

BEFORE THE PRE-TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 003/07-09-2009-ECCC/OCIJ (PTC35) **Party Filing:** The Defence for MEAS Muth**Filed to:** The Pre-Trial Chamber**Original language:** ENGLISH**Date of document:** 19 August 2019**CLASSIFICATION****Classification of the document
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**MEAS MUTH'S REPLY TO THE INTERNATIONAL CO-PROSECUTOR'S
RESPONSE TO MEAS MUTH'S APPEAL AGAINST THE INTERNATIONAL
CO-INVESTIGATING JUDGE'S INDICTMENT**

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All Civil Parties

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I. OVERVIEW

1. Claiming Mr. MEAS Muth's Appeal to be inadmissible because he did not challenge the Indictment's factual findings, legal conclusions, or personal jurisdiction determination,¹ the International Co-Prosecutor ("ICP") nonetheless engages the Pre-Trial Chamber ("PTC") to consider the jurisdictional challenges raised in Mr. MEAS Muth's Appeal,² seducing it to rewrite the Agreement, Establishment Law, and Rules, ignore the principle of *in dubio pro reo*, and implement an inexistent "policy decision" – *when two Co-Investigating Judges ("CIJs") of equal status issue diametrically opposed Closing Orders of equal force, the case must proceed to trial*.
2. Claiming that Rule 77(13)(b) is *lex specialis* so that Indictments automatically prevail over Dismissal Orders,³ the ICP invites the PTC to not only violate the principle of *in dubio pro reo* but wrongly subordinate National Co-Investigating Judge ("NCIJ") YOU Bunleng to International Co-Investigating Judge ("ICIJ") Michael Bohlander – depriving him of his equal status and discretionary authority to present his own findings and conclusions in his own Closing Order.⁴
3. Claiming that Rule 77(13)(b) "indicates an intent to implement the clear mandate of the [Agreement and Establishment Law],"⁵ the ICP tempts the PTC to treat the opposing Closing Orders as an unresolved disagreement, conflating the dispute resolution mechanism designed for the investigation phase of the pre-trial proceedings with the appellate procedure, and mischaracterizing the ECCC framework, negotiating history, and jurisprudence. In a needle-in-the-haystack footnote, the ICP admits that his supporting authority "deals with the formal dispute resolution mechanism ... and so it does not address the precise procedural situation in the present case."⁶
4. Claiming that an Indictment *always* trumps a Dismissal Order unless it is overturned by supermajority, the ICP misleads the PTC to consider that there is no doubt to resolve under the principle of *in dubio pro reo* since it does not apply to situations of procedural

¹ International Co-Prosecutor's Response to MEAS Muth's Appeal Against the International Co-Investigating Judge's Indictment (D267), 28 June 2019, D267/10 ("ICP's Response"), paras. 2, 7.

² ICP's Response, para. 6.

³ ICP's Response, para. 25.

⁴ See MEAS Muth's Appeal Against the International Co-Investigating Judge's Indictment, 8 April 2019, D267/4 ("MEAS Muth's Appeal"), paras. 41, 45-46.

⁵ ICP's Response, para. 25.

⁶ ICP's Response, para. 26, fn. 92.

uncertainty.⁷ Aside from there being no procedural uncertainty or *lacunae*, the ICP implies that the principle of *in dubio pro reo* does not apply to resolve doubt as to the facts and the interpretation of legal provisions at the pre-trial stage,⁸ seeking to misdirect the PTC to ignore the indisputable *doubt* flowing from the CIJs' opposing factual findings and personal jurisdiction determinations – *doubt* that must be resolved in Mr. MEAS Muth's favor under the principle of *in dubio pro reo*.⁹

5. Claiming that *the* “most logical solution”¹⁰ to resolving the opposing Closing Orders is to send Mr. MEAS Muth to trial where he can *then* enjoy his fair trial rights – most notably, his right to be presumed innocent, and its corollary, the principle of *in dubio pro reo* – the ICP urges the PTC to adopt a solution that is as absurd as it is unjust. That Mr. MEAS Muth, an 81-year-old man,¹¹ should go through the life-sucking¹² process of a trial to enjoy constitutionally guaranteed rights and “benefit” from the Trial Chamber's supermajority rule¹³ – only to have his case dismissed, given the doubt that already exists as to the ECCC's personal jurisdiction over him and that the standard of proof at trial is higher than the standard for indictment¹⁴ – is repugnant.
6. The Dismissal Order prevails over the Indictment. Unless the PTC finds by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion (none of which exist),¹⁵ the case against Mr. MEAS Muth must be dismissed. And, even were the PTC to overturn the Dismissal Order, it would still need to uphold the Indictment by supermajority for the case against Mr. MEAS Muth to proceed to trial.¹⁶

⁷ ICP's Response, paras. 40-41.

⁸ ICP's Response, paras. 38, 41-43.

⁹ See MEAS Muth's Appeal, paras. 13-31, 49-66.

¹⁰ ICP's Response, para. 38.

¹¹ Written Record of Initial Appearance, 14 December 2015, D174, EN 01187674.

¹² The history of the ECCC's cases informs that confinement and protracted trials of elderly accused slowly kill. See *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Termination of the Proceedings against the Accused IENG Sary, 14 March 2013, E270/1; *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Termination of the Proceedings against the Accused IENG Thirith, 27 August 2015, E359/1; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Decision to Terminate Proceedings against NUON Chea, 13 August 2019, F46/3.

¹³ ICP's Response, para. 38.

¹⁴ See Rule 87(1); *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427, para. 1323.

¹⁵ See MEAS Muth's Appeal, paras. 13-31, 52-66; MEAS Muth's Response to the International Co-Prosecutor's Appeal of the Dismissal Order, 24 June 2019, D266/5 (“MEAS Muth's Response”), paras. 21-98.

¹⁶ See MEAS Muth's Appeal, paras. 46, 64, 70; MEAS Muth's Response, paras. 20, 98.

II. ADMISSIBILITY

7. ***Mr. MEAS Muth's Appeal is admissible under Rule 74(3)(a), whether or not in conjunction with Rule 21*** The ICP perfunctorily claims that Mr. MEAS Muth's Appeal is inadmissible under Rules 74(3)(a) and 21 because it does not raise errors or abuses of discretion concerning the ICIJ's findings of fact, conclusions of law, or his personal jurisdiction determination,¹⁷ while impliedly endorsing its admissibility by inviting the PTC to resolve jurisdictional issues raised by Mr. MEAS Muth – namely, which of the CIJs' diametrically opposed Closing Orders should stand.¹⁸
8. The ICP conflates the PTC's standard of review with the admissibility of appeals.¹⁹ The standard of review relates to whether Mr. MEAS Muth's Appeal will succeed on the merits.²⁰ Admissibility relates to whether the PTC can consider the merits of an appeal – i.e. whether Mr. MEAS Muth's Appeal fits within one of the enumerated challenges to the CIJs' orders under Rule 74(3).²¹ For judicial economy, Mr. MEAS Muth did not challenge the ICIJ's personal jurisdiction determination in his Appeal since it involves mixed questions of law and fact²² – determinations “made at trial upon hearing and weighing the relevant evidence.”²³ Instead, Mr. MEAS Muth reserved his right to challenge the ICIJ's findings of fact and conclusions of law at trial should the case proceed.²⁴
9. The ICP misapprehends Rule 74(3)(a). While claiming that Mr. MEAS Muth's Appeal is not an appeal of an order confirming the ECCC's jurisdiction because it is “not an appeal

¹⁷ ICP's Response, paras. 2, 7-8.

¹⁸ ICP's Response, para. 6.

¹⁹ ICP's Response, para. 7.

²⁰ The PTC will only reverse the CIJs' discretionary decisions where they were: “(1) based on an incorrect interpretation of the governing law (*i.e.* an error of law) invalidating the decision; (2) based on a patently incorrect conclusion of fact (*i.e.* an error of fact) occasioning a miscarriage of justice; and/or (3) so unfair or unreasonable as to constitute an abuse of the [CIJs'] discretion and to force the conclusion that they failed to exercise their discretion judiciously. In other words, it must be established that there was an error or abuse which was fundamentally determinative of the [CIJs'] exercise of discretion.” *See Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 21 (internal citations omitted).

²¹ *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC35), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, para. 18: “Pursuant to Internal Rule 74(3), a charged person may appeal against nine categories of orders or decisions made by the OCIJ.”

²² *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 37.

²³ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 46.

