D188/1/1**, paras 16-20, 25-26, 29-30, 42-44.

¹⁵⁴ See e.g. **D326**, paras 23-45; **D277/1**, paras 21, 30-31, 45-46.

¹⁵⁵ See e.g. **D345/1** (the ICIJ conducted an extensive analysis of all alleged discrepancies between audio recordings and WRIs, and with the exception of two discrepancies and one translation error, found "all the other

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dismissed *unanimously*,¹⁵⁶ not as Ao An suggests,¹⁵⁷ because of a “blanket rejection” by the national PTC judges.


33. Ao An’s complaints regarding the alleged uncertainty as to the charges against him as a result of the CIJs issuing two closing orders¹⁵⁸ have been dealt with comprehensively by the PTC,¹⁵⁹ and the charges now contained in the Indictment that has seised the TC are unequivocal. Finally, whilst the PTC cautioned the CIJs for their delay in issuing the Closing Orders,¹⁶⁰ it made no finding that Ao An was prejudiced or that the delay justified the termination of proceedings. Ao An has never been detained at the ECCC and the impact of having his name made public as a person under investigation was not significantly enhanced by the time it took to close the case.

34. The TC is not an appeal or review body in relation to decisions by the PTC¹⁶¹ and Ao An identifies no tangible impact of these alleged deficiencies in the investigation on the fairness of the trial, nor does he show that termination is the only means available to address any alleged violations.¹⁶² The TC and SCC now assume the duty of ensuring Ao An’s fair trial rights, and he has provided no reason to believe they will not discharge this duty to the highest standard.

V. CONCLUSION

35. For the foregoing reasons, the ICP respectfully submits that the preliminary objections of the Accused should be dismissed.¹⁶³

Respectfully submitted,

Date	Name	Place	Signature
23 March 2020	Brenda J. HOLLIS, International Co-Prosecutor	Phnom Penh	

inconsistencies alleged by the Defence to be either unfounded or immaterial and non-prejudicial to Ao An.”); **D189/2**, para. 22.

¹⁵⁶ **D260/1/1/3** Considerations on 5th RIA Appeal; **D276/1/1/3** Decision on 6th RIA Appeal; **D277/1/1/4** Decision on 7th RIA Appeal; **D343/4** Decision on 10th RIA Appeal; **D320/1/1/4** Decision on 12th RIA Appeal.

¹⁵⁷ Preliminary Objections, para. 38; **D360/5/1** Ao An Appeal, paras 218, 225.

¹⁵⁸ Preliminary Objections, para. 38; **D360/5/1** Ao An Appeal, para. 215.

¹⁵⁹ **D359/24 & D360/33** Considerations, paras 88-124, 165 (unanimous).

¹⁶⁰ **D359/24 & D360/33** Considerations, paras 60-72 (unanimous).

¹⁶¹ Case 002-**E116** Decision on NC Fairness Objections, para. 18.

¹⁶² Case 002-**E116** Decision on NC Fairness Objections, para. 18. *Contra* Preliminary Objections, paras 36, 39-40.

¹⁶³ The ICP reiterates that she does not object to the removal of Count 3 (national crimes) from the Indictment.