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

FILING DETAILS

Case No: 003/07-09-2009-ECCC-OCIJ/PTC 35 **Party Filing:** International Co-Prosecutor

Filed to: The Pre-Trial Chamber **Original Language:** English

Date of Document: 28 June 2019

CLASSIFICATION

Classification of the document suggested by the filing party: CONFIDENTIAL

Classification by PTC: **សម្ងាត់/Confidential**

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO MEAS MUTH'S APPEAL AGAINST THE INTERNATIONAL CO-INVESTIGATING JUDGE'S INDICTMENT (D267)

Filed by:
Nicholas KOUMJIAN
International Co-Prosecutor

Copied to:
CHEA Leang
National Co-Prosecutor

Distributed to:
Pre-Trial Chamber
Judge PRAK Kimsan
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

All Civil Party Lawyers in Case 003

Co-Lawyers for MEAS Muth
ANG Udom
Michael KARNAVAS

I. INTRODUCTION

1. On 28 November 2018, the International Co-Investigating Judge ("ICIJ") issued a closing order ("Indictment") indicting Meas Muth for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code, and committing him for trial.[1] On the same day, the National Co-Investigating Judge ("NCIJ") issued a closing order ("Dismissal Order") dismissing all charges against Meas Muth on the basis that he does not fall within the personal jurisdiction of the ECCC.[2] Meas Muth filed an appeal against the Indictment ("Appeal").[3]

2. In that Appeal, Meas Muth acknowledges that the crimes for which he is indicted are "of the most serious concern to the international community".[4] He does not challenge any factual or legal findings regarding those crimes, nor the ICIJ's finding that "the ECCC have personal jurisdiction over Meas Muth as one of the persons most responsible for the crimes committed during the DK Regime",[5] yet he argues that he should not be sent for trial. Meas Muth's Appeal should be dismissed for the reasons set forth herein.

II. PROCEDURAL HISTORY

3. The International Co-Prosecutor ("ICP") incorporates by reference the procedural history set out in Annex I to his appeal of the Dismissal Order.[6] The applicable law is set out in the relevant sections below.

4. On 10 May 2019, the Pre-Trial Chamber ("PTC") decided to extend the time and page limits for the parties' responses to the appeals of both closing orders, instructing them to file their responses within 45 days of the notification of the translation for the appeal to which they are responding.[7] The Khmer translation of Meas Muth's Appeal was notified on 16 May 2019,[8] making this Response due on 1 July 2019. Replies to the parties' responses fall due 25 days after the notification of the translation of each response.[9]

---

1 **D267** Closing Order, 28 Nov 2018 ("Indictment"), pp. 256-264.
2 **D266** Order Dismissing the Case Against Meas Muth, 28 Nov 2018 ("Dismissal Order"), paras 427-430.
3 **D267/4** Meas Muth's Appeal Against the International Co-Investigating Judge's Indictment, 8 Apr 2019 ("Appeal").
4 **D267/4** Appeal, para. 44.
5 **D267** Indictment, para. 456.
6 **D266/2.2** Annex I: Procedural History, 8 Apr 2019.
7 **D266/4** & **D267/6** Decision on Requests for Extension of Time and Page Limits for Responses and Replies Relating to the Appeals Against the Closing Orders in Case 003, 10 May 2019 ("Extension Decision"), p. 5.
8 *See* Notification email from the Case File Officer, 16 May 2019, 2.09 p.m.
9 **D266/4** & **D267/6** Extension Decision, p. 5.

III. SUBMISSIONS

A. Request for a Public Hearing

5. Meas Muth requests the PTC to hear the parties in a public hearing pursuant to Internal Rule[10] 77(6).[11] The ICP supports Meas Muth's request and submits that a public hearing is in the interests of justice and public understanding of the work of the ECCC. The ICP submits that there are no confidentiality considerations requiring the proceedings to be held *in camera*. Both the Indictment and the Dismissal Order are already public in substance,[12] so there is no risk of violating protective measures or orders of confidentiality.

B. Admissibility

6. The ICP recognises the PTC's obligation to determine its own jurisdiction. In the circumstances, he does not object to Meas Muth making submissions on the consequence of the two Co-Investigating Judges ("CIJs") issuing a dismissal order and an indictment simultaneously, as the ICP did in the context of his own appeal against the NCIJ's Dismissal Order.[13] The ICP accordingly responds below.

7. However, contrary to Meas Muth's claim,[14] the ICP submits that the Appeal is not admissible under Internal Rules 74(3)(a) and 21 as an appeal against a decision confirming the jurisdiction of the ECCC. The PTC has considered Rule 74(3)(a) to cover appeals of decisions and orders confirming the ECCC's "personal, temporal and subject matter" jurisdiction.[15] However, Meas Muth's Appeal is not an appeal *of the Indictment*.[16] He does not allege any error of law invalidating the Indictment in whole or part, or an error of fact occasioning a miscarriage of justice, nor does he claim that the ICIJ abused his discretion in finding that Meas Muth was among those most responsible for the crimes of the DK regime and thus falls within the personal jurisdiction of the ECCC.[17] Meas Muth does not

---

10 Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 ("Internal Rules" or "Rules").

11 **D267/4** Appeal, para. 12.

12 The public version of the Indictment contains very limited redactions of identifying information of a handful of witnesses and of Meas Muth's address. None of the redactions affect the substance or disposition of the Indictment. Similarly, the public version of the Dismissal Order contains redactions of an extremely limited number of witness names.

13 **D266/2** International Co-Prosecutor's Appeal of the Order Dismissing the Case Against Meas Muth ("ICP Appeal"), 8 Apr 2019, paras 191-198.

14 **D267/4** Appeal, paras 1-4.

15 *See e.g.* Case 002-**D427/1/30** Decision on Ieng Sary's Appeal Against the Closing Order, 11 Apr 2011 ("Ieng Sary Closing Order Appeal Decision"), para. 47.

16 *See* **D267/4** Appeal, para. 11.

17 Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor's Appeal of Closing Order

request any relief requiring the PTC to amend or overturn the Indictment as such.[18]

8. Rather, Meas Muth's "Appeal" lies outside the Indictment as such and relates to the *consequences* of having the Indictment issued in parallel with the Dismissal Order. This was a topic addressed expressly *obiter* by the ICIJ in the Indictment[19] and which Meas Muth admits rests solely with the PTC.[20] Whilst Meas Muth calls for a broader interpretation of Rule 74(3)(a) through the application of Rule 21,[21] there is no doubt that this appeal is inadmissible under Rule 74(3)(a) and thus any interpretative aid of Rule 21 is unnecessary.

C. Merits

1. Preliminary Issue Concerning the Status of the Dismissal Order

9. Throughout the Appeal, Meas Muth asserts that "absent a finding by supermajority that the NCIJ committed errors or abuses fundamentally determinative of his exercise of discretion" the Dismissal Order cannot be set aside and must prevail over the Indictment.[22] He therefore makes various attempts to demonstrate that the NCIJ did not err, and argues that the Indictment cannot seise the Trial Chamber because the NCIJ and ICIJ each made findings in reasoned closing orders of equal standing.[23]

10. Whilst the ICP agrees with Meas Muth[24] that the CIJs have equal status and independent authority under ECCC law,[25] it does not follow that if they differ in their Closing Orders as to whether the charged person falls under the ECCC's personal jurisdiction, proceedings are stalemated and all is frozen. First, as the ICP has set out extensively in his appeal against

---

(Reasons), 28 Jun 2018, para. 21 (unanimous holding) quoted in full in **D266/2** ICP Appeal, para. 7. *See also* **D267/4** Appeal, paras 7, 64 [acknowledging this to be the standard of review on appeal of discretionary decisions]; Case 002-**D427/1/30** Ieng Sary Closing Order Appeal Decision, paras 112-113, and citations therein; *Brđanin*, IT-99-36-A, Appeals Chamber, Judgement, 3 Apr 2007, paras 7-16.

18 **D267/4** Appeal, p. 46.