²⁴ MEAS Muth's Appeal, para. 11.

of the Indictment,”²⁵ the ICP nonetheless concedes that Rule 74(3)(a) covers appeals of orders confirming the ECCC’s “personal, temporal and subject matter” jurisdiction.²⁶ The ICIJ confirmed the ECCC’s personal jurisdiction over Mr. MEAS Muth when he erroneously interpreted Rule 77(13), suggesting that unless the PTC upholds one of the Closing Orders by supermajority, both Closing Orders or only his Indictment would stand.²⁷

10. The ICP misleadingly claims that for Mr. MEAS Muth’s Appeal to be admissible under Rule 74(3)(a), he should have requested the PTC to overturn or amend the Indictment.²⁸ Neither the Rules nor ECCC jurisprudence require this. Mr. MEAS Muth is only required to seek relief that is not speculative.²⁹ Calling for the dismissal of the case is anything but speculative.³⁰
11. The ICP misguidedly claims that Mr. MEAS Muth’s Appeal is inadmissible because it relates to the consequences of opposing Closing Orders, which was “addressed expressly *obiter* by the ICIJ in the Indictment.”³¹ This obscures the overarching issue that the PTC is seized to resolve. Even if the ICIJ’s interpretation of Rule 77(13) is *obiter*, by suggesting that both Closing Orders or only his Indictment would stand regardless of the Dismissal Order’s validity, the ICIJ *implicitly* confirmed the ECCC’s jurisdiction over Mr. MEAS Muth. The PTC has found appeals of orders *implicitly* confirming the ECCC’s jurisdiction admissible under Rule 74(3)(a).³²
12. The ICP misdirects the PTC by evading MEAS Muth’s arguments that his Appeal is *also* admissible under a broader interpretation of the right to appeal under Rule 74(3)(a) in light of Rule 21.³³ Claiming that “any interpretive aid of Rule 21 is unnecessary” because

²⁵ ICP’s Response, para. 7 (emphasis in original).

²⁶ ICP’s Response, para. 7, citing *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 47.

²⁷ Closing Order, 28 November 2018, D267 (“Indictment”), para. 19, fn. 26, citing *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An’s Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2, para. 16; Indictment, para. 579.

²⁸ ICP’s Response, para. 7.

²⁹ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 57), Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties’ Request for Investigative Actions Concerning all Properties Owned by the Charged Persons, 4 August 2010, D193/5/5, para. 31 (holding that the PTC “will not speculate as to whether the Appellant seeks a certain type of relief on appeal”).

³⁰ MEAS Muth’s Appeal, p. 46.

³¹ ICP’s Response, para. 8.

³² See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC35), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, paras. 24-25.

³³ ICP’s Response, para. 8; MEAS Muth’s Appeal, paras. 3-4.

there is “no doubt” that Mr. MEAS Muth’s Appeal is inadmissible under Rule 74(3)(a),³⁴ the ICP dodges addressing the exceptional circumstances warranting a broader interpretation of Mr. MEAS Muth’s right to appeal³⁵ – namely, that the ICIJ’s suggested resolution to the opposing Closing Orders is not contemplated by the Rules;³⁶ that Mr. MEAS Muth’s Appeal raises matters not rectifiable by the Trial Chamber;³⁷ and that not allowing Mr. MEAS Muth to Appeal the Indictment would irreparably harm and permanently deprive him of his constitutional rights to be presumed innocent, to defend himself, to have proceedings against him brought to a conclusion within a reasonable time, to equal protection before the ECCC, and to have doubt resolved in his favor.³⁸

13. *The interests of justice and procedural fairness militate in favor of admitting Mr. MEAS Muth’s Appeal* The PTC is seized of cross-Appeals from Mr. MEAS Muth,³⁹ the ICP,⁴⁰ and the National Co-Prosecutor⁴¹ of opposing Closing Orders concerning the ECCC’s personal jurisdiction over Mr. MEAS Muth. It would be contrary to the interests of justice⁴² and procedural unfairness⁴³ would result were the PTC to find Mr. MEAS

³⁴ ICP’s Response, para. 8.

³⁵ See MEAS Muth’s Appeal, paras. 3-4.

³⁶ See Considerations on MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Re-Issued Decision on MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 26 April 2016, D120/3/1/8 (unanimous holding), para. 24; *Case of IM Chaem*, 004/07-09-2009-ECCC/OCIJ (PTC19), Considerations on IM Chaem’s Appeal Against the International Co-Investigating Judge’s Decision to Charge Her *in Absentia*, 1 March 2016, D239/1/8 (unanimous holding), para. 17.

³⁷ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 48.

³⁸ See Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia which was adopted by the National Assembly on the 4th of March 1999 (“Cambodian Constitution”), Arts. 31, 38; Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“Agreement”), Arts. 12(2), 13(1); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (“Establishment Law”), Arts. 33 new, 35 new (b)-(e); Rules 21(1), 21(4); International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force on 23 March 1976, 999 U.N.T.S. 171 (“ICCPR”), Art. 14(1), (2), (3)(b)-(e). See also Considerations on MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Re-Issued Decision on MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 26 April 2016, D120/3/1/8 (unanimous holding), para. 24; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 48.

³⁹ MEAS Muth’s Appeal.

⁴⁰ International Co-Prosecutor’s Appeal of the Order Dismissing the Case Against MEAS Muth (D266), 8 April 2019, D266/2 (“ICP’s Appeal”).

⁴¹ National Co-Prosecutor’s Appeal Against the International Co-Investigating Judge’s Closing Order in Case 003, 5 April 2019, D267/3 (“NCP’s Appeal”).

⁴² The PTC “has previously accepted filings despite procedural irregularities on the basis that it was in the interests of justice to do so.” See Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor’s Appeal Against the Decision on Re-Filing of Three Investigative Requests, 15 November 2011, D26/1/3 (Opinion of Judges Lahuis and Downing), para. 9, citing *Case of NUON Chea et al.*, 002/19-09-2007-

Muth's Appeal inadmissible. Indeed, it would be an absurdity, if not a perversion of justice, to consider the Co-Prosecutors' Appeals while rejecting Mr. MEAS Muth's, especially considering that the cross-Appeals are intertwined, invoking legal issues that strike at the core of what the PTC is seized to resolve – which of the two Closing Orders should stand or whether they both can stand unresolved in perpetuity. Rejecting Mr. MEAS Muth's Appeal would profoundly impact his fair trial rights guaranteed under the Cambodian Constitution and ECCC framework,⁴⁴ most notably his right to an *effective* appeal,⁴⁵ inclusive of which is his right to be heard.⁴⁶

14. *In sum*, the ICP effectively concedes that Mr. MEAS Muth's Appeal is admissible and has merit. Any claims that Mr. MEAS Muth's Appeal is inadmissible under Rule 74(3)(a), whether or not in conjunction with Rule 21, should be summarily dismissed.

ECCC/OCIJ (PTC 01), Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge NEY Thol pending the Appeal Against the Provisional Detention Order in the case of NUON Chea, 4 February 2008, C11/29, para. 8; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 35, 37, 38 and 39), Decision on the Co-Prosecutors' Application for Extension of Time and Page Limits to File a Joint Response to IENG Thirith, KHEIU Samphan, IENG Sary and Certain Civil Parties' Appeals Against the Order on Joint Criminal Enterprise, 9 February 2010, D97/14/9, para. 7.

⁴³ Rule 21(1)(a): "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties."

⁴⁴ See *supra* fn. 38. See also MEAS Muth's Appeal, para. 4.

⁴⁵ The right to an appeal means a right to an *effective* appeal. See e.g., *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC58), Decision on Civil Party Requests for Extension of Time and Page Limits, 27 August 2018, D362/4, para. 10 (finding that the Cambodian Civil Party Co-Lawyers were not able to "meaningfully prepare any appeals until a Khmer-language version of the Closing Order ... [was] issued") (emphasis added). See also *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Decision on Mićo Stanišić's and Stojan Župljanin's Motions Seeking Variation of Time and Word Limits to File Appeal Briefs, 4 June 2013, p. 2, 4; *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Joint Request for Extension of Time to File Respondent's Brief, 27 July 2009, p. 4. The European Court of Human Rights has held that applicants' fair trial rights were violated when circumstances prevented them from being able to effectively exercise their right to appeal. *Marpa Zeeland B.V. and Metal Welding B.V. v. The Netherlands*, ECtHR App. No. 46300/99, 9 November 2004, para. 51.

⁴⁶ See Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Chum Neou, 13 February 2013, D11/3/4/2 (Opinion of Judges Chung and Downing), para. 6: "Strict respect for these basic principles of due process is necessary to ensure transparency of the proceedings and preserve their adversarial nature by ... allowing the parties or participants to the proceedings the opportunity to be heard or more generally to exercise their rights." See also *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, 5 July 2001, para. 27; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003, para. 39.

III. MERITS

A. Reply to the ICP's Submissions on the Status of the Dismissal Order

15. The ICP erroneously claims that Mr. MEAS Muth “makes various attempts to demonstrate that the NCIJ did not err”⁴⁷ in determining that he is not *among those most responsible* for crimes within the ECCC’s jurisdiction to justify “that the Dismissal Order somehow nullifies the Indictment...”⁴⁸ Mr. MEAS Muth did more than make attempts. He cogently demonstrated how the NCIJ did not err or abuse his discretion in determining that Mr. MEAS Muth is not *among those most responsible*, and why, consistent with the ECCC framework, the Dismissal Order *trumps* the Indictment.
16. Mr. MEAS Muth’s Appeal⁴⁹ and Response⁵⁰ – which must be considered in tandem in order to grasp his argument that the Closing Order calling for dismissal of the case trumps the Closing Order calling for indictment under the principle of *in dubio pro reo* – illustrates how the NCIJ diligently, ethically, and forthrightly performed his judicial duties, faithfully adhered to the letter and spirit of the law, and judiciously exercised his discretion in issuing his Dismissal Order.
17. Recalling his Appeal, the ICP claims that the NCIJ:
 - a. Did not make the required findings on all the facts of which the CIJs were seized;⁵¹ *counterargued in paragraphs 40 to 44 of Mr. MEAS Muth’s Response.*
 - b. Erred in law by relying only on evidence placed on the Case File before 29 April 2011;⁵² *counterargued in paragraphs 21 to 39 of Mr. MEAS Muth’s Response.*
 - c. Erred in law in failing to make factual and legal findings on the crimes committed and Mr. MEAS Muth’s liability for those crimes;⁵³ *counterargued in paragraphs 45 to 54 of Mr. MEAS Muth’s Response.*
 - d. Erred in law and fact in his treatment of coercion, duress, and superior orders and direct participation and proximity to crimes when determining Mr. MEAS Muth’s

⁴⁷ ICP’s Response, para. 9.