19 **D267** Indictment, paras 19, 579. At para. 19, the ICIJ cites **D262.2** Decision on Ao An's Urgent Request for Disclosure of Documents Relating to Disagreements, 18 Sep 2017, paras 13-16. *See, in particular,* para. 16 ["We are of the view that the investigation stage ends at the very latest with the decision of the PTC on any appeal against the closing order. If there were to be no supermajority in the PTC for upholding one of the closing orders, both would appear to stand under the application of Internal Rule 77(13), however there would be in our view no more *investigation stricto sensu* that could proceed. Yet, the solution of that scenario is squarely within the jurisdiction of the PTC." (emphasis added)].

20 **D267/4** Appeal, para. 32.

21 **D267/4** Appeal, para. 3.

22 **D267/4** Appeal, p. 1, para. 66. *See also*, p. 2, paras 2, 9, 45, 49, 62-66.

23 **D267/4** Appeal, p. 1, paras 37, 52-61, 65.

24 *See* **D267/4** Appeal, p. 1, paras 34, 37, 45, 60, 66.

25 *See e.g.* ECCC Agreement, arts 5(1)-(3); ECCC Law, arts 12, 27*new*.

the Dismissal Order,[26] the NCIJ's closing order contained multiple errors of fact and law which undermined his exercise of discretion in determining that Meas Muth was not one of those "most responsible" for the crimes committed during the DK regime. Secondly, as discussed below, even if the PTC should find that both Closing Orders were proper exercises of the discretion of each CIJ, or should the PTC be unable to reach the necessary majority for a decision, the clear intent of the ECCC Agreement[27] and ECCC Law[28] is that the Indictment would then go forward to trial.

11. Given the level of detail contained in his own appeal of the Dismissal Order, to avoid repetition the ICP addresses Meas Muth's arguments here only briefly. Contrary to Meas Muth's assertion,[29] the Dismissal Order did not make the required findings on all the facts of which the CIJs were seised in Case 003.[30] As detailed in the ICP's Appeal,[31] the Dismissal Order contained no factual or legal findings whatsoever about: (i) Toek Sap Security Centre; (ii) Ream Area Worksites and Cooperatives (including Bet Trang, Kang Keng and related execution sites); (iii) the purge of Division 117 and Sector 505 cadres in Kratie; (iv) purges of other military divisions (outside Division 164), including those sent to S-21;[32] and (v) forced marriage (and rape within forced marriage).[33]

12. Moreover, despite Meas Muth's contentions to the contrary,[34] the Dismissal Order's reliance only on evidence placed on Case File 003 by 29 April 2011 - when NCIJ You Bunleng and ICIJ Siegfried Blunk agreed to conclude the investigation by issuing a Rule

---

26 **D266/2** ICP Appeal.

27 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, Phnom Penh, 6 Jun 2003, 2329 UNTS 117 ("ECCC Agreement").

28 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed During the Period of Democratic Kampuchea with inclusion of amendments as promulgated on 27 Oct 2004 (NS/RKM/1004/006),10 Aug 2001, ("ECCC Law").

29 **D267/4** Appeal, paras 21, 54.

30 *See* **D266/2** ICP Appeal, paras 13, 63.

31 **D266/2** ICP Appeal, paras 63-82, 127-133, 158.

32 *Contra* **D267/4** Appeal, paras 24e, 54 *citing* **D266** Dismissal Order, paras 229-258. The CIJs were seised of the purge of all RAK Centre Divisions, Independent Regiments and General Staff members, including those sent to S-21. Whilst the Dismissal Order makes limited findings regarding Meas Muth's role in these purges, particularly of Division 164, it fails to address the purges of Divisions 117, 310, 502, or acknowledge as victims any military cadres outside Division 164 who were sent to S-21. *See* **D266/2** ICP Appeal, paras 68, 79-81, 132-133, 169-170.

33 *Contra* **D267/4** Appeal, paras 24h, 54 *citing* **D266** Dismissal Order, paras 82, 92-93. The CIJs were seised of forced marriage and rape in the Kampong Som Sector. The Dismissal Order's passing reference to the nationwide CPK forced marriage policy made no attempt to consider the evidence concerning forced marriages (or rape within forced marriage) in Kampong Som Sector, or concerning Meas Muth or Divisions 164's involvement in the implementation of that CPK policy there. *See* **D266/2** ICP Appeal, paras 69, 71-72, 131, 158.

34 **D267/4** Appeal, paras 13, 53.

66(1) Notice[35] - was an error of law that seriously undermined the NCIJ's finding that Meas Muth was not subject to the ECCC's personal jurisdiction. As of 29 April 2011, the CIJs had not discharged their obligation to conduct a complete investigation, and despite Meas Muth's positive characterisation of it,[36] it was manifestly incomplete.[37] Whilst the CIJs are independent in the way they conduct their investigation, this does not, as Meas Muth avers,[38] include an unfettered discretion to determine when the investigation may be legally concluded. The CIJs have an obligation to conduct a *complete i.e.* genuine, impartial and effective investigation into *all facts* of which the CIJs have been seised, and the latitude afforded to them in determining *how* they do so does not permit them to *refuse* to do so.[39]

13. Somewhat contradictorily, Meas Muth asserts that, despite the NCIJ expressly and repeatedly stating that he did not consider evidence placed on the case file after 29 April 2011,[40] he "remained engaged throughout the investigation and considered the material on the Case File before drafting the Dismissal Order."[41] However, the documents Meas Muth cites[42] are procedural filings, mainly dealing with the consequences of the CIJs' decision to close the Case 003 judicial investigation on 29 April 2011 and Reserve ICIJ Laurent Kasper-Ansermet's valid determination[43] in December 2011 that it should be re-opened.[44] Whilst the NCIJ did refer to a *de minimis* number of evidentiary documents post-dating 29 April 2011,[45] these were far from sufficient to support an assertion that the NCIJ

---

35 **D266** Dismissal Order, paras 2, 18, 39, 41-42.
36 **D267/4** Appeal, paras 14-16.
37 *See* **D266/2** ICP Appeal, paras 49-57.
38 **D267/4** Appeal, para. 52.
39 *See* **D266/2** ICP Appeal, paras 13, 43-48.
40 **D266** Dismissal Order, paras 2, 18, 39, 41-42.
41 **D267/4** Appeal, para. 53.
42 **D267/4** Appeal, fn. 249.
43 *See* **D266/2** ICP Appeal, paras 36-42.
44 **D266** Dismissal Order, fn. 7 (*citing* **D257/1/8** Decision on Meas Muth's Application for the Annulment of Torture-Derived Written Records of Interview, 24 Jul 2018 [with reference only to the parts of the decision dealing with documents placed on Case 003 prior to the conclusion of the investigation]), fn. 25 (*citing*, in addition to two pre-29 April 2011 documents, **D11/3/3** Order on the Applicability of the Civil Party Applicant Chum Neou, 27 Jul 2011; **D11/4/3** Order on the Admissibility of the Civil Party Application of Timothy Scott Deeds, 9 Sep 2011), fns 27-40, 42, 46-48, 51 (*citing* the procedural ramifications of the CIJs' decision to conclude the investigation on 29 April 2011), fn. 54 (*citing* Case 004/2-**D208/1/1/2** Decision on Ta An's Appeal against the Decision Rejecting the Request for Information concerning the [CIJs'] Disagreement of 5 April 2013, 22 Jan 2015), fn. 57 (*citing* **D87/2/1.9/1** Decision on Meas Muth's Request for the Work Product of OCIJ Investigators in Case 002, 15 Oct 2015), fns 1100-1103, 1105 (*citing* a range of ECCC jurisprudence regarding the use of torture-tainted documents).
45 *See* **D266** Dismissal Order, fn. 942 *citing* **D22.1.14** International Telegram, *Capture of American Personnel*, 26 Apr 1978, attached to **D22** [ICP's] First Case File 003 Investigative Request to Admit Additional Documents and Observations on the Status of the Investigation, 10 Jun 2011, rejected twice by CIJs Blunk and You Bunleng and placed on the case file by ICIJ Kasper-Ansermet on 7 March 2012. The Dismissal Order also relies on evidence in three Case 001 transcripts that were placed on Case 003 after 29 April 2011:

"remain[ed] engaged" with the evidence given that almost 2500 evidentiary documents, including approximately 445 *new* written records of interview, were added to the case file between 29 April 2011 and the end of the judicial investigation conducted thereafter by Reserve ICIJ Laurent Kasper-Ansermet and ICIJs Mark Harmon and Michael Bohlander.[46]

14. In addition to providing almost the entirety of the available crime base and suspect-based evidence for the crime sites and criminal events completely omitted by the Dismissal Order,[47] the evidence collected after 29 April 2011 played a determinative role in erroneous factual findings impacting the NCIJ's personal jurisdiction determination. Examples include errors in: (i) identifying the number and types of victims for whom Meas Muth was responsible at Wat Enta Nhien Security Centre, Stung Hav worksites and for foreigners killed at sea, on the islands, in Kampong Som Sector and at S-21, including those captured by West Zone Division 1 forces;[48] (ii) assessing Meas Muth's participation in the implementation of the DK enemies and enslavement policies through visits to Kampong Som security centres and worksites, and identifying enemies;[49] (iii) the continuation of Meas Muth's role as Division 164 Secretary with full control over military and civilians in Kampong Som Sector until January 1979;[50] and (iv) Meas Muth's position as member of the General Staff from mid-1975 and Deputy Secretary of the General Staff from late 1978.[51] Importantly for the assessment of personal jurisdiction,[52] the post-29 April 2011 evidence provided clear and consistent evidence that Meas Muth committed genocide against the Vietnamese.[53]

15. The Dismissal Order also made a fundamental legal error in failing to make factual and legal findings on the crimes committed, and Meas Muth's liability for those crimes, that are necessary in order to evaluate their gravity and the level of Meas Muth's

---

D266 Dismissal Order, fns 235-236, 330, 332, 850 *citing* Case 001-**E1/19.1** T. 30 Apr 2009 (post-29 April 2011 Case 003 references: **D54/6.1.9** and **D98/3.1.86**); **D266** Dismissal Order, fn. 515 *citing* Case 001-**E1/20.1** T. 18 May 2009 (post-29 April 2011 Case 003 references: **D54/6.1.10** and **D98/1.2.1**); **D266** Dismissal Order, fns 291-292, 312-314, 317-318, 321 *citing* Case 001-**E1/29.1** T. 9 Jun 2009 (post-29 April 2011 Case 003 references: **D55/8.1.4** and **D98/3.1.90**).

46 For further details, *see* **D266/2** ICP Appeal, paras 55-56.

47 *See supra*, para. 11.

48 *See* **D266/2** ICP Appeal, paras 155-170.

49 *See* **D266/2** ICP Appeal, paras 103-107, 121-134.

50 *See* **D266/2** ICP Appeal, paras 137-141.

51 *See* **D266/2** ICP Appeal, paras 142-147.

52 As discussed in **D266/2** ICP Appeal, para. 24, establishing that a suspect has committed genocide is vital to an assessment of the gravity of the crimes committed.

53 *See* **D266/2** ICP Appeal, paras 60-62.

responsibility.[54] Indeed, the Dismissal Order explicitly stated that it would not "describe the types of crimes, legal qualifications or mode of liability."[55] In an attempt to justify these failings, Meas Muth contends that "the Rules do not require the same level of detail for a dismissal order", citing Internal Rule 67(3) which, he asserts, does not require legal characterisation of the material facts.[56] However, as the Dismissal Order itself acknowledges, the assessment of who is "most responsible" for crimes within the jurisdiction of the ECCC requires an evaluation of both the gravity of the crimes charged and the level of responsibility of the suspect.[57] The judges of the PTC have unanimously held that to properly exercise their appellate review function on the issue of personal jurisdiction, they "must be able to review the findings that led to it, including those regarding the existence of crimes or the likelihood of [a charged person's] criminal responsibility,"[58] in respect of all facts of which the CIJs were regularly seised by introductory or supplementary submissions.[59]

16. Contrary to the unfounded assertion in Meas Muth's Appeal, this PTC holding is not "erroneous".[60] A failure to make legal findings on modes of liability renders impossible any attempt to assess which crimes Meas Muth is criminally "responsible" for, as well as the level of his participation.[61] The CIJs' discretion is based upon a determination of who is "most responsible" *for crimes falling within the ECCC's material jurisdiction*.[62] This determination can only be made once facts have been legally characterised.[63] The crime(s) committed is important to the gravity assessment, since the nature and scale of the crimes,

---

54 *See* **D266/2** ICP Appeal, paras 20-34.

55 **D266** Dismissal Order, para. 3.

56 **D267/4** Appeal, para. 61. Under Rule 67(3), the CIJs shall issue a dismissal order if: "a) The acts in question do not amount to crimes within the jurisdiction of the ECCC; b) The perpetrators of the acts have not been identified; or c) There is not sufficient evidence against the Charged Person or person of the charges."

57 **D266** Dismissal Order, paras 3, 365-367; Case 001-**E188** Judgement, 26 July 2010, para. 22. *See also* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 321.

58 Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 26 (emphasis added).

59 Internal Rule 67(4); Case 001-**D99/3/42** Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias "Duch", 5 Dec 2008 ("Decision on Duch Closing Order Appeal"), paras 33, 37-38; Cass. Crim., 24 Mar 1977, No. 76-91.442.

60 *Contra* **D267/4** Appeal, para. 61.

61 *See* Case 001-**D99/3/42** Decision on Duch Closing Order Appeal, para. 115.

62 *See e.g.* ECCC Law, art. 1 ["The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."].

63 Case 002-**D427/3/15** Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 Feb 2011, para. 79 [The CIJs must "make [...] final determinations with respect of the legal characterisation of the acts alleged [...] and determine whether they amount to crimes within the jurisdiction of the ECCC."].

as well as their impact on victims, are all indicators of the gravity of given conduct.[64] To exclude legal characterisations therefore fails to appreciate the full extent of Meas Muth's criminal conduct.[65]

17. Over and above these errors, the Dismissal Order made numerous legal and factual errors in its treatment of (i) coercion, duress and superior orders[66] and (ii) direct participation in and proximity to crimes[67] when determining Meas Muth's level of responsibility for crimes committed. It made further factual errors with a determinative impact on personal jurisdiction,[68] and in its treatment of victims.[69] Finally, it made an additional legal error of holding that Duch was the only most responsible person.[70] Together, these errors were "fundamentally determinative of [the NCIJ's] exercise of discretion"[71] in assessing personal jurisdiction.

18. For all these reasons, Meas Muth's assertions that the Dismissal Order somehow nullifies the Indictment are incorrect. The ICP reiterates his appeal submission that the Dismissal Order's finding on personal jurisdiction should be reversed.[72]

2. Response to Meas Muth's Arguments on the Consequences of Conflicting Closing Orders

19. The NCIJ issued a Dismissal Order against which the ICP has filed an appeal, and the NCP has appealed the ICIJ's Indictment.[73] There are therefore multiple permutations of outcomes of those appeals before the PTC. Meas Muth concedes that should the PTC, by the supermajority required for a decision, overturn the Dismissal Order *and* uphold the Indictment, the case should go to trial. However, Meas Muth wrongly asserts that this is the only situation where conflicting Closing Orders will lead to the case being transferred

---

64 Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-34, Pre-Trial Chamber I, Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision not to Initiate an Investigation, 16 Jul 2015, para. 21; Case 001-**F28** Appeal Judgement, 3 Feb 2012 ("*Duch* AJ"), para. 375. *See further* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 327 (Judges Beauvallet and Baik).

65 Case 001-**F28** *Duch* AJ, paras 295, 299. *See also Jelisić* AJ, Partial Dissenting Opinion of Judge Shahabuddeen, para. 42. *See further*, **D266/2** ICP Appeal, paras 24-25.

66 **D266/2** ICP Appeal, paras 83-111.

67 **D266/2** ICP Appeal, paras 112-134.

68 **D266/2** ICP Appeal, paras 135-154.