⁴⁸ ICP’s Response, para. 18.

⁴⁹ MEAS Muth’s Appeal, paras. 13-31, 49-66.

⁵⁰ MEAS Muth’s Response, paras. 21-98.

⁵¹ ICP’s Response, para. 11. *See also* ICP’s Appeal, paras. 21-34.

⁵² ICP’s Response, paras. 12-14. *See also* ICP’s Appeal, paras. 35-62.

⁵³ ICP’s Response, paras. 15-16. *See also* ICP’s Appeal, paras. 63-82.

level of responsibility for crimes committed;⁵⁴ *counterargued in paragraphs 55 to 71 of Mr. MEAS Muth's Response.*

- e. Made erroneous factual findings with a determinative impact on the issue of personal jurisdiction;⁵⁵ *counterargued in paragraphs 72 to 88 of Mr. MEAS Muth's Response.*
- f. Erred in fact in his treatment of victims;⁵⁶ *counterargued in paragraphs 89 to 92 of Mr. MEAS Muth's Response.*
- g. Erred in law in holding that Duch is the only most responsible person;⁵⁷ *counterargued in paragraphs 93 to 96 of Mr. MEAS Muth's Response.*

18. The ICP does not show how – individually or collectively – the errors he alleges to have been committed by the NCIJ were so fundamentally determinative of his exercise of discretion in determining that Mr. MEAS Muth is not *among those most responsible* to merit overturning the Dismissal Order.

19. ***In sum***, absent a finding by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion, his Dismissal Order cannot be set aside. Under the principle of *in dubio pro reo*, the Dismissal Order trumps the Indictment. The case against Mr. MEAS Muth *must* be dismissed. Even in the likelihood that the PTC sets aside the Dismissal Order by supermajority, it would still need to uphold the Indictment by supermajority for the case to proceed to trial.

B. Reply to the ICP's Submissions on the Consequences of Opposing Closing Orders

1. The ECCC framework does not provide that a case proceeds to trial when a Dismissal Order and an Indictment are simultaneously issued

20. The ICP erroneously claims “[i]t is clear that under the express provisions of the [ECCC framework], should the PTC fail to reach the necessary supermajority for a decision on the Indictment, the case file must be sent to the Trial Chamber.”⁵⁸ There is no credible, verifiable, or incontrovertible evidence that the Parties to the Agreement and drafters of

⁵⁴ ICP's Response, para. 17. *See* ICP's Appeal, paras. 83-134.

⁵⁵ ICP's Response, paras. 14, 17. *See also* ICP's Appeal, paras. 135-54.

⁵⁶ ICP's Response, paras. 14, 17. *See also* ICP's Appeal, paras. 155-70.

⁵⁷ ICP's Response, para. 17. *See also* ICP's Appeal, paras. 171-90.

⁵⁸ ICP's Response, para. 20.

the Rules intended for cases to proceed to trial when equally valid Dismissal Orders and Indictments are simultaneously issued.⁵⁹

21. *The PTC is not seized of a dispute between the CIJs* The ICP misdirects the PTC in claiming that any Indictment unresolved by supermajority is sent to trial because “it would make no sense to purposely leave a potential conflict” between the CIJs unresolved “[s]ince the purpose of the negotiations and the supermajority compromise was to resolve situations where the CIJs ... held different opinions....”⁶⁰ The ICP’s sleight-of-hand would have the PTC adopt a novel and irreconcilable interpretation of the ECCC framework of treating Rules 72 and 77 as indistinguishable and interchangeable.
22. Contrary to the ICP’s claim,⁶¹ whether the CIJs put their separate opinions before the PTC under Rule 72’s dispute resolution mechanism or whether they issue opposing Closing Orders *is* relevant. The dispute resolution mechanism under Rule 72 reflects Article 7 of the Agreement and Article 23 new of the Establishment Law. It serves a different function at a different phase of the pre-trial proceedings than Rule 77, which governs the appellate procedure once the investigation is complete and the CIJs issue their Closing Order(s).⁶²
23. The procedure under the dispute resolution mechanism is unambiguously spelled out in Rule 72. The CIJs have sole discretion to register their disagreements internally under Rule 72(1) or to request the PTC to resolve them under Rule 72(2). Should the CIJs elect to seize the PTC of their disagreement under Rule 72(2), the CIJs submit “a written statement of the facts and reasons for the disagreement to the Office of Administration,”⁶³ which then “communicate[s] the statements” to the PTC.⁶⁴ Once seized of a disagreement, the PTC “settle[s] the specific issue upon which the [CIJs] ... disagree,” for example, determining whether either CIJ “erred in *proposing* to issue an Indictment or Dismissal Order....”⁶⁵

⁵⁹ MEAS Muth’s Appeal, paras. 32-48; MEAS Muth’s Response, paras. 15-20. *See also infra* paras. 42-46.

⁶⁰ ICP’s Response, para. 22.

⁶¹ ICP’s Response, para. 23.

⁶² Rule 67(1): the CIJs “conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.”

⁶³ Rule 72(2). *See also* Agreement, Art. 7(1); Establishment Law, Art. 23 new.

⁶⁴ Rule 72(2). *See also* Agreement, Art. 7(3); Establishment Law, Art. 23 new.

⁶⁵ *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 65 (emphasis added), citing Establishment Law, Art. 23 new; Agreement, Art. 7(4); Rule 72(4)(d).

24. Exercising the judicial discretion accorded to them by the Agreement, Establishment Law, and Rules,⁶⁶ the CIJs opted not to request the PTC to settle their opposing views, registered their disagreement internally,⁶⁷ and issued opposing Closing Orders,⁶⁸ which, notably, the ICP concedes was within the CIJs' remit and not *ultra vires*.⁶⁹
25. The ICP can neither request the PTC to resolve the CIJs' disagreements under Rule 72 nor invite it to consider appeals of opposing Closing Orders under Rule 77 as an unresolved disagreement by applying Rule 72 in the hopes of achieving a desired result that is otherwise unattainable under the ECCC framework – sending Mr. MEAS Muth to trial when two equal and independent CIJs issue opposing Closing Orders of equal force.
26. Were the PTC to erroneously treat the opposing Closing Orders as an unresolved disagreement, Rule 72's dispute resolution mechanism would still *not* resolve the opposing Closing Orders *unless* the PTC *also* reaches a supermajority. Under Rule 72(4)(d), "the default decision shall be that the order ... done by one [CIJ] shall stand, or that the order ... proposed to be done by one [CIJ] shall be executed." If the PTC cannot reach a supermajority under Rule 72(4)(d), both Closing Orders would stand, resulting, as argued in Mr. MEAS Muth's Appeal,⁷⁰ in a violation of his fair trial rights – a matter which the CIJs were cognizant of and concerned enough to seek submissions on whether to suspend their investigation.⁷¹ Leaving an unchallengeable Indictment hanging over the Charged Person is "not compatible with the basic demands of the rule of law."⁷²

⁶⁶ Unlike Chambers' decisions, which require the issuance of a single decision appending the views of the majority and minority when unanimity cannot be attained, the ECCC framework does not require the CIJs to issue a joint Closing Order. Rule 67(1) provides that the CIJs "conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case." Rule 1(2) provides that "a reference in these [Rules] to the [CIJs] includes both of them acting jointly and each of them acting individually...." Cf. Agreement, Art. 4(2); Establishment Law, Art. 14 new (2); Rule 77(14); Rules, Glossary of Terms (defining "Chambers" as the PTC, the Trial Chamber, and the Supreme Court Chamber).

⁶⁷ Order Dismissing the Case Against MEAS Muth, 28 November 2018, D266 ("Dismissal Order"), para. 7; Indictment, para. 27.

⁶⁸ See Dismissal Order, para. 6: "[T]he two [CIJs] agreed to issue the closing orders simultaneously to minimize complexity arising out of issuing two closing orders at a different time."

⁶⁹ See ICP's Response, paras. 10, 37 (the ICP agrees with Mr. MEAS Muth that the CIJs have equal and independent authority under the ECCC law, discretion *not* to resort to Rule 72's dispute resolution mechanism, and discretion to issue opposing Closing Orders).

⁷⁰ MEAS Muth's Appeal, paras. 42-44. See also MEAS Muth's Submission on the Budgetary Situation of the ECCC and its Impact on Case 003, 5 June 2017, D249/2, paras. 26-31; MEAS Muth's Response to the International Co-Prosecutor's Final Submission, 12 April 2018, D256/11, paras. 67-69.