69 **D266/2** ICP Appeal, paras 155-170.

70 **D266/2** ICP Appeal, paras 171-190.

71 *Cf.* **D267/4** Appeal, p. 1, para. 66. *See also*, p. 2, paras 2, 9, 45, 49, 62-66.

72 **D266/2** ICP Appeal, paras 191, 202-203.

73 **D267/3** National Co-Prosecutor's Appeal Against the International Co-Investigating Judge's Closing Order in Case 003, 5 Apr 2019 ("NCP Appeal").

to the Trial Chamber.

20. It is clear that under the express provisions of the ECCC Agreement, ECCC Law and Internal Rules, 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.[74] Where the CIJs disagree on a case going forward and the PTC fails to reach a supermajority resolving the difference in opinions, the prosecution of that case continues, *i.e.* the case file is transferred to the Trial Chamber. Meas Muth's assertion that for the case to progress to the next stage of proceedings, the PTC must uphold the Indictment by supermajority to mirror the decision-making procedure at the trial and appeal stages,[75] is untenable and made without any foundation in the law or jurisprudence of the ECCC. Internal Rules 77(13)[76] and 79(1)[77] both confirm that an indictment issued by the OCIJ seises the Trial Chamber in the absence of approval by supermajority from the PTC. Indeed, Meas Muth's Appeal does not substantively challenge the Indictment.[78]

21. The remainder of Meas Muth's arguments concern the consequences of there remaining, from a procedural perspective, "two equal and independent CIJs issuing Closing Orders of equal force"[79] after the PTC rules on all appeals in this case. There are two realistically possible scenarios where the two conflicting Closing Orders will remain in effect. The first could occur if the PTC is unable to reach the supermajority for a decision on either appeal. The second could arise should the PTC reach decisions to deny all appeals, finding that both the ICIJ in his Indictment and the NCIJ in his Dismissal Order acted within their discretion. In these situations, Meas Muth contends that the case against him should be dismissed[80] because: (i) the parties to the ECCC Agreement never intended a case to move to the trial stage when a Dismissal Order and Closing Order had been simultaneously issued;[81] (ii) if both the Dismissal Order and Closing Order were permitted to stand under Internal Rule 77(13), the result would be absurd and Meas Muth's fair trial rights would be

---

74 *See infra*, paras 22-38.
75 **D267/4** Appeal, p. 1, paras 46, 64, 70.
76 Internal Rule 77(13) ["A decision of the Chamber requires the affirmative vote of at least 4 (four) judges. […] 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 Trial Chamber be seised on the basis of the Closing Order of the [CIJs]."].
77 Internal Rule 79(1) ["The Trial Chamber shall be seised by an Indictment from the [CIJs] or the [PTC]"].
78 *See supra*, paras 7-8.
79 **D267/4** Appeal, p. 1. *See also* paras 37, 45, 60, 66.
80 **D267/4** Appeal, pp. 1, 46, para. 72.
81 **D267/4** Appeal, paras 33-40.

violated;[82] and (iii) sending the case to trial based upon an Indictment issued by only one CIJ would violate the principle of *in dubio pro reo*.[83]

i. The ECCC Agreement, ECCC Law and Internal Rules mandate that where a dismissal order and an indictment are simultaneously issued and neither is overturned by a PTC supermajority, the case proceeds to trial

22. Meas Muth argues that the parties to the ECCC Agreement – the Royal Government of Cambodia ("RGC") and the United Nations ("UN") – did not intend for a case to proceed to trial on the basis of an indictment when a dismissal order is simultaneously issued and neither order is overturned on appeal by supermajority.[84] He asserts that the parties to the ECCC Agreement "purposefully left unaddressed the opposing Closing Orders scenario at the Closing Order stage,"[85] and that "had [they] wished for a case to go forward […], they would have agreed on explicit provisions providing for such an outcome."[86] This assertion is illogical. Since the purpose of the negotiations and the supermajority compromise was to resolve situations where the CIJs or Co-Prosecutors held different opinions, it would make no sense to purposely leave a potential conflict unresolved.

23. Rather, the plain wording of the ECCC Agreement, ECCC Law and Internal Rules, and the evidence of the expressed intentions of the UN and RGC at the time they concluded the ECCC Agreement confirm that any indictment issued by one[87] or both CIJs that is not resolved by a supermajority of the PTC is then transferred to the Trial Chamber for the case to continue. This result applies whether the CIJs put their separate opinions of the case before the PTC by way of submission of a disagreement under Internal Rule 72 or if they issue more fully reasoned closing orders that then reach the PTC. The latter option simply puts more information before the PTC and provides the parties with more opportunities to argue their views on the evidence, including in this case, by each submitting final submissions of hundreds of pages.

24. Unless the Indictment is overturned by a supermajority of the PTC, under the express

---

82 **D267/4** Appeal, paras 41-48, 66.
83 **D267/4** Appeal, paras 45-46, 49-66.
84 **D267/4** Appeal, pp. 1-2, paras 32-40.
85 **D267/4** Appeal, para. 34.
86 **D267/4** Appeal, para. 40.
87 Rule 1(2) further provides that "the singular [shall include] the plural, and vice versa [and] a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually". The ICP notes that this provision does not have any grammatical impact on the document in Khmer since in most instances the provisions do not distinguish between the singular and plural. Rules 77(13)(b) and 79(1) therefore both apply to an indictment issued by a single CIJ, as in the case at hand.

provisions of Internal Rule 77(13)(b), the case must be sent to the Trial Chamber. If the PTC cannot reach a supermajority, Rule 77(13) provides two default decisions: (i) under Rule 77(13)(a), "the order or investigative action other than an indictment [...] shall stand";[88] and (ii) under Rule 77(13)(b) the Trial Chamber is seised with an indictment. Although the word "order" in Rule 77(13)(a) could include dismissal orders,[89] applying both Rules 77(13)(a) and (b) to opposing closing orders would not lead to an "absurd result", that leaves the Indictment "hanging over Mr. Meas Muth in perpetuity".[90]

25. Rather, Rule 77(13)(b) makes it explicitly clear that if the Indictment is not reversed by a supermajority decision on appeal, the case against Meas Muth must be sent to trial. Rule 77(13)(b) is *lex specialis* relating to indictments and thereby prevails over the general terms of Rule 77(13)(a). "Dismissal Order" and "Closing Order", like "Indictment", are defined terms in the Internal Rules.[91] Had the drafters of the Internal Rules wished to specifically address the effect of the failure of the PTC to overturn a dismissal order, they clearly could have done so. Internal Rule 77(13)(b) indicates an intent to implement the clear mandate of the ECCC Agreement and ECCC Law: where the Co-Prosecutors or CIJs disagree on a case progressing, absent a supermajority of the PTC the case moves on to the next stage of proceedings.

26. Contrary to Meas Muth's assertions, a case proceeding to trial on the basis of an indictment, even where a dismissal order stands in parallel, is *precisely* what the parties to the ECCC Agreement intended. Article 7(4) of the ECCC Agreement provides clear guidance as to

---

88 Internal Rule 77(13)(a) ["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, then the default decision of the Chamber shall be as follows: a) As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand."].

89 The ICP notes that the French version of the Internal Rules excludes dismissal orders from the scope of Rule 77(13)(a). Internal Rules 77(13) and 77(13)(a) read "Lorsque la majorité requise n'est pas atteinte, la Chambre préliminaire est présumée avoir rendu une décision s'interprétant comme suit: a) Concernant un appel contre une ordonnance ou une requête en annulation d'un acte d'instruction, *autre que l'ordonnance de clôture*, l'ordonnance ou l'acte d'instruction demeure" (emphasis added)). As the "*ordonnance de clôture*" is a generic term applied to all closing orders (both indictment –"ordonnance de renvoi"- and dismissal order – "ordonnance de non-lieu") it excludes a dismissal order from the ambit of Internal Rule 77(13)(a). The Khmer version, like the English, refers to "an order or investigative action *other than an indictment*" (emphasis added), leaving dismissals orders with the scope of that rule. In Case 004/1, where the PTC was unable to reach a supermajority decision on the ICP's Appeal of D261 Case 004/1 Closing Order (a dismissal order), the PTC unanimously "declared that the Closing Order (Reasons) dismissing the charges against Im Chaem shall stand", in accordance with Internal Rule 77(13)(a). *See* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, p. 27 (unanimous holding).