⁷¹ Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2, 5 May 2017, D249, paras. 1, 54.

⁷² Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2, 5 May 2017, D249, para. 54.

27. Now that the PTC is seized of cross-Appeals of the opposing Closing Orders under Rule 77,⁷³ – rather than a disagreement between the CIJs under Rule 72 – its role is to determine whether the CIJs properly exercised their discretion in reaching their opposing personal jurisdiction determinations,⁷⁴ *not* to settle the CIJs’ irreconcilable differences.⁷⁵
28. On appeal under Rule 77, the CIJs’ discretionary personal jurisdiction determinations may only be overturned if the PTC finds: **a.** errors of law invalidating their decisions; **b.** errors of fact occasioning a miscarriage of justice; and/or **c.** abuses of their discretion.⁷⁶ The PTC must also find that any errors or abuses were “fundamentally determinative” of the CIJs’ exercise of discretion⁷⁷ – i.e. that their decisions hinged on the errors or abuses committed.⁷⁸ Put differently, errors of law must have been so fundamental and dispositive as to “actually” render the CIJs’ personal jurisdiction determinations invalid,⁷⁹ whereas errors of fact must have been so critical to the conclusion reached as to “actually” lead to

⁷³ See MEAS Muth’s Appeal; ICP’s Appeal; NCP’s Appeal.

⁷⁴ See *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), paras. 20-21 (internal citations omitted).

⁷⁵ See *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 65.

⁷⁶ *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 21 (internal citations omitted). See also MEAS Muth’s Appeal, paras. 7-10.

⁷⁷ *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 21, citing *Case of YIM Tith*, 004/07-09-2009-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, 13 February 2018, D365/3/1/5, para. 15; *Case of AO An*, 004/07-09-2009-ECCC/OCIJ (PTC36), Decision on Appeal against the Decision on AO An’s Tenth Request for Investigative Action, 26 April 2017, D343/4, para. 12; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 67), 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, 27 September 2010, D365/2/17, para. 36; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 46), Decision on NUON Chea’s Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 28 July 2010, D300/1/7, para. 14; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC52), Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, paras. 15-16. See also *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 62), Decision on the IENG Thirith Defence Appeal Against ‘Order on Requests for Investigative Action by the Defence for IENG Thirith’ of 15 March 2010, 14 June 2010, D353/2/3, para. 8.

⁷⁸ *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 21 (internal citations omitted).

⁷⁹ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC52), Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 16: “The [PTC] notes that not every error of law or fact will invalidate the exercise of a discretion and lead to the reversal of an order. The onus is upon the Appellant to demonstrate that the error of law or fact actually invalidated the decision or led to a miscarriage of justice.”

a miscarriage of justice⁸⁰ (i.e. a “grossly unfair outcome in judicial proceedings”).⁸¹ To constitute an abuse of discretion, the CIJs’ decisions must be “so unfair or unreasonable” as to “force the conclusion that [the CIJs] failed to exercise their discretion judiciously.”⁸² Absent such errors or abuses fundamentally determinative of either CIJ’s exercise of discretion, the PTC cannot replace its own views for those of the CIJs.⁸³

29. *The ICP mischaracterizes the ECCC framework* The ICP mischaracterizes the ECCC framework by claiming that unless the Indictment is overturned by supermajority under Rule 77(13), Mr. MEAS Muth must be sent to trial.⁸⁴ Declining to respond to Mr. MEAS Muth’s argument that Rule 77(13) exclusively applies to appeals of joint Closing Orders,⁸⁵ the ICP again begs the PTC to adopt his judicially perverse maxim of *when in doubt, prosecute*.⁸⁶

30. If the PTC cannot reach a supermajority, Rule 77(13) provides two “default decision[s]”: under Rule 77(13)(a), the order other than an Indictment “shall stand”; under Rule 77(13)(b) the Trial Chamber is seized “on the basis of the Closing Order of the [CIJs].” The ICP concedes that Rule 77(13)(a) “could include dismissal orders,” yet offers no argumentation, let alone supporting authority, in claiming that applying both Rules 77(13)(a) and (b) to appeals of opposing Closing Orders would not lead to an absurd result leaving the Indictment hanging over Mr. MEAS Muth’s head in perpetuity.⁸⁷

⁸⁰ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC52), Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 16. *See also Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 19 (internal citation omitted).

⁸¹ *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 19 (internal citation omitted).

⁸² *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 21 (internal citations omitted).

⁸³ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, paras. 24-27. *See also Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 67), 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, 27 September 2010, D365/2/17, para. 67; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 46), Decision on NUON Chea’s Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 28 July 2010, D300/1/7, para. 15: “The [PTC] has repeatedly stated that, ‘[i]t is not for the [PTC] to replace its view for that of the [CIJs].’”

⁸⁴ ICP’s Response, para. 24.

⁸⁵ MEAS Muth’s Appeal, paras. 41-48.

⁸⁶ ICP’s Response, paras. 20, 22; ICP’s Appeal, paras. 191-98. *See also* MEAS Muth’s Appeal, paras. 41-48; MEAS Muth’s Response, paras. 15-20.

⁸⁷ ICP’s Response, para. 24.

Effectively, he accepts Mr. MEAS Muth's argument that applying both Rules 77(13)(a) and (b) to appeals of opposing Closing Orders would irreparably harm and permanently deprive Mr. MEAS Muth of his fair trial rights.⁸⁸

31. The ICP recites his Appeal⁸⁹ in claiming that Rule 77(13)(b) is *lex specialis*, "prevail[ing] over the general terms of Rule 77(13)(a)."⁹⁰ So what. Even if Rule 77(13)(b) is *lex specialis vis-à-vis* Rule 77(13)(a) because its terms are more specific to Indictments, Rule 77(13)(b) is only relevant and applicable when there is a joint Closing Order.⁹¹ Applying Rule 77(13)(b) to appeals of opposing Closing Orders so that Indictments automatically prevail over Dismissal Orders is as perverse as it is unconstitutional.⁹²
32. The ICP's contrived interpretation of the Rules subordinates the NCIJ to his international counterpart of equal status.⁹³ It deprives him of his discretionary authority to present his independent – and in this case, irreconcilable – findings of fact and personal jurisdiction determinations.⁹⁴ It also unconstitutionally strips the ECCC proceedings of the principle of *in dubio pro reo* – if neither Closing Order of equal force is overturned by supermajority, doubt must be resolved in Mr. MEAS Muth's favor.⁹⁵ When conceptualizing and adopting the Rules, the ECCC Judges could no more diminish, dilute, or disregard the constitutionally guaranteed principle of *in dubio pro reo* than the Parties to the Agreement could negotiate it away when establishing the Agreement and Establishment Law.⁹⁶
33. If, as the ICP claims, Rule 77(13)(b) makes it "explicitly clear" that Mr. MEAS Muth must be sent to trial should the PTC be unable to reach a supermajority overturning the Indictment,⁹⁷ the CIJs *would not have jointly considered that* "Rule 77(13) only addresses the scenario of a joint dismissal or indictment; not that of split closing orders" and that absent a supermajority upholding one Closing Order over the other, "both would appear

⁸⁸ MEAS Muth's Appeal, paras. 41-44.

⁸⁹ ICP's Appeal, para. 194.

⁹⁰ ICP's Response, para. 25.

⁹¹ MEAS Muth's Appeal, paras. 41, 45-46; MEAS Muth's Response, para. 17.

⁹² MEAS Muth's Appeal, paras. 41, 45-46; MEAS Muth's Response, para. 17. *See also infra* para. 32.

⁹³ Agreement, Art. 5(1); Establishment law, Art. 27 new.

⁹⁴ *See* MEAS Muth's Appeal, para. 45. *See also supra* fn. 66.

⁹⁵ *See* MEAS Muth's Appeal, paras. 46, 49-51.

⁹⁶ *See* MEAS Muth's Appeal, para. 46; MEAS Muth's Response, para. 17.

⁹⁷ ICP's Response, para. 25.

to stand under the application of Rule 77(13)...”⁹⁸ Both CIJs are members of the Plenary entitled to vote on the Rules relating to the ECCC’s procedure⁹⁹ and thus would have had a firm grasp of the procedure applicable to their Closing Orders. The ICP neither challenges the CIJs’ joint view nor offers any compelling arguments that Rule 77(13) applies to appeals of opposing Closing Orders.

34. The ICP incredibly claims that Rule 77(13)(b) “indicates an intent to implement the clear mandate of the [Agreement and Establishment Law]” that where the CIJs disagree, the case “moves on to the next stage of proceedings” absent a PTC supermajority.¹⁰⁰ No provision of the ECCC framework provides that a case “moves on to the next stage” in case of disagreements.¹⁰¹ Rather, when the CIJs disagree, “the *investigation* shall proceed.”¹⁰² The CIJs, having exercised their discretion to register their disagreement internally,¹⁰³ allowed their investigation to proceed by mutually agreeing to issue their opposing Closing Orders simultaneously.¹⁰⁴ They did not stalemate the proceedings.