90 *Contra* **D267/4** Appeal, para. 42.

91 Internal Rules, Glossary, pp. 83-84.

what must be done should the PTC be unable to resolve a disagreement between the CIJs or the Co-Prosecutors. It provides that "the investigation or prosecution shall proceed."[92] Similarly, throughout ECCC proceedings, where the Co-Prosecutors or CIJs cannot agree on a matter and choose *not* to seise the PTC pursuant to the Article 7 disagreement mechanism, the ECCC Agreement mandates that the prosecution[93] or investigation[94] shall proceed. These articles of the Agreement, accepted by both the RGC and the UN, reflect an unambiguous policy decision that in the event of a disagreement, proceedings should *only* be halted by a supermajority of the PTC judges. Whether one considers the transfer of the indictment and case file to the Trial Chamber to be part of the investigation or part of the prosecution, if the PTC fails to overturn an indictment by supermajority, the Trial Chamber must be seised under Internal Rule 79(1) and the case brought to trial.

27. This is because Article 7(4) must be interpreted, not in isolation, but in light of its context and the object and purpose of the treaty between the UN and RGC.[95] That purpose, as set out in article 1 of the ECCC Agreement is "to regulate the cooperation between the United Nations and the Royal Government of Cambodia *in bringing to trial* senior leaders of Democratic Kampuchea and those who were most responsible" for the DK crimes.[96] It is

---

92 ECCC Agreement, art. 7(4). By its terms this provision deals with the formal dispute resolution mechanism outlined in Article 23*new* of the ECCC Law and Rule 72, and so it does not address the precise procedural situation in the present case. But it *does* address exactly the situation we are in *substantively*: two CIJs disagree as to whether proceedings should continue.

93 ECCC Agreement, art. 6(4). *See also* ECCC Law, art. 20*new*; Internal Rule 71.

94 ECCC Agreement, art. 5(4). *See also* ECCC Law, art. 23*new*; Internal Rule 72.

95 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art. 31(1) ["A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."]. *See also, e.g. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, 8 Jun 1960, ICJ Reports 1960, p. 150, at 158 ["The word obtains its meaning from the context in which it is used."]; *Reservations to the Convention on Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports 1951, p. 15, at 24; *Rights of Nationals of the United States of America in Morocco (France v. United States)*, Judgment, 27 Aug 1952, ICJ Reports 1952, p. 176, at 196. *See further, e.g. Corfu Channel Case (United Kingdom v Albania)*, Judgment, 9 Apr 1949, ICJ Reports 1949, p. 4, at 24 ["It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect."]; *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 11 Apr 1949, ICJ Reports 1949, p. 174, at 179 et seq. [Inferring a certain status and capacity of the UN Organisation from the fact that without them, it could not discharge the functions it was clearly intended to have.]; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, 1 Apr 2011, ICJ Reports 2011, p. 70, paras 133-134.

96 *See also* ECCC Agreement, preamble ["Whereas prior to the negotiation of the present Agreement substantial progress had been made [...] towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia for the *prosecution* of crimes committed during the period of Democratic Kampuchea" (emphasis added)].

then reflected unambiguously in article 1 of the ECCC Law.[97] Similarly, the full titles[98] of the ECCC Agreement[99] and ECCC Law[100] also demonstrate that the parties understood that they were regulating the entire "prosecution" of those most responsible for the Khmer Rouge atrocities. In this context, it is clear that the "investigation or prosecution shall proceed" means simply "the case shall proceed", and includes the phase of seising the Trial Chamber with an indictment.

28. This result is consistent with the spirit and structure of the ECCC Agreement, ECCC Law, and the Internal Rules, which embrace the principle that CIJs and Co-Prosecutors can act independently to advance proceedings and a policy preference for proceedings to continue in the case of unresolved disagreements.[101] The PTC has repeatedly upheld this principle.[102]

29. This is also completely consistent with the RGC's and UN's positions throughout the negotiation of the ECCC Agreement. There is nothing in the available records of negotiations to substantiate Meas Muth's unsupported contention that either the RGC or the UN "purposefully left unaddressed the opposing Closing Orders scenario at the Closing Order stage".[103] The ICP submits that had it been the drafters' intention to carve the closing order stage out of the mechanisms they were setting up precisely to address the realistic prospect that CIJs and Co-Prosecutors could disagree, they would have expressly mentioned this during their negotiations, and likely provided for it in the ECCC Agreement.

30. But they did not: the prospect of an investigation without subsequent trial as a solution to a disagreement between the Co-Prosecutors or CIJs as to whether to proceed was never

---

97 ECCC Law, art. 1 states "The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible" for DK crimes.

98 The entire text of the treaty is to be taken into account as "context", including its title. *See e.g. Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, 12 Dec 1996, ICJ Reports 1996, p. 803, para. 47.

99 "Agreement between the [UN] and the [RGC] concerning the Prosecution [...] of Crimes committed during the period of Democratic Kampuchea".

100 "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea".

101 *See* ECCC Agreement, arts 5(4), 6(4), 7(4); ECCC Law, arts 20*new*, 23*new*; Internal Rules 71, 72, 77(13).

102 *See e.g.* **D1/1.3** Considerations of the PTC Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 Aug 2009, paras 16, 26, 45; **D120/3/1/4.1.12** Decision on Im Chaem's Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 15 Aug 2014, para. 14; **D117/1/1/2** Decision on Meas Muth's Appeal Against the International Co-Investigating Judge's Order on Suspect's Request Concerning Summons Signed by One Co-Investigating Judge, 3 Dec 2014, para. 16; **D128/1/7.1.4** Decision on [Redacted] Appeal Against the International Co-Investigating Judge's Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, 4 Dec 2014, para. 7; **D128/1/7.1.5** Decision on [Redacted] Appeal Against the Decision Rejecting His Request for Information Concerning the Co-Investigating Judges' Disagreement of 5 April 2013, 22 Jan 2015, para. 11.

103 **D267/4** Appeal, para. 34.

contemplated by the parties, and would indeed have been an extraordinary measure. Creating a system in which early disagreements were to be resolved in favour of proceeding, but later disagreements between the same officials on the same point were to be resolved in favour of terminating proceedings, would have been to create a system in which, by default, expended tremendous resources of time and effort in investigations with little prospect of proceeding to trial. The ICP submits that it is highly unlikely that such a system would ever be intended. In light of the language of the ECCC Agreement, the ECCC Law, and the Rules, it is clear that in the ECCC's case, it was not.

31. 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 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."[104] Hans Corell confirmed this position in March 2003 after the ECCC Agreement, containing that same wording, was agreed.[105]

32. David Scheffer, who was the United States Ambassador-at-Large for War Crimes Issues and heavily involved in the negotiatons,[106] was of the same view. He stated that, under the supermajority rule, "[t]he only way the prosecution or investigation is halted is if the [PTC] decides by supermajority vote that it should end."[107] Earlier in the process, when the procedural framework envisaged indictments being issued by the Co-Prosecutors upon recommendation by the CIJs, David Scheffer had proposed the supermajority rule before an "extraordinary session" (a forerunner of the PTC) as a solution to disagreements

---

104 **D267/4.1.5** 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 01614369.

105 **D181/2.36** Statement by Under-Secretary-General Hans Corell upon leaving Phnom Penh on 17 March 2003, 17 Mar 2003, EN 01326112 ["There would be two co-investigating judges and two co-prosecutors. In both cases there would be one Cambodian and one international official. In case they differed on whether to proceed with an investigation or a prosecution, that difference would be settled by a Pre-Trial Chamber consisting of three (3) Cambodian and two (2) international judges. In this Chamber at least four (4) judges would have to agree in order to stop an investigation or a prosecution. If this majority was not achieved, the investigation or prosecution would proceed."].

106 **D170.1.7** Scheffer D.J., *The Negotiating History of the ECCC's Personal Jurisdiction*, Cambodia Tribunal Monitor, 22 May 2011, EN 01168931 ["My own involvement in the negotiating process [was] both to represent U.S. interests and to serve as a de facto mediator between the Cambodian and U.N. negotiators"], EN 01168939.

107 David Scheffer in M. Cherif Bassiouni (ed), "The Extraordinary Chambers in the Courts of Cambodia", *International Criminal Law*, Third Edition, Vol. III, 2008 ("Scheffer in Bassiouni"), p. 246.

preventing a case moving forward to trial:

> On 12 January 2000, I submitted to the U.N. lawyers a non-paper that included a proposal on how to resolve disputes between the two Co-Prosecutors over whether or not to indict a suspect, which was one of Corell's major concerns. The answer, I suggested, would be found in requiring a review of the dispute by an "Extraordinary Session" of the Trial Chamber. A supermajority vote of the judges sitting in that Extraordinary Session would be required to uphold the particular Co-Prosecutor's decision *not* to indict. In the absence of that supermajority vote, then the other Co-Prosecutor's decision to indict would stand and the case move forward to trial. In a further non-paper I prepared later in January, I floated the proposal that disagreements between the two [CIJs] be similarly resolved by the "Extraordinary Chamber [replacing 'Session'] of the Trial Chamber." This would mean that a supermajority vote of such Extraordinary Chamber would be required to uphold a [CIJ's] decision not to proceed with an investigation or to recommend to the Co-Prosecutors that sufficient evidence exists to indict a suspect. In the absence of that supermajority vote, the investigation or recommendation to indict would proceed."[108]

33. Unanimous holdings from the ECCC's seven Supreme Court Chamber ("SCC") judges in Case 001 and five PTC judges in Case 002 also confirm that the only interpretation of Internal Rules 77(13) and 79(1) that correctly implements the ECCC Law and ECCC Agreement is the one sending Case 003 to trial on the basis of the Indictment.

34. In the Case 001 Appeal Judgment, the SCC held:

> If, for example, the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in proposing to issue an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, 'the investigation shall proceed.'[109]

Although the SCC used the phrase "the investigation shall proceed" because it was quoting directly from the ECCC Law, the only reasonable interpretation of this statement is, again, that the indictment would proceed to trial—there is no other sense in which anything could "proceed" at the stage that the SCC is discussing (*i.e.* when a conflicting indictment and dismissal order are being issued). Given that the Internal Rules define the "Trial Stage" as "refer[ring] to the date from which the Trial Chamber is seised of a case,"[110] the SCC appears to consider the "investigation" as continuing until the moment

---

108 Scheffer in Bassiouni, p. 231 (emphasis added).

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

110 Internal Rules, Glossary, p. 85.

that the PTC discharges its duty to seise the Trial Chamber with an indictment as required by Rule 77(13)(b), whereupon the "Trial Stage" begins.

35. Contrary to Meas Muth's contention,[111] while the SCC was addressing the formal dispute resolution procedure under art 23*new* ECCC Law and Internal Rule 72, where either one or both CIJs have referred the question of a conflicting indictment and dismissal order to the PTC, the substantive outcome is equally applicable to the current situation where the PTC has been seised by appeals from the parties. The manner in which the PTC has been seised of the same question – whether either CIJ erred in issuing his dismissal order or indictment - is irrelevant. Meas Muth has presented no reason, and indeed there is none, why the method by which the same question reaches the PTC should have any impact upon its outcome.

36. In Case 002, the PTC unanimously held (in a decision that pre-dated the SCC's holding in Case 001) that the phrase "the investigation shall proceed" incorporates the phase where an indictment seises the Trial Chamber. Moreover, it did so in the context of a disagreement between the CIJs concerning the content of their Closing Order that the CIJs, as here in Case 003, chose *not* to refer to the PTC. Following a split in the Trial Chamber in Case 001 over whether charges for crimes under art 3*new* of the ECCC Law (national crimes under the 1956 Penal Code) were compatible with the principle of legality, the CIJs could not agree whether to indict the four Case 002 charged persons for national crimes. Finding themselves in a "procedural stalemate", but concerned that sending the disagreement to the PTC under Rule 72 would cause undue delay,[112] the CIJs ordered that the Charged Persons be indicted and sent before the Trial Chamber on those charges.[113]

37. In his appeal against the Closing Order, Ieng Sary argued - as Meas Muth does here - that indicting on these charges violated the presumption of innocence and that all doubt should

---

111 **D267/4** Appeal, paras 35-37.

112 Case 002-**D427** Closing Order, 15 Sep 2010 ("Closing Order"), para. 1574 ["The CIJs note that, in view of all the foregoing elements, they find themselves in procedural stalemate, which is partly due to the hybrid structure of the ECCC. They have endeavoured to issue a common text on the questions of being tried twice for the same facts, the limitation period for the relevant national crimes, and on the effect of the Constitutional Council decision of 12 February 2001, but have not been able to. In this context, in order to resolve the stalemate, without having recourse to the procedure contained in the rules regarding disagreements, which would put into peril the entire legal process, the CIJs taking into account their obligation to make a ruling within a reasonable time under the terms of Rule 21.4 and the waiting of victims who wish that there be an end to the investigation as soon as possible they have decided by mutual agreement to grant the Co-Prosecutors' requests, leaving it to the Trial Chamber to decide what procedural action to take regarding the crimes in the Penal Code 1956".]

113 Case 002-**D427** Closing Order, para. 1576.

be resolved in his favour. He also argued that the Rule 72 disagreement procedure was mandatory and that the CIJs acted *ultra vires* by choosing to proceed without referring the matter to the PTC under the disagreement mechanism.[114] Upon review, the PTC held:

> The [PTC] observes that the [CIJs] could not agree on a legal reasoning on the issue as to whether the accused can be sent for trial for the national crimes. However, they "have decided by mutual agreement to grant the Co-Prosecutors' requests" and did agree on the conclusion to send the accused to trial for the national crimes. This course of action, contrary to the Co-Lawyers' assertion, does not amount to a violation of the accused's right to be presumed innocent nor to an *ultra vires* decision for failure to have followed the disgreement procedure provided for in Internal Rule 72. The [CIJs] are under no obligation to seise the [PTC] when they do not agree on an issue before them, the default position being that the "investigation shall proceed" which is coherent with the approach taken by the CIJs in the current case.[115]

38. In his Appeal, Meas Muth seeks to persuade the PTC to adopt an interpretation that swims against the current of the entirety of the ECCC's governing laws and procedural history. He advocates illogical interpretations of the various texts in order to discredit them, rather than accepting the plainest interpretation of all the relevant provisions. The most logical solution to Meas Muth's concerns about a "perennial purgatory" of "an unchallengeable indictment hanging in perpetuity"[116] is to accept the policy decision in Internal Rule 77(13), the ECCC Law and ECCC Agreement to progress the case to trial. Before the Trial Chamber, he will be accorded all the rights he seeks in accordance with the ECCC's governing law and the Cambodian Constitution to defend himself against the charges in the Indictment just as the accused in Cases 001 and 002 did.[117] Moreover he will benefit from the presumption of innocence and the supermajority rule, as he could only be convicted if four of the five Trial Chamber judges find his guilt to have been proven beyond a reasonable doubt.[118]

---

114 Case 002-**D427/1/6** Ieng Sary's Appeal Against the Closing Order, 25 Oct 2010, paras 174-175.
115 Case 002-**D427/1/30** Ieng Sary Closing Order Appeal Decision, para. 274 (emphasis added).
116 **D267/4** Appeal, para. 43.
117 **D267/4** Appeal, paras 43-44.
118 *Contra*, **D267/4** Appeal, paras 43-44, 46. As noted above, the PTC has already confirmed that forwarding a charge to the Trial Chamber where the CIJs disagree does not violate the charged person's presumption of innocence: Case 002-**D427/1/30** Ieng Sary Closing Order Appeal Decision, para. 274.