35. The ICP again conflates the dispute resolution mechanism with the appellate procedure in claiming that the Parties to the Agreement intended that a case proceeds to trial on the basis of an Indictment when a Dismissal Order is simultaneously issued because Article 7(4) of the Agreement provides “clear guidance as to what must be done should the PTC be unable to resolve a disagreement between the CIJs...”¹⁰⁵ The ICP vainly attempts to obscure his admission that Article 7(4) “deals with the formal dispute resolution mechanism ... and so it does not address the precise procedural situation in the present case,”¹⁰⁶ which, in no small measure, echoes Mr. MEAS Muth’s argument that the dispute resolution mechanism and appellate procedure are distinct by design.¹⁰⁷

36. The ICP absurdly claims that the Agreement reflects an “unambiguous policy decision that in the event of a disagreement, proceedings should *only* be halted by a supermajority

⁹⁸ *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An’s Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2, paras. 15-16.

⁹⁹ Rules 3, 18(3)(b).

¹⁰⁰ ICP’s Response, para. 25.

¹⁰¹ *Contra* ICP’s Response, para. 25.

¹⁰² See Agreement, Arts. 5(4), 7(4); Establishment Law, Art. 23 new (emphasis added).

¹⁰³ Dismissal Order, para. 7; Indictment, para. 27; Rule 72(1).

¹⁰⁴ Dismissal Order, para. 6; Indictment, para. 19, citing *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An’s Urgent Request for Disclosure of Documents Relating to Disagreements, 18 November 2017, D262.2, para. 14.

¹⁰⁵ ICP’s Response, para. 26.

¹⁰⁶ ICP’s Response, para. 26, fn. 92.

¹⁰⁷ See MEAS Muth’s Appeal, paras. 33-40; MEAS Muth’s Response, paras. 15-20. See also *supra* paras. 21-28.

of the PTC judges”¹⁰⁸ because its purpose is to “bring[] to trial” senior leaders and those most responsible.¹⁰⁹ The Parties to the Agreement did not agree to a “policy” to send cases to trial when the CIJs reach opposing conclusions evidencing doubt as to whether a Charged Person falls within the ECCC’s personal jurisdiction.

37. Considering that the Parties to the Agreement “understood that they were regulating the entire ‘prosecution’ of those most responsible for Khmer Rouge atrocities,”¹¹⁰ it logically follows that had they intended to give preference to Indictments over Dismissal Orders when the CIJs reach irreconcilable personal jurisdiction determinations resulting in opposing Closing Orders, they would have used the explicit terms “the case shall proceed” in the supermajority rule enshrined in the Agreement and Establishment Law.¹¹¹ They did not. And, the PTC cannot read into the Rules non-existent text or implied intentions that would be contrary to the Agreement and Establishment Law.
38. The ICP does not show how the “spirit and structure” of the ECCC framework – with its uniquely negotiated “Co-” structure that prevents subordination of either component to the other¹¹² – embraces any principle or preference for proceedings to continue when the CIJs disagree as to whether a Charged Person is *among those most responsible*.¹¹³ Nor does any PTC jurisprudence support such a proposition.¹¹⁴
39. One CIJ can no more advance the proceedings independently to trial through his Indictment when the other CIJ simultaneously issues a Dismissal Order,¹¹⁵ than the PTC can effectively anoint the Trial Chamber with appellate authority by forwarding both Closing Orders to it for resolution as if it were a third instance organ within the ECCC framework.
40. Although Rule 79(1) provides that the Trial Chamber is seized by “an Indictment from the [CIJs]” and Rule 69(2)(b) provides that if a Dismissal Order stands,¹¹⁶ the case is

¹⁰⁸ ICP’s Response, para. 26 (emphasis in original).

¹⁰⁹ ICP’s Response, para. 27, quoting Agreement, Art. 1 (emphasis in the ICP’s Response).

¹¹⁰ ICP’s Response, para. 27.

¹¹¹ Cf. Agreement, Arts. 5(4), 7(4); Establishment Law, Art. 23 new.

¹¹² See MEAS Muth’s Appeal, para. 68.

¹¹³ ICP’s Response, para. 28.

¹¹⁴ See ICP’s Response, para. 28, fn. 102. All cited PTC jurisprudence relates to disagreements between the Co-Prosecutors or CIJs at the pre-trial stage of the proceedings before the issuance of Closing Order(s).

¹¹⁵ *Contra* ICP’s Response, para. 28.

¹¹⁶ The PTC’s failure to uphold one Closing Order over the other on appeal would be analogous to the situation in which no appeal against a Closing Order is filed under Rule 69(2)(b), which provides that the “case file shall be archived after the expiry of the time limit for appeal.”

sealed and archived, both Rules, like Rule 77(13),¹¹⁷ were designed for a joint Closing Order, not opposing Closing Orders.

41. Both CIJs are of equal status.¹¹⁸ Absent any errors or abuses fundamentally determinative of the NCIJ's exercise of discretion (none of which exist),¹¹⁹ the Dismissal Order cannot be ignored.¹²⁰ Were the PTC tempted to send the case to trial, it must forward both Closing Orders to the Trial Chamber – an absurdity given that the Trial Chamber, unlike the PTC, has no authority to adjudicate appeals from orders of the CIJs.¹²¹

42. *The negotiating history confirms that a case does not proceed to trial based on the Indictment when a Dismissal Order is simultaneously issued* The ICP misrepresents the negotiating history in claiming that it is consistent with *his* desired outcome.¹²² He erroneously claims that “the prospect of an investigation without subsequent trial as a solution to a disagreement” as to whether to send a Charged Person to trial was never envisaged by the Royal Government of Cambodia (“RGC”) and United Nations (“UN”),¹²³ citing UN negotiator Hans Corell¹²⁴ and United States Ambassador-At-Large for War Crimes Issues David Scheffer.¹²⁵ The RGC and UN foresaw that the CIJs may disagree when concluding investigations,¹²⁶ which explains why the CIJs were entrusted with the discretionary authority to issue separate Closing Orders,¹²⁷ and why the negotiators, in establishing the supermajority rule for the investigation phase of the pre-trial proceedings, purposefully left the opposing Closing Orders scenario unaddressed.¹²⁸

43. *Corell* Corell's statement after the conclusion of the negotiations merely confirms that when the CIJs disagree as to “whether to proceed with an investigation,”¹²⁹ a

¹¹⁷ MEAS Muth's Appeal, paras. 32-48; MEAS Muth's Response, paras. 15-20. *See also supra* paras. 29-33.

¹¹⁸ Agreement, Art. 5(1); Establishment Law, Art. 27 new.

¹¹⁹ MEAS Muth's Appeal, paras. 13-31, 52-66; MEAS Muth's Response, paras. 21-98.

¹²⁰ *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 21 (internal citations omitted).

¹²¹ *Cf.* Rule 77.

¹²² ICP's Response, paras. 29-32.

¹²³ ICP's Response, para. 30.

¹²⁴ ICP's Response, para. 31.

¹²⁵ ICP's Response, para. 32.

¹²⁶ *See* MEAS Muth's Appeal, paras. 33-34.

¹²⁷ *See* MEAS Muth's Appeal, para. 36. *See also supra* fn. 66.

¹²⁸ *See* MEAS Muth's Appeal, paras. 33-34.

¹²⁹ Statement by Under-Secretary-General Hans Corell upon leaving Phnom Penh on 17 March 2003, 17 March 2003, D181/2.36, EN 01326112. *Contra* ICP's Response, para. 31.

supermajority would be needed “to stop the *investigation*....”¹³⁰ He offers no further insight. He certainly does not validate the ICP’s claim that the Parties to the Agreement intended that Dismissal Orders would inexorably give way to Indictments so that cases would proceed to trial when the CIJs issue opposing Closing Orders. Had the Parties to the Agreement intended that a supermajority would be required to prevent a case from proceeding to the trial stage when the CIJs disagree as to whether to indict, since this proposal had been discussed,¹³¹ Corell would have explicitly stated so. Its absence in the Agreement and Establishment Law¹³² evidences its rejection.

44. Scheffer While Scheffer has demonstrated a reluctance to disclose relevant negotiating history materials,¹³³ and although his autobiographical chapter is not authoritative, the ICP cites passages that confirm Mr. MEAS Muth’s argument – that during the negotiations the supermajority rule that would send cases to trial when the CIJs disagree as to whether to indict *was* considered but *not* adopted.¹³⁴

45. Scheffer explains that the procedure under discussion in early 2000 was that a decision “not to proceed with an investigation” or “*not* to indict” would need to be upheld by a supermajority of Judges for the proceedings to stop,¹³⁵ and that absent a supermajority, the “decision to indict would stand and the case would move forward to trial.”¹³⁶

46. Scheffer recalls that by late April 2000, UN lawyers were willing to accept the supermajority rule although “there remained uncertainty” over how it would be used – “either to terminate or to approve an investigation or indictment.”¹³⁷ He notes, however, that by 2003, a compromise emerged: a Co-Prosecutor’s decision “to proceed with a prosecution would be honored unless the [PTC] terminated it with a supermajority vote. The identical objective applies to the [CIJs] and how their decisions and disagreements *on*

¹³⁰ Letter from UN Secretary-General Kofi Annan to Prime Minister H.E. Hun Sen, 19 April 2000, D267/4.1.5, EN 01614369 (emphasis added). *Contra* ICP’s Response, para. 31.