ii. The in dubio pro reo *principle does not require that the Dismissal Order trumps the Indictment*

39. Meas Muth argues that absent a decision by a PTC supermajority reversing the Dismissal Order, it must prevail over the Indictment under the principle of *in dubio pro reo.*[119] The *in dubio pro reo* doctrine, he argues, means that *all* doubt – both to the facts and all legal provisions - must be resolved in his favour.[120]

40. This is patently false for several reasons. Even if the PTC does not decide by supermajority to reverse the Dismissal Order, as detailed above, the relevant provisions of the Internal Rules, ECCC Law, ECCC Agreement and SCC and PTC jurisprudence *all* mandate that if the PTC fails to reach the required consensus to decide the closing order appeals, or if it finds that neither CIJ erred, the case must proceed to trial on the basis of the Indictment issued by the ICIJ.[121] Such a result does not violate the principle of *in dubio pro reo*, as there is no "doubt" to resolve – the path forward is confirmed by all of these sources.[122]

41. In any event, *in dubio pro reo* as articulated in the Cambodian Constitution,[123] and by the ECCC framework and international law,[124] is not applicable in situations of procedural uncertainty such as this, where the question is whether to send a charged person to trial. As Meas Muth recognises,[125] *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.[126] Its primary function is thus address questions of fact and denotes a default finding

---

119 **D267/4** Appeal, p. 1, para. 66. *See also*, p. 2, paras 2, 45, 49, 62-66.

120 **D267/4** Appeal, p. 2, paras 4, 45, 49-51, 65-66.

121 *See* **D266/2** ICP Appeal, paras 191-198.

122 *See supra,* paras 22-38.

123 The Constitution of the Kingdom of Cambodia, adopted 21 September 1993, art. 38 ["The doubt shall benefit the accused"].

124 **D267/4** Appeal, p. 2, paras 4, 32, 41, 45-46, 50-51, 66, 68 and citations therein.

125 **D267/4** Appeal, para. 51.

126 Case 002-**E50/3/1/4** Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 Jun 2011 ("Khieu Samphan SCC Release Decision"), para. 31 ["The Supreme Court Chamber must stress that the *in dubio pro reo* rule, which results from the presumption of innocence, is guaranteed by the Constitution of Cambodia…"]; *Limaj et al*, IT-03-66-A, Appeals Chamber, Judgment, 27 Sep 2007, para. 21 ["The Appeals Chamber is satisfied that the principle of in dubio pro reo, as a corollary to the presumption of innocence, and the burden on proof beyond a reasonable doubt, applies to findings required for conviction, such as those which make up the elements of the crime charged. […] the principle is essentially just one aspect of the requirement that guilt must be found beyond a reasonable doubt."]; *Renzaho,* ICTR-97-31-A, Appeals Chamber, Judgment, 1 Apr 2011, para. 474 ["The principle of in dubio pro reo provides that any doubt should be resolved in favour of the accused. The Appeals Chamber recalls that, as a corollary of the presumption of innocence and the burden of proof beyond reasonable doubt, the principle of *in dubio pro reo* applies to findings required for conviction, such as those which make up the elements of the crime charged." (internal citations omitted)]. *See also, Delalić et al.,* IT-96-21-T, Trial Chamber, Judgement, 16 Nov 1998 ("*Čelebići* TJ"), para. 601 ["the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the

in the event where factual doubts are not removed by the evidence.[127] Put another way, it is mainly a rule of proof and not one of legal interpretation.

42. Even in the rare event that it applies to questions of law, as a principle pertaining to the presumption of innocence, *in dubio pro reo* deals primarily with doubt regarding *substantive* criminal law. It is this, not procedure, that determines the accused's ultimate guilt.[128] The question here does not concern Meas Muth's innocence or guilt for the crimes charged at all. Rather, it asks the question whether he will be tried for them. As already noted, all suspects, charged persons, and accused persons, including Meas Muth, enjoy the presumption of innocence unless and until they are convicted by a supermajority of the Trial Chamber judges.

43. In any event, its narrow applicability to dilemmas of law is limited to doubts that remain after *interpretation* using the civil law rules of interpretation, 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.[129] Every legal text is subject to interpretation and the fact that a particular scenario is not expressly covered by it does raise "doubt" from which a defendant will always profit. As the SCC confirmed, "*in dubio pro reo* will therefore be unnecessary when addressing legal *lacunae*".[130]

44. Holdings in Case 002 also refute Meas Muth's invocation of *in dubio pro reo* here. The

---

doubt as to whether the offence has been proved."].

127 Case 002-**E50/3/1/4** Khieu Samphan SCC Release Decision, para. 31; **D87/2/1.7/1/1/7** Decision on Meas Muth Appeal Against the International Co-Investigating Judge's Decision on Meas Muth Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 10 Apr 2017, para. 65; *Stakić*, IT-97-24-T, Trial Chamber, Judgment, 31 Jul 2003, para. 416 [*In dubio pro reo* "is applicable to findings of fact and not law"].

128 *See, e.g.* Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, art. 22(2) ["The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."]. *See further Gbagbo & Goudé,* ICC-02/11-01/15-744, Appeals Chamber, Judgment on the Appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé Against the Decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 Nov 2016, para. 83 ["The Appeals Chamber notes that the priniciple *in dubio pro reo* is encapsulated in article 22(2) of the Statute as a general principle of criminal law to be employed, where ambiguity arises, in the interpretation of the definition of a crime."].

129 Case 002-**E50/3/1/4** Khieu Samphan SCC Release Decision, para. 31 [Explaining further that the civil law rules of interpretation of the law take into account "the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective"]; *Čelebići* TJ, para. 413 ["The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning *which the canons of construction fail to solve*, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is why ambiguous criminal statutes are to be construed *contra proferentem*." (emphasis added)]

130 Case 002-**E50/3/1/4** Khieu Samphan SCC Release Decision, para. 31; **D261** Closing Order (Reasons) in Case 004/1, 10 Jul 2017, para. 2.

accused there argued that Rule 21(1) required the Court to interpret the Internal Rules in their favour in order to safeguard their interests, but the SCC held that the interpretive direction of the Rule "does not [...] mean that Internal Rules are to be construed so as to 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 any fundamental rights of the Accused.[131] Indeed, read in its entirety, Internal Rule 21 requires that the ECCC Law and Internal Rules be interpreted so as to always safeguard the interests not only of the suspects, charged persons and accused, but also *victims*. The PTC has previously confirmed that the Internal Rules must be read in a manner that takes into account the needs of the affected community as expressed in the ECCC's foundational instruments.[132]

45. This is entirely consistent with Internal Rule 2, which provides:

> Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers *shall decide* in accordance with Article 12(1) of the Agreement and Articles 20new, 23new, 33new or 37new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws.[133]

In short, this Rule provides that 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, and with respect for the rights of *all* parties. Nowhere does it provide for an automatic default finding in favour of the suspect, charged person, or accused.

---

131 *See, e.g.* Case 002-**E50/2/1/4** Decision on Immediate Appeals by Nuon Chea and Ieng Thirith on Urgent Applications for Immediate Release, 3 Jun 2011, para. 39; Case 002-**E50/3/1/4** Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 Jun 2011, para. 30 (*see also* para. 31); Case 002-**E154/1/1/4** Decision on Ieng Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex-Parte Communications, 25 Apr 2012, para. 14.

132 Case 002-**D411/3/6** Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 Jun 2011, para. 67.

133 Emphasis added.

46. It is a fundamental tenet of the law of the ECCC[134] and international tribunals,[135] as well as the French and Cambodian legal processes,[136] that, pursuant to the principle of equality,

---

134 Internal Rule 21(1) [Fundamental principles governing the conduct of proceedings before the ECCC command that "The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of [...] Victims [...] a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. [...] The SCCC shall ensure that victims are kept informed and that their rigths are respected throughout the proceedings"]. *See further* **D269/3.1.1** United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 of 29 November 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 they have suffered."]

135 *Aleksovski*, IT-95-14/1, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, para. 25 ["This application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community). This principle of equality does not affect the fundamental protections given by the general law or Statute to the accused, and the trial proceeds against the background of those fundamental protections. Seen in this way, it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections."]. *See also Zigiranyirazo*, ICTR-2001-73-T, Decision on the Prosecution Joint Motion for Re-Opening Its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link, 16 Nov 2006, para. 18 ["Protecting the integrity of the proceedings means ensuring fairness in the conduct of the case as far as *both* Parties are concerned."]; *Karemera et al,* ICTR-98-44-PT, Decision on Severance of André Rwamakuba and Amendments to the Indictment, 7 Dec 2004, para. 26 ["Finally, the Chamber is aware of the particular circumstances of the case and of their consequences on the Prosecution Case. The Chamber recalls that the right to a fair trial applies both to the Defence and the Prosecution. The Chamber shall ensure the respect of the interests of justice."]; *Situation in the Democratic Republic of the Congo*, ICC-01/04, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 Mar 2006, para. 38 ["The term "fairness" (*equité*), from the Latin "*equus*", means equilibrium, or balance. As a legal concept, equity, or fairness, "is a direct emanation of the idea of justice". Equity of the proceedings entails equilibrium between the two parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings. In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings)."]; *Situation in Uganda*, Decision on the Prosecutions Application for Leave to Appeal the Decision on Victims Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05, 19 Dec 2007, para. 27 ["It is commonly understood that the right to a fair trial in criminal proceedings mainly ensues to the benefit of the defendant or the defence. Yet, fairness also extends to other parties in proceedings such as the Prosecution."].

136 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'authorité 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, *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

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.

47. Dismissing Case 003 without a trial on the merits would amount to a failure to deliver any measure of justice to tens of thousands of victims who have waited four decades for accountability. The dismissal would also violate the specific rights afforded to the civil parties within the ECCC framework. Should Case 003 go to trial, those selected as civil parties would be entitled to participate in court proceedings, to have their stories heard and to seek reparations.[137] Termination of the proceedings in the face of a valid indictment would constitute a breach of those rights and, more broadly, constitute an affront to the many men and women who came forward to assist the Court by providing evidence to the CIJs.

48. The ECCC Agreement provides in its preamble "Whereas [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".[138] This requires the Judges and Chambers of the ECCC to not only seek the truth about what happened in Cambodia,[139] but also to ensure a meaningful participation for the victims of

---

Criminal Procedure ("CCCP"), art. 4 ["Criminal actions are brought by Prosecutors for the general interests of the society."].

137 Internal Rules 23(1), 80(2).

138 Emphasis added.

139 *See, e.g.* Internal Rule 55(5) ["In the conduct of judicial investigations, the [CIJs] may take any investigative action conducive to ascertaining the truth."], 87(4) ["the [Trial] Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth."]; Case 002-**D164/3/6** Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 Nov 2009 ("SMD Decision"), para. 35 ["the [CIJs] first have to conclude their investigation, which means that they have accomplished all the acts they deem necessary to ascertaining the truth in relation to the facts set out in the Introductory and Supplementary Submissions"]; **D120/3/1/8** Considerations on Meas Muth's Appeal Against the [ICIJ's] Re-Issued Decision on Meas Muth's Motion to Strike the [ICP's] Supplementary Submission, 26 Apr 2016, para. 36 (on p. 25) (Judges Beauvallet and Baik) [confirming "the need to ascertain the truth about the crimes with which the accused has been charged"]. 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'interêt de la manifestation de la verité 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, No. 78-92.277, 19 Jun 1979 ["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*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 Jul 1996, para. 3 ["[i]nternational 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".].

the crimes committed as part of the pursuit of national reconciliation.[140] The PTC has previously determined that "the inclusion of civil parties in proceedings is in recognition of the stated pursuit of national reconciliation".[141]

49. The protection of a charged person's rights must thus be interpreted and balanced with the fundamental purpose of the Tribunal "to bring to trial senior leaders of [DK] and those who were most responsible" for crimes which occurred during the DK regime. This entails balancing the rights of the charged person with the need to ascertain the truth about the crimes with which he has been charged throughout the judicial process,[142] as well as with the general principle of proper administration of justice.[143] To always defer to the accused on procedural matters would have a chilling effect on the administration of justice.

50. In fact, as the PTC has previously unanimously held, it is the obligation of the CIJs, and then the PTC, to uphold the "general necessity for the investigation and judicial processes to advance."[144] If procedural uncertainty were to be permitted to automatically benefit the charged person 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 and are limited to the death of the accused, the expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law and *res judicata*.[145] Jurisprudence at the international

---

140 Case 002-**D411/3/6** Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 Jun 2011, paras 64-65.

141 Case 002-**C11/53** Decision on Civil Party Participation in Provisional Detention Appeals, 20 Mar 2008, para. 37.

142 *See supra*, para. 48.

143 *Boddaert v. Belgium*, No. 12919/87, Judgment, 12 Oct 1992, para. 39 ["Article 6 (art. 6) commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice. In the circumstances of the case, the conduct of the authorities was consistent with the fair balance which has to be struck between the various aspects of this fundamental requirement."]; *Neumeister v. Austria*, No. 1936/63, Judgment, 27 Jun 1968, para. 21. *See also* Case 002-**E284/4/8** Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, 25 Nov 2013, para. 74 ["These provisions regulating the role of judges at the ECCC have been interpreted so as to ensure the best administration of justice"]; CCCP, art. 2 ["The purpose of a criminal action is to examine the existence of a criminal offense, to prove the guilt of an offender, and to punish this person according to the law."]

144 Case 002-**D314/1/8** Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 Jun 2010, para. 70; Case 002-**D375/1/8** 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 Sep 2010, para. 102.

145 Cambodia: CCCP, art. 7, entitled "Extinction of Criminal Actions". ["The reasons for dropping a charge in a criminal action are as follows: (1) The death of an accused person; (2) The expiration of the statute of limitations; (3) A general grant of amnesty; (4) Abrogation of the criminal law; or (5) The res judicata. When a criminal action is extinguished a criminal charge can no longer be pursued or must be terminated."]. *See further*, with regard to French procedural law, art. 6, FCCP: ["L'action publique pour l'application de la peine s'éteint par la mort du prévenu, la prescription, l'amnistie, l'abrogation de la loi pénale et la chose

level[146] also establishes an extremely high threshold for the termination or stay of proceedings.[147] The SCC and Trial Chamber have both held that it follows that the ECCC has no authority to order termination for other reasons.[148] Indeed, under Internal Rule 67(3) there is no provision to dismiss a case at the closing order stage for procedural considerations. In any case, a dismissal unrelated to the merits of the case against him does nothing to protect Meas Muth's reputation or allow him the opportunity he claims to seek to "challenge the evidence against him, confront his accusers, or maintain his innocence" following indictment.[149]

IV. RELIEF SOUGHT

51. For all of the foregoing reasons, the International Co-Prosecutor respectfully requests that the PTC dismiss Meas Muth's Appeal and send Case 003 for trial on the basis of the Indictment issued by the ICIJ.

Respectfully submitted,

Date	Name	Place	Signature
28 June 2019	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh	

jugée." Unofficial translation: "Criminal proceedings are extinguished by the death of the defendant, expiry of the statute of limitations, amnesty, repeal of the criminal law and res judicata."].

146 ECCC Law, art. 33*new*.

147 Termination 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. S*ee, e.g. Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on Motion for Stay of Proceedings, 8 Apr 2010, para. 4 [acknowledging that the extreme remedy of a stay of proceedings may be granted where serious violations of Accused human rights render a fair trial impossible]; *Lubanga*, ICC-01/04-01/06-772, Appeals Chamber, Judgement on the Appeal of Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 Dec 2006, para. 30.

148 Case 002-**E138/1/10/1/5/7** Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith, 14 Dec 2012, para. 38; Case 002-**E116** Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 Sep 2011, paras 16-17 [Finding that ECCC proceedings may only be terminated under Internal Rule 89(1)(b) on one of the limited grounds set out in art. 7 of the CCCP.].

149 **D267/4** Appeal, para. 44.