¹³¹ See David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW 219, 231 (M. Cherif Bassiouni 3rd ed. 2008) (Attachment 1). See also *infra* paras. 45-47.

¹³² Agreement, Art. 7(4); Establishment Law, Art. 23 new.

¹³³ See MEAS Muth’s Response, para. 19, fn. 93.

¹³⁴ See MEAS Muth’s Appeal, paras. 33-40.

¹³⁵ David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW 219, 231 (M. Cherif Bassiouni 3rd ed. 2008) (emphasis in original) (Attachment 1).

¹³⁶ David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW 219, 231 (M. Cherif Bassiouni 3rd ed. 2008) (Attachment 1).

¹³⁷ David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW 219, 234 (M. Cherif Bassiouni 3rd ed. 2008) (Attachment 1).

investigations would be handled.”¹³⁸ All references to Indictments were removed from the dispute resolution mechanism that was adopted in Article 7(4) of the Agreement and Article 23 new of the Establishment Law.¹³⁹

47. *ECCC jurisprudence does not support the proposition that “the investigation shall proceed” extends beyond the investigation phase of the pre-trial proceedings* The ICP misrepresents ECCC jurisprudence in claiming that the Supreme Court Chamber in Case 001 and the PTC in Case 002 held that the terms “the investigation shall proceed” means that “the indictment would proceed to trial”¹⁴⁰ and “incorporate[] the phase where an indictment seises the Trial Chamber.”¹⁴¹ ECCC jurisprudence only confirms that the terms “the investigation shall proceed” means that disagreements between the CIJs must not lead to a stalemate in their investigation, which concludes when they issue Closing Order(s).¹⁴² Once Closing Orders are issued, the investigation ceases and the CIJs are *functus officio*.¹⁴³ The PTC was neither “established” nor “equip[p]ed” to conduct investigations.¹⁴⁴

48. Other than copy-pasting his interpretation of the Supreme Court Chamber’s *obiter dictum* in Case 001 from his Appeal,¹⁴⁵ the ICP offers no support for his assertion that “the only reasonable interpretation” of the terms “the investigation shall proceed” is that the Indictment proceeds to trial when a Dismissal Order is simultaneously issued. As Mr. MEAS Muth explained in his Appeal¹⁴⁶ and Response,¹⁴⁷ the Supreme Court Chamber’s *obiter dictum* in Case 001 relates to disagreements between the CIJs in the context of the

¹³⁸ David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW 219, 247 (M. Cherif Bassiouni 3rd ed. 2008) (emphasis added) (Attachment 1).

¹³⁹ Agreement, Art. 7(4): “[T]he investigation or prosecution shall proceed”; Establishment Law, Art. 23 new: “The investigation shall proceed.” Cf. David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW 219, 231, 234, 247 (M. Cherif Bassiouni 3rd ed. 2008) (Attachment 1).

¹⁴⁰ ICP’s Response, para. 34.

¹⁴¹ ICP’s Response, para. 36.

¹⁴² Rule 67(1).

¹⁴³ See Indictment, para. 29. See also 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, 11 August 2017, D249/6, para. 18.

¹⁴⁴ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC25), Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence in the SHARED MATERIALS DRIVE, 12 November 2009, D164/3/6, para. 24.

¹⁴⁵ See ICP’s Response, paras. 34-35; ICP’s Appeal, paras. 195-96.

¹⁴⁶ MEAS Muth’s Appeal, paras. 35-36.

¹⁴⁷ MEAS Muth’s Response, para. 18.

dispute resolution mechanism *before* the CIJs issue a Closing Order – i.e. when “*proposing* to issue an Indictment or Dismissal Order.”¹⁴⁸

49. Recalling his bogus claim that it is “irrelevant” how the question of “whether either CIJ erred in issuing his dismissal order or indictment” reaches the PTC because the “substantive outcome is equally applicable” under the dispute resolution mechanism and the appellate procedure,¹⁴⁹ the ICP misrepresents PTC jurisprudence, claiming that the terms “‘the investigation shall proceed’ incorporate[] the phase where an indictment seises the Trial Chamber.”¹⁵⁰
50. The PTC did not hold that the case proceeds to trial where there is a disagreement resulting in two diametrically opposed Closing Orders. It merely held that when the CIJs disagree – including disagreements concerning the contents of the Closing Order(s) they intend to issue – the *investigation* shall proceed.¹⁵¹ Context matters.
51. In Case 002, the CIJs disagreed as to whether the Charged Persons could be tried for national crimes.¹⁵² Considering their obligation to issue a Closing Order within a reasonable time, they mutually agreed not to request the PTC to resolve their disagreement, but to “leav[e] it to the Trial Chamber to decide what procedural action to take regarding [national crimes].”¹⁵³ By issuing their Closing Order, rather than taking no action at all, the CIJs allowed the investigation to proceed.
52. The CIJs’ approach in Case 003 is consistent with the approach taken in Case 002. Rather than stalemating the proceedings by taking no action at all, they allowed the investigation to proceed: they mutually agreed to register their disagreements under Rule 72(1), rather than requesting the PTC to resolve their opposing personal jurisdiction determinations

¹⁴⁸ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 65 (emphasis added).

¹⁴⁹ ICP’s Response, para. 35. *Counterargued supra* paras. 21-28.

¹⁵⁰ ICP’s Response, paras. 36-37, citing *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 274.

¹⁵¹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 274.

¹⁵² *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427, para. 1574.

¹⁵³ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427, para. 1574.

under Rule 72(2),¹⁵⁴ and mutually agreed to simultaneously issue their opposing Closing Orders.¹⁵⁵ The investigation proceeded and concluded.¹⁵⁶

53. In light of the doubt that already exists as to the ECCC's personal jurisdiction over Mr. MEAS Muth, and given that the standard of proof at trial is higher than the standard for indictment,¹⁵⁷ unnecessarily prolonging the proceedings by sending him to trial would not only constitute a violation of Mr. MEAS Muth's right to have proceedings brought to a conclusion within a reasonable time,¹⁵⁸ but would also constitute an injudicious use of the ECCC's time and resources.¹⁵⁹ Yet, absurdly, the ICP claims that the "most logical solution" to resolving the opposing Closing Orders is for Mr. MEAS Muth to be sent to trial so he can enjoy his fair trial rights and benefit from supermajority rule at trial.¹⁶⁰

54. *In sum*, the ICP urges the PTC to illegitimately treat the opposing Closing Orders as an unresolved disagreement by conflating the dispute resolution mechanism with the appellate procedure and mischaracterizing the ECCC's negotiating history and jurisprudence. The Parties to the Agreement did not provide, and the Judges who drafted the Rules could not provide, that a case proceeds to trial on the basis of an Indictment when a Dismissal Order is simultaneously issued.

2. The principle of *in dubio pro reo* mandates that the Dismissal Order trump the Indictment

55. The ICP again misleads the PTC in claiming that the ECCC framework and jurisprudence mandate that Indictments always trump Dismissal Orders unless they are overturned by supermajority and that "[s]uch a result does not violate the principle of *in dubio pro reo* as there is no 'doubt' to resolve...."¹⁶¹ Where opposing Closing Orders place the question of personal jurisdiction over a Charged Person in equipoise, an Indictment cannot stand and trial cannot proceed under the principle of *in dubio pro reo*. By mischaracterizing the

¹⁵⁴ Dismissal Order, para. 7; Indictment, para. 27.

¹⁵⁵ Dismissal Order, para. 6; Indictment, para. 19, citing *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2, para. 14.

¹⁵⁶ See Rule 67(1).

¹⁵⁷ See Rule 87(1); *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427, para. 1323.

¹⁵⁸ Rule 21(4).

¹⁵⁹ See MEAS Muth's Response to the International Co-Prosecutor's Final Submission, 12 April 2018, D256/11, paras. 51-52.

¹⁶⁰ ICP's Response, para. 38. See also Agreement, Art. 4(1)(a); Establishment Law, Art. 14 new (1)(a).

¹⁶¹ ICP's Response, para. 40.

resolution of the opposing Closing Orders as an issue of procedural uncertainty, the ICP brazenly invites the PTC to circumvent the principle of *in dubio pro reo*, arguing that Mr. MEAS Muth *must* be tried for the sake of delivering justice to the victims, regardless of doubt leading to the CIJs' opposing personal jurisdiction determinations.

56. *The resolution of the opposing Closing Orders is not an issue of procedural uncertainty, but doubt* The ICP misdirects the PTC in claiming that the principle of *in dubio pro reo* "is not applicable in situations of procedural uncertainty such as this, where the question is whether to send a charged person to trial."¹⁶² The jurisdictional merits of Mr. MEAS Muth's case – the existence of doubt raised by the CIJs' divergent personal jurisdiction determinations – governs the resolution of the opposing Closing Orders. Procedural uncertainty is not at issue.

57. The ICP concedes that the principle of *in dubio pro reo* applies to resolve factual doubts,¹⁶³ questions of law,¹⁶⁴ and has a residual role in the interpretation of legal provisions.¹⁶⁵ Yet, erroneously, he implies that the principle of *in dubio pro reo* does not apply at the pre-trial stage.¹⁶⁶ The principle of *in dubio pro reo* applies at *all* stages of the proceedings, including the pre-trial stage.¹⁶⁷

58. Whether Mr. MEAS Muth falls within the ECCC's personal jurisdiction is a mixed question of law and fact,¹⁶⁸ requiring the CIJs to exercise their independent judicial discretion.¹⁶⁹ The ICP concedes that for the PTC to set aside either Closing Order it must

¹⁶² ICP's Response, para. 41.

¹⁶³ ICP's Response, para. 41.

¹⁶⁴ ICP's Response, para. 42.

¹⁶⁵ ICP's Response, para. 43.

¹⁶⁶ See ICP's Response, para. 41: "As Meas Muth recognises, *in dubio pro reo* is a corollary of the presumption of innocence, and is one aspect of the requirement that guilt must be found at trial beyond a reasonable doubt." See also *id.*, para. 38.

¹⁶⁷ See e.g., *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 310; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, D427/2/15, para. 144. The International Criminal Court also considers the principle of *in dubio pro reo* applicable to all stages of the proceedings. See *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 31: "Lastly, in making this determination [on the confirmation of charges] the Chamber wishes to underline that it is guided by the principle *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage."

¹⁶⁸ See also *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 37: "The Accused's appeal on personal jurisdiction ... involves a mixed question of law and fact..."

¹⁶⁹ *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 20 (internal citation omitted).

find by supermajority that either CIJ committed errors or abuses fundamentally determinative of their exercise of discretion in determining whether Mr. MEAS Muth is *among those most responsible*.¹⁷⁰ Absent a supermajority finding, one CIJ's investigation, assessment of the facts, application of the law, or Closing Order is neither superior nor subordinate to the other CIJ's.¹⁷¹

59. Simply because the PTC disagrees with either CIJ's findings of fact or personal jurisdiction determination does not mean it may set aside their discretionary decisions.¹⁷² It may only overturn findings of fact when it finds that no other reasonable CIJ would have reached such findings.¹⁷³ The PTC has declined to substitute its own views when discretionary decisions involve questions of fact¹⁷⁴ because the CIJs make their assessments having "in-depth, intimate knowledge of the Case File."¹⁷⁵ And to overturn the CIJs' discretionary decisions, the PTC *must* find that the factual errors were "fundamentally determinative" of the CIJs' exercise of discretion.¹⁷⁶ In other words, an error of fact, even if found, must have been critical to the conclusion reached as to

¹⁷⁰ ICP's Appeal, para. 7.

¹⁷¹ *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 21 (internal citations omitted). *See also* MEAS Muth's Appeal, paras. 64, 69.

¹⁷² *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), paras. 20-21 (internal citations omitted). *See also supra* para. 28.

¹⁷³ *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, D427/2/15, para. 86.

¹⁷⁴ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, paras. 25-26. *See also Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 67), 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, 27 September 2010, D365/2/17, para. 67; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 46), Decision on NUON Chea's Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 28 July 2010, D300/1/7, para. 15.

¹⁷⁵ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 67), 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, 27 September 2010, D365/2/17, para. 67.

¹⁷⁶ *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 21 (internal citations omitted).

“actually” lead to a miscarriage of justice;¹⁷⁷ i.e. a “grossly unfair outcome in judicial proceedings.”¹⁷⁸

60. The ICP concedes that the principle of *in dubio pro reo* as enshrined in the Cambodian Constitution and ECCC framework applies to resolve factual doubts.¹⁷⁹ Given that the CIJs jointly articulated and applied the same factors to determine whether Mr. MEAS Muth is *among those most responsible*,¹⁸⁰ and assessed the facts based on the same methodology,¹⁸¹ the CIJs’ opposing personal jurisdiction determinations evidence *factual doubt* that must be resolved by applying the principle of *in dubio pro reo*. Absent a finding by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion¹⁸² – none of which exist¹⁸³ – the principle of *in dubio pro reo* mandates that the Dismissal Order trump the Indictment.

61. *Dismissing the case for lack of jurisdiction does not violate the rights of the victims*

The ICP misleadingly claims that because Rule 21(1) does not grant Mr. MEAS Muth an automatic advantage in every concrete situation arising on the interpretation of the Rules, the victims’ rights must be considered in determining whether to send him to trial.¹⁸⁴ Mr. MEAS Muth claimed no such entitlement. The ICP also misrepresents PTC jurisprudence – cherry picking a portion of a PTC decision out of context.¹⁸⁵ The PTC did not hold that Rule 21 requires *all* Rules to “be read in a manner that takes into account the needs of the affected community....”¹⁸⁶ Rather, the PTC interpreted the criteria for Civil Party

¹⁷⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC52), Decision on Appeal of Co-Lawyers for Civil Parties Against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 21 July 2010, D310/1/3, para. 16. *See also Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 19.

¹⁷⁸ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 19 (internal citation omitted). *See also* MEAS Muth’s Appeal, paras. 7-9.

¹⁷⁹ ICP’s Response, para. 41.

¹⁸⁰ Dismissal Order, paras. 360-407; Indictment, paras. 32-39. *See also Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017, D261, paras. 3-41.

¹⁸¹ Dismissal Order, paras. 354-59; Indictment, paras. 118-31. *See also Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017, D261, paras. 103-39.

¹⁸² *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (unanimous holding), para. 21 (internal citations omitted).

¹⁸³ *See* MEAS Muth’s Appeal, paras. 13-31, 52-66; MEAS Muth’s Response, paras. 21-98.

¹⁸⁴ ICP’s Response, paras. 44-47.

¹⁸⁵ ICP’s Response, para. 44, citing *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC76, PTC112, PTC113, PTC114, PTC115, PTC142, PTC157, PTC164, PTC165 and PTC172), Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 67.

¹⁸⁶ ICP’s Response, para. 44, citing *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC76, PTC112, PTC113, PTC114, PTC115, PTC142, PTC157, PTC164, PTC165 and PTC172), Decision on Appeals Against

admissibility under Rule 23 *bis*(1),¹⁸⁷ holding that the PTC reads the Rules governing the admissibility of Civil Party applications “in a manner that takes into account ... the needs of the affected community....”¹⁸⁸ In the same decision, the PTC also held that Civil Parties rights cannot “directly and adversely affect the position of the Accused, such as whether to prosecute or not....”¹⁸⁹

62. The ICP misconstrues Rule 2 in claiming that it confirms his assertion that victims’ rights must be considered when deciding to send Mr. MEAS Muth to trial.¹⁹⁰ Rule 2 governs the procedure applicable to *lacunae*. There are no *lacunae*. The procedure governing the opposing Closing Orders is unequivocal. But even if a *lacuna* exists, as correctly put by the ICP, “where a specific scenario is not covered by the Internal Rules, the decision-making bodies *must* interpret the provision with regard to Cambodian law and relevant international procedural rules....”¹⁹¹ Precisely. Resorting to Cambodian law and international procedural rules, the PTC must apply the constitutionally guaranteed and universally accepted principle of *in dubio pro reo*.¹⁹²

63. The ICP claims that since fair trial rights belong to all Parties to the proceedings,¹⁹³ dismissing the case against Mr. MEAS Muth without a trial on the merits would fail to deliver justice to the victims.¹⁹⁴ He misdirects the PTC to disregard the ECCC’s negotiated personal jurisdiction limits and inappropriately assume breath-taking legislative powers. The Parties to the Agreement were fully aware that there would be a “massive impunity gap”¹⁹⁵ and that many potential perpetrators would not face justice by limiting the ECCC’s jurisdiction “to bring to trial senior leaders of Democratic

Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 67.

¹⁸⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC76, PTC112, PTC113, PTC114, PTC115, PTC142, PTC157, PTC164, PTC165 and PTC172), Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 56.

¹⁸⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC76, PTC112, PTC113, PTC114, PTC115, PTC142, PTC157, PTC164, PTC165 and PTC172), Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 67.

¹⁸⁹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC76, PTC112, PTC113, PTC114, PTC115, PTC142, PTC157, PTC164, PTC165 and PTC172), Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, para. 97.

¹⁹⁰ ICP’s Response, para. 45.

¹⁹¹ ICP’s Response, para. 45 (emphasis in original).

¹⁹² See MEAS Muth’s Appeal, paras. 50-51.

¹⁹³ ICP’s Response, para. 46.

¹⁹⁴ ICP’s Response, para. 47.

¹⁹⁵ *Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017, D261, para. 25.

Kampuchea and those who were most responsible....”¹⁹⁶ It would be a perversion of justice were the PTC to illegitimately arrogate itself legislative powers by expanding through judicial fiat the circumscribed contours of the Agreement and Establishment Law, to ignore, or worse yet, to deny the application of a constitutional provision¹⁹⁷ as justification for attaining a desired result – righting a perceived wrong committed by the Parties to the Agreement in establishing and limiting the ECCC’s jurisdiction.

64. The ICP misleadingly claims that the purpose of the Agreement – “*pursuit of justice and national reconciliation*”¹⁹⁸ – requires the Judges and Chambers to not only seek the truth about what happened in Cambodia, but also to ensure meaningful participation of the victims.”¹⁹⁹ Without minimizing the impact on and suffering of the victims of any crimes that may have occurred, they cannot meaningfully participate in proceedings if the ECCC lacks jurisdiction over Mr. MEAS Muth. “The purpose of Civil Party action before the ECCC is to: a) Participate in criminal proceedings against *those responsible for crimes within the jurisdiction of the ECCC....*”²⁰⁰ The ECCC cannot engage in proceedings that exceed its jurisdiction lest justice be denied to victims.²⁰¹ Bluntly, “[t]o proceed without jurisdiction would strike at the root of the ECCC’s mandate, and would deprive the Trial Chamber of its legal authority to try an accused person.”²⁰²
65. The ICP misleadingly claims that the protection of a Charged Person’s rights must be interpreted and balanced with the fundamental purpose of the Tribunal to “bring to trial” senior leaders and those most responsible²⁰³ – to balance the Charged Person’s rights “with the need to ascertain the truth about the crimes with which he has been charged, as well as the general principle of proper administration of justice.”²⁰⁴ Another ruse.

¹⁹⁶ *Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017, D261, paras. 18-19; Agreement, Arts. 1, 2(1); Establishment Law, Art. 1.

¹⁹⁷ Cambodian Constitution, Art. 38.

¹⁹⁸ Agreement, Preamble.

¹⁹⁹ ICP’s Response, para. 48.

²⁰⁰ Rule 23(1)(a) (emphasis added).

²⁰¹ *See Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, paras. 34-37; Répertoire de droit pénal et de procédure pénale (Daloz), Frédérique Agostini, Compétence (February 2005, updated February 2007), para. 213: “Comme toute juridiction pénale, le juge d’instruction a le droit mais aussi le devoir, une fois qu’il est saisi, de vérifier sa compétence territoriale, matérielle et personnelle.” [unofficial translation: “Like any criminal court, the investigating judge has the right but also the duty, once seized, to ascertain his territorial, subject-matter, and personal jurisdiction”]. *See* MEAS Muth’s Response, paras. 31-32.

²⁰² *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, para. 34.

²⁰³ ICP’s Response, para. 49.

²⁰⁴ ICP’s Response, para. 49.

66. The ICP effectively argues that every Suspect investigated at the ECCC *must* be tried regardless of whether doubt exists as to whether they fall within the ECCC's personal jurisdiction, offering emotive and evasive rhetoric in lieu of relevant and reliable supporting authority. Had the RGC and UN intended to ensure that no Khmer Rouge cadre could escape criminal liability, they would not have restricted the ECCC's personal jurisdiction to senior leaders and those most responsible,²⁰⁵ which the ICP acknowledges is reflected in the fundamental purpose of the Tribunal.²⁰⁶
67. The ICP mischaracterizes PTC jurisprudence in claiming that the CIJs and the PTC have an obligation to uphold the "general necessity for the investigation and judicial process to advance."²⁰⁷ The PTC merely held that the CIJs and PTC must, pursuant to Rule 21(4), bring proceedings to a conclusion within a reasonable time.²⁰⁸ It did not hold, state, or otherwise imply that the CIJs and PTC have an obligation to advance the judicial process to the next phase of the proceedings, especially when doubt exists as to whether the Charged Person falls within the ECCC's personal jurisdiction.
68. The ICP misleadingly claims that "[i]f procedural uncertainty were to be permitted to automatically benefit the charged person to the point of terminating proceedings," this would violate Cambodian procedural law (which provides limited causes for extinction of criminal action) and the ECCC framework because Rule 67(3) does not permit dismissal of the case for procedural considerations.²⁰⁹ Mr. MEAS Muth did not request *dismissal of his case* for any other reason than lack of jurisdiction²¹⁰ – relief provided by the ECCC framework.²¹¹
69. Factual doubt as to whether Mr. MEAS Muth is *among those most responsible* must be resolved in his favor – as provided by the Cambodian Constitution and ECCC

²⁰⁵ Agreement, Arts. 1, 2(1); Establishment Law, Art. 1.

²⁰⁶ ICP's Response, para. 49.

²⁰⁷ ICP's Response, para. 50, quoting *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 50), Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 June 2010, D314/1/8, para. 70; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC68), Decision on Appeal and Further Submissions in Appeal against OCIJ Order on NUON Chea's Requests for Interview of Witnesses (D318, D319, D320, D336, D338, D339 & D340), 20 September 2010, D375/1/8, para. 102.

²⁰⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 50), Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 June 2010, D314/1/8, para. 70; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC68), Decision on Appeal and Further Submissions in Appeal against OCIJ Order on NUON Chea's Requests for Interview of Witnesses (D318, D319, D320, D336, D338, D339 & D340), 20 September 2010, D375/1/8, para. 102.

²⁰⁹ ICP's Response, para. 50.

²¹⁰ MEAS Muth's Appeal, p. 46.

²¹¹ See Rule 67(3)(a).

framework.²¹² The ICP provides no support for his claim that dismissing Mr. MEAS Muth's case for lack of personal jurisdiction interferes with the proper administration of justice or does nothing to protect his interests.²¹³ To the contrary, sending Mr. MEAS Muth to trial so he can "benefit" from the Trial Chamber's supermajority rule, as the ICP absurdly claims²¹⁴ – i.e. to have time and resources spent on preliminary objections, and possibly, a full trial – would not only constitute a violation of Mr. MEAS Muth's right to have proceedings brought to a conclusion within a reasonable time,²¹⁵ but would also constitute an injudicious use of the ECCC's time and resources.²¹⁶

70. *In sum*, the ICP entreats the PTC to ignore that the ECCC was established as a court of "selective justice"²¹⁷ However it may feel about the impunity gap recognized by the Parties to the Agreement when negotiating and establishing the ECCC,²¹⁸ the PTC is not endowed with the power to disregard jurisdictional limits placed upon it in order to ensure that victims get their day in court. Nor should it be engaged in *consequentialism* by reading into the Agreement, Establishment Law, or Rules contrived interpretations of what was negotiated or what might have been intended as a means of achieving a desired result.²¹⁹

²¹² MEAS Muth's Appeal, paras. 49-66; MEAS Muth's Response, para. 17.

²¹³ ICP's Response, paras. 49-50.

²¹⁴ ICP's Response, paras. 38, 50.

²¹⁵ Rule 21(4).

²¹⁶ See MEAS Muth's Response to the Final Submission, paras. 51-52.

²¹⁷ *Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017, D261, para. 31.

²¹⁸ *Case of IM Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017, D261, paras. 18-19, 25.

²¹⁹ As Professor Donald L. Drakeman notes, some scholars' "plea for interpretive flexibility is part of a recent resurgence in transnational scholarship encouraging judges to base decisions primarily on their consequences rather than on the traditional processes of interpretation. These scholars seek to inform – and perhaps to replace – the age-old arguments about how legal texts should be interpreted with a consequentialist focus on the expected results of judicial decisions." See Donald L. Drakeman, *Consequentialism and the limits of interpretation: do the ends justify the meanings?*, 9 JURISPRUDENCE 300, 300-01 (Routledge 2018) (Attachment 2).

IV. CONCLUSION

71. Despite his tepid claims to the contrary, the ICP effectively concedes to the admissibility of Mr. MEAS Muth's Appeal, inviting the PTC to consider Mr. MEAS Muth's jurisdictional challenges, tempting it to engage in a perversion of justice – to wholesale disregard the Cambodian Constitution and the carefully-worded letter of the ECCC framework – and implement an inexistent “policy decision” that ECCC cases proceed to trial when two CIJs of equal status issue diametrically opposed Closing Orders of equal force by urging it to: **a.** turn the appeals process into the dispute resolution mechanism by treating the opposing Closing Orders as an unresolved disagreement; **b.** conjure up torturous legal interpretations that would deprive the NCIJ of his equal status and discretionary authority; **c.** ignore the principle of *in dubio pro reo* by considering the resolution of the opposing Closing Orders as an issue of procedural uncertainty; and **d.** invent *lacunae* to contravene the ECCC's negotiated personal jurisdiction limits as justification for righting a perceived wrong committed by the Parties to the Agreement.
72. During the decade-long negotiations leading to the establishment of the ECCC framework, the Parties to the Agreement and drafters of the Rules did not provide that Indictments *automatically* prevail over Dismissal Orders. They could not have negotiated away the constitutionally guaranteed principle of *in dubio pro reo*, any more than the PTC can disregard its application in ECCC proceedings. Constitutional protections and negotiated personal jurisdiction limits cannot be circumvented to compensate for the existence of impunity gaps and attempt to give victims their due of justice – recourse that is unavailable to them based on a strict application of the ECCC framework.
73. Both CIJs enjoy equal status. Both CIJs' Closing Orders are of equal force. *Doubt* flowing from the CIJs' diametrically opposed factual findings and personal jurisdiction determinations must be resolved in Mr. MEAS Muth's favor under the principle of *in dubio pro reo*.
74. Mr. MEAS Muth's Appeal is admissible. The Dismissal Order trumps the Indictment. The case against Mr. MEAS Muth must be dismissed.

Respectfully submitted,



ANG Udom





Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **19th** day of **August, 2019**